

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON THE UTAH RULES OF APPELLATE PROCEDURE

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Judicial Council Room
Thursday, December 5, 2019
12:00 pm to 1:30 pm

PRESENT

Christopher Ballard
Troy Booher—Emeritus Member
Paul C. Burke—Chair
Lisa Collins
Tyler Green (by phone)
R. Shawn Gunnarson
Michael Judd—Recording Secretary
Larissa Lee—Staff

Alan Mouritsen
Judge Gregory Orme
Rodney Parker
Judge Jill Pohlman
Clark Sabey
Nathalie Skibine
Scarlet Smith
Mary Westby

EXCUSED

Patrick Burt

1. Welcome and approval of November 2019 minutes **Paul C. Burke**

Paul C. Burke welcomed the committee. The committee reviewed the November 2019 minutes. Alan Mouritsen noted an error in those minutes, in which Mr. Mouritsen's able description of certain advisory-committee-note recommendations was attributed instead to Troy Booher. The committee agreed that the error should be corrected.

Judge Pohlman moved to approve and adopt the minutes from the November 2019 meeting, subject to the correction of the error noted by Mr. Mouritsen. Scarlet Smith seconded the motion and it passed unanimously.

2. Discussion: Rescheduling January meeting **Paul C. Burke**

Mr. Burke asked whether there were objections to moving the January meeting planned for January 2, 2020, to January 9, 2020.

After discussion, Mr. Burke provided notice to the committee that the meeting would be rescheduled to January 9, 2020, as proposed.

3. Discussion and Action: **Judge Orme**
Review of Advisory Committee Notes **Alan Mouritsen**
Rodney Parker

Judge Orme has identified seven sets of advisory committee notes for which certain changes are recommended: Notes for Rules 2, 20, 22, 24, 28A, 37, and 44. Judge Orme noted a complication in the exercise, in which advisory committee notes that appeared in the published hard-copy version of the rule do not appear in online versions of the rules that appear on Westlaw and/or Lexis. Larissa Lee presented research conducted to determine the source of that inconsistency. The committee also discussed a clarification to the Rule 22 advisory committee note to state that appeals are placed in the oral argument queue after all principal briefs have been filed, not after “the completion of briefing.”

Rodney R. Parker moved to adopt the revised version of the Rule 22 advisory committee note, with an adoption date. R. Shawn Gunnarson seconded the motion and it passed unanimously.

Mr. Burke asked the committee whether there was any objection to the practice of including adoption dates with each newly adopted, re-adopted, or revised advisory committee note. No members objected, and that practice will be followed.

The committee discussed what portion of the Rule 2 advisory committee note is helpful in its current position and discussed the relationship between Rule 2 and Rule 4.

Mr. Gunnarson moved to adopt the revised version of the Rule 2 advisory committee note, with an adoption date. Judge Pohlman seconded the motion and it passed unanimously.

With respect to the Rule 20 advisory committee note, Judge Orme recommended that the note be repealed in its entirety. The committee noted

that further attention should be given to the text of Rule 20, as amendment or revision may be appropriate.

Mr. Parker moved to repeal the Rule 20 advisory committee note in its entirety. Judge Orme seconded the motion and it passed unanimously.

The committee briefly discussed the Rule 24 advisory committee note and agreed that it remains useful.

Lisa Collins moved to leave the advisory committee note to Rule 24 unchanged, with reference to its 2017 adoption date. Mr. Parker seconded the motion and it passed unanimously.

The committee discussed removing the advisory committee note to Rule 28A and, at the same time, amending Rule 28A(a) to replace the word “direct” with the word “order,” noting that that change, in conjunction with Rule 28A(g), addressed by rule what had previously been addressed only by advisory committee note.

Judge Orme moved to repeal the advisory committee note in its entirety and to make a one-word change to Rule 28A(a) to replace the word “direct” with the word “order.” Scarlet Smith seconded the motion and it passed unanimously.

With respect to Rule 37, the committee discussed that further discussion may be warranted regarding the rule, the advisory committee note, and their statutory or caselaw underpinning. The committee determined that the best approach is to table any discussion of Rule 37 in the meantime.

The committee discussed the advisory committee note to Rule 44, including whether it added any information not presented in the rule itself. With that discussion in mind, Judge Orme changed his recommendation from a “soft” recommendation to retain to a recommendation to repeal.

Judge Orme moved to repeal the advisory committee note to Rule 44. Mr. Parker seconded the motion and it passed unanimously.

Mr. Burke asked for any objections to amending the meeting agenda to allow the committee to address proposed amendments to Rules 44 and 28A. No committee members objected.

Ms. Collins moved to remove the word “appellate” from the term “appellate jurisdiction” in Rule 44 and to change the words “shall” to “will.” Judge Pohlman seconded the motion and it passed unanimously.

4. Discussion and Action: Larissa Lee
Finalizing Rules 21 and 26

Ms. Lee discussed recommended changes to Rules 21 and 26 designed to better facilitate email filing. Mr. Booher noted that further attention to Rule 5 may be needed in order to eliminate unnecessary filing and service of “copies” of filings other than principal briefs.

Mr. Parker moved to adopt amendments to Rules 21 and 26, as presented during the committee meeting. Judge Pohlman seconded the motion and it passed unanimously.

5. Discussion: Larissa Lee
Requirement to file copy of notice of appeal

Ms. Lee discussed proposed changes to the service requirements in Rule 3, which would require the parties to serve a courtesy copy of the notice of appeal on the appellate court. This would eliminate current delays between the parties filing the notice of appeal in district/juvenile court and the appellate courts receiving the notice of appeal from the district/juvenile judicial assistant. The committee asked whether a failure to serve a copy of a notice of appeal would constitute a jurisdictional defect and whether serving a copy of a notice of appeal would constitute an attorney’s appearance in the appellate court. Ms. Lee clarified that the proposed amendments would require serving, not filing, a courtesy copy with the appellate court (paragraph (e) not paragraph (a)).

The committee considered using an advisory committee note rather than amending the rule. But the committee noted that any rule that is optional may not effectively address the problem at issue.

The committee decided that the soundest approach at this point is to table the discussion until the next meeting. No objections were made.

6. Discussion and Action: Clark Sabey
Petitions for rehearing/to modify (Rule 35A/35B)

Clark Sabey recommended that discussion of Rule 35A/35B be postponed to a meeting at which more time is available. No committee members objected.

7. Discussion and Action: Clark Sabey
Stays and quantifying security (Rule 8)

Mr. Sabey recommended that discussion of Rule 8 be postponed to a meeting at which more time is available. No committee members objected.

8. Discussion and Action: Clark Sabey
Requests for damages (Rule 33)

Mr. Sabey noted that the current rule appears to allow the party against whom sanctions are sought to demand a hearing on the sanctions. The proposed rule change would allow the court to impose sanctions without a hearing, so long as the court provides the party against whom sanctions are sought with notice and an opportunity to respond. The committee worked to clarify the rule.

Mr. Burke proposed that the discussion of Rule 33 be tabled until the January meeting. No committee members objected.

9. Discussion: Paul C. Burke
Other Business

None.

10. Adjourn

Judge Orme moved to adjourn the meeting. Mr. Mouritsen seconded the motion and it passed unanimously. The committee is scheduled to meet again on January 9, 2020.