

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 18, 2004

ATTENDEES

Matty Branch
Marian Decker
Larry Jenkins
Judge Gregory Orme
Karra Porter
Clark Sabey
Kate Toomey
Todd Utzinger

EXCUSED

David Lewis
Margaret Lindsay
Brian Pattison
Clark Nielsen
Fred Voros
Joan Watt

GUESTS

Judge Pamela Greenwood
Martha Pearce
Carol Verdoia

STAFF

Brent Johnson

1. WELCOME AND APPROVAL OF MINUTES

Todd Utzinger welcomed the Committee members and guests to the meeting. The minutes from the January meeting were approved with one typographical change.

2. CHILD WELFARE APPEALS

Judge Pamela Greenwood, Carol Verdoia, and Martha Pearce attended the meeting to explain the history of the child welfare appeals proposals. After the explanation, the Committee members focused on the specific language of the proposals.

Judge Orme expressed a concern over proposed Rule 55(b), which states that the petition on appeal must be prepared by the appellant's trial counsel, absent a showing of extraordinary circumstances. The rule proposal states that claims of ineffective assistance of counsel do not constitute extraordinary circumstances. Judge Orme expressed the opinion that ineffective assistance could sometimes constitute extraordinary circumstances and worried that the rule may be too exclusive. Judge Greenwood stated that the Committee had substantial discussions about ineffective assistance issues. Judge Greenwood stated that, after the petition is filed, the court can still review the issues and appoint conflict counsel. The Child Welfare Committee was concerned that if exceptions are allowed in the rules, the goal of expedited appeals will be eviscerated.

Judge Orme suggested that, if ineffective assistance is the only claim, there may be a benefit to having another attorney prepare the petition. Ms. Verdoia stated that most cases probably will not be briefed and the Committee should not create exceptions based on rare circumstances. Ms. Verdoia stated that the Committee can revisit this issue after the rules have been in place. After further discussion, the Committee agreed that the rule should be adopted as proposed.

Judge Orme also questioned the language in Rule 57 which requires the record on appeal to include anything that was judicially noticed. Judge Orme stated that this could create difficulties. Judge Orme stated that the Court of Appeals could take judicial notice of the same facts that were judicially noticed at the trial level. Carol Verdoia agreed that the phrase "or judicially noticed," could be removed from the rule.

Judge Orme also expressed a concern with the certification form which requires the person to state that they have "checked with the telephone company." Judge Orme suggested that this phrase is archaic and the form could just state that the person checked to see if there were any new listings. Judge Greenwood agreed with the suggestion, as did other Committee members.

Karra Porter asked whether the Child Welfare Committee had given any consideration to including district court adoptions. Ms. Porter stated that expedited appeals might also be warranted in those cases. Larry Jenkins stated that the court has been good about expediting contested adoptions. After brief discussion, the Committee agreed that this issue could be addressed later, after the rules have been implemented for a period.

Todd Utzinger thanked the guests for the work of their committee and the proposals that had been presented. Matty Branch then moved to approve the rules as proposed, with the elimination of the phrase "or judicially notice," from Rule 57. Ms. Branch also moved that the rules should be adopted on an emergency basis if the child welfare appeal statute passes. Marian Decker seconded the motion. The motion carried unanimously.

3. RULE 19, REPLY BRIEFS

Todd Utzinger reminded the Committee of Troy Booher's comment that Rule 19 be amended to include a provision allowing reply briefs and the time within which those briefs should be submitted. The Committee discussed whether reply briefs are contemplated in extraordinary relief proceedings. Clark Sabey stated that the Supreme Court will typically consider the briefing to be complete upon receipt of the petition and the response, and does not expect a reply brief. Judge Orme suggested putting language into the rule which states that a reply brief is not expected or required, unless requested. The Committee members agreed with the suggestion.

Matty Branch suggested that, as long as the Committee was looking at Rule 19, the last sentence in paragraph (c) should be eliminated. The sentence refers to oral argument, and oral

argument is rarely held in extraordinary relief proceedings. Clark Sabey offered to review Rule 19, make the changes suggested by the Committee, and propose any other changes that may be necessary. The Committee agreed with the suggestion.

4. OTHER BUSINESS

Larry Jenkins suggested that the Committee revisit the issue of page limits and proportional spacing. Mr. Jenkins reminded the Committee members that the federal rule contains a word limit and that the Committee had rejected a word limit in favor of proportional spacing. Mr. Jenkins stated that the proportional spacing requirement is still easy to manipulate and suggested a reconsideration of the word limit issue. Matty Branch agreed that the proportional spacing requirement has been hard to monitor at the counter. Ms. Branch stated that one concern, however, is the pro se litigant. Mr. Jenkins stated that the federal courts have a default position. If a brief is less than 35 pages or so, it is not a big issue. But when the briefs are larger, the word-count becomes important. The Committee members suggested that this could be discussed at future meetings.

5. ADJOURN

The Committee had no additional business, therefore the Committee meeting adjourned at 1:20 p.m. The next meeting is scheduled for March 17, 2004 at noon.

Administrative Office of the Courts

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

February 10, 2004

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

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

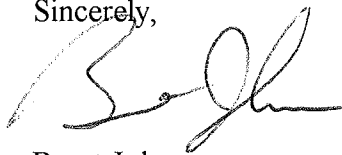
Re: Next Meeting

Dear Committee Member:

This letter is to remind you that the next meeting of the Supreme Court's Advisory Committee on the Rules of Appellate Procedure will be Wednesday February 18, 2004 at noon at the Administrative Office of the Courts. The agenda item for this meeting will be the proposed appellate rules for child welfare appeals. I am enclosing another copy of those rules for your reference. I am also enclosing the minutes from the last meeting.

If you will be unable to attend the meeting, or if you have any questions, please contact me.

Sincerely,



Brent Johnson
General Counsel

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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.