

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 84114-0241

November 17, 2008 - 12:00 p.m.

**ATTENDEES**

Tawni Anderson  
Matty Branch  
Paul Burke  
Marian Decker  
Larry Jenkins  
Judge Gregory Orme  
Brian Pattison  
Clark Sabey  
Joan Watt

**EXCUSED**

Jennifer Gowans  
Judge Kate Toomey  
Fred Voros

**STAFF**

Brent Johnson

**I. WELCOME AND APPROVAL OF MINUTES**

Joan Watt welcomed the committee members to the meeting. The minutes from the last meeting were approved.

**II. RULE 19**

Judge Orme explained a change to Rule 19 which had been pending for awhile. Judge Orme stated that the amendment will require a litigant who seeks an extraordinary writ to state in the petition whether a petition for interlocutory appeal has been filed, and if one has been filed, the result of the petition. After brief discussion, Judge Orme moved to adopt the amendment. Clark Sabey seconded the motion. The motion carried unanimously.

**III. RULES 25 & 50**

Clark Sabey stated that Rules 25 and 50 had been tabled until the committee could review the Tenth Circuit Court rule. The Tenth Circuit requires an amicus motion to be filed no later than seven days after the filing of the principal brief of the party being supported. The motion must be accompanied by the proposed brief. Clark Sabey stated that his proposal is to require the motion to be filed at least thirty days before the date on which the party's brief is to be filed. Mr.

Sabey asked whether thirty days is appropriate or whether a different time frame, such as twenty-one days, would be better. Mr. Sabey stated that the Supreme Court needs about twenty-one days to resolve such a motion. Joan Watt stated that thirty days is too long because it would always prompt requests for extensions. Ms. Watt asked how a twenty-one day requirement would affect civil cases. Ms. Anderson stated that it wouldn't be a problem. Paul Burke stated that the timing gives the appellant an advantage because an appellee would have a very short time frame to find an amicus to support its position. Mr. Sabey stated that an appellee could request an extension, explaining to the court that it had not foreseen the issues raised by the amicus.

Mr. Burke asked whether the rule should state that an amicus can file a brief at any time and then the parties could move to strike the brief. Ms. Watt stated that, in criminal areas, parties would want to object rather than move to strike. Mr. Sabey stated that there are due process concerns with allowing an amicus to file without permission. Ms. Watt suggested that twenty-one days is appropriate and a party could argue for an extension. Mr. Burke asked whether the rule should address the time within which a court must deal with these. The committee members agreed that this could just be left to the court. Ms. Watt asked whether the rule should automatically stay the time frames until the motion can be resolved. Ms. Watt stated that she is concerned that a motion for extension might be denied. Mr. Sabey stated that this is a current issue, but hasn't been a problem. Mr. Sabey stated that he will watch and see if it becomes a problem. The committee members agreed that an automatic stay should not be put in the rule.

Bryan Pattison asked whether the amicus issue should also be addressed in the rule on petitions for rehearing. Mr. Pattison stated that he had a case in which an amicus came in at the point of the petition for rehearing. Mr. Pattison stated that he was required to address the amicus position in that case. The committee members agreed that this would be a rare case and there probably isn't a need to address it in rule. Mr. Sabey stated that he did not think an amicus could join at the rehearing stage. Matty Branch then moved to approve the rule, changing thirty days to twenty-one days. Paul Burke seconded the motion. The motion carried unanimously.

Mr. Sabey then explained the changes to Rule 50. The proposed amendments provide a detailed process for an amicus petition on certiorari. Ms. Watt asked whether the granting of an amicus motion would automatically mean that the amicus could file a brief. Mr. Sabey stated that would be the case. Mr. Burke suggested that there is a concern if a petitioner seeks certiorari and then an amicus opposes the petition, because the petitioner might not have had an adequate opportunity to address the issues in the opposition. Mr. Sabey stated that, because this is on certiorari, the party would probably already anticipate that an amicus will become involved. Matty Branch then moved to approve Rule 50 as proposed. Paul Burke seconded the motion. The motion carried unanimously.

#### **IV. RULE 38**

Matty Branch explained that the proposal comes from the previous meeting when Judge Orme had noted that paragraph (b) incorrectly makes a reference to the procedure to be followed when there is a death of a party. The proposed changes to Rule 38 create two new processes for substitution: one when a party becomes incompetent, and another for any other case. Judge Orme suggested that, instead of having the court grant substitution based upon motion filed by any party, the court may grant substitution upon “good cause shown.” Judge Orme stated that this is because there may be situations in which the court recognizes that substitution is necessary without anyone having to file a motion. Paul Burke suggested changing the word “necessary” to the word “appropriate” in the section involving substitutions for any other situation. After those amendments, Mr. Burke moved to publish the rule for public comment. Tawni Anderson seconded the motion. The motion carried unanimously.

#### **V. RULE 40**

Staff distributed an amendment to Rule 40 which simply made a technical change. Paul Burke moved to adopt the change. Marian Decker seconded the motion. The motion carried unanimously.

#### **VI. SCOPE OF REPRESENTATION IN FIRST APPEAL CASES**

Matty Branch stated that there is a concern about Utah Code Ann. § 77-32-301, which states when counsel must be provided for indigent defendants. The concern is that the statute is not clear on when the counties are no longer obligated to provide counsel. Ms. Branch stated that the court wants the committee to define a “first appeal of right” so that there isn’t a question. Judge Orme stated that the first appeal of right should include a petition for rehearing, a cert petition, and cert brief, if certiorari is granted. Mr. Sabey noted that an attorney could still file a motion to withdraw in those situations, but a county would be obligated to pay for the defense. Ms. Watt agreed that the statute has been a problem. Ms. Watt stated that there are also some attorneys who believe that a cert petition must be filed in every case, and perhaps also a petition for rehearing. Mr. Sabey stated that it is ultimately a disservice to clients if petitions are filed in every case, because the court would be inundated with pleadings and important issues might become obscured. Ms. Watt suggested forming a subcommittee to draft a definition. The subcommittee is Joan Watt, Clark Sabey, and Marian Decker.

#### **VI. RULE 49**

Joan Watt stated that an amendment to Rule 49 was e-mailed to committee members and the intent was to make the provision an “either or” provision. Matty Branch moved to approve the amendment for public comment. Marian Decker seconded the motion. The motion carried unanimously.

## VII. OTHER BUSINESS

Joan Watt reported on the meeting with the Supreme Court on the victims issue. Ms. Watt stated that the Supreme Court does not want the committee to do anything, but to take a wait-and-see approach. Judge Orme asked whether the courts had received any victims statements so far. Mr. Sabey stated that he had not seen any.

Clark Sabey stated that the court did not like the proposed changes to Rule 37. The court made some changes and now wants the rule to be sent out for public comment. Mr. Sabey stated that the court wants discretion to deny a stipulated dismissal. The committee then discussed the issue of whether proposed rule amendments should be sent to the Supreme Court before they are published for public comment. Judge Orme stated that it is important that the committee continue to give an independent perspective on rule issues and the committee must feel free to discuss those and send final proposals after public comment. Judge Orme noted, however, that there are rare times when it is appropriate to get the court's feedback, such as the recent issue on victims.

The committee scheduled its next meeting for February 18, 2009. The committee adjourned at 1:30 p.m.