

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

September 30, 2009
12:00 p.m.

ATTENDEES

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

EXCUSED

Tawni Anderson

GUESTS:

Mark Buchi
Thomas Peters

Staff

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

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

II. RULE 15

Joan Watt welcomed Mark Buchi and Thomas Peters to the meeting. They attended in order to discuss proposed Rule 15. Matty Branch asked why the reference to the court of appeals is still in the statute. Mr. Peters stated that it is probably to deal with situations in which the supreme court sends a case to the court of appeals. Clark Sabey asked whether the committee previously discussed consolidating the cases rather than staying the supreme court case. Mark Buchi stated that the committee discussed this but

the problem is that there would be two records and two standards of review. Mr. Buchi stated that the point of the Tax Court Act is to allow parties to go to an independent trier-of-fact. Mr. Buchi stated that the statute needs flexibility, however, in case there is only a legal issue that remains and the parties can then go directly to the supreme court. Mr. Buchi stated that going directly to the supreme court helps the parties reduce costs. Mr. Peters stated that he represents the counties and their concern is that the rule needs to be made clear that if there is a trial de novo while there is an appeal in the supreme court, the supreme court litigant must go to the district court to establish a record on facts and legal issues. Mr. Buchi proposed additional language to address that concern.

Larry Jenkins asked why an issue isn't preserved if a party goes directly to the supreme court, but doesn't appear in the district court. Mr. Buchi explained that there shouldn't be two appeals going on at the same time. The district court record should be the only record, because it will be different from the Tax Commission record. Mr. Buchi stated that if any one party wants to go to the district court, that is where the entire case should be. Mr. Buchi noted, however, that the committee had added the language "extraordinary circumstances," which will allow a party to show the supreme court that the appeal should continue after the district court proceedings have concluded. Mr. Buchi stated that these cases rarely go directly to the supreme court but the rule needs to address that eventuality. Ms. Watt asked whether the extraordinary circumstances language would be contrary to the constitutional provision. The committee briefly reviewed the constitutional language and it appeared that the language was broad enough to allow this rule change. Paul Burke asked whether there would be a financial burden on the parties by forcing someone to go from the supreme court to the district court. Mr. Peters stated that it is a concern. Mr. Peters stated that there is concern that if one party has money, that party might attempt to wear down the other party.

Mr. Burke asked why a direct appeal is allowed to the supreme court when one of the parties can thwart that appeal by going directly to the district court. Mr. Buchi stated that he has never seen that happen. Clark Sabey asked how many times more than one party appeals. Mr. Buchi stated that he has not seen it that often. The committee reviewed the language proposed by both Mr. Buchi and Laren Lind. Joan Watt asked whether there is a downside to adopting both proposals. Mr. Buchi stated that he believes Laren Lind's proposal is redundant, but there wouldn't be a downside to adopting. Mr. Peters stated that he also does not see a downside to adopting. Ms. Watt asked how the Wasatch County case will affect the amendments. Mr. Peters stated that it probably would not affect the proposal. Mr. Sabey stated that, because it was a split decision, it might be best not to add language because the case might be taken up on certiorari.

Mr. Burke noted that the court of appeals stated in a footnote that clarification is necessary but that it should be done legislatively. Mr. Burke asked whether the committee should address the issue, considering that footnote. Ms. Watt expressed the same concern.

Joan Watt thanked Mr. Buchi and Mr. Peters for coming to the meeting. Ms. Watt then asked the committee members how they felt about the proposed language. Ms. Watt stated that the proposed second suggestion should not be included. The committee agreed with Ms. Watt. Ms. Watt asked about the language in the first proposal which would state that if a party does not go to the district court proceeding, the issues on appeal to the supreme court will be waived, absent a finding of exceptional circumstances in the supreme court. Mr. Burke expressed a concern with forcing a party to the district court. Ms. Branch stated that such a result is exactly what the proponents want. Mr. Sabey stated that if the parties agree that there is a discrete legal issue that the supreme court should decide, the parties should not be forced to go down to the district court.

Ms. Watt stated that the committee should look at the Constitution to see if the rule is consistent. Fred Voros expressed a concern with the phrase "exceptional circumstances." Mr. Voros stated that this is a term of art and should not be used in that context. Mr. Voros stated that the parties should go directly to the district court and if the facts are not in dispute they could do a motion for summary judgment and then take the result to the supreme court. Ms. Watt stated that the committee should think about taxpayers who want to avoid additional costs.

Ms. Watt suggested that the committee review all the statutes and rules, along with the constitutional provision, and revisit the issue at the next meeting. Larry Jenkins was asked to put together the relevant provisions and send those to the committee members. The committee scheduled its next meeting for October 28 at which time the committee will revisit the rule. The committee meeting adjourned at 1:30 p.m.