

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, October 4, 2018
12:00 p.m. to 1:30 p.m.

PRESENT

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

EXCUSED

Rodney Parker

1. Welcome and approval of minutes; introductions

Paul Burke

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

Ms. Westby moved to approve the minutes from the June meeting. Judge Pohlman seconded the motion and it passed unanimously.

2. Report from Finality of Judgment Work Group and discussion of proposed amendment to URCP 58A and URAP 4.

Paul Burke
Alan Mouritsen

Mr. Burke and Mr. Mouritsen have been part of a subcommittee tasked with proposing amendments to Utah's procedural rules to bring them more in line with the federal rules. Their work on that subcommittee led to the proposal before the committee today about amending appellate Rule 4. Mr. Mouritsen explained that the court wants to change Rule 4 to make it so that motions or claims for attorney's fees do not automatically toll the time for appeal (as the rule does now), and instead to treat attorney's fees as a collateral issue that does not toll the time for appeal unless the district court expressly decides that the time for an appeal should be extended.

Mr. Sabey asked why the district court should have the option to extend the time for appeal. Mr. Mouritsen and Mr. Burke said that there are some cases where attorney's fees are the main issue in dispute, so the district court should have discretion to recognize those situations and extend the time for appeal when it is warranted.

Ms. Romano asked if the proposed amendment to Rule 4 fixes the problem with finality that arose in *McQuarrie v. McQuarrie*, 2017 UT App 209. She doesn't think it does. Ms. Westby agreed, and suggested that the reference to civil Rule 73 in appellate Rule 4(b)(1)(F) should be deleted in order to make that provision apply to all claims for attorney's fees (not just those brought under civil Rule 73).

Mr. Booher said that he thinks that the *McQuarrie* case was improperly decided and he questioned whether the issues of finality and appealability are being conflated. The proposed amendments seem to re-entangle finality (with respect to triggering post-judgment deadlines and enforceability of a judgment) with appealability, which is a problem in his view. He thinks this creates more of a quagmire for practitioners to figure out whether they need to ask the district court to enter an order extending the time for appeal.

Judge Orme asked whether it would be a better approach to allow parties to appeal from a final judgment when there has been a judgment awarding fees, but the amount of the fees has not yet been determined. The appeal would include the right to appeal the amount of attorney's fees that is later determined. Mr. Booher said there are practical problems that arise if that approach is followed—for example with contingency fee contracts, where the plaintiff's rate increases from 33% to 40% once a notice of appeal is filed. If the rule requires a defendant to file a notice of appeal before the issue of attorney's fees is finally decided, that can reduce settlement leverage.

Mr. Burke asked Mr. Booher how he would fix this. Mr. Booher said that he doesn't think anything needs to be fixed. He likes the way Rule 4 and related civil rules are now. They provide clear guidelines that when a judgment is entered, it triggers post-trial motion deadlines; it triggers Civil Rule 62(a) so the judgment can be enforced within 14 days; but it does not trigger the deadline to appeal if a motion or claim for attorney's fees has been filed, because the deadline to appeal is tolled under Rule 4(b). This gives parties the opportunity to wait and see how the attorney's fee issue comes out, and evaluate whether it is worth it to appeal.

Mr. Mouritsen said that his understanding is that the court doesn't want attorney fee issues delaying the appellate process. Mr. Sabey said he is not sure that is what the court wants.

Mr. Gunnarson suggested created a new rule to address the situation that arose in *McQuarrie*, rather than revising the existing rules. Mr. Sabey suggested that if the committee is reacting to a directive from the court in revising Rule 4, it should be clear what the directive is.

Mr. Booher agreed with the suggestion to eliminate the reference to civil Rule 73 in Rule 4(b), and suggested revising civil Rule 58A to say that any outstanding issues concerning attorney fees do not affect the finality of a judgment, but does qualify to toll the time to appeal under Rule 4(b).

Judge Orme asked if that approach would give practitioners the option to file a notice of appeal immediately when a judgment is entered, or to wait until after the attorney's fee issue is decided. Mr. Booher said it would, just like filing a Rule 59 motion early. But if you file a notice of appeal early, it doesn't really matter because the appeal is going to be stayed anyways until the attorney fee issue is decided.

