

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

February 18, 2009 - 12:00 p.m.

ATTENDEES

Matty Branch
Marian Decker
Jennifer Gowans
Larry Jenkins
Judge Gregory Orme
Brian Pattison
Clark Sabey
Judge Kate Toomey
Joan Watt

EXCUSED

Tawni Anderson
Paul Burke
Fred Voros

GUEST

Tim Shea

STAFF

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

Joan Watt welcomed the committee members to the meeting. Larry Jenkins moved to approve the minutes from the last meeting. Matty Branch seconded the motion. The motion carried unanimously.

II. COURT REPORTER RULE AMENDMENTS

Joan Watt welcomed Tim Shea to the meeting. Mr. Shea had previously distributed a packet of proposed rule amendments that address the elimination of the court reporter program. Mr. Shea stated that court reporting is being eliminated because of budget cuts. Mr. Shea stated that there will be a statutory change in the 2010 legislature, but the statute will not affect the rule changes. The rules will go into effect on July 1, 2009. Mr. Shea stated that the courts are moving to audio systems and that audio will maintain the record in almost 100% of cases. Mr. Shea stated a judge will still have discretion to order court reporting in capital cases, but the parties will bear the costs of the reporting. Marian Decker asked why court reporting is not mandatory in capital cases. Mr. Shea stated that the committee wants audio to be the record in court cases, but also determined that there is something different about capital cases that should allow the parties to still request court reporting. Jennifer Gowans asked whether an indigent

defendant would be able to request that the state pay for the court reporting. Mr. Shea stated that an indigent defendant could make that request and for the prosecuting government entity to pay.

Joan Watt asked whether judges have the ability to record bench conferences. Mr. Shea stated that judges have that ability. Mr. Shea stated that the quality of the audio equipment is an issue and is being worked on. Mr. Shea stated that this is primarily a training issue. Judges and court personnel will be trained on the proper use of the equipment to ensure that everything said in a court proceeding is adequately recorded. Mr. Shea stated that the court is moving away from designating an "official record." Mr. Shea stated that every recording is a court record and that if there is a dispute about accuracy, there is a process for challenging statements in the record. Mr. Shea stated that the proposed amendments to Rule 12 clarify the process for requesting a transcript. Mr. Shea stated that the process will be moved from the trial court to the appellate courts. A litigant will submit a request directly to an appellate court coordinator.

Ms. Watt asked whether a party would be able to pick their own transcriber. Matty Branch stated that the parties will have to go through the appellate court coordinator, but a party could request a specific transcriber through the coordinator. Ms. Watt asked how long the current recording equipment has been in place. Mr. Shea stated that some equipment has been out there for a while, but there is a replacement schedule in place. Mr. Shea stated that he did not know how budget cuts will affect the replacement schedule.

The committee discussed the amendments to Rule 12. Mr. Jenkins asked whether the rule should give a specific time frame for the parties to make payment arrangements. Ms. Branch stated that the court has a tickler system to follow-up on whether payment has been made. Ms. Watt asked whether there would be a benefit to a specific time frame. Ms. Branch stated that eventually the same thing would happen and the courts prefer flexibility. Judge Orme stated that there are many other deadlines in rules and that if the committee were drafting this rule from scratch it would probably put in time frames. The committee ultimately agreed that it is comfortable without time frames. Matty Branch then moved to approve the proposed amendments to Rule 12. The committee unanimously approved the motion.

The committee then discussed proposed changes to Rule 11. Ms. Branch noted that the change is just to make certain that the request goes through the appellate court. Larry Jenkins moved to approve the amendments. Clark Sabey seconded the motion. The motion carried unanimously.

Ms. Watt then asked whether there would be any problems between the gap when the legislation goes into effect and when the rules go into effect. Mr. Shea stated that there shouldn't be a problem because the statute just deals with the office of the court reporter and not with the process. However, Mr. Shea stated that committee members should review the rules to see if there are any problems.

III. RULE 12

Matty Branch submitted proposed changes to Rule 12 which will eliminate current paragraphs (b) and (c). Ms. Branch stated that the amendments will add a new paragraph (b). She stated that the amendments reflect the way the courts are currently doing things. Ms. Branch stated that the proposed amendments will provide time frames to guide trial court personnel on what they should do. Ms. Branch stated that the proposed changes will be behind the scenes for practitioners, because this is for the trial court clerks. Ms. Watt stated that the amendments will help practitioners, because they will know what's going on behind the scenes. Judge Kate Toomey then moved to approve the amendments. Jennifer Gowans seconded the motion. The motion carried unanimously.

IV. SCOPE OF REPRESENTATION SUBCOMMITTEE

Ms. Watt provided a report from the subcommittee which is discussing the scope of representation issue. Ms. Watt stated that there was a split among subcommittee members on whether the statute allows the court to require representation on certiorari petitions. Judge Orme noted that the Supreme Court currently interprets that statute to include petitions for rehearing and petitions for writs of certiorari. Clark Sabey stated that the Supreme Court sends out a letter to that effect, but it is not an official position. Mr. Sabey stated that the court recognizes that the statute is ambiguous. Ms. Branch stated that there was a proposal to fix the statute to require petitions for rehearing and certiorari, but the counties opposed the proposal because of fiscal impacts.

Ms. Watt asked committee members whether the committee should go forward in light of the ambiguous statute. Ms. Branch stated that the court believes it manages the process for appeals and that this is a process issue. Ms. Decker stated that her office believes that this is a substantive policy decision and the statute should be clarified, rather than putting this into rule. Judge Orme noted that the committee had been instructed by the court to draft a rule. Judge Orme suggested that the committee draft a rule, but in the report back to the court, the committee will note that there are some on the committee who think that this should be done by legislation. Ms. Branch asked whether Ms. Watt would like to meet with the court to determine its position before spending time on drafting. Ms. Decker suggested that the issue should be litigated before any rule change is created. After some discussion, committee members agreed that Ms. Watt will draft a rule and she would also propose legislation that might cure the problem. Larry Jenkins suggested that Marian Decker also draft something that will inform the court that there is a concern. Brian Pattison asked whether this would be a stand-alone rule. Ms. Watt stated that it would be.

5. RULE 34

Staff distributed an e-mail from Judge John Paul Kennedy suggesting a change to Rule 34 to clarify that paragraphs (a) and paragraph (b) are mutually exclusive. After brief discussion,

the committee stated that the rule is currently clear and change is not necessary. Judge Orme suggested that staff write Judge Kennedy about the committee's position.

6. OTHER BUSINESS

The committee scheduled its next meeting for April 22, 2009. Judge Orme then moved to adjourn. The committee adjourned at 1:30 p.m.