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 4, 2014
12:00 p.m. to 1:30 p.m.

PRESENT	**EXCUSED**
Joan Watt – Chair	Bridget Romano
Alison Adams-Perlac – Staff	
Troy Booher	
Paul Burke (by phone)	
Marian Decker	
Alan Mouritsen	
Judge Gregory Orme	
Rodney Parker	
Bryan Pattison	
John Plimpton – Recording Secretary	
Clark Sabey	
Lori Seppi	
Tim Shea	
Anne Marie Taliaferro	
Judge Fred Voros	
Mary Westby	

1. Welcome and Approval of Minutes **Joan Watt**

Ms. Watt welcomed the committee to the meeting. She asked for any comments on the minutes from the previous meeting. There were no comments.

Mr. Sabey moved to approve the minutes from the meeting held on June 11, 2014. Ms. Decker seconded the motion and it passed unanimously.

2. Public Comment to Rule 38B **Joan Watt**

The committee amended Rule 38B to read as follows:

Rule 38B. Qualifications for Appointed Appellate Counsel.

(a) In all appeals where a party is entitled to appointed counsel, only an attorney proficient in appellate practice may be appointed to represent such a party before either the Utah Supreme Court or the Utah Court of Appeals.

(b) The burden of establishing proficiency shall be on counsel. Acceptance of the appointment constitutes certification by counsel that counsel is eligible for appointment in accordance with this rule.

(c) Counsel is presumed proficient in appellate practice if any of the following conditions are satisfied:

(c)(1) Counsel has briefed the merits in at least three appeals within the past three years or in 12 appeals total; or

(c)(2) Counsel is directly supervised by an attorney qualified under subsection (c)(1); or

(c)(3) Counsel has completed the equivalent of 12 months of full time employment, either as an attorney or as a law student, in an appellate practice setting, which may include but is not limited to appellate judicial clerkships, appellate clerkships with the Utah Attorney General's Office, or appellate clerkships with a legal services agency that represents indigent parties on appeal; and during that employment counsel had significant personal involvement in researching legal issues, preparing appellate briefs or appellate opinions, and experience with the Utah Rules of Appellate Procedure.

(d) Counsel who do not qualify for appointment under the presumptions described above in subsection (c) may nonetheless be appointed to represent a party on appeal if the appointing court concludes there is a compelling reason to appoint counsel to represent the party and further concludes that counsel is capable of litigating the appeal. The appointing court shall make findings on the record in support of its determination to appoint counsel under this subsection.

(e) Notwithstanding counsel's apparent eligibility for appointment under subsection (c) or (d) above, counsel may not be appointed to represent a party before the Utah Supreme Court or the Utah Court of Appeals if, during the three-year period immediately preceding counsel's proposed appointment, counsel was the subject of an order issued by either appellate court imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before either appellate court.

(f) The fact that appointed counsel does not meet the requirements of this rule shall not establish a claim of ineffective assistance of counsel.

(g) Appointed appellate counsel shall represent his or her client throughout the first appeal as of right, respond to a petition for writ of certiorari filed by the prosecuting entity, file a petition for writ of certiorari if appointed counsel determines that such a petition is warranted, and brief the merits if the Supreme Court grants certiorari review.

Advisory Committee Note

This rule does not alter the general method by which counsel is selected for indigent persons entitled to appointed counsel on appeal. In particular, it does not change the expectation that such appointed counsel will ordinarily be appointed by the trial court rather than the appellate court. The rule only addresses the qualifications of counsel eligible for such appointment. See generally State v. Hawke, 2003 UT App 448 (2003).

Mr. Parker moved to approve Rule 38B as amended. Mr. Sabey seconded the motion, and it passed unanimously.

3. Rule 35 without Public Comment **Joan Watt**

The committee amended Rule 35 to read as follows:

Rule 35. Petition for rehearing.

(a) Petition for rehearing permitted. A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed only in cases in which the court has issued an opinion, memorandum decision, or per curiam decision. No other petitions for rehearing will be considered.

(b) Time for filing~~; contents; answer; oral argument not permitted. A rehearing will not be granted in the absence of a petition for rehearing.~~ A petition for rehearing may be filed with the clerk within 14 days after ~~the entry of the decision~~ issuance of the opinion, memorandum decision, or per curiam decision of the court, unless the time is shortened or enlarged by order.

(c) Contents of petition. The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires. Counsel for petitioner must certify that the petition is presented in good faith and not for delay.

(d) Oral argument. Oral argument in support of the petition will not be permitted.

(e) Response. No ~~answer~~response to a petition for rehearing will be received unless requested by the court. ~~The~~Any ~~answer~~response ~~to the petition for rehearing~~ shall be filed within 14 days after the entry of the order requesting the ~~answer~~response, unless otherwise ordered by the court. A petition for rehearing will not be granted in the absence of a request for a~~n answer~~response.

