

## 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

January 11, 2012

## ATTENDEES

Judge Fred Voros  
Judge Gregory Orme  
Diane Abegglen  
Tawni Anderson  
Troy Booher  
Paul Burke  
Marian Decker  
Bryan Pattison  
Bridget Romano  
Clark Sabey  
Lori Seppi  
Joan Watt

## EXCUSED

Ann Marie Taliaferro

## STAFF

Brent Johnson

**I. Welcome and Approval of Minutes**

Joan Watt welcomed the committee members to the meeting. The committee made a couple of technical changes to the minutes from the last meeting. Paul Burke then moved to approve the minutes. Marian Decker seconded the motion. The motion carried unanimously.

**II. Rule 4 and 21**

Joan Watt explained that the rules were back before the committee after having been published for public comment. Ms. Watt stated that the committee did not receive any public comments. Troy Booher asked whether the word "docketed" meant docketing in the appellate court. Ms. Watt stated that it does. Judge Fred Voros suggested adding language to clarify the meaning. Bryan Pattison noted that, with e-filing in the district courts, documents are no longer stamped but the filer simply receives email confirmation that the document was filed. Ms. Watt wondered whether there are other rules in which the word "docketed" should be used rather than "filing."

Bridget Romano then moved to approve rule 4 as amended. Paul Burke seconded the motion. The motion carried unanimously.

Judge Voros stated he had a suggestion for rule 21, but the suggestion was not related to the proposed amendment. Judge Voros stated that the use of the word “shall” in subparagraph (a) did not seem like the right word to use in those circumstances, because the sentence was not directing any particular action. Judge Voros suggested using the phrase “is not considered timely.” The committee members agreed with this suggestion. Judge Voros then moved to approve rule 21 as amended. Bridget Romano seconded the motion. The motion carried unanimously.

### **III. Rule 38B**

Ms. Watt noted that the committee members have had time to review the rule proposals and asked whether committee members had any suggestions. Ms. Watt also asked what the next steps would be. Judge Voros stated that the proposal would go back to the task force for review as to whether the proposal addresses the task force’s concerns. Ms. Watt stated that the other rule proposal would go to the advisory committee on the Rules of Professional Conduct. The members all agreed that the rule was ready to be forwarded to the task force and the companion rule could go to the professional conduct committee if the task force does not have any changes to the proposals. Judge Orme stated that if the task force has concerns, then perhaps a joint committee could be formed to work through the concerns. The members all agreed with this suggestion. Judge Orme then moved to send the rule proposals to the task force. Tawni Anderson seconded the motion. The motion carried unanimously.

### **IV. Child Welfare Appeals**

Paul Burke distributed proposed amendments to the child welfare rules. Mr. Burke stated that he had discussed these proposals with Martha Pierce in the Office of the Guardian ad Litem. Mr. Burke stated that the proposed changes to rules 4 and 5 are to direct petitioners to the child welfare rules so that practitioners do not rely on 4 and 5 for notices of appeal and petitions for interlocutory appeal. Mr. Burke explained that the proposed amendments to rule 52 are intended to minimize any issues about whether an order is final. Mr. Burke stated that he created an amalgam of rule 5 for child welfare interlocutory appeals and made the time-frames consistent with final appeals. Bridget Romano asked whether it is consistent to have filing coincide with the postmark. Mr. Burke stated that rule 55 also refers to filing being based on the postmark. Judge Voros suggested that this is because the petition in a child welfare appeal is similar to a brief, the filing of which is also based on postmark. Clark Sabey stated that petitions for interlocutory appeal in child welfare appeals are similar to petitions for interlocutory appeal in other cases and therefore filing should not be tied to the postmark.

Joan Watt questioned the proposal that would allow the court to treat an appeal that turns out not to be a final order as an interlocutory appeal. Mr. Sabey stated that the proposal could be a problem because the filing is jurisdictional and therefore needs to be treated solely as one or the other. Ms. Watt stated that if there were a question about whether an order was truly final, a

practitioner should file both an appeal and a petition for interlocutory appeal. Mr. Burke stated that he will reword that sentence.

