

**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 18, 2013

**ATTENDEES**

Joan Watt - Chair  
Judge Gregory Orme  
Judge Fred Voros  
Diane Abegglen  
Troy Booher  
Paul Burke  
Marian Decker  
Brent Johnson  
Bryan Pattison  
Clark Sabey  
Lori Seppi  
Mary Westby

**EXCUSED**

Bridget Romano  
Ann Marie Taliaferro

**I. Welcome and Approval of Minutes**

Joan Watt welcomed the committee members to the meeting. The minutes from the February 20, 2013 meeting were approved without amendment and seconded. The motion carried unanimously.

**II. Rule 29**

Clark Sabey, at the request of the Supreme Court, provided proposed amendments to Rule 29. Mr. Sabey explained that the Supreme Court does not want to allow parties to stipulate to waive oral argument. He stated that the court's position on this change is not negotiable. He also suggested that the Court of Appeals might want to take the opportunity to make any adjustments it would like for its court. Mr. Sabey also explained that the Supreme Court has elected to delete the last line from subsection (c), which currently states, "Such argument in reply shall be limited to answering points made by appellee in appellee's oral argument." He said that this change is also not negotiable.

Troy Booher expressed concern that deleting the last line in (c) seems to invite appellants to bring up new issues in rebuttal. Marian Decker stated that the Attorney General's Office is opposed to deleting the last line from subsection (c) and will comment if the proposal is

submitted for public comment. Ms. Decker stated that the amendment was prompted by a letter the Attorney General's Office sent to the court regarding its concern that it would like the opportunity to respond if the court's questions during rebuttal raise new issues. The Attorney General's Office received a letter in reply, which Ms. Decker read to the committee. The letter expressed the court's view that oral argument is for the benefit of the court, not the parties, and that the best way to address the Attorney General's concerns would be by amending the rule. Judge Orme stated that if the Supreme Court is adamant about deleting the last line in (c) the Court of Appeals will want to include its own language. The Court of Appeals likes (c) the way it is. The court sees the issue as a matter of fairness because the appellee has no chance to respond to new issues raised during the rebuttal.

Paul Burke suggested that the last line of (c) might be repetitive of the line before, which says, "The appellant *may reply to the appellee's argument* if appellant reserved part of appellant's time for this purpose." (emphasis added). Mr. Booher responded that if the line is redundant, both lines need to be amended to address the Supreme Court's concern.

Mr. Sabey stated that he is willing to take proposed language for amending (c) back to the Supreme Court for consideration. The committee drafted this proposed language to replace the last line of (c): "Such argument in reply shall be limited to responding to points made by appellee in appellee's oral argument and answering questions from the court."

Ms. Decker stated that the Attorney General's Office is opposed to the alternative language proposed by the committee. That office believes the amendment does not answer its concern that the appellee should be permitted to respond if the appellant makes a misrepresentation during rebuttal that pertains to a new issue. Mr. Sabey stated that he will take the Attorney General's concern back to the Supreme Court with the committee's alternative amendment to (c).

Judge Orme stated that the Court of Appeals would accept the committee's alternative amendment to (c).

Judge Voros stated that the language, "The Supreme Court presumes that oral argument is primarily for the benefit of the court and that oral argument will aid the decisional process with respect to all cases before it," which is in the proposed amendment to the Advisory Committee Notes, does not seem to state the Supreme Court's intent. Ms. Watt suggested that the purpose of oral argument is to aid the court, and Lori Seppi suggested the purpose is to allow the parties to address the court's concerns. After some debate, the committee adopted this proposed alternative language: "The primary purpose of oral argument is to aid in the court's decisional process."

Judge Voros expressed concern about this language in the proposed amendment to (b)(1): "Not later than 30 days prior to the term of court in which a case is to be submitted, ..." In response, the committee adopted this alternative language: "Not later than 30 days prior to the date on which a case is calendared, ..."

Mr. Booher noted that the language of subsections (b)(2) and (f) seem to suggest that oral argument is presumed and that the parties do not need to request oral argument. Judge Orme stated that most briefs do not include a request and that the court makes the decision for oral argument based upon the recommendation of central staff. Judge Voros added that the panel also discusses whether to hold oral argument during conference.

Ms. Watt summarized the proposed changes to Mr. Sabey's proposed amendments to rule 29. They are as follows:

(a)(1) In ~~C~~cases ~~B~~before the Supreme Court.

(b)(1) Not later than 30 days prior to the ~~term of court in which a case is to be submitted date on which a case is calendared,~~...

(c) ... Such argument in reply shall be limited to ~~answering~~ responding to points made by appellee in appellee's oral argument and answering questions from the court.

Advisory Committee Notes: ... The ~~Supreme Court presumes that oral argument is primarily for the benefit of the court and that oral argument will aid the decisional process with respect to all cases before it~~ primary purpose of oral argument is to aid in the court's decisional process. ...

