

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 23, 2012

ATTENDEES

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

EXCUSED

Tawni Anderson
Diane Abegglen
Brent Johnson

STAFF

I. Welcome and Approval of Minutes

Ms. Watt welcomed the committee members to the meeting. With one minor amendment, Ms. Romano moved to approve the minutes from the last meeting. Ms. Decker seconded the motion. The motion carried unanimously.

II. Rule 23B Update

Ms. Watt reported on the progress being made by the Rule 23B subcommittee. The starting point for the subcommittee was that the Appellate Rules committee had recommended repeal of Rule 23B. Comments that were received suggested some opposition to the repeal. The subcommittee has extensively discussed the basis for this recommendation and the pros and cons of the rule. The subcommittee has also looked at a number of alternative approaches and considered how other states approach this issue. The court of appeals has issued a temporary order that requires filing of 23B motions at the same time as the brief which seems to be diminishing the amount of time required to prepare the brief and motion. The subcommittee is now looking at revising the rule rather than recommending repeal and is making progress in assessing what revisions might improve the rule.

III. Rule 4

Ms. Watt informed the Committee of a request by the Rules of Civil Procedure Advisory Committee that Rule 4 be amended to allow the jurisdictional time to run from proof of service of the judgment. Ms. Decker indicated that she was opposed to this in criminal cases. Ms. Romano indicated that it raised concerns in habeas cases. Judge Orme suggested the possibility of treating criminal cases differently from civil cases. Judge Voros wondered whether it seemed right to treat entry of a money judgment more leniently than a criminal judgment. Ms. Seppi suggested that the issue may become less important with the advent of electronic filing because, at least in civil cases, judgments will be served electronically at the time they are entered. Ms. Watt suggested that the Committee either form a subcommittee to interface with the civil procedure rules committee or invite the chair of that committee to the next Appellate Rules Committee to outline the proposal. The Committee agreed to invite Francis Wikstrom, the chair of the Supreme Court Advisory Committee on the Rules of Civil Procedure to our next meeting

IV. Rule 38B/11-401

Judge Voros reported that the reconciliation subcommittee comprised of members from the Appellate Rules committee and Appellate Task Force had approved a new Rule 11-401 covering the creation and maintenance of an appellate roster for representation in indigent criminal cases. Judge Voros outlined the areas of disagreement between the rule originally proposed by the Task Force and the Rule proposed by this subcommittee. Those included concerns as to whether Judges rather than a subcommittee would be the persons to select attorneys for the roster, whether lawyers who are on the roster would be required to reapply for retention, and whether eligibility requirements would appear in the rule.

The committee members reviewed the new draft of the rule and discussed several provisions. Mr. Burke questioned whether the certification requirement of (2)(C)(vi) raised a potential problem in regard to workload arguments made by public defenders as a basis for requesting additional funding or created problems in subsequent litigation if a lawyer were to say that s/he had difficulty completing a case because of extensive caseload. Judge Voros suggested that if someone obtained the contract, that would ensure they had time to do it. There was a discussion about the fact that a different issue is presented when an office contracts and is seeking additional resources as opposed to an independent attorney who seeks an appellate contract. Mr. Booher suggested that lawyers would still be able to turn down a particular case if caseloads grew, and that the question of whether a lawyer has adequate resources turns on how many appeals they have.

Following further discussion about the use of the word “resources” in this context, the committee voted that subsection (2)(C)(vi) should be revised to read, “(vi) certify that the applicant is willing to devote sufficient time and administrative support to adequately represent indigent criminal defendants.”

The committee also discussed and voted that subsection (2)(E) should be revised to read, “(2) (E) *Reconsideration*. An attorney whose application was approved by the committee

but who was not chosen by the Board of Appellate Court Judges for inclusion on the appellate roster, or who was removed from the roster by the Board, may file a petition for reconsideration in the form of a letter submitted to the Board. The petitioner shall submit an original letter and twelve copies.” This language more clearly reflects the purpose of the subsection.

