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 9, 2014
12:00 p.m. to 1:30 p.m.

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

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

Ms. Watt welcomed the committee to the meeting. The committee discussed the minutes from the previous meeting. Judge Voros stated that "Bridget" on page 5 should be changed to "Ms. Romano."

Judge Voros moved to approve the minutes from the January 9, 2014 meeting as amended. Ms. Decker seconded the motion and it passed unanimously.

2. Rules without Public Comment **Joan Watt**

The committee discussed whether rules that have been in the public comment period should come back to the committee even when no comments have been made. Judge Voros stated that the proposals should come back to the committee. He said that they could be sent around by email. Mr. Booher stated that reviewing these proposals would allow the committee to consider whether there

are other proposals for the committee's consideration that might be impacted by the proposal. The committee agreed that such proposals should come back to the committee so that the committee can give final approval prior to sending them to the Supreme Court.

In the future, Ms. Adams-Perlac will distribute proposals that have not received public comment to the committee by email. If committee members think there is an issue, they can request that the proposal be put on the next meeting's agenda for more in-depth discussion. If no concerns are raised, the proposals will be forwarded to the Supreme Court for its consideration.

3. Public Comment to Rule 9 **Joan Watt**

Two public comments were made to rule 9 as follows:

> Deletion of the language in (f) -- that an issue not listed in the docketing statement may nevertheless be raised in appellant's opening brief -- is helpful in efforts to mediate. The appellee is given a better sense of what issues are actually being appealed at time of mediation.
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> Posted by Jon V. Harper December 18, 2013 03:10 PM
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> Where jurisdiction is addressed thoroughly in the docketing statement, the committee should consider eliminating the requirement of Rule 24(a)(4) that jurisdiction be revisited in the briefs.
>
> Posted by Leslie Slaugh November 1, 2013 09:33 AM

Judge Voros stated that Leslie Slaugh's comment is worth keeping in mind. Ms. Watt agreed, especially with regard to the word count issue. Judge Voros stated that he thinks it is a holdover, borrowed from the U.S. Supreme Court rule. He stated that jurisdiction is dealt with at the docketing statement stage. Ms. Watt stated that jurisdiction is either confirmed at that stage, or if jurisdiction is an issue, it will be briefed.

Judge Voros stated that he would suggest rethinking the brief format as a whole as a topic for the Appellate Judge Conference. He stated that Mr. Booher and Mr. Burke might want to consider looking at the brief format as part of the global rules revision.

Ms. Watt stated that the other public comment was positive. Judge Voros stated that he would like someone to review the proposal, read every word of all of them, and make sure that there are no typos, and that the committee did not say something they did not mean to say.

Mr. Shea stated that line 9 "serve a copy if required" is confusing. Mr. Parker suggested changing the language to "serve a copy, with any required attachments". Mr. Shea asked whether on line 25, the committee intended to limit it to the district court. He stated that the juvenile court is civil in nature, but the rule does not include the juvenile court. Mr. Sabey asked whether rule 9 applies to juvenile court. Ms. Westby stated that it would apply for delinquency cases, but not for child welfare cases. Mr. Shea stated that on line 161 there are consequences if a party is represented and other consequences if a party is not represented. Judge Voros stated that ordinarily the sanction

would be dismissal, but the committee was hesitant to dismiss a case if the real problem was that criminal defense counsel was not doing his or her job. If a criminal defense attorney does not file a docketing statement, the Court needs other options.

Ms. Romano moved to approve the proposal on rule 9 as amended, and to send it to the Supreme Court for its approval. Ms. Seppi seconded the motion and it passed unanimously.

Ms. Adams-Perlac will review each proposal when they are no longer in legislative format, to make sure that they say what the committee has intended, and that there are no typographical errors.

