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, February 5, 2014
12:00 p.m. to 1:30 p.m.

PRESENT	**EXCUSED**
Rodney Parker – Acting Chair	Joan Watt – Chair
Alison Adams-Perlac – Staff	Bryan Pattison
Troy Booher	Anne Marie Taliaferro
Paul Burke	Mary Westby
Marian Decker	
Alan Mouritsen	
Judge Gregory Orme	
Bryan Pattison	
John Plimpton – Recording Secretary	
Bridget Romano	
Clark Sabey	
Lori Seppi	
Tim Shea	
Judge Fred Voros	

1. Welcome and Approval of Minutes **Rodney Parker**

Mr. Parker welcomed the committee to the meeting. He asked for any comments on the minutes from the previous meeting. Judge Voros said that on page 3, in the last sentence of the first full paragraph, "she or she" should be changed to "he or she." The other committee members agreed. Ms. Seppi said that on page 6, in the third sentence of the fourth paragraph, "he wants to Rule to provide" should be changed to "he wants the Rule to provide." The other committee members agreed.

Ms. Romano moved to approve the minutes from the meeting held on January 8, 2015, as amended. Mr. Burke seconded the motion and it passed unanimously.

2. Public Briefs **Tim Shea**

Mr. Shea said that the supreme court was approached by someone from the BYU law library about the public availability of briefs. He said that the library has been digitizing briefs and putting them online and demand for them has increased. He said that the supreme court directed the committee to form a workgroup to recommend policies regarding the public availability of briefs. He said that the workgroup's recommendation is that briefs are public because an appellate court is a public forum, so parties and appellate attorneys should be careful about what they say in briefs. He said that parties should ask for briefs that contain sensitive information to be classfiied as nonpublic.

Mr. Parker said that law libraries were worried about their potential liability for putting briefs online that may contain sensitive information. Mr. Shea said that some people were embarrassed about briefs in their cases, and other were worried about briefs being available in cases the record of which has been expunged. Mr. Shea said that the supreme court justices had no sympathy for people who were embarrassed by the briefs. But he said that there are other motivations for keeping briefs from being publicly available that merit consideration. He said that even if a conviction is expunged, that does not change history, and someone looking for information on an expunged case would probably be able to find it.

Mr. Shea said that the workgroup's recommendation is that briefs need to be public, and it should be a rare exception when they are not public. He said that there needs to be a procedure that countenances those rare exceptions, so that parties can have the briefs in their case classified as private or nonpublic on motion to the court.

Mr. Shea said that there are some conflicts on the public availability of briefs in the current law, both within court rules and within GRAMA. He said that the definition of a record in court rules and GRAMA is broad enough to cover three things: a piece of information, a document in which that information is written, and the file in which that document is filed. He said that all three of those things are records independently of one another. He said that the classification system identifies certain types of cases in which the files are necessarily nonpublic, such as adoption cases. He said that, the way that rule is written, it does not cover appellate briefs in those cases. He said that the rules are written in such a way that appellate briefs in nonpublic cases are typically public. He said that the workgroup agreed that this result accords with public policy, and appellate briefs should generally be public, even in cases with nonpublic files.

Mr. Shea said that the workgroup recommends a rule saying that briefs are public. He said that the rule should also say that the information contained in briefs is public. He said that this would make clear that courts have no obligation to redact information in briefs. Judge Voros asked whether the committee had already approved such a rule. Mr. Shea said that the committee is currently considering it. Judge Voros said that the rule under consideration says that records have the same designation on appeal that they had below, and that private information should be submitted in a sealed addendum. Ms. Adams-Perlac said that the proposed rule is Rule 21A, which went out for comment and returned to the committee, and there are some suggested changes the committee will consider after it deals with Rule 24.

Judge Orme asked whether there is a duty on the drafter of the brief to ensure that the brief does not contain sensitive information. Mr. Shea said that that is often the case, but sometimes an

appellate brief needs to contain sensitive information because such information is critical to the issues on appeal. Judge Orme said that parties should omit sensitive information from briefs when the information is not necessary to the appeal. He said that the courts should not be required to redact information in briefs.

Mr. Parker said that the proposed draft of Utah Code of Judicial Administration 4-202.09(9) gives the party filing a public record the burden of redacting nonpublic information or petitioning to classify the record as nonpublic. Mr. Shea said that with the approach in the proposed draft of Utah Code of Judicial Administration 4-202.09(9), the committee would not need the approach it was considering in proposed Rule 21A. He said that the Judicial Council has the statutory, and perhaps even constitutional, obligation to regulate records and access to them. He said that, accordingly, the Code of Judicial Administration is a better vehicle than the Rules of Appellate Procedure for addressing the public availability of appellate briefs. Mr. Parker said that housing the rule in the Code of Judicial Administration has the benefit of uniformity. Mr. Shea said that the Code of Judicial Administration already governs public availability of records, so those rules only need to be amended to achieve the desired result for appellate records, as opposed to creating a completely new rule of appellate procedure.

