**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, June 7, 2018
12:00 p.m. to 1:30 p.m.

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

**1. Welcome and approval of minutes** **Paul Burke**

Mr. Burke welcomed the committee to the meeting and invited a motion to approve the minutes from the May meeting.

*Judge Orme moved to approve the minutes from the May meeting. Judge Pohlman seconded the motion and it passed unanimously.*

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

The committee continued its discussion of the proposal the amend Rule 23B to incorporate the contents of the Supreme Court's September 23, 2013 Revised Order Pertaining to Rule 23B. A draft of these proposed changes was included in Tab 2 of the meeting materials. Mr. Ballard proposed two additional substantive changes to Rule 23B(e): 1) stating that the trial court will enter conclusions of law in addition to findings of fact, and 2) stating that both the defendant and

the State are entitled to present evidence during the proceeding before the district court on remand.

Mr. Burke asked if everyone agreed that Rule 23B should, at a minimum, be changed to conform to the standing order. Everyone agreed. Mr. Burke proposed recommending those changes first, and then continuing the discussion of Mr. Ballard's proposal.

*Mr. Ballard moved to adopt only the proposed changes to Rule 23B that conform to the standing order, and to continue the discussion of the two additional changes he proposed. Mr. Sabey second the motion and it passed unanimously.*

Mr. Ballard explained his reasons for suggesting the additional changes are 1) to bring Rule 23B remand hearings in line with other hearings held by the district court; 2) to help appellate courts better resolve claims for ineffective assistance of counsel by providing more information; and 3) because trial courts are in the best position to judge both deficient performance and prejudice. Mr. Ballard said he recognizes that the Court of Appeals will make the ultimate legal conclusion, but he thinks the trial court's conclusions of law on those points should be entitled to some deference because it is a mixed question of fact and law.

Mr. Booher said that the limited purpose of Rule 23B is to address the problem that arises when there is an inadequate factual record for the Court of Appeals to rule on an ineffective assistance of counsel claim. He questioned whether it was wise to expand the scope of the proceedings beyond that discrete purpose. He also wondered what would happen if the trial court concluded that there had been ineffective assistance of counsel—would that result in the defendant's sentence being vacated?

Ms. Westby said there would be no effect on the sentence until the Court of Appeals ruled on the issue. Mr. Booher said, and Mr. Sabey agreed, that he thought that the reason that the trial court doesn't make conclusions of law in these Rule 23B remand hearings is out of caution for the effect it may have on the defendant. However, Mr. Sabey said he could see some value in letting the trial court make conclusions of law on whether there was prejudice or not, because the trial court may be in a better position to evaluate that.

Judge Orme agreed there would be some value to having the trial judge weigh in on whether there was prejudice, but only if it was the judge that actually tried the case. He said he would give some deference to that. However, if it is a different judge, there is no real value. Judge Orme also said that trial judges sometimes mislabel factual findings as conclusions of law and vice versa, and so may not include information in the findings that may have been helpful because he or she believed it is a conclusion of law. Judge Orme would rather have the benefit of the trial judge's thinking by allowing them to include the conclusions of law.

Ms. Seppi expressed several concerns. First, she said that when a trial judge is making conclusions of law, it should be based on the entire record and not just what is happening at the Rule 23B hearing. She said that judge may not remember the record well enough to make proper conclusions. In her experience, she thinks that judges who remember the record typically make conclusions anyway. This happens about half of the time. If it becomes a requirement for trial

judges to make conclusions of law, she feels she would need to ask the judge to review the entire record. Second, Ms. Seppi said that Rule 23B is a big mess with significant ramifications. She would prefer that no changes be made to it beyond the changes conforming the rule to the standing order. If the committee is thinking about making substantive changes, she asked that a subcommittee be reformed to carefully evaluate the effect they will have on defendants.

Mr. Ballard said he thinks there is a difference in the way the defense bar and the State view Rule 23B. The State doesn't see it just as an opportunity to supplement the record. He thinks it is more than that. It takes what would happen at the post-conviction stage and moves it to the direct appeal. He sees Rule 23B as essentially the same process litigating the claim of ineffective assistance of counsel as if it came up in a motion for new trial or in post-conviction proceedings.

Mr. Booher asked if the State would be open to amending Rule 23B to not only allow the trial court to make conclusions of law, but also to give the trial court all the authority it would have if it were ruling on a post-conviction petition or a Rule 24 motion? He pointed out that these proceedings are only the same in ways that make it so the defendant can't get immediate relief.

