

# **AGENDA**

## **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 9, 1999 - 3:30 p.m.

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|-----------|--|---------------|
| <b>1.</b> | <b>WELCOME AND APPROVAL OF MINUTES</b> | Todd Utzinger |
| <b>2.</b> | <b>REVIEW PUBLIC COMMENTS</b>          | Todd Utzinger |
| <b>3.</b> | <b>RULE CHANGE PROPOSALS</b>           | Matty Branch  |
| <b>4.</b> | <b>OTHER BUSINESS</b>                  |               |
| <b>5.</b> | <b>ADJOURN</b>                         |               |

MINUTES

**Supreme Court's Advisory Committee  
on the Rules of Appellate Procedure**

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November 9, 1999  
3:30 P.M.

**ATTENDING**

Todd Utzinger  
Julianne Blanch  
Larry Jenkins  
Fred Voros  
Karra Porter  
David Arrington  
George Haley  
Matty Branch  
Clark Nielsen

**EXCUSED**

Joan Watt  
Fred Metos  
Judge Judith Billings

**GUESTS**

Jerry Howe  
Susan Allred

**STAFF**

Brent Johnson

**I. WELCOME AND APPROVAL OF MINUTES**

Todd Utzinger welcomed the Committee members to the meeting and introduced George Haley as a new member. Larry Jenkins moved to approve the minutes of the August meeting. Julianne Blanch seconded the motion. The motion carried unanimously.

**II. APPELLATE MEDIATION RULE**

Todd Utzinger noted that the Judicial Rules Review Committee had provided the only comment on the proposed appellate mediation rule. The comment was distributed at the meeting. Matty Branch suggested that the Judicial Rules Review Committee's comments could be best addressed through education, noting that forty percent of mediations result in settlement. David Arrington stated that the Tenth Circuit Court's data would support the same figures.

Susan Allred stated that the Committee's concerns were that mediation is presented as a public service, but mediation is mandatory and random. Ms. Allred stated that the perception is that, if a case has reached the appellate level, there is little reason to mediate the case. Ms. Allred stated that the Committee was also concerned that the attorneys have too much authority to settle the case, without consulting the client.

Karra Porter stated that the process must be random, because the office does not have the personnel to handle all of the cases. Ms. Porter noted that the Tenth Circuit has at least three mediators. Matty Branch also noted that the opportunity exists for parties to request mediation. Todd Utzinger stated that mediation makes sense at the appellate level because even the victor may see a problem with how the case is won and may be satisfied to accept less, in exchange for settlement. Mr. Utzinger also stated that the loser may also realize that there is no point to pursue the appeal after mediation.

The Committee members also noted that the mediator is not vested with significant authority. The mediator does not even have authority to toll the time lines for an appeal.

After further discussion, Todd Utzinger moved that, before the Committee finalize any changes to the Appellate Mediation Rule, that Judge Wilkins, Karin Hobbs and Committee representatives meet with the Legislature to address concerns. If any differences remain after that point, the Committee will resolve those issues. David Arrington seconded the motion. The motion carried unanimously. The Committee agreed that Karra Porter, Julianne Blanch and Todd Utzinger would also meet with the Legislature.

### **III. CAPITAL CASES RULE CHANGE**

Matty Branch presented a proposal from the staff attorneys in the Supreme Court to allow better tracking of capital cases. The proposal was that the notice of appeal note the fact that the appeal is a capital case and the sentence that was imposed. The purpose of this notice would be to prevent pour-over to the Court of Appeals and to ensure that the case received proper tracking.

The Committee engaged in debate as to whether such a requirement should be contained in the notice of appeal or the docketing statement. Larry Jenkins noted that the federal rule just requires a docketing statement on a provided form, then the attorneys simply fill out the form. Fred Voros noticed that there is a very good policy reason not to load up the notice of appeal with information. Mr. Voros stated that the information would fit better in the docketing statement. George Haley made a motion to have Matty Branch talk with the court attorneys about the possibility of putting the requirement in the docketing statement, rather than the notice of appeal. Clark Nielsen seconded the motion. The motion carried unanimously.

Fred Voros suggested forming a subcommittee to review whether Utah should follow the federal model for docketing statements. The subcommittee members are Fred Voros, Larry Jenkins, Clark Nielsen, and possibly Joan Watt.

### **IV. RULE 35**

Matty Branch stated that a question arose as to whether the three day mailing rule applies on petitions for rehearing. Ms. Branch stated that the courts had internally applied the three day mailing rule and the question arose as to whether the rule should be amended to reflect the courts' internal policy. Larry Jenkins stated that the rule is clear that the three day mailing rule does not apply. Clark Nielsen

stated that the rule is clear and if the court wants to excuse late filings under the three day rule, that is their prerogative. Clark Nielsen then moved that the Committee not propose a rule change. Larry Jenkins seconded the motion. The motion carried unanimously.

Matty Branch raised the additional issue as to whether a brief should be required for petitions for rehearing. Ms. Branch noted that the issue is expense and the Tenth Circuit does not require a brief, the pleading is simply like a motion. Larry Jenkins noted that requiring a brief adds a couple of hours to preparation time because of the binding requirement. Julianne Blanch noted that the current rule could act as a deferant to frivolous petitions.

Clark Nielsen moved that the Committee not propose a rule change. Fred Voros seconded the motion. The motion carried unanimously.

Matty Branch raised an additional issue as to whether an amicus can file a petition for rehearing. Fred Voros stated that he did not think that an amicus should have the right. George Haley stated that if the amicus has been granted the right to file a brief, the amicus should also have the right to petition for rehearing. Fred Voros questioned what would happen if the parties were satisfied with the decision, but the amicus wanted to file a petition for rehearing.

David Arrington stated that as a practical matter, the amicus would usually have a relationship to one of the parties. Karra Porter stated that it should not be a problem if the amicus joins a petition already filed, but should not be able to file on their own. Todd Utzinger noted that if an amicus is not happy with a particular decision, the amicus should be able to petition for leave to file for a rehearing. After brief further discussion, George Haley moved to leave Rule 35 as it is. Julianne Blanch seconded the motion. The motion carried unanimously.

## **V. ADJOURN**

The next meeting was scheduled for January 11, 2000 at 3:30 p.m. There being no further business, the meeting adjourned at 5:10 p.m.