Mr. Shea said that all of the questions surrounding the public availability of records involve a balancing act, balancing the interests that favor public access against those that favor privacy. He said that the outcome often depends on the standard employed, whether common law or constitutional. He said that generally court records are governed by the constitution, and privacy under the constitution carries little weight, but privacy under the common law has a better chance of outweighing the interest in public access. He said that statutes and rules fall somewhere between the constitution and common law.

Mr. Shea said that the workgroup recommends a change to the certificate that the author is supposed to include with an appellate brief. He said he would require the author to certify that the information in the brief is public because the definition of a record is broad enough to include sensitive information contained in briefs. He said that he would require this certification because the court cannot bear the burden of combing through appellate filings to find and redact such information.

Mr. Booher asked what the consequences might be for an attorney who falsely certified that the information in the brief is public. He asked what entity, the courts or the bar, would be charged with enforcing such a certification, and what the remedy would be for a person whose nonpublic information was in the brief. Mr. Shea said that he did not know. He said that the person harmed by the inclusion of the sensitive information could move or petition to have the information removed or the brief classified as nonpublic. Mr. Parker said that the workgroup believed that those issues would arise right away, and there was not much sympathy for parties who did not address the issue quickly. He said that this is because once the case is adjudicated and the briefs are published by law libraries, there is nothing that can be done to alter the briefs at that point. Mr. Shea said that many attorneys do not realize how easy it is to get a brief these days.

Mr. Parker said he was concerned about the idea that a piece of information classified as private can become public simply by virtue of the fact that it is in a public brief. He asked whether the addendum to a brief should be thought of differently than the brief. Mr. Shea said he thinks so. He said that an addendum is principally for the trial court records, and if trial court records are not public at the trial level, they should not be public at the appellate level. He said that a private trial court record should be put in an addendum that is separate from a public brief. Judge Orme asked if proposed Rule 21A already required this. Mr. Shea said the committee had talked about it, but there was no express requirement in the proposal. He said the proposed Rule contained the principle that nonpublic information should be included in something separate from the brief, and that principle would apply to an addendum. Ms. Romano said that the proposed Rule 21A would require a redacted public brief and an unredacted nonpublic brief. She said that filing two briefs seemed redundant.

Mr. Shea said that, regarding the certification, he was not sure whether the better approach is to have the certification amount to consent by the author that the information contained in the brief is public, or to redefine private information as becoming public once it is in a public brief. He said that the committee should to resolve the problem that arises when a private piece of information is in a public document. Mr. Sabey said that the committee previously arrived at a solution where the author would need to redact nonpublic information from the brief. Mr. Sabey asked Mr. Shea if he was proposing the elimination of that redaction option. Mr. Shea said he would propose that it is the author's responsibility to write a brief that does not contain private information. Ms. Romano said that in some cases that is impossible. Mr. Sabey said that Mr. Shea's proposal would not solve the problem of lazy authors who, instead of omitting private information from their briefs, simply move to file their briefs under seal because they contain private information. Mr. Shea said that, under his approach, those authors would not be redacting, they would be omitting, because the information should not be in the briefs in the first place. Mr. Sabey said that having a redaction option would be a better solution because sometimes parties need to include sensitive information in briefs, and they should be able to redact that information for the publicly accessible version of the briefs. He said that if parties can only keep private information in briefs private by moving to file the brief under seal, the burden of keeping the information private will shift to the courts. He said that if parties are required to keep private information private by redacting it, then the burden will remain on the parties filing briefs, which is where it belongs. He said he does not understand what the problem is with the redaction solution. Mr. Shea said that he did not see his approach as eliminating the redaction option. He said he sees it as simply putting the obligation on the author of the brief to omit the information in the first place.

Mr. Parker asked the committee if there was agreement on the idea that briefs are presumed public, and the information in them becomes public by being included in the brief. Judge Voros said that, in proposed Code of Judicial Administration 4-202.09(9)(A), he was not sure what "accessible" means. He said that it is not a term of art, and it does not necessarily mean public. Mr. Shea said that accessible is a defined term of art that means someone can look at it and make a copy. Judge Voros asked how that is different than a public record. Mr. Shea said that every record is accessible, it is just a question of to whom. Judge Voros said that the word "accessible" really adds no information on that definition. Mr. Shea said that is correct.

