

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, September 3, 2015
12:00 p.m. to 1:30 p.m.

PRESENT

Joan Watt – Chair
Alison Adams-Perlac – Staff
Troy Booher
Paul Burke
R. Shawn Gunnarson
Alan Mouritsen
Judge Gregory Orme
Adam Pace – Recording Secretary
Rodney Parker
Bridget Romano
Clark Sabey
Lori Seppi
Tim Shea
Ann Marie Taliaferro
Judge Fred Voros
Mary Westby

EXCUSED

Marian Decker

1. Welcome and Introduction of New Members Joan Watt

Ms. Watt welcomed the committee to the meeting and introduced the new member of the committee, R. Shawn Gunnarson, and the new recording secretary, Adam Pace.

2. Member Disclosures Committee

Ms. Watt invited each of the committee members to disclose a brief summary of their practice area, as is normally done when a new member joins the committee. Each member present did so.

3. Approval of June and July Minutes Joan Watt

Ms. Watt invited a motion to approve the minutes from June and July meetings.

Mr. Parker moved to approve the June minutes. Ms. Romano seconded the motion and it passed unanimously. Ms. Seppi moved to approve the July minutes. Mr. Sabey seconded the motion and it passed unanimously.

4. Confidential Requests for Mediation

**Michele Mattsson
Tim Shea**

Ms. Watt invited continued discussion regarding the committee's recommendation on Utah R. App. P. 28A(h) which allows confidential requests for mediation. Mr. Shea explained that the Utah Supreme Court has already decided to not allow confidential requests, so the issue is what changes should be made to the Rule, if any, and how it should apply in the Court of Appeals. He explained the underlying concern that a confidential request could be viewed as an *ex parte* communication with the Court.

Michele Mattsson, Chief Appellate Mediator, advocated for the Rule to remain as it is and to preserve the ability for parties to confidentially request mediation. She explained that other jurisdictions allow confidential mediation requests, including the Tenth Circuit. She explained that a confidential request does not affect her neutrality as a mediator; that the requests go through a screening process; that not all requests lead to a court-ordered mediation; and that there is ultimately no harm if the request does lead to a court-ordered mediation because the other side has the option of not participating if they call her and request to get out of it.

Judge Voros said that he views the appellate mediation program as significant and successful, and that in his experience, parties who participate in the mediations have generally had positive feedback. However, he expressed concern about the unilateral nature of a confidential request, and asked for comments from practitioner committee members.

Mr. Booher, Mr. Parker, Mr. Burke, and Ms. Romano all agreed that they did not see a problem with the *ex parte* nature of a confidential mediation request from a practitioner standpoint. Mr. Parker commented, and Mr. Burke agreed, that a confidential mediation request is similar to practice of calling a court clerk to request a hearing be scheduled. The committee members agreed that a confidential mediation request would not lead to a competitive advantage for one side or the other in the mediation.

Judge Voros commented on the separation between mediation and adjudication, and how he has no involvement in the mediation or communication with the mediator other than signing the order for the parties to mediate.

Mr. Shea commented that the Utah Supreme Court has different reasons for deciding to not allow confidential mediation requests, which has to do with its discretionary docket and with preserving policy interests in deciding cases.

The committee members discussed whether the Rule needed to be amended to account for the Utah Supreme Court practice of not allowing confidential mediation requests. Michelle Mattsson commented, and Ms. Watt agreed, that changing the rule was not necessary and that it would confuse people more than it would help.

Mr. Parker moved for the committee to recommend that Utah R. App. P. 28A(h) be left as it is. Mr. Booher seconded the motion and it passed unanimously.

5. Subcommittee Updates

Tim Shea

Federal Rules- Mr. Shea reported that the federal rules subcommittee has completed its report and recommendation to adopt the federal model and extend the time to appeal after post-trial motions for attorney's fees are decided. This will require amendments to Utah's appellate and civil rules that will need to be discussed in the future, and will be on the Agenda for discussion in October or November.

E-filing- Mr. Shea reported that the E-filing subcommittee has completed its first cut of proposed amendments to the rules, which may be ready for discussion by the committee in October or November. The amendments include substantive edits that are not strictly related to e-filing, which will be time-consuming to discuss. Mr. Parker suggested that someone should prepare a summary of the policies behind the amendments instead of reviewing it line by line.

6. Public Comment to Rule 38A

Joan Watt

Ms. Watt invited discussion on the two public comments that were received to Rule 38A. The first comment expressed concern that a client might lose his or her right to petition for certiorari if counsel did not file one on their behalf, due to the short time frames involved. The comment questioned whether the rule should require counsel to inform the client about deadlines, or toll the time to petition for certiorari so that rights are not lost.