(~~b~~f) Form of petition~~; length~~. The petition shall be in a form prescribed by Rule 27 and shall include a copy of the decision to which it is directed.

(g) Number of copies to be filed and served. An original and ~~six~~6 copies shall be filed with the court. Two copies shall be served on counsel for each party separately represented.

(h) Length. Except by order of the court, a petition for rehearing and any response requested by the court shall not exceed 15 pages.

(i) Color of cover. The cover of a petition for rehearing shall be tan; that of any response to a petition for rehearing filed by a party, white; and that of any response filed by an amicus curiae, green. All brief covers shall be of heavy cover stock. There shall be adequate contrast between the printing and the color of the cover.

(~~c~~j) Action by court if granted. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(~~d~~k) Untimely or consecutive petitions. Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.

(~~e~~l) Amicus curiae. An amicus curiae may not file a petition for rehearing but may file a~~n answer~~ response to a petition if the court has requested a~~n answer~~ response under subparagraph (~~a~~e) of this rule.

Mr. Booher moved to approve Rule 35 as amended. Ms. Westby seconded the motion, and it passed unanimously.

4. Rule 5 **Troy Booher**

Mr. Booher stated, in response to Judge Orme's email asking when district court judges are required to inform parties of their appellate options, that judges are never required to do so for an interlocutory order. He stated that Judge Blanch's proposal to extend the time to file a petition for interlocutory review to 30 days was based on a concern about instances where it is unclear whether an order is interlocutory or final, because district court judges are required to inform defendants that they have 30 days to appeal following imposition of sentence. He further stated that a notice of appeal would not be treated as a petition for interlocutory review in any case, so extending the time to petition for interlocutory review to 30 days would not alleviate Judge Blanch's concern.

Judge Orme stated that district judges should not be in the business of advising litigants of their appellate options. He stated that parties and their attorneys should figure out their options on their own by researching the Rules and case law. Ms. Watt stated that it is common for district judges to inform parties of the time limit for filing an appeal to prevent reinstatement of the right to appeal under *State v. Manning*.

Mr. Sabey stated that, in any event, commenting on the length of time to appeal is not going to give litigants the information they need when it is uncertain whether an order is interlocutory or final. Mr. Booher agreed that extending the time to file a petition for interlocutory review to 30 days would not solve anything. Mr. Sabey stated a party cannot use a notice of appeal to challenge an interlocutory order.

Ms. Decker suggested that Rule 5 cannot be amended because it cannot be suspended under Rule 2. Judge Voros suggested that the Rule was passed by committee, so it can be amended. Mr. Sabey said that the Attorney General's position is that the time limit under Rule 5 is jurisdictional and it flows from statutory authorization that was given when the procedural rules were based in statute, so the time limit in Rule 5 cannot be amended. Ms. Decker confirmed that that is the Attorney General's position.

Ms. Watt said the reason for the 20-day limit is to expedite interlocutory appeals during pending litigation. She stated that there has historically been no problem with the time limit. Mr. Sabey stated that if it is unclear whether the order is interlocutory or final, a party can file both a petition for interlocutory review and a notice of appeal within the respective time limits.

The committee took no action on Rule 5.

5. Rule 23B **Lori Seppi**

Ms. Seppi explained her proposed revisions to Rule 23B(c). She said she modeled the proposed language on the rule on motions for new trial. She said she included an advisory committee note citing to *Johnston*, and she added the statute which says that unsworn declarations can be used in lieu of an affidavit.

Judge Voros said that adding the word "evidence" brings the Rule in line with current case law. He stated that the change from "facts that would support a finding of deficient performance and a finding of prejudice" to "facts that would support the motion" is a sea change in 23B. He said that the current case law is that a party making a 23B motion must show facts that would support a finding of deficient performance and prejudice. He stated that if the Rule requires showing facts that would support the motion, there is no benchmark to measure the adequacy of the allegations in the motion. He said he could not support the language "facts that would support the motion."

Mr. Seppi noted that subsection (a) explains what facts a party needs to show, which are facts that, if true, would support a finding of ineffective assistance, and subsection (b) explains how a party would do that. Ms. Seppi also doubted how a party could demonstrate prejudice in a 23B motion apart from a bald statement that the deficient performance was prejudicial. Judge Voros pointed to the example of a 23B motion alleging that counsel was ineffective for failing to call an expert without saying anything about what the expert would testify to. He stated that the Rule needs to put litigants on notice that this would be insufficient, that the Rule must inform litigants that they would need to give some indication about what the expert would have testified to.

Ms. Watt stated that the Rule could say that the party needs to support a determination of ineffective assistance. Judge Voros said that it is more helpful to a movant to include both prongs. Ms. Watt asked whether the affidavit would need to allege facts tending to prove prejudice. Judge Voros stated that a party would not need to allege prejudice in an affidavit, but prejudice could be argued in the motion.