The committee approved Mr. Sabey's proposed amendments with the changes listed above. Mr. Sabey will take the proposed changes back to the Supreme Court for review. If the court approves the changes, Ms. Watt will submit the rule for public comment. Ms. Decker opposed Mr. Sabey's proposed amendments and the committee's changes to the amendments.

### III. Rule 9

Mary Westby summarized the proposed amendments to rule 9, dealing with docketing statements. She explained that, among other things, the proposed amendments eliminate the requirement for attachments in civil and criminal cases.

Mr. Booher suggested that subsection (c)(1), dealing with civil cases, should be changed to include the jurisdictional issues contained in the new retention letter checklist. Ms. Westby took a copy of the checklist and will make changes to (c)(1) as appropriate.

Mr. Booher proposed deleting the proposed references in subsections (c)(1)(D) and (c)(2)(D) to rule 11's "statement of issues." He stated that rule 11's "statement of issues" requirement is unrealistic and suggested that it should also be removed from rule 11. The committee approved deleting the reference to rule 11 in (c)(1)(D) and (c)(2)(D). Ms. Westby will make the change.

Mr. Booher proposed amending subsection (e) to read: "When a petition for interlocutory appeal permission to appeal from an interlocutory order is granted under rule 5, ..." The committee approved this change.

Ms. Westby will make the noted changes and bring the proposed amendment to rule 9 back to the next committee meeting for further discussion.

#### **IV. Rule 11(e)**

Mr. Booher explained that almost no one complies with rule 11(e)(3)'s requirement for the appellant to submit a statement of issues if he/she does not order a complete transcript. Mr. Booher also stated that the requirement is never enforced. Mr. Booher stated that he had contacted the 10<sup>th</sup> Circuit about their practices and learned that litigants do not file the statements and the court does not consider it to be a problem. Mr. Booher stated that the parties won't know until briefing whether additional transcripts are necessary. Mr. Booher stated that it is unfair at the early stage of the appeal to force the appellant to commit to certain issues and to expect the appellee to know what it will do in response.

Mr. Booher stated that he believes the rule should be amended to eliminate the requirement and he circulated proposed changes. The committee reviewed the proposed amendments and made one change. In subsection (h), the amendment should read: "... or because the appellant ~~failed to~~ did not order a transcript of proceedings that the appellee needs to respond to issues raised in the Brief of Appellant..."

Ms. Seppi asked if the rule needs to spell out who will pay for the transcripts. Judge Orme noted that in most cases no one will have to order a transcript because the appellee will just ask the court to presume the regularity of the proceedings below. Mr. Booher and Ms. Decker agreed, stating that an appellee will only need to order a transcript if it shows that the appellant waived the issue below or for similar reasons. The committee agreed that the rule does not need to spell out who will pay for the transcripts.

Mr. Booher moved to amend rule 11 with the change listed above. Judge Voros seconded the motion. The committee passed the amendment unanimously.

#### **V. Rule 5**

Rule 5 was tabled until the next committee meeting.

#### **VI. Rule 8A**

Rule 8A was tabled until the next committee meeting.

#### **VII. Rule 44**

Mr. Sabey stated that he is still considering whether to propose an amendment to the Advisory Committee Notes. Consideration of rule 44 was tabled until the next committee meeting.

## **VIII. Global Review of Rules**

Ms. Watt proposed forming a subcommittee to address the issues identified in Mr. Booher's letter to the committee dated June 3, 2013. Mr. Booher, Ms. Westby, Mr. Sabey, and Mr. Burke volunteered for the subcommittee. Mr. Booher will chair the subcommittee.

## **IX. Global Review – Replies**

Ms. Westby noted that this topic ties in with the Global Review of Rules subcommittee and that she will address it there.

## **X. Rule 23B**

The rule 23B subcommittee is meeting next week.

## **XI. Juvenile Court Record on Appeal Update**

Judge Orme noted that the Judicial Council has approved amendments to the Rules of Judicial Administration. The amendments are now out for public comment. The amendments deal with the names of parents/children in juvenile cases. The amendments require addenda to be sealed and to be bound separately. They also require briefs to obscure the names of parents, foster parents, and children. These changes will necessitate changes to the appellate rules as well. Judge Orme will bring the proposed changes to the next committee meeting for discussion.

## **XII. Rule 45**

Mr. Booher proposed this amendment: "...shall be initiated by filing in the Utah Supreme Court a petition for a writ of certiorari to the ~~Supreme Court of Utah~~ Utah Court of Appeals."

Judge Voros seconded the motion. The motion carried unanimously.

## **XIII. Other Business/Adjourn**

The committee scheduled its next meeting for August 14, 2013, at noon. The meeting adjourned.