Mr. Burke suggested remanding this issue back to the subcommittee for further consideration. He invited Mr. Booher and Judge Pohlman to join the subcommittee so they can provide their insights. The subcommittee will work to see if it can reach a consensus on the approach to take with the proposed amendment to Rule 4. If the subcommittee cannot reach a consensus, it will propose two alternatives for the committee to consider at a future meeting. The committee agreed with this approach.

3. Proposed amendment to Rule 48(e) and (f) and Rule 4.

Judge Pohlman

Judge Pohlman introduced proposed amendments to Rule 48(e) and (f), and Rule 4. She explained that there is a mistake in Rule 48(e)(1), where it says that a party, upon a showing of good cause, may extend the time for filing a petition or a cross-petition for a writ of certiorari upon a motion filed *not later than 30 days after* the expiration of the time prescribed in the rule. Rule 48(e)(1) was meant to address the situation where a party files a motion for an extension *before* the time expired, not after. This is clear if you look at Rule 48(e)(2), which addresses the situation where a party requests an extension *after* the time has expired. *The committee agreed that lines 27-28 of Rule 48(e)(1) should be amended to read: "...upon motion filed before the expiration of the time prescribed...."*

Judge Pohlman proposed revising Rule 48(f) to require only two copies of the petition to be filed, rather than seven. Ms. Collins suggested, and the committee agreed, that the language in Rule 48(f) requiring an original signature should also be deleted. *The committee agreed that Rule 48(f) should be amended to read: "Two copies of the petition for a writ of certiorari must be filed with the Clerk of the Supreme Court."*

Judge Pohlman proposed revising Rule 48(e)(2) to include a sentence indicating that the Court may rule at any time after the filing of a motion. Mr. Burke said he didn't favor that language. He thinks the court should wait for a response before ruling on a motion in that situation. Judge Pohlman agreed, and withdrew the proposal.

Judge Pohlman proposed revising Rule 48(e)(2) to require “good cause *and* excusable neglect” rather than “good cause *or* excusable neglect.” The committee discussed the differences between the two. Judge Orme said that he can think of some situations where good cause is excusable neglect, but that is not always the case. Ms. Seppi said she doesn’t want the standard changed to require both. Mr. Sabey said that the language should be left alone in Rule 48 unless the committee is also going to change it in Rule 4. The committee discussed whether the reference to excusable neglect in Rule 48(e)(2) should be deleted, but several members of the committee opposed that suggestion. Mr. Burke said that there is case-law that discusses the differences between good cause and excusable neglect, which may be disturbed by the amendment. Mr. Burke also said that he thinks it is important to leave the reference to excusable neglect in Rule 48(e)(2), because that sends a signal that something more than good cause may be required. The committee ultimately decided to leave the language alone.

Mr. Burke summarized the final proposal to amend lines 27-28 and 40-41 of Rule 48 as proposed, and to reject the proposed changes to lines 33 and 36-37.

Judge Pohlman moved to amend Rule 48 as summarized above. Mr. Gunnarson seconded the motion and it passed unanimously.

4. Information: Report from Court Conference on Rule 24 and 24A. Approval to send Rules 23B, 25, 49, 50, and 51 out for public comment.

**Judge Orme
Cathy Dupont**

Ms. Dupont reported that the proposed amendments to Rules 23B, 25, 49, 50, and 51 have been sent out for public comment, but she has not seen any comments yet. The next court conference is set for October 29. Mr. Burke said that he would like to be able to report to the court at that conference what the committee is doing about the proposed amendments to Rule 4 (Item 1 above).

Mr. Ballard asked what happens if the public makes comments. Ms. Dupont said that the comments will be brought to the committee to discuss at a future meeting.

Judge Orme reported on his meeting with the court about word limits for briefs. Mr. Burke, Mr. Sabey, Ms. Dupont, and Judge Pohlman were also present for that meeting. The court is amenable to the committee’s suggestion to defer this issue pending a one-year opportunity after the amendment to Rule 24 took effect to see if it resolves the court’s concern about briefs being too long. Ms. Collins will do a statistical analysis to compare the average length of briefs before and after the amendment took place to see if they are getting shorter. The issue will probably come back to the committee for consideration in February or March, 2019.

5. Other business

The committee did not discuss other business.

6. Adjourn

The meeting was adjourned. The next meeting will be held on November 1, 2018.