

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

June 14, 2011

ATTENDEES

Judge Fred Voros
Tawni Anderson
Paul Burke
Marian Decker
Jennifer Gowans
Bryan Pattison
Clark Sabey
Joan Watt

EXCUSED

Judge Kate Toomey
Judge Gregory Orme
Diane Abegglen
Larry Jenkins

STAFF

Brent Johnson

I. Welcome and Approval of Minutes

Joan Watt welcomed the committee members to the meeting. Ms. Watt proposed several changes to the minutes from the previous meeting. The changes more accurately reflect statements that she made. Clark Sabey also proposed a change to eliminate language that was confusing and irrelevant to the discussion. Marian Decker then moved to approve the minutes with the proposed changes. Tawni Anderson seconded the motion. The motion carried unanimously.

II. Rule 24A

Clark Sabey proposed a new rule 24A. Mr. Sabey stated that one of the main purposes of the proposal is to address a concern that was recently raised by the Supreme Court when one of the parties to a case hired a new law firm on supplemental briefing. Mr. Sabey stated that the court is concerned that, although the party in that case did not have improper motive, in the future parties could use this as a tactic to disqualify a justice or judge. Judge Voros asked why this is only a concern on supplemental briefing. Mr. Sabey stated that the parties will have had an opportunity to gauge the justices' perspectives because the case will have been briefed and oral argument will have been held and a party may attempt to remove a justice that the party perceives is not favorable to the party's position. Mr. Sabey stated, however, that the situation might be so rare that it does not warrant a rule change. Judge Voros stated that the court's

concern is legitimate and suggested that perhaps the court could simply deny any motion to recuse. Paul Burke stated that it could be a slippery slope if the proposal is passed. Mr. Burke stated that if the court tells parties who they cannot hire in these circumstances, the court could subsequently tell parties who they may not hire on appeal, in order to avoid disqualification. Jennifer Gowans suggested that the rule change is not necessary because quality attorneys will not want to ruin their reputation by proceeding with such a tactic. The committee members agreed that there is no need for a rule change at this time.

III. Rule 25

Mr. Sabey stated that if Rule 24A is not adopted then there is no need to proceed with proposed changes to Rule 25. Paul Burke then moved to not adopt either rule proposal. Judge Fred Voros seconded the motion. The motion carried unanimously.

IV. Rule 4 and Rule 21

Mr. Sabey stated that he is proposing changes to Rule 4 and Rule 21(f) to consolidate provisions on prisoner filings. Mr. Sabey stated that the rule on inmate filings, in Rule 4, applies only to notices of appeal and he proposes to move a more generalized filing requirement to Rule 21. Ms. Watt stated that notarization can be a problem for inmates because they often don't have access to a notary. Judge Voros suggested that, because the rule also permits a written declaration, the rule language in that regard is satisfactory. Judge Voros questioned whether the rule should elaborate on what is meant on delivering pleadings to the institution's internal mail system. Judge Voros stated that different institutions will have different processes. Mr. Sabey stated that he is not aware of any problems. Mr. Burke noted that the rule is silent on who may provide the declaration. Ms. Watt stated that there could be situations in which an inmate can't write and so another person will write something on the inmate's behalf. Judge Voros suggested that it is better to be general in order to accommodate different circumstances.

Mr. Sabey asked the committee members whether there should be a change to Rule 4 if provisions are moved to Rule 21. Mr. Sabey suggested that there isn't a need to change Rule 4 even though the changes to Rule 21 would also address the procedure in Rule 4. Judge Voros stated that the better practice is not to restate provisions in the rules and it would be best to move everything to Rule 21. The committee members agreed with this statement. Mr. Burke asked how electronic filing will affect prisoner mailings. Mr. Sabey stated that prisoners will still mail their pleadings and the clerks will scan the pleadings. Tawni Anderson noted that the rules create two different dates from which time is calculated, with some time frames running from the date of filing, and some time frames running from the date of docketing. Ms. Anderson stated that some of the filing deadlines will have to run from the date of docketing because there could be a significant delay from the time the prisoner delivers a pleading to the inmate filing system and the time it is received by the court. Judge Voros suggested putting in Rule 4(d) a reference to the date that something is "docketed." Brian Pattison asked whether that would put the burden on the other party to follow-up on the case. Ms. Watt stated that the other party would have the

burden, but that isn't necessarily a bad idea as it will help parties ensure that they follow the correct time frames.

Paul Burke then moved to approve the rules as proposed by Mr. Sabey and as changed by the committee. Judge Fred Voros seconded the motion. The motion carried unanimously.

V. Rule 5

Mr. Sabey distributed a proposed change to state that, in both appellate courts, the parties on a petition for interlocutory appeal and the answer to the petition must file an original and five copies. Mr. Sabey stated that clerks have informed him that parties have been reading Rule 5(e) as requiring them to file five copies in the Supreme Court and at the same time four copies in the Court of Appeals. Mr. Burke stated that he could see how some might read the rule that way given that the Supreme Court might pour over a case to the Court of Appeals. Ms. Watt stated that it would be burdensome to require an additional copies for the Court of Appeals, given the size of some briefs, and considering the fact that the extra copies would not be needed by the Court of Appeals. Ms. Watt suggested that the rule remain the same and Mr. Sabey can notify the committee if it becomes a problem. The committee members agreed with this suggestion.

VI. Rule 65C

Paul Burke distributed a suggested committee comment to the proposed amendment to Rule 65C of the Rules of Civil Procedure. Mr. Burke stated that Rule 65C should not make a reference to statutory language, but should instead adopt the specific statutory language if the Supreme Court determines that is appropriate. Mr. Burke stated that the legislature might amend the particular statute, which would have the effect of amending the rule, and amending the rule is within the province of the Supreme Court. The committee reviewed the original amendment proposed by Judge Kate Toomey. Judge Voros suggested that the committee refer the amendment to the Civil Procedure Committee with a request that they adopt the proposal with the elimination of the statutory references. Paul Burke moved to adopt Judge Voros' suggestion. Tawni Anderson seconded the motion. The motion carried unanimously.

VII. Other Business/Adjourn

Joan Watt stated that the committee does not have any pending business other than the proposed amendments to Rule 38B. Ms. Watt suggested that the committee set its next meeting for September, which will allow the subcommittee time to work on the proposal. The committee scheduled its next meeting for September 21. The committee adjourned at 1:15 p.m.