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, January 8, 2014
12:00 p.m. to 1:30 p.m.

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

1. Welcome and Approval of Minutes **Joan Watt**

Ms. Watt welcomed the committee to the meeting. She asked for any comments on the minutes from the previous meeting. Ms. Seppi said that on page 6, points 4, 5, and 6 should combined. The other committee members agreed. Mr. Parker said that on page 2, in point 3, "The committee amended Rule 9 to read as follows" should be changed to "The committee proposed that Rule 9 be amended to read as follows." The other committee members agreed.

Ms. Romano moved to approve the minutes from the meeting held on November 6, 2014, as amended. Mr. Parker seconded the motion and it passed unanimously.

2. Rule 24 **Troy Booher**

Ms. Decker introduced Jeff Gray, an attorney with the criminal appeals division of the Attorney General's office (AG), who was present at the meeting to voice the AG's concerns about the proposed amendments to Rule 24. Ms. Decker said that Mr. Gray was the AG's foremost expert on appellate brief readability, including font and typography.

Mr. Gray began with what the AG likes about the proposed amendments. He said that the AG likes the elimination of the jurisdictional statement and the relevant provisions. He said he does not think too many people, including judges, read those sections. He said most jurisdictional matters are handled with the docketing statement, and if jurisdiction is an issue on appeal, it is going to be in the argument section.

Mr. Gray said that the AG is concerned that the introduction requires too much. He pointed to the *Clopten* brief that Mr. Booher revised to comply with the proposed amendments. Mr. Gray said he thought the original briefs, which were filed under the current version of Rule 24, were easier to read. He said that the introduction in the revised *Clopten* brief was too long and included too much information. He said that the AG likes the idea of having an introduction in most cases, but it should not be a requirement for all cases. He said that the Rule should permit, but not require, an introduction. He said the Rule should state that the purpose of the introduction is to explain what the brief is about and give context to the issues.

Mr. Gray and Ms. Decker said that the AG would like to keep the argument summary section. Ms. Decker said that the argument summary should come after the fact section because the reader needs factual context for the summary to make sense. She said that including the summary in the introduction untethers it from important factual context and makes it more difficult to follow. Mr. Gray said that the introduction should not include the argument summary because it would make introductions too long.

Ms. Romano said that changing Rule 24 will not necessarily make for better brief writing. She said that every aspect of brief writing should be aimed toward advocating and concision. She said that she was convinced from reading the sample briefs that long introductions with an argument summary will not save the readers any time.

Ms. Watt agreed with the idea that an introduction should be a short introduction to the case. She said that the problem is how to articulate a rule that adequately describes what an introduction should be.

Mr. Gray went on to discuss the proposed requirements for the argument section. He said that some of the requirements detract from the ability to advocate. He said that the proposal is to have a contention statement, a preservation statement, and a standard of review for each issue before the argument even begins. He said the AG would like to keep the issue statement as it is in the current version of the Rule. He said that the contention statement is appellant-oriented.

Judge Voros asked if having the contention statement, a preservation statement, and a standard of review in the argument section makes advocates feel like they are stuck taking care of housekeeping when they should be diving into their arguments. Mr. Gray and Ms. Decker said yes. Ms. Decker said the AG would like to keep the statement of the issues, preservation, and standard of review as they are in the current Rule.

Judge Voros said that, as a judge, he has found himself skipping the issue statements and just reading the tables of contents to discern the issues in the case. He said that the issue statements are really just contentions phrased in the form of a question, so having them is not very helpful. He asked Mr. Gray if he thought requiring contention statements was appellant-oriented. Mr. Gray read the proposed Rule's definition of contention statement, which is "a statement of error that the appellant contends warrants relief on appeal." Mr. Gray said the proposed Rule only requires the appellee to state whether he or she disagrees with the appellant's contention statement.

Mr. Gray said that the proposed Rule appears to put the standard of review in the argument section because there is nowhere else to put it. Judge Voros said that the point of putting the standard of review in the argument section is to try to get the parties to view the issue through the lens of the standard of review. Ms. Romano said she agreed with Judge Voros. Judge Voros said that appellants forget that they need to view the issues through the standard of review when the standard of review is early in the brief. Ms. Romano said that the 10th Circuit requires the standard of review in the argument section and she likes it that way because it forces parties to write to the standard of review. Ms. Decker said that a party who is going to ignore the standard of review is going to do it no matter where the Rule requires it to be in the brief. Mr. Gray agreed.

