

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

May 26, 2011

ATTENDEES

Judge Gregory Orme
Judge Fred Voros
Diane Abegglen
Tawni Anderson
Paul Burke
Marian Decker
Jennifer Gowans
Larry Jenkins
Bryan Pattison
Clark Sabey
Joan Watt

EXCUSED

Judge Kate Toomey

STAFF

Brent Johnson

I. Welcome and Approval of Minutes

Joan Watt welcomed the committee members to the meeting. Judge Fred Voros moved to approve the minutes from the last meeting. Jennifer Gowans seconded the motion. The motion carried unanimously.

II. Rule 38B

Ms. Watt stated that she had carefully reviewed the proposal from the Appellate Representation Task Force. Ms. Watt stated that she has concerns because the proposed procedure would be costly and time-consuming for her office, without improving the quality of the representation. Ms. Watt wondered if there could be an exception for established offices such as LDA. Ms. Watt stated that her appellate division has a high case-load and they often look for other attorneys in the office to assist. Those attorneys are supervised to ensure adequate appellate representation. Ms. Watt stated that the rule proposal would hinder that ability. Ms. Watt also stated that the rule would hinder their ability to hire new individuals because they would not qualify. Ms. Watt stated that there are individuals fresh out of law school who make

good appellate attorneys. Ms. Watt stated that the best way for someone to become proficient at appeals is to be supervised by someone who is proficient.

Ms. Watt also stated that the CLE requirement is onerous without any benefit. Ms. Watt stated that it is currently impossible to find 12 hours of CLE credit on appellate practice in Utah. Ms. Watt stated that it would be difficult to comply with that requirement every two years. Ms. Watt stated that four to five years might be more appropriate, but in her experience CLE provides little benefit.

Judge Voros asked whether Ms. Watt agrees with the broad contours of the rule, meaning that a committee is established to certify individuals for appellate practice. Ms. Watt stated that she is okay with the concept generally, but is not certain that this would solve problems. Judge Voros asked Ms. Watt as to what she thought would be helpful. Ms. Watt again stated that having someone supervised by a proficient attorney is the best practice.

Ms. Watt stated that the appellate courts should use their body of knowledge to become more involved in this area. Ms. Watt asked why the appellate courts have been reluctant to use their authority. Judge Orme agreed that the courts could use their authority more. Judge Orme stated that the most the courts have done is to discharge an attorney or strike a brief upon motion from an opposing party or on the courts own motion. Judge Orme suggested that if the appellate courts were to appoint counsel, the courts could draw on their knowledge of those attorneys who are proficient. Clark Sabey stated that perhaps the proposed committee could forward names to the appellate courts for approval. Judge Voros noted that appellate courts have not appointed counsel in the past because counties are responsible for hiring appointed counsel. Judge Voros stated that the Appellate Representation Task Force has proposed that counties adopt separate contracts for trial and appellate work. Judge Voros stated that the task force also wants to avoid subjectivity as much as possible in the appointment process and that is why they propose blind grading of briefs. Judge Voros stated that perhaps there could be an exception for institutionalized public defender offices.

Judge Orme stated, that in the Rules of Judicial Administration, each rule has a scope section stating entities to which the rule applies. Judge Orme suggested that the appellate rule could similarly narrow its scope to individuals or specific entities. Judge Orme agreed that it might be insulting to established attorneys to have to go through the certification process. Judge Orme also stated that the CLE anticipated by the Task Force would be interactive. Judge Orme stated that attendees would be creating writing samples and having them graded during the CLE. Ms. Watt noted that new lawyers in her office regularly receive feedback from her. Judge Voros stated that he likes the idea of an exception for institutions because then counties might pool together to co-fund an office. Brian Pattison asked whether the counties are buying into the proposal. Judge Voros stated that counties are interested and willing to participate. Judge Voros stated that there is a potential for a lawsuit on the adequacy of representation being provided by the state and the counties want to avoid increased costs.

