

MINUTES

Supreme Court's Advisory Committee
on the Rules of Appellate Procedure

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

April 27, 2011

ATTENDEES

Judge Gregory Orme
Judge Kate Toomey
Judge Fred Voros
Diane Abegglen
Tawni Anderson
Jennifer Gowans
Larry Jenkins
Bryan Pattison
Clark Sabey

EXCUSED

Paul Burke
Marian Decker
Joan Watt

STAFF

Brent Johnson

I. Welcome and Approval of Minutes

Judge Fred Voros welcomed the committee members to the meeting. Judge Voros stated that Joan Watt was unable to attend the meeting and therefore he would be acting as chair. Judge Kate Toomey moved to approve the minutes from the last meeting. Larry Jenkins seconded the motion. The motion carried unanimously.

II. Rules Published for Public Comment

The committee did not receive any comments on the rules that were published for public comment. Judge Voros asked whether the committee would approve Rule 24. The committee unanimously approved the rule. Judge Voros then asked whether the committee would approve Rule 27. Judge Voros stated that he was not certain if the rule should retain the requirement of 14-point type. Judge Voros stated that the committee could offer two choices to the Supreme Court. Judge Voros stated that the first choice would be to submit the rule with 14-point type, but with a comment stating that the committee members believe that 13-point type is appropriate. Judge Voros stated that the second option would be to change the rule to 13-point type and explain why the change was made. The committee agreed to forward the rule with 13-point type and an explanatory note.

The committee then discussed Rule 38B. Judge Voros stated that this issue is a bit complicated because the Appellate Representation Task Force is proposing a rewrite of the rule. Judge Voros stated that the rule has been presented to the Judicial Council and the Task Force is awaiting Council action. Judge Voros stated that the appellate procedure committee's proposal would still be placed in Rule 38B as it is not inconsistent with the changes. Judge Toomey suggested that there is no need to take action on the rule at this point, but the committee could wait until the entire rule is before the committee. The committee members agreed with this suggestion. The committee will discuss the Rule 38B rewrite at the next meeting.

III. Form 17

Brian Pattison proposed a new form 17 that attorneys will use for certifying word count limits. Mr. Pattison stated that he copied the federal form. Judge Voros noted that the certificate did not include page limits, but recognized that page limits would be evident. Judge Voros stated that there could be a problem in the future with page limits because attorneys are sometimes extending the use of roman numerals beyond the table of contents and other tables, and using them to designate pages all the way up to the argument section. Judge Voros stated that he has not seen anyone use this practice to circumvent the page limit requirement, but it could happen in the future. Judge Toomey stated that she is seeing the same thing in memoranda presented to the district courts. The committee approved form 17 as proposed. The form does not need to be published for public comment and therefore will be published at the appropriate time.

IV. Rule 29

Judge Voros proposed a change to Rule 29 to address oral argument and inadequate briefing. Judge Voros stated that there is a provision in the rule which states that the court might not conduct oral argument if the briefing is adequate for the court to decide the issue. Judge Voros stated that a similar provision needs to be added for when the briefing is inadequate and oral argument would not be appropriate. Judge Toomey asked whether this would bring the rule into current practice. Judge Voros stated that it would. Clark Sabey asked whether the rule should simply provide for any argument at the court's discretion. Judge Voros stated that this had been discussed before but the proposal was not popular with practitioners. The committee then approved Rule 29A as proposed.

V. Rule 38A Withdrawal of Counsel

Judge Voros stated that Rule 38A should contain a provision requiring the parties to send out a "notice to appear or appoint" when counsel withdraws. Judge Voros stated that this is the practice in the district courts and the appellate courts should not be doing the job of the attorneys. Judge Toomey noted that, in the district courts, because it is opposing counsel's responsibility to send out the notice, sometimes nothing happens. Judge Voros stated that the appellate court clerks are trained to follow up so that it doesn't happen. Judge Gregory Orme then moved to approve the proposal. The motion carried unanimously.

VI. Rule 23B

Judge Voros stated that Ms. Watt is anxious for a repeal of Rule 23B since the committee has approved that. Judge Voros suggested moving forward so that this may be accomplished as soon as possible. The committee members agreed with this suggestion. Mr. Sabey suggested that, when the proposal is presented to the Supreme Court, two people from each side attend to explain why the rule is being repealed. The committee members agreed with this suggestion. Judge Voros stated that he is also interested in the proposed change to Rule 65C of the Rules of Civil Procedure, which is the companion change to repealing Rule 23B. Judge Voros stated that this will help make clear that Rule 23B issues may be addressed in post-conviction cases. Judge Toomey stated that the Civil Procedure Committee was meeting that afternoon and she will discuss the proposal with the committee if there is time. Judge Toomey stated that the committee will be discussing the discovery rules and there may not be time.

VII. Other Business/Adjourn

Mr. Sabey stated that he will have a couple of proposals for the next meeting. Mr. Sabey stated that the Supreme Court is concerned about conflicts that may be created when there is a substitution of counsel on a supplemental brief and one of the justices has a conflict with new counsel. Mr. Sabey stated that there is a similar issue when dealing with an amicus.

The committee scheduled its next meeting for May 26th at 12:30 p.m.