Judge Voros asked which other committee members practice in the 10th Circuit, and he asked them if they think including the standard of review in the argument section makes a difference. Ms. Taliaferro said she practices in the 10th Circuit and that having the standard of review in the argument section does not make much of a difference. Mr. Parker agreed with Ms. Taliaferro.

Mr. Parker said that the primary issue with brief organization is just a question of knowing where to find the different parts. He said the difference between the current Rule 24 and the 10th Circuit's rule regarding the placement of the standard of review do not make much of a difference other than knowing where to find the standard of review. He said it is less a question of readability than locatability. Ms. Taliaferro said it is beneficial as an advocate to be able to start your argument right when you get to the argument section. Ms. Decker added that having information such as preservation and standard of review in the beginning of the brief makes it easy to locate.

Judge Voros said that it is not uncommon to get a brief and not be able to understand what the case is about before reading far into the brief. He said that this problem might be fixed with an introduction.

Ms. Watt said the Rule should require a concise introduction. She said that she agrees with Mr. Gray that the introductions in the sample briefs were too long and included too much. She said that the introduction needs to communicate what the case is about, but no more, so it orients the

reader and gives an idea of what to expect in the brief. Judge Orme said the introduction should be very generalized.

Mr. Booher said that, in subcommittee, Justice Lee said that if he were in practice again, he would never file another document that did not have an introduction. He said that the proposed Rule was largely motivated by a desire to reduce redundancy. He said that the average brief writer will probably be redundant in the introduction, the argument summary, and the nature of the case, so the subcommittee decided to eliminate the summary and nature of the case in favor of the introduction.

Ms. Romano said the point of an introduction is to orient the reader to the case while the reader's attention is fresh, and that point is defeated if the introduction includes an argument summary because then the introduction is too lengthy. Ms. Watt agreed, but she said the difficulty is formulating a rule that provides for a concise introduction and an argument summary and reduces redundancy. Mr. Gray said the Rule could require that the introduction not be argumentative. Several committee members said they did not think such a provision would be effective.

Judge Voros said that he would like an introduction that is a neutral orientation. Judge Orme said that the proposed Rule requires much more in the introduction than when the subcommittee initially discussed the amending the Rule. He said that the subcommittee initially preferred an introduction that was about five sentences long that generally orients the reader to the type of case and the issues on appeal.

Mr. Booher said that the subcommittee had passed around samples of much longer introductions, some of them three or four pages, that were met with approval. Mr. Burke agreed.

Mr. Gray said that the committee cannot legislate good writing, and that some attorneys will write briefs that are very readable and others will not, no matter how Rule 24 is written. Ms. Watt added that many appellate judges read briefs and all of them have idiosyncratic preferences for them. She said that the goal is to devise a general rule that helps attorneys advocate and helps judges read the briefs. Mr. Gray questioned whether contention statements would be more helpful than issue statements. Ms. Watt said she prefers issue statements because they are helpful in framing the case. She said she is satisfied with the current Rule's placement of preservation, issue statement, and standard of review, but the Rule should provide for an adequately circumscribed introduction. She said that the jurisdiction statement and relevant provisions should be eliminated. She said she thinks the Rule should provide for both an introduction and an argument summary, but she is not sure how to articulate that in a rule that also reduces redundancy. She said that an introduction should be very short.

Mr. Gray said that introduction is supposed to set readers up to understand what the issues are when they read the issues; it is supposed to provide background to understand the brief. Mr. Parker said the argument summary should come after the fact section so the reader has factual context.

Judge Voros said it would be difficult for the Rule to provide for optional introductions. He said there seem to be three choices: short introduction and argument summary, long introduction and

no argument summary, or long introduction and summary. Mr. Parker said he would prefer a short introduction and summary. He said he thought the current Rule was originally intended to provide for an introduction in the nature of the case section, but it has not worked out that way.

Ms. Westby said that the two words she has been hearing repeatedly are orientation and context. She said the Rule should require a short introduction that explains the case and orients or gives context to the reader. She said the Rule needs to make clear that the introduction should orient the reader and provide enough factual context for the brief to make sense as the reader continues.

