

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, November 1, 2018
12:00 p.m. to 1:30 p.m.

PRESENT

Christopher Ballard
Paul Burke- Chair
Lisa Collins
Alan Mouritsen
Judge Gregory Orme
Judge Jill Pohlman
Adam Pace – Recording Secretary
Bridget Romano
Clark Sabey
Lori Seppi
Ann Marie Taliaferro
Mary Westby

EXCUSED

Troy Booher
Cathy Dupont- Staff
R. Shawn Gunnarson
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 October meeting.

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

2. Report from Finality of Judgment Work Group and discussion of proposed amendment to URCP 58A and URCP 73

**Paul Burke
Alan Mouritsen
Judge Pohlman**

Mr. Burke summarized the Finality Working Group's proposed solutions to the Court of Appeals' interpretation of Civil Rules 58A and 73 and Appellate Rule 4 in *McQuarrie v. McQuarrie*, 2017 UT App 209.

The Working Group's first proposal was to amend Civil Rule 73(b)(1) to state: "The motion must... specify the statute, rule, contract, *judgment*, or other basis entitling the party to the award..." (emphasis added). This makes a "judgment" one potential basis for attorney fees, rather than being a mandatory part of any motion for fees. Mr. Burke invited discussion of this proposal.

Mr. Ballard asked if there may still be a *McQuarrie* problem if parties make a claim for attorney's fees outside of Rule 73, such as asserting the claim in the complaint. Judge Pohlman said that she thought it would be easier to remove the reference to Rule 73 altogether, but the Working Group wanted to keep it. Mr. Mouritsen said that he thinks the proposed solution solves the problem. Mr. Burke asked if anyone had concerns about the new advisory note to Rule 73. No one did. Mr. Burke invited a motion.

Judge Pohlman moved for the committee to endorse the Civil Rules Committee's recommendation to amend Rule 73(b)(1) as proposed by the Working Group. Ms. Romano seconded the motion and it passed unanimously.

Mr. Burke summarized two other potential solutions to the *McQuarrie* problem that were discussed by the Working Group: 1) adopting the federal approach that motions for attorney fees never toll the time for appeal without leave of court; or 2) leaving Rules 58A and 4 in the default position of motions for attorney fees automatically tolling the time for appeal until the dispositive order on the motion is entered. The Working Group's proposal was to present the two options to the Court so it can make a policy decision between them.

Mr. Ballard asked if, under the first approach, a district court would make its decision whether to toll the time for appeal before the 30 day deadline to file a notice of appeal expires. The committee agreed that it would.

Mr. Ballard questioned whether Rule 58A(f) should be amended to include a claim for costs as a basis to toll the time for appeal. Mr. Burke said that this language mirrors the federal rule, and that there is not a lot of case law addressing disputes over this provision.

Ms. Westby said she doesn't think there is a problem that needs to be fixed here, and that she agreed with Mr. Booher's view on this. She asked if the federal approach will create a situation where two appeals are filed a few months apart that will just end up being consolidated.

After additional discussion, Mr. Sabey noted that the committee seemed to be favoring the second proposal to leave Rules 58A and 4 alone.

Ms. Westby asked if the federal approach had something to do with the difference between federal and Utah law regarding the appealability of collateral orders. Mr. Burke asked if adopting the federal model would create a need for Utah courts to adopt a similar collateral order doctrine. Mr. Mouritsen said that he didn't think there was a connection there.

Mr. Mouritsen moved to present the two options to the Court, and recommend the second option of leaving Rules 58A and 4 alone. Judge Pohlman seconded the motion, and it passed unanimously.

**3. Discussion of comments to published amendments to Rules 46
And 49 and comment suggesting an amendment to Rule 47**

**Paul Burke
Clark Sabey**

The committee discussed several comments made by William Haines:

- 1) Proposed change to correct typo in Rule 23B
 - a. This change has already been made.
- 2) Proposal to add “or procedural rule” to line 19 of Rule 46
 - a. *Mr. Ballard moved to amend lines 19-20 of Rule 46 to read: “...constitutional provision, statute, or rule....” The committee felt that this change addressed the substance of the comment. Judge Pohlman seconded the motion and it passed unanimously.*
- 3) Proposal to keep the old subpart (3) in Rule 46 (referring to error correction as a potential bases for certiorari).
 - a. Mr. Sabey objected to this proposal. He explained that the amendment was made to signal that error correction is not a bases for granting certiorari in most cases. The change does not prevent the court from taking the rare case of error correction if it wants to. Keeping the old subpart (3) would invite petitioners to continue to base their petitions on error correction.
 - b. The committee agreed that the proposal to keep the old subpart (3) should be rejected.
- 4) Proposal to change ordering language in Rule 49 to allow practitioners flexibility in how they present the requested information
 - a. Mr. Sabey said he has no objection to this suggestion.
 - b. Mr. Burke appreciated the reference to the new revised Rule 24, he thought that was a good point.
 - c. Ms. Romano said the change would improve readability.
 - d. The committee discussed how best to reword the language of Rule 49 to accomplish the objective of the comment.
 - e. *Judge Pohlman moved to amend lines 46-50 of Rule 49 to read: “(a)(8) A statement of the case. The statement must indicate briefly the course of the proceedings and the disposition below. It must also include a statement of the facts relevant to the issues presented for review. All statements of fact and references to the proceedings below must be supported by citations to the record on appeal or to the opinion of the Court of Appeals.” Ms. Collins seconded the motion and it passed unanimously, except for Judge Orme who abstained.*
- 5) Proposal to change Rule 47(a)
 - a. Mr. Burke said he thinks this proposal is beyond the scope of the public comments at issue here. It is a proposal to change a rule that the committee has not proposed to amend.
 - b. Mr. Sabey agreed and suggested that the committee should discuss this suggestion at a later time.

The committee discussed whether to revise the punctuation separating subparts (1), (2), and (3) in Rule 46.

Mr. Ballard moved to amend lines 20, 23, and 27 by striking the periods at the end of the sentences, and replacing them with semicolons, and (per Judge Pohlman and Ms. Romano's suggestion) to add the word "or" on line 27 after the semicolon at the end of subpart (3). Ms. Taliaferro seconded the motion and it passed unanimously.

4. Update: Report on Supreme Court Conference action on Rules 23B, 25, 50 and 51 **Paul Burke**

Mr. Burke reported that Court accepted the committee's recommendations on Rules 23B, 25, 50, and 51. Mr. Burke thanked the committee for its work on those issues.

5. Other business

Judge Orme said that today's lunch was excellent (Greek from Roulas Café) and suggested that, budget permitting, the committee should order this for lunch every meeting.

Mr. Burke said there is a good chance that the December meeting will be canceled.

6. Adjourn

The meeting was adjourned. The next meeting will be held on January 3, 2018.