

MINUTES

APPROVED 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

April 22, 2009 - 12:00 p.m.

ATTENDEES

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

EXCUSED

Paul Burke

STAFF

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

Joan Watt welcomed the committee members to the meeting. The minutes from the last meeting were approved.

II. COURT REPORTER RULES

Matty Branch explained the public comments that had been received on the court reporter rules. Ms. Branch stated that most of the comments addressed the Judicial Council's decision to eliminate the court reporting program. Ms. Branch stated that there weren't any comments directed to the Rules of Appellate Procedure. Fred Voros asked whether the rules still provided for a transcript on appeal. Ms. Branch stated that the record will still be transcribed. Ms. Branch stated that the transcript coordinator will contact a transcriber to do the work and the attorneys will contact with the transcriber after that point.

Matty Branch moved to approve Rule 11 as published for public comment. Judge Kate Toomey seconded the motion. The motion carried unanimously.

Matty Branch then moved to approve Rule 12 as published for public comment. Judge Kate Toomey seconded the motion. The motion carried unanimously.

Tawni Anderson moved to approve Rule 54 as published for public comment. Matty Branch seconded the motion. The motion carried unanimously.

III. RULE 25

Annina Mitchell submitted comments on Rule 25 asking why the rule did not require the motion to include a proposed brief. Clark Sabey stated that the omission was intentional because of the short time frames involved.

Ms. Mitchell also proposed language that would address the situation in which an amicus does not support either party. Mr. Sabey stated that the situation is very rare and the committee should leave the rule as is, allowing the court to handle each situation on a case-by-case basis. Fred Voros suggested that there isn't a downside to including the proposed language. Joan Watt stated that including the language might establish a guideline that does not allow the court flexibility. Ms. Watt stated that the current practice allows the court to look at each circumstance to determine whether an amicus brief should be allowed and how it should be handled.

Fred Voros moved to include Annina Mitchell's proposed language. Marian Decker seconded the motion. The motion failed with Fred Voros, Marian Decker and Jennifer Gowans voting in favor of the motion and the rest of the committee members voting against.

Judge Orme asked whether it would make sense to state in the rule that these types of amicus situations will be handled on an ad hoc basis. Judge Toomey expressed a concern that adding any language will encourage more individuals and entities to seek amicus status. Joan Watt suggested leaving the language as is and the committee can revisit the issue if problems develop later.

Clark Sabey moved to approve Rule 25 as published for comment. Tawni Anderson seconded the motion. The motion carried with Fred Voros and Marian Decker voting against and Judge Orme abstaining.

Ms. Mitchell also submitted a comment suggesting that the rules be amended to give the Attorney General's Office automatic amicus status. Bryan Pattison noted that Rule 24 of the Rules of Civil Procedure gives the Attorney General's Office automatic status when the constitutionality of a statute is challenged. Clark Sabey noted that the civil procedure rule gives the office the right to intervene, which would make the Attorney General's Office one of the parties. Mr. Pattison noted that the Attorney General's Office might not be aware of a constitutional challenge until a case is appealed. Ms. Watt stated that the Attorney General's Office could still seek amicus status in any situation and the court can and probably would grant the motion. Judge Orme stated that it would be better to know that an Attorney General's brief is

going to be filed rather than receiving a brief without notice. Judge Orme noted, however, that Ms. Mitchell's suggestion is a new proposal and does not directly relate to the rules as published for public comment. Judge Orme suggested that Ms. Mitchell be invited to a committee meeting to discuss her proposal. The committee members agreed with this suggestion.

Clark Sabey then moved to approve Rule 50 as published for comment. Matty Branch seconded the motion. The motion carried unanimously.

IV. RULE 37

The committee then discussed Rule 37. The committee had previously drafted an amendment to Rule 37, granting the party's the right to automatically withdraw an appeal if done before the opinion is issued. The proposal was submitted to the Supreme Court which amended the rule to require a motion for leave to withdraw an appeal. The court then instructed that the rule be published for public comment. The proposal received several comments objecting to the motion requirement, stating that parties should have an absolute right to settle and withdraw cases. The committee discussed what should be done based on the history of the rule and the comments received. The committee decided that it would be best to simply send the rule to the Supreme Court with comments that had been received and that the committee take no further position on the rule. Fred Voros made a motion to that effect. Tawni Anderson seconded the motion. The motion carried unanimously.

V. RULE 19

Joan Watt noted that Susan Rose had submitted comments that were apparently directed at the proposed amendment to Rule 19. Clark Sabey stated that the comments were not directed at the proposed changes, but seem to be an objection to Rule 19 in general. Larry Jenkins moved to approve Rule 19 as published for comment. Jennifer Gowans seconded the motion. The motion carried unanimously.

VI. RULE 38

Fred Voros asked whether the rule should be amended to clarify that substitution when a party becomes incompetent does not apply in criminal cases. Clark Sabey suggested that the context of the rule should make it clear that this would not apply in criminal cases. Joan Watt noted that the rule addresses substitution of parties and substitution does not occur in criminal cases.

Matty Branch moved to approve Rule 38 as published for public comment. Judge Orme seconded the motion. The motion carried unanimously.

VII. RULE 49

Matty Branch moved to approve the amendments to Rule 49 as published for public comment. Tawni Anderson seconded the motion. The motion carried unanimously.

VIII. SCOPE OF REPRESENTATION SUBCOMMITTEE

Fred Voros distributed proposed amendments to the statute on appointed counsel. The proposed amendments would state that counsel must handle a case up through certiorari. Joan Watt distributed a proposed rule change which would require appointed counsel to handle a case through certiorari if counsel believes that certiorari is warranted. Mr. Voros noted that there is disagreement among committee members as to whether this issue should be handled by statute or by rule.

Joan Watt stated that handling a case through certiorari is part of a defendant's right to adequate representation. Mr. Voros stated that the Supreme Court could require counsel to remain on a case, but the rule cannot require counties to pay for the representation. Mr. Voros stated that the counties are likely to oppose any statute or rule. Ms. Watt stated that the rule would be a starting place for change. Ms. Watt stated that the rule would force counsel to go back to the counties to get paid for the representation. Judge Orme stated that the rule and statute should be done as a package to address the issue. Jennifer Gowans stated that she agrees that there should be a rule because the rule would tell attorneys that the court feels strongly about full appellate representation.

Joan Watt suggested that the committee members review the proposed rule and statute and come prepared to discuss the proposals at the next meeting.

IX. OTHER BUSINESS/ADJOURN

The committee scheduled its next meeting for June 17. The agenda will include Annina Mitchell's proposal and discussion on the scope of representation proposals. The committee adjourned the meeting at 1:35 p.m.