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, May 10, 2018
12:00 p.m. to 1:30 p.m.

PRESENT
Christopher Ballard
Troy Booher
Paul Burke- Chair
Cathy Dupont-Staff
R. Shawn Gunnarson
Alan Mouritsen
Judge Gregory Orme
Judge Jill Pohlman
Adam Pace – Recording Secretary
Rodney Parker
Bridget Romano
Clark Sabey
Lori Seppi
Ann Marie Taliaferro

EXCUSED
Lisa Collins
Mary Westby

1. Welcome and approval of minutes — Paul Burke

Mr. Burke welcomed the committee to the meeting and asked Mr. Ballard, Ms. Seppi, and Ms. Taliaferro to disclose a brief summary of their practice area in accordance with Rule 11-101(4) of the Supreme Court Rules of Professional Practice. They each did so. Mr. Burke then invited a motion to approve the minutes from the January and March meetings.

Judge Pohlman moved to approve the minutes from the January and March meetings. Mr. Gunnarson seconded the motion and it passed unanimously.

2. URAP 23B and 2013 Supreme Court Order. **Clark Sabey**
Cathy Dupont

The committee deferred discussion of this item until the next meeting due to technical difficulties with the internet.

3. Reducing brief word to page ratio; briefing attorney fees. **Bridget Romano**
Rules 24 and 24A. Survey of mid-level Appellate Courts

Ms. Romano summarized the committee's prior discussion on this topic, which is reflected in the minutes from the January 2018 meeting. She then presented a 50-state survey summarizing her research on the word and page limits for appellate briefs in each state. Ms. Romano noted that most jurisdictions have either higher word/page limits for the state's highest court, or the same limits in both the intermediate and highest court. The exceptions are Arizona, California, Texas, Virginia, and Wisconsin, which have lower word/page limits for the state's highest court.

Ms. Romano is still concerned about reducing the word limit in the Supreme Court given the high level of briefing required there and the difficulty in getting permission to file an over-length brief.

Mr. Booher proposed reducing the word limits as suggested, but changing the rule to allow parties to have the additional words they are allowed under the current rule, without the need for a court order, if the signing attorney certifies that the additional words are necessary. This will allow parties the flexibility to use the additional words when they are needed without increasing the court's administrative burden in having to respond to an increased number of motions for permission to file an over-length brief. Mr. Booher suggested trying this approach for a year to see if it has the desired effect of reducing the overall word count of appellate briefs.

Ms. Seppi asked what the policing mechanism will be for this approach and if parties will have to defend their decision to use the extra words. Mr. Ballard said that he didn't think an appellee would waste its words arguing about the appellant's decision to use additional words. Mr. Burke agreed that parties are unlikely to make those arguments.

Mr. Burke asked if the proposed word reduction creates due process concerns for criminal defense appeals. Ms. Seppi said she is very concerned about this because a criminal appellant must brief all issues in order to preserve them. She is worried that a limited word count will interfere with her ability to do that. She is also concerned about the frequency with which appeals are dismissed without reaching the merits due to inadequate briefing. She thinks that reducing the word limits will exacerbate this problem. She also thinks that reducing the word limits will make briefing more difficult and more expensive for the attorneys.

Ms. Romano noted that several other states allow more words for criminal appeals than for civil appeals. She asked if the committee should follow this approach. Mr. Booher said he thinks that the appellate courts will not see the difference in briefs that they are hoping to see by reducing the word limits because a poorly written brief will still be poorly written at 12,500 words.

Ms. Romano asked Judge Orme how often briefing in criminal appeals is longer than in civil cases. Judge Orme said that he doesn't agree that criminal briefing is necessarily longer. He has seen plenty of complicated civil cases which need extra briefing. In his experience, the vast majority of briefs in both criminal and civil appeals are well-below the word limit. He doesn't share the concern of some of his colleagues about word limits—he feels that he can police it himself by skimming over redundancy.

Judge Orme suggested that the changes that have recently been made to Rule 24 to streamline briefing may address the Supreme Court's concerns about briefs being too long. He would join in Mr. Booher's recommendation, or in an alternate recommendation to simply wait a year and see if the new Rule 24 solves the perceived problem. Judge Pohlman agreed that the current word limits are not a problem for her in the court of appeals.

Ms. Romano asked if Judge Orme's suggestion would be well-received by the Supreme Court. Mr. Sabey said it would be better received if Judge Orme were there in person to deliver it, and said that if the committee is going to recommend against reducing the word limits, it needs to explain why.

Mr. Booher commented that the reason why briefs are redundant is because judges read them differently, and start at different places. With the changes to Rule 24, practitioners can now be assured that judges will begin by reading the introduction. This should reduce the need for repetition in the brief.