Ms. Watt stated, and the committee agreed, that it is the attorney's responsibility to communicate with the client about the deadlines for filing a cert petition, and that this is a matter of attorney-client relations, not something that should be addressed directly in the Rule. Mr. Sabey commented that cert petition deadline is jurisdictional, and cannot be extended by adding a tolling provision to the Rule.

The second comment opposed adopting the amendment, expressing concern that lawyers should not be forced to represent a client throughout the appeals process. Mr. Shea stated, and the committee agreed, that this concern is adequately addressed by the exception in the Rule that allows an attorney to withdraw for good cause.

The committee discussed how the Rule was adopted to clarify that attorneys who represent indigent clients on appeal are expected to represent them throughout the appeals process, including filing a cert petition if warranted. Mr. Booher pointed out a potential ambiguity in Rule 38A(a)(2) where it states "if a party has a right to effective assistance of counsel," which could be read as limiting the representation to exclude a cert petition. Mr. Parker suggested amending that language to read "if a party has a right to effective assistance of counsel through the first appeal of right," in order to address that concern.

Mr. Booher made a motion to recommend the Rule's adoption to the Utah Supreme Court with the minor revision proposed by Mr. Parker. Mr. Parker seconded the motion, and it passed unanimously.

7. **Rule 24**
Rule 24 and *State v. Nielsen*
Rule 27

Troy Booher

Mr. Booher summarized the committee's prior discussions on the proposed amendments to Rule 24, which included subsections (a) through (b)(4). The committee discussed and agreed to reject the proposed changes to subsections (b)(5), (b)(6), and (b)(7), and to go back to using the original language that was used in the pre-amendment section (a)(5), which is now renumbered as subsection (b)(5). The proposed changes read as follows:

(a) Definitions. For purposes of this rule, the terms “appeal,” “cross-appeal,” “appellant,” and “appellee” include the equivalent elements of original proceedings filed in the appellate court.

(b) Brief of the appellant. The bBrief of the aAppellant shall contain under appropriate headings and in the order indicated:

(ab)(1) List of parties. A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties and except as provided in paragraph (e). The list should be set out on a separate page ~~which appears~~ immediately inside the cover.

(ab)(2) Table of contents. A table of contents, ~~including the contents of the addendum,~~ with page references to the items included in the brief, including page or tab references to items in the addendum.

(ab)(3) Table of authorities. A table of authorities including all ~~with~~ cases, alphabetically arranged ~~with parallel citations,~~ rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(ab)(4) Introduction. A ~~brief~~ succinct statement of the nature of the case, intended to provide a brief explanation of the case for the purpose of orienting the reader as to the general context in which the appeal arises. ~~showing the jurisdiction of the appellate court.~~

(ab)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(ab)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(ab)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(ab)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

Judge Voros made a motion to make these changes. Mr. Parker seconded the motion, and it passed unanimously.

The committee moved on to discuss the proposed amendment to subsection (b)(7)—Statement of the Case. Judge Voros suggested that a comma should be inserted after the words “history” and “below.” The proposed text reads as follows:

(ab)(7) Statement of the case. To the extent relevant to the issues on appeal, a procedural history, including the disposition(s) below, and a statement of the facts. Both the procedural history and statement of facts ~~The statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (ef) of this rule.~~

Mr. Parker moved to accept the proposed changes to subsection (b)(7). Ms. Westby seconded the motion, and it passed unanimously.

The committee moved on to discuss the proposed amendment to subsection (b)(8)—Summary of arguments. Mr. Burke suggested that the language should be edited to omit the words “succinct,” “actually,” and “mere,” which gives the rule a snarky tone. “Judge Orme suggested using language “in the nature of an executive summary.” Judge Voros commented, and other committee members agreed, that this is a term of art that might not be understood by everyone, and that it might incorrectly imply that Judges will only read the summary. Mr. Parker commented that the Rule should not be focused on offering practice tips to practitioners, and should instead just state the requirement. The committee agreed upon the following changes:

(ab)(8) Summary of arguments. ~~The~~ A summary of the arguments, ~~suitably~~ paragraphed, shall be a succinct condensation of the arguments actually made in the body

of the brief. It shall not be a ~~mere~~ repetition of the heading under which the argument is arranged.

Mr. Parker moved to approve these changes. It was seconded, and passed unanimously.

The other items were tabled until the next meeting.

8. Other Business

The committee did not discuss other business.

9. Adjourn

The meeting was adjourned at 1:32 p.m. The next meeting will be held on Thursday, October 1, 2015.