

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 84114-0241

January 19, 1999 - 3:30 p.m.

**PRESENT**

Annina Mitchell  
David Arrington  
Matty Branch  
Joan C. Watt  
Julianne R. Blanch  
Fred Voros  
Fred Metos

**EXCUSED**

Karra Porter  
Judge Billings  
Clark Nielsen  
Todd Utzinger  
Larry Jenkins

**STAFF**

Peggy Gentles

**I. WELCOME AND APPROVAL OF MINUTES**

Annina Mitchell welcomed the Committee members to the meeting. Matty Branch moved that the minutes from the November 17, 1998, meeting be approved. Fred Voros seconded the motion. The motion passed unanimously.

**II. SUBCOMMITTEE REPORT**

Matty Branch reported that she, Joan Watt, and Karra Porter had met and reviewed the proposals that Ms. Branch had made concerning changes to various appellate rules. Ms. Branch distributed copies of the Subcommittee's proposals to Committee members. The proposed changes to Rule 3 would remove all references to "docketing fees" because all fees paid are "filing fees." Also, the Subcommittee proposed adding language to paragraph (e) which would require the certificate of service on a notice of appeal to identify which attorney is representing which party. This change has been proposed at the request of the appellate clerks office and the Subcommittee thinks that it would also assist counsel. An additional proposed change to Rule 3 would require the trial court to transmit a certified copy of the notice of appeal. This would allow the appellate court to determine which notice of appeal had been forwarded by the trial court. Joan Watt expressed a concern that adding the language to paragraph (e) would be interpreted as making the requirement of service of the notice of appeal a jurisdictional requirement. She stated that this was in conflict with case law. Ms. Branch pointed out that the rule as it currently reads states that "the party taking the appeal shall give notice." Fred Voros suggested that the proposed new language "a certificate evidencing such service must be

filed with a notice of appeal” should have the word “must” changed to the word “shall.” Matty Branch made a motion that Rule 3 as proposed with Mr. Voros’ suggested change be published for comment. After a second, the motion passed unanimously.

Ms. Branch stated that the Subcommittee proposed removing the reference in Rule 5(b) to the appellate court transmitting the filing fee back to the trial court. Because the filing fee is paid into the general fund, whether by the appellate court or the trial court, the filing fee is no longer transmitted back to the trial court and instead is deposited by the appellate court. Matty Branch moved that the proposed change to Rule 5 be published for comment. Joan Watt seconded the motion. The motion passed unanimously.

Matty Branch presented a proposed change to Rule 9 which would change the requirement for the number of copies of a docketing statement from three to one. This proposal is largely to cut down on unnecessary use of paper. Matty Branch made a motion to publish the proposed change to Rule 9 for comment. After a second, the motion passed unanimously.

Matty Branch presented a proposed change to Rule 11(e)(1). The proposed change would require that when a party is requesting a transcript for an appeal the request filed with the court executive shall indicate that it is needed for appeal. This change is proposed at the request of the appellate clerks and the managing court reporters. Matty Branch moved to publish the proposed change to Rule 11 for comment. After a second, the motion passed unanimously.

Matty Branch presented a proposed change to Rule 14 which would remove the sentence from paragraph (a) “the term ‘petition for review’ includes a petition to enjoin, set aside, suspend, modify, or otherwise review a notice of appeal or a writ of certiorari.” This is proposed for removal because it does not appear to have any meaning in the context of review of administrative orders. Also, the Subcommittee recommended removing references to “docketing fees.” Matty Branch moved that the Rule 14 changes be published for comment. Fred Voros seconded the motion. The motion passed unanimously.

Matty Branch presented a proposed change to Rule 19 that removed references to “docketing fees” and replace them, when appropriate, with “filing fees.” She moved that the proposal be published for comment. Joan Watt seconded the motion. The motion passed unanimously.