Additionally, the committee talked about subsection (2)(F), the retention subsection. Mr. Burke questioned what happens when a person is no longer eligible but has appeals that have not been completed. Mr. Sabey pointed out that eligibility applies to the time of appointment. Judge Voros agreed but recognized that it could create problems with clients if a lawyer is no longer on the roster. Mr. Booher likes the recertification requirement but suggested that lawyers would be required to inform their clients if they were no longer on the roster. Ms. Romano suggested a five year timeline; a four year timeline was also discussed. Mr. Sabey suggested that the problems with obtaining qualified appellate practitioners for indigent defendants could not be solved unless recertification were required. Mr. Booher suggested that perhaps a two year period for recertification apply to people when they initially appear on the roster, but that the recertification period later be extended to six years.

Judge Voros reminded the committee that the Task Force wants periodic review and suggested that the timing be kept simpler for tracking purposes. He also suggested that review of the roster by the judges at the annual meeting might be sufficient to ensure that lawyers have continuing eligibility. Ms. Taliaferro said that is what the Tenth Circuit does. Ms. Watt suggested that approach was contrary to the Task Force’s concern about judges overseeing the roster.

Ms. Watt brought up the distinction between being removed from the roster and reapplying unsuccessfully to remain on the roster. Mr. Booher pointed out that the mentoring program is facing some of the same questions and might have some helpful input.

Mr. Pattinson wondered whether there had been input from Washington and other counties outside Salt Lake. Judge Voros said there had been and the counties had responded positively in attempting to meet the problems of indigent appellate representation.

Ms. Watt suggested that Judge Voros discuss the concerns raised during this meeting with the Task Force and suggest another meeting of the reconciliation subcommittee to address these concerns. The Committee agreed with this approach.

V. Child Welfare Rules

This issue is tabled until the next meeting.

VI. Over-length Briefs

Ms. Watt prepared a draft incorporating the concerns discussed at the last meeting. That

draft was disseminated and will be discussed at the next meeting.

VII. Docketing Statement Rule

A draft of rule 9 aimed at incorporating the appellate courts' current policy and approach regarding docketing statements has been prepared but was not disseminated to the members of the Committee. Judge Voros will get a copy of that proposal and send it to members.

VIII. Rule 24

Judge Orme discussed the background of this proposed change and handed out a draft of the rule. The Committee began looking at this rule to consider including a subsection that would require practitioners to include an introductory paragraph alerting the appellate court to what issues were being raised in the case. After Judge Orme began looking closely at the rule, he found a number of other problems such as the reference to appellant only when the Rule really refers to petitioners as well. He also raised a concern about the subsection referring to addenda and suggested that the rule more clearly state the items that should appear in the addenda. After a brief discussion as to how to incorporate these concerns, Judge Orme agreed to prepare another draft to the rule and email it to the committee members.

IX. Procedural Difficulties re Cross-appeals in Interlocutory Appeals

Judge Orme brought up the decision in the Gun Hill Dairy case and its discussion regarding procedural difficulties in cross-appeals. Mr. Booher stated that he had just filed a petition for writ of certiorari in that case; Judge Orme stated that the concern for the Committee did not revolve around the substance and instead was focused on the procedural issue in the rules regarding cross-appeals in interlocutory appeals. The members agreed to review the opinion and discuss the procedural concern at the next meeting.

X. Other Business / Adjourn

The committee scheduled its next meeting for June 19, 2012 at noon. Ms. Watt will invite Mr. Wikstrom to attend that meeting; Rule 4 will appear first on the agenda. The committee will also discuss requests for over-length briefs, docketing statements, Rule 24, and procedural difficulties with cross-appeals in interlocutory appeals. Additionally, the Committee will hear an update on Rule 38B/11-401. The meeting adjourned at 1:45 p.m.