4. Rule 24(f) Mary Westby

Mr. Sabey discussed changes to rule 24(f). Mr. Sabey stated that the proposal came about as a concern expressed by the Supreme Court that proceedings before the appellate courts are presumed public, and there is a strong public interest in that transparency, but the practice of sealing briefs has been over-utilized. There may be cases where a portion of the argument or isolated references that are properly deemed to be non-public, but there is no reason to deem the rest of the brief to be non-public.

Mr. Sabey stated that he and Ms. Westby determined that the solution was to require the parties to provide a redacted copy of the brief for public availability. The proposal is a brand new subsection. Ms. Westby stated that it made sense to her to place it at (f), and move the other subsections down. Mr. Sabey stated that the Supreme Court also requested that parties be required to certify that the protected status designated in the court below is still maintained on appeal. Mr. Sabey said it may make sense to put it under rule 11. He stated that the appellate courts typically have adopted whatever status has been assigned below.

Ms. Romano stated that simply redacting information to protect an individual may not be as simple as redacting the name, since in context, the individual's identity may be clear. Mr. Booher asked if the presumption the proposal is talking about refers to all papers filed in the appellate courts. He said if all papers are presumptively valid, there should be a separate rule that explains that parties should use the least restrictive approach, and provide examples, and refer back to (24)(f) for how to handle the non-public information. Judge Voros stated that the rule should be narrowly tailored.

Mr. Booher stated that the intent to require only one redacted copy is not clear until (f)(2). Ms. Westby stated that briefs are the biggest issue, because they are kept in the library for public review. Mr. Booher stated that once we move to the electronic record, all records will be more available to the public.

Judge Voros asked whether the committee can give examples of what types of information are non-public. Mr. Shea stated that the concept of the proposal is sound. He stated that classification of records applies only to records. He stated that the document and the information in the document are classified. He stated that most of the records will be the trial court record on appeal and they will already be classified based on what the trial court did. He stated that there is already a provision that records from the trial court that are not public shall be bound in a separate addendum. He stated if the committee is going to classify the brief itself, the committee should consider why a public brief with a non-public addendum, or a redacted brief does not satisfy the privacy interests that need to be protected. Only when you get to it as the only alternative, do you classify a brief as something other than public. The issue may arise with records other than briefs, so it may be better to have the rule apply generally, rather than just to briefs.

Judge Orme stated that we should use the least restrictive alternative, but that we want the rule to be automatic and in broad categories, so that the appellate court and staff do not need to spend a lot of time making these determinations. Mr. Parker asked whether the federal rule might be considered in crafting a rule. Mr. Shea stated that the Court already has rules classifying records. If we want to classify briefs or other appellate record document as something other than public, we need to specify whether it is private, safe-guarded, etc. He stated that private would likely be adequate for all appellate records, since the parties can see them, but the public cannot.

Judge Voros suggested that Mr. Shea redraft the proposal. Ms. Watt stated that the proposal gets at the concerns Mr. Shea is expressing, but the way it is set up, it is almost backwards. If someone reads the first sentence, they may file a motion to seal the brief. She suggested working backwards. She stated that the concept is sound. Mr. Shea agreed.

Mr. Booher stated that the federal appellate courts in federal rule 25(a)(5) piggyback on what has happened before. All privacy protections governed by rules of criminal procedure, etc. are governed by those on appeal. Mr. Shea stated that the current Utah rules are similar. If a record is private at the district court level, it will be private on appeal. Judge Voros stated could a rule like the federal rule apply so that you could not put anything in the brief that is private. Ms. Watt stated that it would be very difficult to do this because some protected information is relevant to the issues on appeal. The committee agreed that the federal approach does not work in that caes.

Mr. Booher stated that there are two issues: 1) which documents are public and which are non-public, and we can use the current rules for this, and 2) how do you write a brief in the appellate court when you are relying on information that is non-public. He stated that the proposal seems more like practical suggestions of how to accomplish something, rather than determining what is public and non-public, which has already been done.