Mr. Booher asked if the Supreme Court's objective in reducing word limits is to encourage more streamlining in briefs or to address a perceived mismatch between word and page limits. Mr. Sabey said that he thinks it is a little bit of both.

Mr. Parker agreed with Mr. Booher's comment about redundancy in briefs resulting from practitioners writing different sections of the briefs to be freestanding. He also said that appellate courts include "malpractice alerts" in their opinions, commenting that the lawyers failed to include an argument in their brief that would have persuaded the court if it had been made. These comments lead lawyers to feel that they need to argue every issue in their brief, or else they will be criticized for not doing so. He is not comfortable with reducing the word limit, and does not think that it is necessary. He thinks it should be left alone for now.

Mr. Burke agreed that he notices the "malpractice alerts" in appellate opinions, but he doesn't remember ever seeing the court compliment attorneys in the opinion for shorter, more effective briefing. Ms. Seppi commented that in criminal cases, the malpractice alert becomes the basis for the ineffective assistance of counsel claim.

Mr. Burke summarized the general consensus reached by the committee as follows: the committee will report to the Supreme Court that it recommends, for the time being, that any changes in word limits be deferred, and that when taken up again it be considered in conjunction with rules about granting over-length briefs. The committee recommends review and study over the next year of the size and subject matters of submitted briefs, so that in a year the committee can make an informed recommendation to the Supreme Court about how to proceed based on

facts, feedback, and perception. The committee also recommends monitoring whether the recent changes to Rule 24 have had the intended effect of streamlining briefs and making them shorter. The committee also recommends educating practitioners on how to write better, shorter briefs.

Ms. Taliaferro moved to adopt the recommendation as summarized by Mr. Burke. Mr. Parker seconded the motion and it passed unanimously.

4. Rule of Professional Practice 11-401 and URAP 38b — Cathy Dupont

Ms. Dupont summarized the committee's prior discussion on this topic, which is reflected in the minutes from the March 2018 meeting. She reported that Judge Jones is the chair of the new committee that has been formed to recommend names to be included on the appellate roster, and the criteria for appellate attorneys to be included on the roster. The committee will be meeting the first week of June to select its other members. It should be up and running soon. Ms. Dupont is coordinating with staff for the juvenile and criminal rules committees. They are going to work together to propose a uniform approach and language across all of the rules to address this new procedure for appointing appellate counsel. Ms. Dupont recommended delaying further action on Appellate Rule 38B until these other pieces are in place. The committee agreed with this approach.

5. URAP 25, 46, 49, 50, and 51 regarding writs of certiorari — Clark Sabey

Mr. Sabey introduced proposed changes to Rules 25, 46, 49, 50, and 51 regarding writs of certiorari.

Rule 25

There were no objections to the conforming amendment to Rule 25.

Rule 46

Mr. Burke said he did not like adding the sentence in subpart (a): "[t]he possibility of an error in the Court of Appeals' or other tribunal's decision, without more, ordinarily will not justify review." The committee discussed this language further and generally agreed that it should be included, and that it accurately reflects the court's practice when evaluating certiorari petitions.

The committee discussed and agreed that

- subpart (a)(1) should be amended to say: "The petition presents a question regarding the proper interpretation of, or ambiguity in, a constitutional or statutory provision that is likely to affect future cases;"
- subpart (a)(2) should be amended to say: "The petition presents a legal question of first impression in Utah that is likely to recur in future cases;" and
- subpart (a)(3) should be amended to say "The petition provides an opportunity to resolve confusion or inconsistency in a legal standard set forth in a decision of the Court of Appeals, or in a prior decision of the Supreme Court, that is likely to affect future cases."

Mr. Mouritsen moved to recommend adoption of the proposed changes to Rule 46 with these changes. Ms. Romano seconded the motion and it passed unanimously.

Rule 49

Mr. Mouritsen suggested replacing the term “pleading” where it is used in subpart (c) with “filing.” Mr. Parker suggested using the term “memorandum” instead of “pleading” in both places. The committee agreed with that suggestion.

Mr. Booher suggested deleting the reference to “nature of the case” in subpart (a)(8), because that term is no longer used in Rule 24.

Mr. Gunnarson moved to adopt the proposed changes to Rule 49 with these two changes. Judge Pohlman seconded the motion and it passed unanimously.

Rule 50

Ms. Romano moved to approve the suggested changes to subparts (a) through (d), and to table further discussion and final adoption of Rule 50 pending discussion of subpart (e). Ms. Romano incorporated into her motion, for now, Judge Orme's suggestion to change the title of Rule 50 to “Response; reply; amicus curiae.” Mr. Mouritsen seconded the motion and it passed unanimously.

6. Rule 22(d) Timing. **Alan S. Mouritsen**

The committee deferred discussion of this item until the next meeting.

7. Adjourn

The meeting was adjourned at 1:30 p.m. The next meeting will be held on June 7, 2018.