Ms. Taliaferro said that it is difficult for appellate attorneys to investigate the case and conduct the Rule 23B hearing in the time they are allowed. This is not enough time to do it properly.

Mr. Booher said that appellate counsel are under a lot of pressure to bring Rule 23B motions due to fear of procedural bars, because the State is going to argue in post-conviction proceedings that appellate counsel should have filed a Rule 23B motion. This puts appellate attorneys in a terrible position of having to review the entire record in the limited time available and make the motion, so that they don't foreclose post-conviction relief later. This is a complex problem, however, because there are resources available in the appellate process that make it possible to actually address the Rule 23B issues which are not available in post-conviction proceedings.

Ms. Westby proposed that there may be a way to narrow Rule 23B to allow only realistic chances of success, such as DNA evidence or alibi witnesses.

Mr. Burke commented that this discussion seemed to indicate that the Rule 23B subcommittee should be reformed to look into this further. He asked if the committee should vote on Mr. Ballard's proposal.

Mr. Ballard said that he did not intend to reopen a can of worms here with his proposal. He thinks the proposed change about letting the trial court make conclusions of law is the most controversial. He amended his proposal to omit that part, and just include the sentence that says that both the defendant and the state can present evidence at the Rule 23B hearing.

Ms. Seppi said she still opposes this change, because it will turn the Rule 23B hearing into a min-trial. She is concerned that Rule 23B motions are very rarely granted, and that when they are denied it creates a procedural bar to raising the argument later. Anything that makes it harder for a defendant to get relief than it already is not appropriate.

Judge Orme commented that the court needs to hear both sides of the story to evaluate the information. Judge Pohlman said it makes more sense to let the trial court evaluate what both sides have to say about the facts in a min-trial than to remand and find out for the first time in the new trial.

Mr. Ballard said that you can't evaluate prejudice to defendant if you don't see how the State would have responded to the new argument if it had been made at trial.

Ms. Seppi agreed with a point Mr. Booher made, saying that if the defendant has to present all of his/her evidence in the Rule 23B motion, the State should have to do likewise in its response memorandum, and provide all the facts and information it would present at the Rule 23B hearing. Judge Orme said this suggestion seems fair.

Ms. Seppi said she is open to considering this idea further. Mr. Ballard said he would need to think about it, and that the committee should discuss this further at another meeting if his proposal is going to be modified.

Mr. Ballard withdrew his proposal pending further discussion.

**3. Rule 22(d) Timing. Alan Mouritsen**

Mr. Mouritsen explained that standing order 11 allows parties to submit appellate documents electronically to the court, but still requires parties to file paper copies of briefs with the court. However, standing order 11 does not say anything about service. He presumes that Rule 21 still applies, which says that service may be personal or by mail. Mr. Mouritsen asked if it is still the court's standard practice to add the 3 extra days allowed under the mailbox rule (Rule 22(d)) when briefs are served on the opposing party by mail. He had a case recently where this wasn't done. Ms. Collins said that the Court is still doing that, and it was a mistake in the case where it wasn't done.

Mr. Ballard asked if Rule 21 should be amended to allow service by email. Mr. Booher pointed out that change is already included in the electronic filing rules that haven't been adopted yet.

**4. Inquiry by Utah Supreme Court regarding URAP 4(b)(1)(f) and URCP 58A(f) as interpreted by *McQuarrie v. McQuarrie*, 2017 Paul Burke**

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

**5. URAP 50 Response; reply; statement of amicus curiae Clark Sabey**

Mr. Sabey proposed amending Rule 50 to allow amicus curiae briefs concerning a petition for certiorari to be filed only after the petition is granted.

Mr. Burke proposed rewording the language of the proposal to state more clearly that the Court will not accept amicus curiae briefs concerning whether to grant the petition, and will only accept briefs on the merits after the petition is granted.

Mr. Booher commented that amicus participation is conceptually more important at the petition stage than the merits stage, and that it is odd to preclude it. He suggested allowing amicus to submit a proposed brief on whether to grant the petition with a motion for leave to file it. Mr. Burke agreed, and suggested tabling this issue for further discussion at the next meeting.

**6. Other Business**

Mr. Burke reported that the committee has been asked to reconvene a joint subcommittee to revisit the issue of finality of judgments in the context of attorney fee motions. This will be presented for discussion at a future meeting.

**7. Adjourn**

The meeting was adjourned at 1:30 p.m. The next meeting will be held on September 6, 2018.