

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

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

February 19, 2003

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| 1. | WELCOME AND APPROVAL OF MINUTES | Todd Utzinger |
| 2. | APPELLATE QUALIFICATIONS RULE | Todd Utzinger |
| 3. | RULE 8 AMENDMENTS | Fred Voros |
| 4. | RULE 10 AMENDMENT | Clark Sabey |
| 5. | MISCELLANEOUS RULE AMENDMENT | Matty Branch |
| 6. | OTHER BUSINESS | |
| 7. | ADJOURN | |

**The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.**

MINUTES

APPROVED 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

February 19, 2003

ATTENDEES

Todd Utzinger
Joan Watt
Matty Branch
Larry Jenkins
Clark Sabey
Fred Metos
Marian Decker
Fred Voros
Judge Gregory Orme

EXCUSED

Julianne Blanch
George Haley
Clark Nielsen
Karra Porter
David Arrington

STAFF

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

Todd Utzinger welcomed the Committee members to the meeting. Judge Orme moved to approve the minutes of the January meeting. Matty Branch seconded the motion. The motion carried unanimously.

II. APPELLATE QUALIFICATIONS RULE

Todd Utzinger distributed another draft of the proposed rule on appellate qualifications. Mr. Utzinger explained that the recent revisions place a burden on counsel to show that they meet the proficiency requirements and to place an obligation on the trial court to ensure that only qualified individuals are appointed. Mr. Utzinger explained that this creates some difficulty, because appointed counsel typically do not appear in the trial court. The trial court just appoints the individual who has the county contract.

Mr. Utzinger explained that the previous provisions on suspension and disqualification would be jettisoned in favor of provisions that simply prevent appointment of an attorney who has previously been disciplined. Fred Voros expressed concern with the reference to orders to show cause. Mr. Voros noted that an order to show cause might be unfounded and it would not be fair to disqualify an attorney simply because the attorney had faced an order to show cause. Clark Sabey suggested

an order to show cause with a sanction. Mr. Voros stated that this might not go far enough, because sometimes there is fault on the part of an attorney, but no sanction. Joan Watt noted that if the sanction requirement is in the rule, however, then appellate courts may feel that they are able, or may feel compelled, to take action to ensure that a sanction is imposed so that the attorney is disqualified. Judge Gregory Orme stated that the order to show cause would then be irrelevant. The sanction would be the important factor.

Judge Orme suggested that an attorney who had been subject to an appellate sanction, an order of default or an equivalent action calling the quality of representation into question should not be appointed. Marian Decker asked how the trial court would know whether an attorney had been sanctioned. Judge Orme stated that the attorneys will have to voluntarily confess. Fred Metos questioned whether there is a mechanism by which a trial court could ask the appellate courts whether an attorney had been sanctioned. Matty Branch stated that it could be done. Judge Orme suggested that, rather than having the trial court ask, that the attorney submit a written certification that they have not been sanctioned. Ms. Watt noted that in Salt Lake County, the court simply appoints LDA and not a specific attorney and written certification may therefore be difficult. Judge Orme suggested language stating that acceptance of the appointment would constitute certification by the attorney that the requirements of the rule are met. Mr. Voros stated that if the appellate courts then had an appearance by a sanctioned attorney, the appellate court could remand to the trial court for removal of the attorney and appointment of new counsel. Mr. Metos questioned whether the remand process needed to be placed into the rule. Judge Orme stated that it would probably be best to do so.

Matty Branch suggested language which would state that “acceptance of appointment constitutes certification by counsel that counsel is proficient in appellate practice in accordance with the rule.” Judge Orme moved to approve the language proposed by Ms. Branch. Marian Decker seconded the motion. The motion carried unanimously.

Todd Utzinger suggested that the first paragraph would state that counsel is deemed proficient if the conditions of the rule are met and counsel has not been subject to sanction notice of default dismissal or an equivalent action. Ms. Watt questioned what was meant by a notice of default. Ms. Branch suggested requiring an actual default dismissal. Ms. Watt noted that sometimes a dismissal may result from innocent mistakes and the case is subsequently reinstated. Judge Orme also noted that sometimes dismissals are intentional, when the party has determined that it would be best not to pursue an appeal.

Fred Voros questioned whether a finding of ineffectiveness should be added to the list of conditions. Joan Watt noted that sometimes even good attorneys have been cited for ineffectiveness. Ms. Watt stated that the rule should focus on sanction and that would give the appellate courts something to look to that will prevent reappointment.

After brief discussion, the Committee agreed that the rule could focus on sanctions and discharges by the appellate courts. Judge Orme noted that sanctions and discharges are serious and should be

enough alone to prevent appointment in future cases. Fred Voros questioned whether the bar for removal was now too high. Judge Orme stated that, with a rule in place, the appellate courts will have a tool by which they can prevent reappointment, which is what the appellate courts seek.

Todd Utzinger stated that he will create another draft for dissemination at the next meeting. The goal of the Committee is to have a proposed rule in place before the May meeting of the Board of Appellate Court Judges. Judge Orme will present the rule to the appellate court judges at that time.

III. OTHER BUSINESS/ADJOURN

Due to the lack of time, the Committee agreed that other agenda items would be postponed until the March 19, 2003 meeting.