Mr. Burke stated that he is proposing to reduce the time for appeal to 15 days in rule 60 abortion bypass cases. Mr. Burke stated that these issues are very time-sensitive and the appeal should be filed within a shorter period of time. Mr. Burke also stated that he is proposing that judges appoint an attorney to represent the minor because there could be a conflict between the minor's position and the position of the GAL, who represents the best interests of the minor. Mr. Burke stated that he had a case in which the AG's Office challenged his representation of a minor when a GAL was already involved. Mr. Burke stated that the Attorney General's Office's concern was that a parent might employ an attorney for the child in order to manipulate the case. Mr. Burke stated that the district court agreed with the Attorney General's Office's position, but the Court of Appeals reinstated him.

Judge Voros suggested that the language "at the minor's direction" implies greater control than any other client has over the client's attorney and should perhaps be removed. Judge Voros suggested that the rule could be more explicit on the scope of representation by the private attorney and the GAL. Ms. Watt asked whether the minor has a right to court-appointed counsel in these types of proceedings. Ms. Romano stated that she does not know if they have that right but they should be represented in all cases. Ms. Watt agreed but questioned whether the court could mandate that in a rule. Judge Voros pointed out that such a rule might cause the Legislature to override the Supreme Court's rule by two-thirds majority or amend the rule in other ways. Judge Orme stated that perhaps the rule could simply clarify that if a minor is represented by one type of attorney, appointment of the other type of attorney is not precluded. Mr. Burke stated that he will take the committee members' comments and present new proposals at the next meeting.

## **V. Rules 24 and 9**

Judge Orme stated that he did not believe Leslie Slaugh's proposed amendment should be adopted because the two provisions serve different functions. Judge Orme stated that his proposal addresses Judge Voros' statements from the last meeting as to what should be included in the content of the statement of the case. Judge Orme proposed moving the requirements from rule 24(a)(7) to higher in the list, so that the statement would help put everything that follows in context. Ms. Romano asked whether there would then be a need to clarify in the rule the difference between the statement of facts and the statement of the case. Judge Orme stated that there would be a need to explain the differences. Judge Voros stated that he agreed the provision should be moved up the list, but that it should be right after the jurisdictional statement because jurisdiction is a threshold issue. Ms. Romano suggested that the committee look to the 10<sup>th</sup> Circuit rule because the 10<sup>th</sup> Circuit has different provisions for each of these areas. Judge Orme stated that he will review the 10<sup>th</sup> Circuit rule and present a proposal at the next meeting.

## **VI. Word Count Rule**

Ms. Romano noted that, in cross-appeals, when the number of words for all of the briefs is calculated, the cross-appellant gets 4,500 fewer words than the appellant. Ms. Romano suggested that the amounts be equal. Ms. Watt asked where the number should be increased. Mr. Sabey stated that he thought the disparity was intentional, but he could not remember why. Mr. Burke asked whether the disparity existed prior to moving from a page count to a word count. Mr. Sabey stated that there previously was not a disparity. Judge Voros noted that the cross-appellant usually has fewer issues. Mr. Sabey stated that this is usually the case, but sometimes there is a race to the courthouse and the cross-appellant is the one who has more issues. Ms. Watt stated that the rule may need to be revisited because her office is concerned about the word count. Ms. Watt stated that the word count is resulting in shorter briefs by several pages and those pages are often very important in setting forth the entire argument. Ms. Watt stated that she likes the idea of allowing attorneys to select either a word limit or a page limit. Mr. Sabey noted that the rule on petitions for writs of certiorari still refers to page limits and Mr. Sabey suggested that the committee consider whether the rules should be consistent. Lori Seppi volunteered to review the rules for other word-count issues.

## **VII. Adjourn**

The committee scheduled its next meeting for February 22, 2012 at noon. The committee will discuss the child welfare rules, proposed changes to rule 24, the word count rule, and over-length briefs. The meeting adjourned at 1:40 p.m.