Mr. Booher said that this raises an enormous question. He said he assumes that right now libraries only want to put briefs online after the decision has been issued. He said that with electronic filing, briefs will be online immediately after they are filed, before the other party has even read it.

Judge Voros said that there is a problem with a party certifying that information in a brief is public even though the law might provide otherwise. Mr. Parker said "acknowledge" might be a better word than "certify," because the intention was for persons filing briefs to acknowledge that the briefs are public documents and the information in them will be accessible to the public. Judge Voros asked whether a person filing a brief can just transform private information into public information by including it in a brief. Ms. Romano said that the language needs to be improved, and "certify" should be changed to "acknowledge." Judge Voros said he liked Mr. Sabey's solution that a person filing a brief has a duty to omit private information and if he or she cannot, then he needs to file a redacted version for the public. Mr. Sabey asked what the process for the court would be for a motion to classify an entire brief as private. He asked whether the court would need to review the brief line by line to determine whether to grant or deny the motion. He said that this would be an undue burden on the court.

Ms. Romano asked if briefs in certain types of cases, such as juvenile cases, could be classified as presumptively private. She said it is very hard to write a brief in such a case that does not contain private information. Mr. Shea said that there could be a rule that says briefs in appeals from juvenile court are private. Mr. Parker said there could be a rule that briefs in cases that are nonpublic at the trial level are nonpublic on the appellate level. He said that the workgroup did not take that approach because it was persuaded by the idea that briefs are an important part of what leads to an appellate decision. Mr. Booher added that the briefs are sometimes important to understanding appellate decisions, especially cursory ones. Mr. Parker said that the workgroup felt that the balance tipped in favor of making briefs public. He said that the committee needs to come to a consensus on how the balance should be struck.

Mr. Shea said that the reason for the language that private information in a public document is public was to address the conflict in the rules and statutes from having private information in a public record. He said that GRAMA was not written for documents that are filed in court cases. He said that filing two briefs instead of one would be a burden. He asked the committee what it wanted the rule to look like.

Mr. Booher asked if it would be possible to change GRAMA. Ms. Romano suggested that it would be practically impossible. Mr. Shea said that court rules are not in lockstep with the statutes. Judge Orme said that the courts have long believed that GRAMA does not govern the judiciary. Ms. Romano said that trial courts can release records that are otherwise classified under GRAMA.

Ms. Seppi said she would like to compare the proposed Rule 21A to the proposed changes to the Code of Judicial Administration. She said she liked the redaction option in Rule 21A. Mr. Parker said that he agreed. He said that maybe the workgroup should reconvene to review proposed Rule 21A and draft amendments that accommodate the interests addressed by that proposal. He said that the burden of removing nonpublic information should be on the author of the brief, and that briefs should be presumptively public.

Mr. Burke asked what the remedy would be for the opposing party who disagrees with the inclusion of information in a brief. Mr. Booher said that is a problem. He said a subspecies of litigation should be avoided, but he said that there should be a remedy for an opposing party whose private information is made public in an appellate brief. Ms. Adams-Perlac said that under GRAMA disclosing private information is a class B misdemeanor. Mr. Burke said that makes him want to retire from the practice of law. Mr. Parker said that the committee would not be able to define remedies, that will be up to the legislature or the courts.

Ms. Romano asked Mr. Parker if the workgroup looked at bankruptcy rules as a potential model, because bankruptcy cases involve so much private information. Mr. Shea said he did not know how the federal courts handled sensitive information.

Judge Voros said that Ryan Tenney raised a question about closed oral arguments. Ms. Adams-Perlac said that the committee is slated to discuss oral arguments in the future. Judge Voros said that perhaps the workgroup should consider addressing privacy concerns in oral argument, as well. Mr. Shea said he did not think that would be appropriate for this workgroup.

Mr. Shea said that the standard is typically much higher for closing a hearing than a record. He said that the reason is that if a mistake is made in trying to close a hearing, there is no remedy for the mistake. Judge Voros said that the recording of a hearing is a record, so it might be appropriate for the workgroup to address oral arguments. Mr. Shea said that the balancing of interests is very much the same, but that he did not think oral arguments would be an appropriate topic for this workgroup.

The committee did not take any action on the classification of briefs.

3. Rule 24 **Troy Booher**

Mr. Parker said that, at this meeting, the committee should only discuss the issue of the introduction and the contention statements. Judge Voros said he was persuaded by Jeff Gray that issue statements, preservation, and standards of review should be in the front of the brief, not in the argument section. Mr. Parker said he agreed. He said that whoever wrote the current Rule 24 put some thought into the issues the committee is grappling with.

