

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, March 1, 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 Jill Pohlman
Adam Pace – Recording Secretary
Rodney Parker
Clark Sabey
Lori Seppi
Ann Marie Taliaferro
Mary Westby

EXCUSED

Lisa Collins
Judge Gregory Orme
Bridget Romano

1. Welcome and approval of minutes

Paul Burke

Mr. Burke welcomed the committee to the meeting and introduced guest Joanna Landeau. He suggested accommodating Ms. Landeau by moving her item to the top of the agenda for discussion. Review and approval of the minutes from the January meeting was deferred until the next meeting.

2. Rule of Professional Practice 11-401 and URAP 38b

Joanna Landau

Ms. Landeau explained that she is the director of the Utah Indigent Defense Commission (IDC) which was created in 2016 to help the state ensure its indigent defense services are consistent with the United States and Utah Constitutions. The IDC recently recommended that the Utah Supreme Court act on a recommendation made by prior appellate task forces to establish an appellate roster of attorneys eligible for appointment to represent indigent defendants. The Utah Supreme Court accepted the IDC's recommendation and promulgated Rule of Professional

Practice 11-401, which was sent out for public comment and approved at the end of February 2018. Rule 11-401 describes the committee that will be established to recommend the names to be included on the appellate roster, and the criteria for appellate attorneys to be included on the roster. The Utah Supreme Court has asked the appellate rules committee to evaluate how Rule 11-401 interacts with Appellate Rule 38B (Qualifications for Appointed Appellate Counsel), and to recommend appropriate revisions to Rule 38B.

Mr. Burke moved to eliminate subsection (b) of Rule 38B entirely because Rule 11-401 has effectively supplanted it. Mr. Mouritsen seconded the motion and it passed unanimously.

Mr. Parker commented that if provisions of Rule 38B are deleted, the references to Rule 38B in Rule 11-401 will need to be updated.

The committee discussed whether the references to attorney qualifications in Rule 38B(c) should also be eliminated because they have been supplanted by Rule 11-401. This led to a discussion of whether Rule 38B should be eliminated entirely.

The committee reached a consensus that Rule 38B is no longer necessary and should be deleted entirely upon promulgation of Rule 11-401 and the issuance of an appropriate rule in the rules of judicial administration that addresses the court's appointment of appellate attorneys from the appellate roster contemplated under Rule 11-401. The committee recommended that the judicial administration rules committee consider whether the rule it issues should allow the court to appoint attorneys who do not meet the established criteria, and presently contemplated under Rule 38B(d).

Mr. Burke invited a motion. Mr. Gunnarson moved to recommend eliminating Rule 38B upon promulgation of Rule 11-401 and the issuance of an appropriate rule in the rules of judicial administration. Judge Pohlman seconded the motion. Ms. Seppi asked to amend the motion to include a recommendation that the criminal rules committee consider revisions that may need to be made to Rule 8 of the Utah Rules of Criminal Procedure, which addresses appointment of counsel in criminal cases. Mr. Gunnarson amended his motion to include Ms. Seppi's suggestion, and Judge Pohlman re-seconded the motion. The motion passed unanimously.

3. URAP 23B and 2013 Supreme Court Order.

**Clark Sabey
Cathy Dupont**

Mr. Sabey introduced a proposal to amend Appellate Rule 23B to make it consistent the Utah Supreme Court's September 25, 2013 Revised Order Pertaining to Rule 23B (regarding the timing of when a Rule 23B motion must be filed and responded to). For reasons that are unclear, the Revised Order was never adopted as a standing order.

Mr. Sabey explained that under the existing rule, a Rule 23B motion has to be filed before the appellant's opening brief, which automatically triggers a 20-day response time. The amendment allows the appellant to file the Rule 23B motion with the opening brief (or earlier), and it allows the court flexibility in deciding when the response to the Rule 23B motion will be due.

Ms. Seppi asked whether it is the appellant's choice or the court's choice to have the Rule 23B motion heard before the brief on the merits. Mr. Sabey said that the appellant can choose whether to file the Rule 23B motion early, but the appellate court decides whether to address it before the merits briefing.

Ms. Seppi asked if the court will automatically stay proceedings when a Rule 23B motion is filed before the opening brief, until the court determines when the motion must be responded to. Ms. Westby commented that proceedings must be stayed in that situation until the court makes its determination. It would not be fair otherwise.

Ms. Seppi suggested having some clarity in the rule that tells appellants what happens if they chose to file a Rule 23B motion before the opening brief. Mr. Sabey said that the clarity has to come in the court's response to the motion, when it decides whether it will require a response in 20 days, or whether it will defer the issue for consideration with the briefing on the merits.

Ms. Westby suggested deleting the proposed language in subsection (b) referring to proposed orders that states: "The motion shall also be accompanied by a proposed order of remand that identifies....," and "The response shall include a proposed order of remand that identified...." The committee agreed this language should be deleted.

Ms. Westby suggested deleting the proposed language in subsection (d) and replacing it with: "If a motion is filed before appellant's principal brief, the briefing schedule is stayed pending further order of the court." Ms. Seppi said that this revision would address her concerns. The committee agreed this change should be made.

Mr. Parker asked if the automatic stay applies if the appellant files the Rule 23B motion at the same time as the opening brief. Ms. Westby said there would not be a stay in that situation, and the appellee's response to the motion will be due with its response to the brief. Judge Pohlman suggested including additional language to make that clear.

Mr. Ballard proposed including language in Rule 23B to clarify that the State can present evidence if a case is remanded, and also including language to clarify that trial courts can make conclusions of law in addition to findings of fact. Mr. Sabey commented that the first suggestion is not controversial, but the second suggestion is more of a policy question. Judge Pohlman commented that the purpose of a remand under Rule 23B is to have the district court find additional facts for the appellate court to consider—the appellate court doesn't ask the district court for a legal conclusion.

Mr. Sabey said that he would prepare a new draft of the proposed changes to Rule 23B for discussion at the next meeting. The committee agreed that there was no need for the September 25, 2013 Revised Order to be converted into a standing order, because of the proposed amendment to Rule 23B.

**4. Reducing brief word to page ration; briefing attorney fees.
Rules 24 and 24A. Survey of mid-level Appellate Courts.**

**Bridget Romano
Cathy Dupont**

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

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

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

6. Adjourn

The meeting was adjourned at 1:30 p.m. The next meeting will be held on May 10, 2018.