

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

November 6, 2012

ATTENDEES

Judge Gregory Orme
Judge Fred Voros - Acting Chair
Diane Abegglen
Troy Booher
Marian Decker
Bridget Romano
Clark Sabey
Lori Seppi
Mary Westby

EXCUSED

Joan Watt
Paul Burke
Bryan Pattison
Ann Marie Taliaferro

STAFF

Brent Johnson

I. Welcome and Approval of Minutes

Joan Watt was excused from the meeting and Judge Fred Voros acted as chair. Lori Seppi noted a change to the minutes. With the change, Clark Sabey moved to approve the minutes. Diane Abegglen seconded the motion. The motion carried unanimously.

II. Rule 24

Staff reminded the committee about the history of the changes to rule 24 and that the version of the rule that had been distributed reflected changes submitted by the committee members at previous meetings. Judge Voros reiterated his preference for having all statutes and rules in the addendum so that the attorneys do not have to worry about the distinction between “determinative” and “important.” Bridget Romano agreed, stating that her office is concerned about word count and perhaps the body of the brief could just contain the determinative portion of the statute or rule. Judge Gregory Orme stated that he did not have a strong opinion and noted that competent attorneys will usually put the determinative provisions in the body of the argument. Troy Booher suggested having attorneys provide a list of the determinative provisions that will be found within the addendum. Mr. Booher noted, however, that even putting this in the rule may not change practice much, because good attorneys will already be highlighting the appropriate provisions and others may not pay attention to the rule. Mr. Booher also questioned

whether it would be helpful to create a list of provisions that are central to the appeal because they will already be listed in the table of authorities. Ms. Romano stated that there would be a benefit to highlighting those specific provisions that are central because the table of authorities will list many provisions that aren't necessarily determinative. Judge Voros stated that he will ask others on the court about their preferences. This issue will be discussed again at the next meeting. Judge Voros also suggested reordering section (a)(13). Judge Voros will reorder those provisions according to importance and present the changes at the next meeting.

III. Docketing Statement and Over-length Briefs

Judge Voros stated that these two issues will be tabled until the next meeting when Ms. Watt is able to attend.

IV. Rule 5 Cross-Appeals

Ms. Romano distributed a proposed amendment to rule 5 to address issues on petitions for interlocutory appeals and cross-appeals. Ms. Romano stated that an issue arises when a petition for an interlocutory appeal is granted and the other party is then potentially able to file a cross-appeal, expanding the issues that will be reviewed. Mary Westby stated that if parties file separate petitions, with separate issues, one of those will not be considered a cross-petition unless and until the court declares one to be such. Ms. Westby stated that there is a difference between cross-petitions and two independent petitions for interlocutory appeal. Ms. Westby stated that the rule needs to appropriately identify cross-petitions versus original petitions. Mr. Sabey stated that the rule should clarify when each type of petition should be used. Ms. Romano noted that if it is a true cross-petition then the respondent has 20 days to respond to the petition, but if it is an independent petition, then the respondent has 20 days from the original order to file as a petitioner. Judge Voros noted that there could be a cascading problem if a petition is filed on one order and then a cross-petition is filed raising issues from an order issued a few days later from the first order, etc. Ms. Westby stated that this cascading would make it more likely that the petition would not be granted because it then becomes apparent that the issues should be resolved upon appeal.

Judge Voros posed the question of whether, when a petition for interlocutory appeal is granted, that automatically sets the scope of review and would therefore prohibit or prevent any cross-appeals. Mr. Booher stated that there would need to be assurance that if a petition is granted and a right to appeal is created, that the parties are nevertheless not precluded from raising those issues at a later point. The committee agreed that the right to cross-appeal on an interlocutory appeal is not a good idea. Judge Orme suggested specifically stating that there is no cross appeal on an interlocutory appeal. Judge Voros agreed, stating that if an individual has an important issue, that individual should file a separate petition for interlocutory appeal.

Judge Orme stated that there also needs to be a page limit on petitions. Judge Voros agreed, stating that petitioners waste a lot of time on issues in petitions that simply do not matter for purposes of whether the petition will be granted. Judge Voros stated that the issues for the committee are: 1) does the committee want to allow cross interlocutory appeals? 2) what should

be the scope of review? and 3) what should be the page limits? Ms. Seppi suggested that the page limit be 20, similar to certiorari petitions. Ms. Westby suggested that 10 or 15 pages may be sufficient. Marian Decker stated that her office responds to more petitions than they file. Ms. Decker stated that they have found that the shorter the petition the better. Mr. Booher suggested that this should be phrased in word limits, rather than page limits. Ms. Decker suggested that when dealing with fewer pages, word counts are not as important because with shorter pages parties aren't able to manipulate word counts to a great extent.

Mr. Booher suggested that a response to a petition for interlocutory appeal only be submitted when the court invites a response. Mr. Booher stated that the court could then resolve petitions much more quickly so that cases may move forward. Judge Orme agreed that this is a good idea. Ms. Romano also agreed, stating that her office would like the idea of not having to respond unless appropriate. Ms. Seppi stated that her office files more petitions than they respond to, but she does not see a problem with only having to respond when necessary.

On establishing the scope of review, Ms. Westby stated that a rule change is not necessary because the orders granting the petition will set forth the scope. The committee also agreed that cross petitions should be eliminated and if a party has an issue the party should file a separate petition within the appropriate time frame. Ms. Romano will make the suggested changes and present a proposal at the next meeting.

V. Rule 38B/11-401

Judge Voros reminded the committee members that the appellate representation task force had approved rules 38B and 11-401. Judge Voros stated that the rules had not changed since these were last seen by the committee and the rules were now ready for committee review and approval. The committee will take a final vote on the rules at the next meeting.

VI. Rule 11(e)(3)

Mr. Booher stated that there is an issue from rule 11 when an appellant does not order full transcripts but is then required to present a statement of the issues so that the appellee can determine whether additional transcripts are necessary. Mr. Booher stated that sometimes issues are raised in the brief that were not anticipated and the appellee must seek additional transcripts and additional time to prepare, and there is often a dispute as to who should pay for the transcripts. Ms. Westby stated that the party could argue that the issue cannot be raised in the brief because it was not listed in the statement of issues. Ms. Romano stated that sometimes a transcript is not necessary for the appellant's issue, but it is necessary for the appellee's response and then there is an issue about who should pay. Mr. Booher noted that this is a difficult situation that creates a potential for abuse on both sides because an appellee may need the transcript but the appellant refuses to pay or the appellee tries to get the appellant to pay more by claiming that everything is needed. Mr. Booher stated that he did not have a proposed solution to the problem at this time. Ms. Seppi agreed that there is a problem, but suggested that there are solutions in place by allowing appellees opportunities to request more time and by giving appellees the opportunity to ask the trial court to order the appellant to pay for the transcripts.

Ms. Westby stated that she has never seen any objections to motions to stay briefing and to supplement the record. Ms. Westby stated that she has seen objections about who should pay for the transcripts. Mr. Booher noted that payment issues will always be present. Judge Voros suggested that Mr. Booher consider whether the rule could be amended to conform to current practice.

VII. Other Business/Adjourn

Judge Voros stated that form 7 needs to be revised to change the reference to rule 4(g) to rule 21(f). The committee scheduled the next meeting for December 19. The meeting adjourned at 1:50 p.m.