

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

November 28, 2007

ATTENDEES

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

EXCUSED

Paul Burke
Larry Jenkins

STAFF

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

Joan Watt welcomed the committee members to the meeting. The committee members made several changes to the minutes to more accurately reflect the discussions at the previous meeting. Fred Voros then moved to approve the minutes. Matty Branch seconded the motion. The motion carried unanimously.

II. RULE 41

Matty Branch stated that she had talked to the court about changes to Rule 41. Court members stated that if the committee can improve the rule, the rule should be amended. Tawni Sherman stated that she had talked to Troy Booher, Michael Zimmerman and attorneys from the Department of Justice. Ms. Sherman stated that the attorneys at the Department of Justice have not experienced any problems. She stated that Troy Booher had experienced some issues with one case in which the issues were briefed simultaneously. Also, during oral arguments, one side had a chance for rebuttal but the other side did not. Ms. Sherman stated that this did not seem like a huge issue and perhaps changes were not necessary.

Judge Gregory Orme suggested having a rule on certification which specifically identified

the other rules of procedure that did not apply to the process. The rule could also address briefing schedule and oral argument. Clark Sabey noted that it is difficult to write a rule that deals with briefing because each case will be different as to which side should file the initial brief. Mr. Sabey suggested that all of these issues simply be handled by the form letter that is sent from the court. Fred Voros stated that if the process will be described in the letter, it would be helpful to put those in a rule so that attorneys know in advance what might happen. Mr. Voros also suggested looking at what other states do.

After brief discussion, Matty Branch stated that she will review the suggestions submitted by Troy Booher and present to the committee a proposal that includes a rule and a form letter. Matty Branch noted that the fee section in Rule 41 should still be deleted. Tawni Sherman then moved to delete the fee section from Rule 41. Clark Sabey seconded the motion. The motion carried unanimously. Tawni Sherman stated that she will also look at what other states are doing in this area and provide a report at the next meeting.

III. RULE 37(b)

Paul Burke had submitted a report to the committee stating that he had reviewed the U.S. Supreme Court rule and they permit voluntary dismissals without any time limits. Mr. Burke recommended no change to the rule. Clark Sabey suggested that rule should perhaps still be amended to state that voluntary dismissal cannot occur after the court announces that it will be publishing an opinion. Ms. Sherman stated that there might be a constitutional problem if the court issues an opinion after the parties have voluntarily dismissed the case. Mr. Sabey stated that there is still an issue as to when an opinion is officially issued. Judge Orme suggested that a rule should specifically define when an opinion is deemed issued. After some discussion, the committee members agreed that a rule change should state that an opinion is considered issued as of 8:00 a.m. on the date of the opinion.

Joan Watt conducted an informal poll of the committee members to determine whether there is consensus that the party should be able to voluntarily dismiss a case up to the time that the opinion is issued. The committee unanimously supported the proposal. The committee members also unanimously supported the idea of establishing a specific time as to when an opinion is deemed issued. Clark Sabey agreed to propose specific language in Rules 30(c) and 37(b).

IV. OTHER BUSINESS

Matty Branch stated that she had received a proposal from Sue Willis asking for clarification in Rules 10 and 20 that copies of pleadings do not need to be filed in both courts. Ms. Branch stated that the rule might seem obvious, but the courts often receive inquiries asking whether they need to file in both courts, because the rule seems to suggest such. Kate Toomey

moved to amend Rules 10 and 20 to make them consistent with Rule 26, which contains the qualifying language “for matters pending in.” Judge Orme seconded the motion. The motion carried unanimously.

Judge Orme distributed an e-mail in which he proposed that Rule 19 be amended to include a requirement that the petitioner state that an interlocutory appeal had been sought and then to either explain the results of the petition for interlocutory appeal or why interlocutory appeal had not been sought. The committee members agreed it would discuss this proposal at the next meeting.

The committee scheduled its next meeting for January 16, 2008. There being no further business, the committee adjourned at 1:20 p.m.