Ms. Seppi asked whether the Rule could say facts which would support a "conclusion," rather than a "finding," of deficient performance and prejudice. Mr. Booher said that there is recent case law supporting the idea that an appellate court defers to a trial court's finding on prejudice in the context of a motion for a new trial, and he did not see how prejudice in the ineffective assistance context would be different. He stated that, as a result, prejudice in ineffective assistance context may not be a question of law, but a finding of fact. Mr. Watt said that prejudice in the ineffective assistance context is a legal standard, so it is a legal question. Mr. Booher stated that a 23B motion is less like a motion for a new trial than a motion for summary judgment. He stated that the purpose is to allege facts that would support a finding of ineffective assistance so that evidence relevant to those facts can be presented, the trial court can made findings based on that evidence, and then appellate court can adjudicate the legal question of ineffective assistance based on the trial court's findings. Ms. Watt stated that there is much more of a legal overlay in ineffective assistance context. Judge Voros stated that there is case law supporting the idea that prejudice for ineffective assistance is a question of law, and that idea is supported by the fact that a constitutional right is at stake. He stated, however, that generally prejudice is a factual determination that is entitled to deference under

an abuse of discretion standard. Ms. Watt stated that a trial court abuses its discretion when it errs as a matter of law. Judge Voros said the standard of review presents a complicated issue.

Judge Voros wants to clarify the Rule so parties know what to file. Mr. Sabey said it is difficult to articulate precisely what the appellate courts want. Ms. Watt stated that the committee note is very helpful.

Ms. Seppi read the original rule. She stated that the rule says "show" deficient performance and prejudice, without reference to "finding." Judge Voros stated that trial courts were confused about what they were supposed to do on remand. Mr. Sabey asked whether the original intent of the rule was just to require trial courts to make findings of fact so that the appellate courts could make the legal determination. Mr. Sabey and Judge Voros said that the appellate courts seem to want to trial courts to make findings and draw legal conclusions. Judge Orme suggested that it is essential for the trial court to make findings, but the trial court could go on to draw legal conclusions. Ms. Watt stated that the trial court would then need to review the entire record, and that is not something trial courts or appellate courts want. Judge Voros asked why a 23B motion should not be like a regular motion for a new trial. Mr. Parker stated that there are jurisdictional problems with this approach, because there is a pending appeal.

Judge Orme stated that it cannot hurt for the appellate court to have the benefit of the trial court's analysis, but a 23B remand is really about getting the facts sorted out. Ms. Watt said the purpose of a 23B remand is to remand to supplement the record. Judge Voros asked if the trial court could be given authority to grant or deny a new trial. Ms. Watt stated there are probably jurisdictional problems with that because the case is on appeal. Judge Orme said that treating a 23B motion as a motion for a new trial is more confusing than helpful. He said a motion for a new trial is reviewed as an abuse of discretion, where ineffective assistance is a matter of law. Ms. Watt stated that it is always an abuse of discretion to make a legal error.

Judge Voros stated that he would like to include the word "evidence," but otherwise leave the rule as is. Ms. Watt suggested that the committee members review the existing rule. Judge Voros agreed.

Judge Voros said it would be useful for a district court to make a conclusion of law on the ineffective assistance question. Ms. Decker said that the Attorney General wants that. Ms. Seppi stated that a 23B remand, unlike a motion for a new trial, usually occurs a very long time after trial, and the district judge does not have the record in front of him or her. Ms. Watt noted that the judge on remand may even be different than the trial judge. Ms. Westby said it would be a new record review for the district court. Judge Voros said that, given this consideration, the benefit/burden analysis weighs against letting the trial court make a conclusion on the ineffective assistance question.

Ms. Watt proposed sending the Rule back to subcommittee. The committee agreed.

The committee sent Rule 23B back to subcommittee.

6. Rule 24 **Troy Booher**

Judge Voros proposed that a committee member take an existing brief and conform it to the Rule 24 proposal so the committee could see what such a brief would look like. Mr. Pattison stated that he would do it for the next committee meeting.

Ms. Watt stated that briefs are more difficult to read without being able to set off the headings with capitalized and bolded type.

The committee tabled Rule 24 until the next meeting.

7. **Rule 24 and *State v. Nielsen*** **Joan Watt**

Ms. Watt stated that *State v. Nielsen* would be addressed in the revisions to Rule 24.

The committee tabled Rule 24 and State v. Nielsen *until the next meeting.*

8. Rule 27 **Troy Booher**

The committee tabled Rule 27 until the next meeting.

9. Other Business

There was no other business discussed at the meeting.

10. Adjourn

The meeting was adjourned at 1:39 p.m. The next meeting will be held Tuesday, September 30, 2014.