

**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, November 5, 2015  
12:00 p.m. to 1:30 p.m.

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**PRESENT**

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

**EXCUSED**

Joan Watt – Chair

**1. Welcome and Introduction of New Members**

**Rodney Parker**

Mr. Parker served as acting chair in Ms. Watt’s absence. He welcomed the committee to the meeting.

**2. Member Disclosures**

**Committee**

Mr. Parker invited Ms. Decker to disclose a brief summary of her practice area to the new committee members, since she was not present for member disclosures in the September meeting. She did so.

**3. Approval of September Minutes**

**Rodney Parker**

Mr. Parker invited a motion to approve the minutes from the September meeting.

*Mr. Burke moved to approve the September minutes. Ms. Seppi seconded the motion and it passed unanimously.*

#### **4. Rule 28 A – Appellate Mediation Office**

**Tim Shea**

Mr. Parker invited Mr. Shea to provide an update on the committee’s recommendation to not amend Utah R. App. P. 28A(h), which allows confidential requests for mediation. Mr. Shea reported that the Supreme Court agreed with the committee’s recommendation as to the Court of Appeals, but that they wanted to include language explaining that confidential mediation requests are not allowed in the Supreme Court. Mr. Shea introduced the proposed changes to Rule 28A(h), now labeled as Rule 28A(e)(1) and (e)(2), which differentiate how mediation requests are treated in the Supreme Court and the Court of Appeals. This led to a discussion of additional proposed changes to the rule.

Mr. Shea recommended deleting subsection (c) and the first sentence of subsection (b), regarding the transmittal of the record on appeal. Mr. Shea indicated that these provisions are obsolete because there is no physical transmission of the record anymore—it takes place electronically.

Mr. Parker asked whether the proposed deletion of only the “[u]pon receipt of the order…” language in subsection (d) would affect the perception of when participation in mediation is mandatory. Judge Voros indicated, and Mr. Shea agreed, that the language in subsection (d) was unnecessary because the order itself states that the parties are required to participate. Mr. Parker suggested and others agreed that subsection (d) should be deleted entirely to avoid any ambiguity. Mr. Shea suggested including a committee note explaining that the deletion of the language in (d) was not intended to be a substantive change to the rule. The committee members agreed with this approach.

Mr. Shea recommended deleting the last two sentences in subsection (e), now relabeled as subsection (b). He indicated that the statutory references in the first sentence are unnecessary, and in any event are outdated. He also indicated that the language in the second sentence would be more appropriate to include in a rule of evidence. Judge Orme suggested leaving the language in the second sentence alone unless and until the Rules of Evidence are amended to address it. Mr. Parker suggested, and others agreed, that the second sentence should not be deleted. This led to a discussion by Ms. Westby, Mr. Shea, Ms. Perlac, and others about the types of documents which are sent to the mediator or available to them electronically. Mr. Parker asked Mr. Shea to flag the issue for discussion by the e-filing committee as to whether the mediation office should be carved out from electronic filing.

Mr. Burke suggested adding language in the rule to state that the Court’s denial of a mediation request will not preclude the parties from engaging in private mediation or settlement discussions. He emphasized the public policy encouraging settlement, and expressed concern that the Court’s denial of a mediation request under the rule might be misinterpreted, and would have the effect of discouraging settlements. Mr. Perlac suggested including Mr. Burke’s suggested language as a new subsection (e)(3).

Mr. Parker summarized the proposed changes to Rule 28A and invited a motion to adopt them.

*Mr. Burke moved for the committee to adopt the proposed changes to Rule 28A as further amended. Mr. Gunnerson seconded the motion and it passed unanimously.*

## **5. Effect of Post-judgment Proceedings on Time to Appeal**

**Tim Shea**

Mr. Parker invited discussion of a proposal to amend Rule 4(b) to conform to the federal model, which allows Rule 60 motions, and motions for attorney's fees if the district court so orders, to extend the time in which to file a notice of appeal. Mr. Shea introduced the topic by explaining that a joint workgroup comprised of members of the Civil and Appellate Rules Committees examined Utah policies underlying the issue, and recommended that Utah adopt the federal model. He reported that the Civil Rules Committee already agreed with the recommendation as it relates to the civil rules, and he urged the committee to move forward quickly so that the proposed amendments could be published and put in place as soon as possible.

The committee members discussed whether, and under what circumstances, a motion for attorney's fees should be included in Rule 4(b) as a motion that extends the time to file a notice of appeal. Mr. Sabey questioned the benefit of leaving the determination to the trial court's discretion. He recommended including motions for attorney's fees in Rule 4(b), without the need for an order from the district court. Judge Voros spoke in favor of adopting the federal model, noting that it did not really change anything as to attorney-fee motions because judges already have discretion to certify non-final orders as final under Rule 54, which affects the timing of an appeal. The committee discussed the pros and cons of the two approaches. Mr. Shea expressed his preference to follow the federal model if possible. Judge Voros commented that the federal model allowed appeals on the merits to proceed faster, while Mr. Sabey's proposal would force the appeal to be consolidated with the attorney fee issues. Ms. Westby spoke in favor of Mr. Sabey's approach, saying that it would encourage attorney's fee issues to be resolved faster, and that it would be easier to have a bright line rule regarding them. Mr. Burke favored adopting the federal model, and commented that there is a benefit in giving the trial court flexibility. Mr. Parker commented, and several others agreed, that it is not realistic to get in front of a state district court judge that quickly to decide whether an attorney fee issue would toll the time for appeal. This could lead to problems because the time to appeal would expire before the judge ruled on the issue. This led to a discussion by the committee members about the potential traps to parties not knowing when to file an appeal. Ultimately, the committee members agreed that it was better to have a bright-line rule regarding attorney fee motions that does not involve judicial discretion. Mr. Booher and Judge Orme supported Mr. Sabey's suggestion of including them in Rule 4(b). Mr. Parker asked if there was a consensus on the issue. The majority of the committee members agreed with Mr. Sabey's proposal. The committee then discussed drafting changes to Rule 4(b) to implement this approach.

The committee members discussed whether, and under what circumstances, a Rule 60 motion should be included in Rule 4(b) as a motion that extends the time to file a notice of

appeal. Some members questioned whether it made sense to include Rule 60 motions, and there was discussion about whether including them in Rule 4(b) would raise issues with the timing of when such motions are filed. Mr. Booher suggested, and others agreed, that only motions filed under Rule 60(b) should be included. The committee agreed to approve the recommendation to include Rule 60(b) motions, send the proposed change out for public comment, and then revisit the issue after seeing the comments.

Mr. Perlac summarized the proposed changes to Rule 4(b), and Mr. Parker invited a motion to adopt them.

*Mr. Booher moved for the committee to adopt the proposed changes to Rule 4(b) as further amended. Mr. Burke seconded the motion and it passed unanimously.*

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

**Committee**

Discussion of this issue was tabled until the next meeting.

**7. Other Business**

The committee did not discuss other business.

**8. Adjourn**

The meeting was adjourned at 1:37 p.m. The next meeting will be held on Thursday, January 7, 2016.