

## MINUTES

Supreme Court's Advisory Committee  
on the Rules of Appellate ProcedureAdministrative Office of the Courts  
450 South State Street  
Salt Lake City, Utah 84114

October 19, 2011

## ATTENDEES

Judge Fred Voros  
Judge Gregory Orme  
Marian Decker  
Bryan Pattison  
Clark Sabey  
Joan Watt  
Ann Marie Taliaferro  
Lori Seppi  
Troy Booher

## EXCUSED

Diane Abegglen  
Paul Burke  
Tawni Anderson

## STAFF

Brent Johnson

**I. Welcome and Approval of Minutes**

Joan Watt welcomed the committee members to the meeting. Ms. Watt introduced the three new members of the committee. Marian Decker moved to approve the minutes from the last meeting. Clark Sabey seconded the motion. The motion carried unanimously.

**II. Rule 23B**

Ms. Watt explained why the committee had proposed a repeal of Rule 23B. Ms. Watt stated that the concept of Rule 23B is important, but there have been concerns because attorneys believe they must raise the issue in almost all cases, and attorneys believe that the rule is too vague. Ms. Watt stated that there is often a significant expenditure of time and resources for hearings that ultimately prove unproductive. Ms. Watt stated that there is a need to supplement the record in some circumstances, but in her experience it may be better to file such a request at the time of briefing because the court would then have a better understanding of all the facts and issues to determine whether a Rule 23B hearing is warranted.

Ms. Watt explained that the committee had received several public comments opposing the repeal of the rule. Ms. Watt suggested that the committee look at revamping the rule, rather than having an outright repeal. Judge Fred Voros noted that the task force on appellate

representation had not reviewed the issue in great detail. Judge Voros stated that the defense attorneys on the task force agreed with the repeal and therefore the task force did not engage in extensive discussions. Judge Voros stated that the post-conviction subcommittee is currently looking at the issues covered by Rule 23B. Lori Seppi stated that she likes the idea of Rule 23B, but believes that the time for requesting a hearing should be changed. Ms. Seppi suggested that the request be done at briefing or after. Ms. Watt stated that, at that point, the court could direct the Rule 23B proceedings in a more meaningful way. Judge Voros stated that filing motions at the time of briefing may not save resources, because the preparation will be the same. Judge Voros stated that it might give the Court of Appeals a better understanding of the issues, but would not save attorneys time and money.

Ms. Watt suggested that the Rule 23B issues be a part of the brief. Ms. Watt stated that litigants may be able to rely more on case law at that point, and might not need to hire experts. Ms. Watt stated that if the Court of Appeals determines that there is an issue for which experts might be helpful, then the court could send the issue back to the trial court to gather more information. Judge Voros suggested that the Rule 23B subcommittee look at all of these issues and try to draft a new proposal. Judge Orme stated that one of the important reasons for Rule 23B is to create a record while the defendant is still represented by counsel. Judge Orme stated that, if defendants have counsel on post-conviction cases, Rule 23B may not be necessary. Judge Voros noted that ineffective assistance of counsel claims have been raised more often in recent years. Judge Voros stated that Rule 23B hearings have the potential to be as onerous than trials. Judge Voros stated that the subcommittee needs to look at ways to have the process work for cases that have merit, while having efficient ways to resolve cases that do not.

Judge Orme suggested that parties could submit information by proffer and the court could decide whether a hearing is warranted based on the information that is proffered. Judge Orme stated that under the present scheme, a litigant must essentially present to the appellate court the same evidence that would be presented to the trial court at the Rule 23B hearing. Judge Orme suggested that the proffer process would be similar to motions for summary judgment, with the court assuming that the allegations are true in determining whether such allegations would demonstrate deficient performance by counsel. If they would, then the appellate court could remand to see if the allegations as proffered could be established through testimony and other evidence. After brief additional discussion, Judge Voros moved to create a subcommittee of him, Joan Watt, Lori Seppi, Clark Sabey, and Marian Decker. Judge Voros stated that the subcommittee will also invite Erin Riley to participate. Marian Decker seconded the motion. The motion carried unanimously. Ms. Watt stated that Judge Voros should be the chair. The committee members agreed with this suggestion.

### **III. Rule 29**

Judge Voros noted that the committee had received one comment on the proposed change to Rule 29. The commenter stated that the courts already have this discretion. Troy Booher stated that there could be an issue for the courts if they deny oral argument because the case was inadequately briefed but then the court resolves the case on an issue other than inadequate briefing. Judge Voros stated that the committee had previously attempted to have a rule that

simply stated that oral argument would be granted at the discretion of the court. Judge Orme stated that discretion is nevertheless the current practice of the court and the rule change would simply reflect the practice. Judge Voros then proposed language stating that the courts would hold oral argument when argument will significantly aid the decision-making process. The committee members agreed with the proposed language. Because the language is substantively different from the previous proposal, the rule will again be published for public comment. Ms. Watt suggested that the rule also include a committee note stating that the amendment reflects current practice.

#### **IV. Rule 38A**

The committee did not receive any comments on the proposed changes to Rule 38A. Judge Voros moved to approve the rule. Troy Booher seconded the motion. The motion carried unanimously.

#### **V. Other Business/Adjourn**

The committee postponed other business until its next meeting. The committee scheduled its next meeting for November 16. The meeting adjourned at 1:30 p.m.