

MINUTES

**SUPREME COURT’S ADVISORY COMMITTEE ON THE
UTAH RULES OF APPELLATE PROCEDURE**

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Judicial Council Room
Thursday, May 4, 2017
12:00 p.m. to 1:30 p.m.

PRESENT

Troy Booher
Paul Burke- Chair
Lisa Collins
Marian Decker
James Ishida-Staff
R. Shawn Gunnarson
Alan Mouritsen
Judge Gregory Orme
Adam Pace – Recording Secretary
Rodney Parker
Bridget Romano
Clark Sabey
Lori Seppi
Ann Marie Taliaferro
Judge Fred Voros
Mary Westby

EXCUSED

1. Welcome and approval of minutes

Paul Burke

Mr. Burke introduced guest attendants Nancy Silvester and Judge James Blanch from the civil rules committee, and he invited a motion to approve the minutes from the April meeting.

Ms. Romano moved to approve the April minutes as amended to correct a typo noted by Mr. Sabey. Ms. Collins seconded the motion and it passed unanimously.

**2. Conforming amendment to Civil Rule 6-
prisoner mailbox rule**

Civil Rules Committee

The committee continued its discussion of the proposed conforming amendment to the prisoner mailbox rule in appellate Rule 21. Ms. Silvester and Judge Blanch explained the civil rules

committee's views on the proposed changes to the civil rules. Judge Blanch said that their committee has not yet discussed adding the requirement for a contemporaneously signed declaration, but it will probably follow a modified version of that approach that encourages filing the declaration while still leaving the door open for the court to consider a filing without the declaration.

Ms. Romano proposed creating a presumption that filing in accordance with the rule is timely, but allowing the state to challenge that presumption. Mr. Burke said he thought that was a good solution. Judge Voros said that if the state disputed timeliness, the court of appeals would remand to the district court to make a factual determination of whether the filing was timely.

Ms. Seppi commented that the proposed amendment to Rule 21 seems more limiting than the federal rule, because it has fewer options for allowing the court to find timeliness.

Mr. Sabey opposed allowing the appellate court discretion to determine timeliness. He said, and others agreed, that this would lead to litigation when jurisdictional deadlines are implicated. Judge Voros agreed that the court of appeals should not exercise discretion with respect to jurisdiction. Ms. Seppi said that the court has discretion to determine if a filing was timely—not discretion to excuse untimeliness. Judge Blanch said that it is not discretion, it is a fact-finding power.

Mr. Burke summarized the discussion to this point, saying that there is not unanimous consensus, but a majority of the committee seems to support a bright line approach to the issue of timeliness. He suggested picking a draft to work from to reach a consensus.

The committee worked from draft language that Ms. Romano emailed before the meeting and produced the following proposed language for Rule 21(f):

(f) Filing by person in a place of legal confinement. If an institution has a system for legal mail, a confined person must use that system to receive the benefit of this Rule 21(f). Papers filed by a person committed to a place of legal confinement are timely filed if they are deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a contemporaneously filed notarized statement or written declaration setting forth the date of deposit and stating that first class-postage has been prepaid or that the person committed to a place of legal confinement has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court.

Mr. Burke suggested moving forward with this language. He said he would circulate the proposed language in writing to the committee for review and suggested that the committee discuss it at the next meeting if they weren't able to agree over email.

Mr. Ishida suggested incorporating a form into the rule. Mr. Burke suggested that be discussed at the next meeting.

**3. Proposed amendment to Appellate Rule 25 and 25A
Allowing State to participate in oral argument**

Clark Sabey

Mr. Sabey introduced the proposed amendment to Rule 25A to grant the Attorney General (or local attorney in cases involving ordinances) the right to appear at oral argument whenever an amicus brief has been filed pursuant to the rule.

Ms. Romano asked whether the Attorney General's office will receive notice and an opportunity to waive argument, and whether the court can call for participation of a governmental agency that waives the right to participate.

Mr. Burke asked whether the governmental agency will have to split argument time with one of the parties or whether it will receive extra time. Judge Voros commented that it will not always be clear whose side the governmental agency is on, so this should be left undecided.

Judge Voros asked whether the court will invite the governmental agency to participate at oral argument or if they will just show up. Mr. Sabey said he thinks the purpose of the amendment is to create a presumption that governmental agencies can participate at oral argument when they file an amicus brief under the rule, without the need for an express invitation.

Mr. Burke asked Mr. Sabey to clarify the scope and intention of the proposed amendment with the court and suggested tabling the discussion until a future meeting.

**4. Proposed amendment to Appellate Rule 55 re:
Dismissing an appeal in child welfare cases**

Mary Westby

Ms. Westby introduced a proposed change to Rule 55 to provide the court of appeals discretion to dismiss untimely filed petitions in child welfare cases, rather than requiring dismissal. She explained that approximately 10% of petitions are dismissed as untimely (7 in the last year), which raises questions about whether clients are being served by the current rule.

Judge Voros explained that the court of appeals changed its internal policy to stop dismissing appeals by default in criminal cases, and instead the court issues an order to show cause why the case should not be dismissed. He suggested that something similar could be done for child welfare cases. He asked whether there is a policy interest in speedy resolution of child welfare cases that weighs in favor of retaining the current policy.

The committee reached a consensus that the rule should be changed. Mr. Booher, Mr. Parker, and Mr. Burke supported the language in Alternative No. 1 proposed by Ms. Westby which states that when an untimely petition is filed, "[t]he court may dismiss the appeal or take other appropriate action."

Ms. Collins moved to amend Rule 55 as stated in Alternative No. 1 proposed by Ms. Westby. Mr. Burke seconded the motion and it passed unanimously.

5. Logue Subcommittee report

Lori Seppi

Ms. Seppi reported that the *Logue* subcommittee is still working on a proposal. They are currently investigating whether counsel will be more readily available in PCRA cases. Judge Voros said that he presented on this topic recently. The court is encouraging district court judges to call law firms to ask them to take PCRA cases, and there has also been discussion about creating a state-wide funded office with attorneys to handle PCRA cases.

6. Other business

Ms. Collins reported that 114 motions were filed in the last month under Rule 23 to stay the briefing schedule. This report was to follow-up on a discussion from the previous meeting about whether a new rule is needed to authorize the court to stay its proceedings.

Ms. Collins also reported that some prisoners have difficulty getting a notarized affidavit (following up on earlier discussion of the amendment to the prisoner mailbox rule) because they only have access to a notary one day a week. She suggested changing the requirement to allow a declaration instead of a notarized affidavit.

7. Adjourn

The meeting was adjourned at 1:27 p.m.. The next meeting will be held on June 1, 2017.