Mr. Booher said that most appellate judges do not read briefs in the order that the current Rule provides. He said that, as a writer, that is frustrating because one does not know where the judge is starting in the brief. He said that that leads to redundancy. He said that requiring an introduction will help give attorneys confidence that the judge is starting the brief at the beginning, which will allow attorneys to craft their briefs in a more effective, less redundant way.

Mr. Sabey said that he thinks the committee needs to dispense with the idea that the introduction is a summary of the argument. He said that, as staff attorney at the Utah Supreme Court, he has been writing introductions that are typically one paragraph in length. Judge Orme said that the Rule could require an introduction not exceeding one paragraph in length, providing general orientation. Ms. Decker said the Rule needs to be more flexible than that.

Mr. Burke asked if there was a consensus among appellate judges on how they have their bench briefs prepared. Judge Voros said he does not have bench briefs prepared.

Judge Voros said that not infrequently in civil cases, the appellant's brief will be so focused on what the trial court got wrong that it will not say what type of case it is. He also said that the procedural history will include proceedings that are not relevant to the issue on appeal. Mr. Gray asked if revising the Rule would fix this problem. Ms. Watt said that the challenge will be to draft a rule that addresses all of the major concerns.

Judge Voros asked Mr. Gray if he has a problem with framing the issue as a contention rather than a question. Mr. Gray said he did not know if there would be a problem with it. Ms. Watt said that stating the issue as a "whether" statement gives attorneys the opportunity to frame the issue. Mr. Gray added that in the opinion the appellate court will frame the issue as a question or a "whether" statement. Judge Voros disagreed. He said that he expects the issue to be what the appellant tells him it is, and he expects the appellant to tell him that the trial court erred in some way. Judge Voros said that oftentimes appellants do not realize that they have a burden on appeal, and he would like the Rule to signal to appellants that they have a burden.

Judge Orme returned to the issue of the introduction. He said he would like the Rule to require a very succinct introduction that provides overview and context. He said that that would provide judges with a filter with which to read briefs, so they would know what is important and what is not. Judge Voros added that he would like the Rule to signal to attorneys that the introduction should be neutral.

Mr. Gray addressed fonts. He said that the Rule should permit readable fonts. He said that Book Antiqua is not the only readable font. He said the Rule should not require certain fonts, but perhaps it should forbid certain fonts. He said that Garamond is a not a very readable font. Judge Orme said Arial was a nice font.

Mr. Gray said the research shows that sans serif fonts are more easily read on a screen, but serif fonts are easier to read in print. Mr. Gray said that the AG recommends that the Rule not require certain fonts, but it should forbid unreadable fonts. Ms. Watt said the Rule could be framed in terms of readability.

Mr. Gray addressed typography. He said that double-spaced is actually harder to read than single-spaced because it is harder for the eye to move from one line to the next. He said that single-spaced with two-inch margins is easier to read and uses less paper than double-spaced with one-inch margins. Judge Orme noted that Utah appellate opinions are published single-spaced with two-inch margins. Mr. Gray recommended that the appellate courts suspend the Rule for certain groups so they could see which typographical format they prefer.

Mr. Booher said that he wants the Rule to reflect what judges want. Mr. Burke said he wants the Rule to specifically state what fonts are acceptable, rather than provide a vague standard like "readable." He said his word processor has forty fonts, and he wants the Rule to provide a list of approved fonts. Mr. Gray said as long as the list includes Book Antiqua, he is fine with it.

Judge Voros said it is expected that within a year, all filing will be electronic. He said that means that Judges will then be reading briefs on screens more often. Judge Orme said that reading on a screen is easier with single-spacing and two-inch margins.

Ms. Watt said that the committee should be ready to discuss Rule 24 more at the next meeting. She said she would be interested to know more about judges' preferences about font and typography. Mr. Shea said that the readability of a font partly depends on its size. Ms. Watt said that the Rule should contemplate the transition to efiling. Mr. Shea said there will need to be some level of acceptance of the fact that it is impossible to satisfy everyone. Mr. Booher said the proposed amendments are the result of conversations with judges about their preferences. Judge Voros said that he, Judge Orme, and Justice Lee are the appellate judges who have the strongest opinions about font and typography.

The committee did not take any action on Rule 24.

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

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

4. Other Business

There was no other business discussed at the meeting.

5. Adjourn

The meeting was adjourned at 1:24 p.m. The next meeting will be held Thursday, February 5, 2015.