Matty Branch presented proposed changes to Rule 21. A proposed change to paragraph (d) would require that, if another party is represented by counsel, the name of the party that each counsel represents be identified on the certificate of service. The Subcommittee also proposed a change to paragraph (e) which would eliminate the requirement that “briefs, petitions, motions, certificates of service” be signed by counsel of record. Instead it would state that “all papers” be signed by the counsel of record. This attempted to get around the requirement that counsel sign certificates of service. After discussion, Matty Branch moved that the proposal be published for comment. Joan Watt seconded the motion. The motion passed unanimously.

Matty Branch presented a proposed change to Rule 29. The proposal changes a reference to “industrial commission orders” to “orders of the Department of Workforce Services and the Labor Commission.” This change recognizes renaming of executive branch agencies. In response to Committee members questions, Matty Branch discussed how the priority system outlined in Rule 29 worked. Matty Branch moved that Rule 29 as proposed to be changed be published for comment. Fred Metos seconded the motion. The motion passed unanimously.

Matty Branch presented proposed change to Rule 34. She stated that Rule 34(a) lays out how costs are awarded, even without order of court. The Subcommittee proposes removing the initial language “when costs are awarded to a party in an appeal” from paragraph (d) to make it clear that a party claiming costs can file a bill of costs regardless of whether it was specifically ordered by the appellate courts. Matty Branch moved that the rule be published for comment. Fred Voros seconded the motion. The motion passed unanimously.

Matty Branch presented a proposed change to Rule 40(d) which would indicate that any counsel appearing pro hac vice must comply with Supreme Court Rule 11-302. The rule would also state that separate admission to the appellate court would not be required if the attorney had previously been admitted pro hac vice. The amendment as proposed stated that a separate motion was not necessary if the attorney had previously been admitted “in the matter.” After discussion of attorneys representing parties in appeals from agency matters, the Committee changed the language “in the matter” to “in the lower court.” Matty Branch moved that the proposed change be published for comment. The motion passed unanimously.

Matty Branch presented proposed changes to the appellate forms. The Subcommittee had a number of issues with the explanatory notes which are reproduced after each form but contain exactly the same language. Ms. Branch stated that the Subcommittee struggled with whether to cleanup the explanatory notes or delete them entirely. In addition, the Subcommittee had presented a number of new forms such as an affidavit of impecuniosity and a petition for review. Annina Mitchell moved that explanatory note number 6 be removed entirely. Fred Metos seconded the motion. The motion passed unanimously. Joan Watt moved that the last sentence of explanatory note 3 be removed. Fred Metos seconded the motion. The motion passed unanimously. The Committee also asked that the explanatory notes be moved to the top of the forms and be called “explanatory notes” rather than “explanatory notes for appellate forms.” Matty Branch moved that the forms as amended by the Committee be published for comment. Fred Metos seconded the motion. The motion passed unanimously.

### **III. RULE 24**

David Arrington presented a proposed change to Rule 24(a)(B)(9) which added the language “when the sufficiency of evidence for a fact finding is appealed, the appellant shall marshal all record evidence supporting the challenged finding.” In addition, Mr. Arrington had a proposed advisory committee note. Mr. Arrington had prepared this proposal because case law clearly required the marshaling of evidence when challenging sufficiency but parties were repeatedly being admonished

by the appellate courts for failing to do so. By putting the requirement in the rule, the occasional appellate practitioner is alerted to the requirement. Fred Voros asked if any different requirement applied when challenging a jury verdict. Mr. Arrington stated that regardless of the standard of proof, the marshaling requirement still applied. Joan Watt moved that the proposed change to Rule 24 be published for comment. Fred Metos seconded the motion. The motion passed unanimously.

#### **IV. OTHER BUSINESS**

Matty Branch stated that she, Joan Watt, and Karra Porter would volunteer to serve as a drafting subcommittee for the Committee if so desired. The Committee agreed with Ms. Branch's proposal. The Committee scheduled its next meeting for February 16, 1999 at 3:30 p.m. Annina Mitchell stated that if there was no business, the meeting would be canceled.

There being no further business, the meeting adjourned.