

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE
ON THE RULES OF APPELLATE PROCEDURE

October 17, 2007

ATTENDEES

Matty Branch
Paul Burke
Marian Decker
Jennifer Gowans
Judge Gregory Orme
Clark Sabey
Tawni Sherman
Judge Kate Toomey
Fred Voros
Joan Watt

EXCUSED

Brent Johnson
Larry Jenkins

I. WELCOME AND APPROVAL OF MINUTES

Joan watt welcomed the committee members to the meeting and introduced Jennifer Gowans as a new member. Ms. Watt stated that Ms. Gowans has a significant appellate practice in Utah County.

The minutes of August 15, 2007, were reviewed. Ms. Watt said that Tawni Sherman should be shown as excused from the meeting. Matty Branch said that she thought the last two sentences of Section VIII were inaccurate and should be stricken. Fred Voros and Paul Burke requested two minor corrections. Subject to the corrections requested, Mr. Burke moved to approve the minutes. Judge Toomey seconded the motion. The motion carried.

II. RULE 41 CERTIFICATION

Pat Bartholomew, clerk of court in the Supreme Court, discussed the process used by the Supreme Court when a question of Utah law is certified to it by a federal court under Rule 41 and provided copies of the various orders and notices used. She said that the court sends the parties a briefing notice that states when the briefs are due and that they are to be filed simultaneously. As far as oral argument, Ms. Bartholomew says that the court essentially leaves it to the parties to decide who will argue first. Rebuttal is generally not permitted. Ms. Bartholomew said that the Rule 41 process has not been particularly problematic, but that she thought some clean up of the rule would be helpful. She pointed out that the existing rule indicates that a fee is required when a request/order of certification is filed in the Supreme Court, but that a fee has never been assessed since the request always comes from a federal court, and the Supreme Court does not think it appropriate to require the federal court to pay a filing fee.

The committee asked Ms. Bartholomew to ask the Supreme Court whether it would prefer Rule 41 to be rewritten to more accurately reflect the nature of a certification of law matter and to provide practitioners with more specifics as to briefing requirements and the way oral argument is handled, or whether the court would prefer the rule to be simplified and to specifically provide that the court will establish the briefing requirements and oral argument process by order and letter on a case by case basis. The committee also asked Ms. Bartholomew to review briefs filed in closed certification cases to determine whether attorneys followed the usual briefing format and content requirements or modified the requirements to fit the certification situation. Ms. Bartholomew agreed to get the requested information and to report back to the committee at its next meeting.

Mr. Voros said he was interest in hearing from practitioners who think there are problems with the present Rule 41. Tawni Sherman believes Troy Booher was the attorney who initially voiced concerns about the rule. She will contact him, and any other attorneys she can identify who have been involved in a Rule 41 certification, and get their views as to needed amendments to the rule. Ms. Sherman agreed to report to the committee at the next meeting.

III. RULE 37(B) - VOLUNTARY DISMISSAL

Matty Branch advised that the Board of Appellate Court Judges recently discussed the amendments to Rule 37(b) proposed by the Supreme Court which require stipulated motions to dismiss to be referred to the court for decision rather than permitting such motions to result in automatic dismissal. She reported that some judges felt that if all parties stipulate to dismissal of an appeal, then there is no case and controversy, and the appellate court should not proceed to adjudicate the appeal. Ms. Branch advised that the Supreme Court would like the committee to consider the issue further, including a possible drop-dead provision. Paul Burke volunteered to investigate whether the rules of the United States Supreme Court place any constraints on the ability of litigants to settle and voluntarily dismiss their cases, even after oral argument. He will report back to the committee at its next meeting.

IV. OTHER BUSINESS - NEXT MEETING

Ms. Watt suggested that the committee review the use of the words “appellant” and “petitioner” in each appellate rule in order to insure that the rule is not equally applicable to an “appellee” or “respondent” under the proper circumstances. Ms. Watt said she will make an initial review of the rules to determine if further consideration is warranted.

The committee scheduled its next meeting for November 28, 2007. The committee adjourned at 1:30 p.m.