Ms. Romano suggested a statement of intent for Rule 24, which would say that the intention of the Rule and the purpose of the brief is to advocate and be geared toward concision, that the issue statements should be sufficient to clue the court and the parties into what in fact is at issue, that the introduction should serve its immediate purpose of orienting the reader to the case. She said that such a statement of intent would help guide practitioners who are inexperienced at writing appellate briefs. She asked if the committee could consider a statement of intent communicating these ideas. Ms. Decker said that the Rule will not make people better writers. Mr. Parker agreed. Mr. Sabey said the best way to improve writing is to provide examples of good writing, but he did not know how to do that in a rule.

Judge Orme said that he found a draft of an advisory committee note he prepared in 2013 regarding an introduction and he read it to the committee. He said that the draft contained an example of a good introduction. Mr. Parker said the section of Rule 24 requiring an introduction should describe the introduction as a succinct statement of the nature of the case which provides a brief explanation of the nature of the case, for the purpose of orienting the reader as to the general context in which the appeal arises. He said that Judge Orme's draft could be included in the advisory committee note to Rule 24. He asked how the committee feels about that as a starting point. Judge Voros said it was a good starting point.

Mr. Burke said that the committee should decide on the scope of the introduction first. He said that there were two competing models, one a short orienting statement and the other more of a summary of the argument. Judge Voros said he was persuaded that a summary of the argument should not be in the introduction. Mr. Parker said that the introduction requirement would replace the part of the Rule that refers to the statement of the nature of the case. The committee agreed. Mr. Booher said that the committee already approved many of the proposed changes to Rule 24 back in 2013, including that the introduction would replace the nature of the case. Mr. Parker asked the committee if it could agree that the introduction should not include a summary of the argument. Mr. Booher said he would oppose a rule saying that the introduction could not include a summary of the argument. Ms. Decker said there needs to be flexibility to include a summary of the argument in the introduction. She said that she still supports keeping a summary of the argument section that comes after the fact section.

Ms. Romano proposed repealing and replacing Rule 24 instead of amending it because the committee seems stuck with the order that the current Rule 24 imposes. Judge Voros said that the committee had strayed from the current Rule and is now moving back towards the current Rule. Ms. Decker said that the committee is realizing the merits of the current Rule. Mr. Sabey said that his impression was that the judges wanted more of a repeal and replace. Judge Voros said the judges did not provide much feedback on Rule 24. Mr. Burke and Mr. Booher disagreed. They said there was a lot of feedback from the judges.

Mr. Booher said that the requirements of Rule 24 should be based on how judges want briefs to be organized. Ms. Decker said that lawyers should be allowed some flexibility to be persuasive. Mr. Parker asked the committee how the introduction should be described. Ms. Seppi said that instead of trying to legislate good brief writing, the description of the introduction should allow for a longer introduction or a shorter introduction depending on the case. Mr. Booher said that he did not have a problem with the proposed language describing an introduction, but he did not like Judge Orme's example of a short introduction because it could be taken to preclude a longer introduction including a summary of the argument. Ms. Seppi said that the rule should allow for flexibility in crafting an introduction.

The committee revised the draft of amended Rule 24(b)(4) to read as follows:

> (b)(4) Introduction. A succinct statement of the nature of the case, intended to provide a brief explanation of the case for the purpose of orienting the reader as to the general context in which the appeal arises.

Mr. Booher addressed Justice Lee's criticism of the draft of Rule 24(a) and the corresponding advisory committee note. Justice Lee had suggested that the draft should be revised to the extent it says that petitioners and respondents should be referred to as "appellants" and "appellees." Mr. Booher said that once certiorari has been granted, "appellant" and "appellee" are the correct terms. Judge Voros said that the purpose of the Rule 24(a) is to make clear that it applies to petitioners and respondents in the same way it applies to appellants and appellees, but the way the Rule is written could lead to confusion. He agreed to draft a revision to Rule 24(a) that clears up the potential confusion.

Mr. Booher asked the committee if it wanted him to revise the draft of amended Rule 24 to move the issue statements, preservation, and standard or review sections back to where they are in the current Rule. The committee wanted the revision.

The committee did not take any action on Rule 24.

4. Rule 24 and *State v. Nielsen*; Rule 27

The committee did not discuss Rule 24 and *State v. Nielsen* or Rule 27.

5. Other Business

There was no other business discussed at the meeting.

6. Adjourn

The meeting was adjourned at 1:33 p.m. The next meeting will be held Thursday, March 5, 2015.