

## MINUTES

Supreme Court's Advisory Committee  
on the Rules of Appellate ProcedureAdministrative Office of the Courts  
450 South State Street  
Salt Lake City, Utah 84114

March 21, 2012

## ATTENDEES

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

## EXCUSED

Tawni Anderson

## 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. Lori Seppi seconded the motion. The motion carried unanimously.

**II. Rule 38B Update**

Ms. Watt stated that the Rule 38B subcommittee would be meeting soon and therefore did not yet have anything to report.

**III. Rule 23B Update**

Ms. Watt stated that the subcommittee has been researching issues and looking at options. Ms. Watt stated that the subcommittee recently invited individuals who have had experience with Rule 23B proceedings to speak to the subcommittee. Ms. Watt stated that subcommittee will be meeting again in April to discuss various options.

#### **IV. Child Welfare Rules**

Paul Burke distributed new proposed changes to the child welfare rules. Mr. Burke explained that, in rule 52A, he proposes clarifying that the appointed guardian ad litem has the right to file appeals and petitions etc., whether the guardian ad litem is or is not considered to be a party. Mr. Burke stated that the change in rule 5 will not mandate dismissal upon a failure to file a petition but will instead make the action subject to dismissal. Judge Voros asked whether the filing was similar to the filing of a notice of appeal, which is jurisdictional, and therefore should have clearly established limits. Mr. Burke explained that the petition is equivalent to filing a brief, and not a notice of appeal, and therefore dismissal need not be automatic. Clark Sabey suggested that there might be case law on this issue that should be reviewed before changes are made.

Mr. Burke explained that clarifications to rule 60 are intended to recognize the appointment of both a guardian ad litem and a private attorney for the minor. Ms. Watt asked whether there are cases in which both a GAL and a private attorney represent the minor. Bridget Romano said that she has seen cases in which the parents have hired an attorney for the minor and the court has also appointed a GAL. Ms. Romano stated that the GAL will be representing the best interests of the minor, which are sometimes contrary to the minor's desires. Those will be represented by a private attorney. Mr. Booher suggested a committee note to describe the intentions of the rule. Judge Greg Orme suggested that the rule could address how things should be done in one circumstance and how things should be done in another. Mr. Burke stated that the rule could presume appointment of a guardian ad litem and address situations in which that is not the case. Ms. Watt stated that the appellate procedure rule should be consistent with the juvenile procedure rule so that there are provisions for appointment in both rules.

Mr. Burke will consider the suggestions of the committee members and present new proposals at the next meeting.

#### **V. Work Count**

Bridget Romano stated that the committee should consider word-count limits on cross-appeals. Ms. Romano stated that the person who files the appeal second ultimately receives fewer words for briefs. Ms. Romano suggested that the amounts be equal. Ms. Romano recognized that the Tenth Circuit has different word limits, but suggested that the Utah rules be more equitable. Judge Orme stated that the logic on cross-appeals is that the briefs will have a similar focus, but Judge Orme noted that this will not always be the case. Judge Orme suggested that if there is a way to identify those cases in which the issues are substantially different then that should be considered. Mr. Sabey stated that there could be problems in making that determination. Judge Voros suggested that the rule should apply to ordinary situations, and for extraordinary situations individuals can seek a higher word limit. After some discussion, Ms. Romano moved to rescind her proposal. Mr. Booher seconded the motion. The motion carried unanimously.

## **VI. Over-length Briefs**

Ms. Watt distributed a proposal that included language showing that requests for over-length briefs are disfavored and that there needs to be a showing of diligence and substantial need. Mr. Sabey suggested that the phrase “good cause” could be removed in favor of using the word “justification.” The members agreed with this suggestion. Ms. Watt stated that she is proposing five days as the limit for filing because there will be a need to attach the proposed brief at that point. Mr. Sabey suggested that the rule contain language stating that such motions are “strongly” disfavored. Mr. Sabey noted, however, that this is the practice of the Supreme Court but it might not be the practice of the Court of Appeals.

Mr. Booher asked about the implications from having a motion denied. Marian Decker stated that the due date is moved back, and if the court denies the motion, they typically give ten days for the response to be filed. Brian Pattison posed the question of whether filing a motion five days before the due date automatically shows a lack of diligence. Judge Orme stated that there may be circumstances in which a party has repeatedly attempted to edit a brief in an effort to make the word limit, but ultimately concludes that it is not possible without omitting relevant arguments. Mr. Burke stated that there may also be circumstances when a law firm has a team working on a brief and the firm won’t know where they stand until all the pieces are completed.

Judge Voros asked whether there is a need to specifically address capital cases. Judge Voros asked Ms. Watt whether she had ever seen a capital case with fewer than 100 pages. Ms. Watt stated that she had not seen any. Ms. Watt suggested that the rule not separately identify capital cases. Ms. Watt stated that if 100 pages is the standard, a person might later argue that counsel was ineffective if they did not use the entire 100 pages. Ms. Watt stated that the current rule works well because appellants have an opportunity to explain their reasons for needing more pages or words, and to ask the court for a specific number of words or pages. Ms. Watt suggested that the committee deal with the proposal on motions for over-length briefs and address capital case issues at a later time.

Ann Marie Taliaferro asked whether opposing sides typically get a copy of the proposed brief. Ms. Decker stated that her office has received them before. Ms. Watt stated that her office always serves them with their motions. Ms. Taliaferro suggested that it be clear in the rule as to whether proposed briefs must be served on other parties. Mr. Burke suggested that the rule require the brief to be served on the opposing parties. Mr. Booher suggested that if the goal of the rule is to discourage these requests, then requiring a party to serve the proposed brief on the other parties will certainly result in parties giving more consideration to whether such a motion is necessary. Mr. Burke stated that if this is intended to be a deterrent, it would still create problems greater than the abuse of the practice. Mr. Burke stated that there may be issues with attorney work product, disclosing arguments that might subsequently be abandoned, or exposing attorneys to ethics issues when briefs are submitted, but then words must ultimately be cut. Mr. Sabey suggested that the rule only require briefs to be submitted ex parte. Judge Orme stated that having a brief to review greatly aids the court’s ability to make an informed decision on such a motion.

Ms. Watt stated that she will review the committee members' comments and present new proposals at the next meeting.

## **VII. Other Business / Adjourn**

The committee scheduled its next meeting for May 23, 2012 at noon. The committee will discuss requests for over-length briefs, docketing statements, Rule 24, and the email distributed by Troy Booher. The meeting adjourned at 1:30 p.m.