Ms. Gowans asked whether poor briefs are mostly from appointed counsel. Judge Orme stated that there are plenty from retained counsel. Marian Decker asked how many chances the

court usually gives attorneys who submit deficient briefs. Judge Orme stated that the court will usually give an attorney another chance to fix the brief unless the attorney is a repeat offender and the court knows that the attorney will not be able to provide a better brief. Mr. Pattison asked how the court knows if an attorney is appointed. Judge Orme stated that the court usually doesn't know, but noted that in most criminal cases the attorneys are appointed. Ms. Watt asked whether the court has ever barred someone from appearing. Judge Orme stated that the court had barred someone and referred the person to the bar. Judge Orme stated that the person was ultimately disbarred. Judge Voros stated that it seems like it should be a Supreme Court function to determine whether attorneys may practice, based on the Supreme Court's supervisory authority over the bar. Judge Voros noted, however, that the Supreme Court does not see as many attorneys as the Court of Appeals. Ms. Watt asked whether certiorari briefs are better than the briefs seen by the Court of Appeals. Mr. Sabey stated that they are usually better, but not always.

Paul Burke stated that it appears as if the rule has created an appellate bar. Mr. Burke stated that this seems unnecessary because the appellate courts can already deal with the issue. Mr. Sabey stated that the courts would be dealing with this reactively and it is probably better to deal with this proactively to ensure defendants receive adequate representation in all cases. Ms. Watt stated her belief that counties will not go with the lowest bidder if the counties see that the courts are removing attorneys, and counties are being forced to pay for new briefs.

Ms. Watt asked the committee what it should do at this point. Ms. Watt asked whether the committee should send the rule back to the Task Force. Judge Orme stated that it will save time if the committee just addresses the rule as a proposal from the Task Force. Ms. Gowans noted that Rule 24 has a provision for sanctions and that provides another avenue for courts to take action. Judge Orme stated that there needs to be a way to identify inadequate briefs earlier in the process. Judge Orme stated that judges often do not see the briefs until oral argument is set and it is difficult to strike briefs at that point. Judge Voros stated that he will report back to the Task Force the committee's concerns. Ms. Watt stated that in the meantime the committee should form a subcommittee to work on proposals. The subcommittee members are Marian Decker, Joan Watt, Clark Sabey, and Judge Fred Voros.

III. Rule 65C

Ms. Watt stated that Judge Kate Toomey had distributed the proposed revision to Rule 65C to the civil procedure committee. Ms. Watt stated that the civil procedure committee had reviewed the proposal and pared it down significantly. Diane Abegglen stated that the committee determined that it was important to remind judges that they can appoint counsel and that the rule should simply refer judges to the statutory provisions. Judge Orme stated that there is a general policy to avoid referring to statutes in rules because statutes often change. Judge Orme suggested that there be generic language. Joan Watt stated that this is a proposal from the civil procedure committee and all the committee can do is comment when it is published for public comment. Mr. Burke stated that there might be a separation of powers issue because the court may be reserving the right to appoint attorneys beyond that provided by the legislature.

IV. Rule 38A

Ms. Watt stated that she was concerned about the proposed change to Rule 38A because she wanted to make certain that the court is still involved in the process. Judge Voros stated that the court actively tracks these issues. Judge Voros asked whether there is a problem with applying the proposed change in criminal cases. Mr. Sabey noted that the proposed revision only applies in civil cases. Ms. Watt stated that she is then okay with the proposed changes to Rule 38A.

V. Other Business/Adjourn

Mr. Sabey stated that his proposed amendments could be postponed until the next meeting. The committee scheduled its next meeting for June 14th at 12:00 p.m. The committee will discuss Mr. Sabey's proposals at the meeting. Ms. Watt stated that the Rule 38B subcommittee will meet after the regular committee meeting because the regular committee meeting will most likely be brief. There being no further business, the meeting adjourned at 2:00 p.m.