Mr. Sabey stated that this is a two-level problem. Typically, a party will have an addendum which has some sort of non-public classification, so the party will file the brief as non-public. This is solved by allowing parties to file a non-public addendum. The second piece is how to deal with information in the brief that is non-public. Ms. Watt stated that the proposal should extend beyond briefs, since non-public information may need to be discussed in these documents.

Ms. Westby asked where the rule should be located. She asked whether all of these issues should be addressed in one confidentiality rule, but that all of the other rules, e.g. 5 and 24, should reference the confidentiality rule. Mr. Sabey stated that what Ms. Westby has proposed is a good starting point, but suggested that it may need to be restructured and placed in another location.

Ms. Westby, Mr. Shea, and Ms. Adams-Perlac will revise the proposal for the committee's review at the next meeting. The committee will consider where the rule should be referenced in the other rules after approving the confidentiality rule.

5. Rule 5 **Mary Westby**

Ms. Westby discussed a proposal to revise rule 5. She stated there was clean-up to do with the rule. Ms. Romano stated that this was based on her proposal to revise the rule. The committee reviewed the proposal and amended the rule to read as follows:

> (a) Petition for permission to appeal. An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the

case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action. A timely appeal from an order certified under Rule 54(b), Utah Rules of Civil Procedure, that the appellate court determines is not final may, in the discretion of the appellate court, be considered by the appellate court as a petition for permission to appeal an interlocutory order. The appellate court may direct the appellant to file a petition that conforms to the requirements of paragraph (c) of this rule.

(b) Fees and copies of petition. For a petition presented to the Supreme Court, the petitioner shall file with the Clerk of the Supreme Court an original and five copies of the petition, together with the fee required by statute. For a petition presented to the Court of Appeals, the petitioner shall file with the Clerk of the Court of Appeals an original and four copies of the petition, together with the fee required by statute. The petitioner shall serve the petition on the opposing party and notice of the filing of the petition on the trial court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition, to the trial court where the petition and order shall be filed in lieu of a notice of appeal.

(c) Content of petition.

(c)(1) The petition shall contain:

(c)(1)(A) A concise statement of facts material to a consideration of the issue presented and the order sought to be reviewed;

(c)(1)(B) The issue presented expressed in the terms and circumstances of the case but without unnecessary detail, and a demonstration that the issue was preserved in the trial court. Petitioner must state the applicable standard of appellate review and cite supporting authority;

(c)(1)(C) A statement of the reasons why an immediate interlocutory appeal should be permitted, including a concise analysis of the statutes, rules or cases believed to be determinative of the issue stated; and

(c)(1)(D) A statement of the reason why the appeal may materially advance the termination of the litigation.

(c)(2) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the phrase "Subject to assignment to the Court of Appeals" shall appear immediately under the title of the document, i.e. Petition for Permission to Appeal. Appellant may then set forth in the petition a concise statement why the Supreme Court should decide the case ~~in light of the relevant factors listed in Rule 9(c)(9)~~.

(c)(3) The petitioner shall attach a copy of the order of the trial court from which an appeal is sought and any related findings of fact and conclusions of law and opinion. Other documents that may be relevant to determining whether to

grant permission to appeal may be referenced by identifying trial court docket entries of the documents.

(d) Page limitation. A petition for permission to appeal shall not exceed 20 pages, excluding table of contents, if any, and the addenda.

(e) Service in criminal and juvenile delinquency cases. Any petition filed by a defendant in a criminal case originally charged as a felony or by a juvenile in a delinquency proceeding shall be served on the Criminal Appeals Division of the Office of the Utah Attorney General.

(~~e~~f) ~~Answer~~Response; no reply. No response to a petition for permission to appeal will be received unless requested by the court. Within 10 days after an order requesting a response~~service of the petition~~, any other party may oppose or concur with the petition. ~~file an answer in opposition or concurrence. If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the answer may contain a concise response to the petitioner's contentions under Rule 5(c) .~~ Any response to a petition for permission to appeal shall be subject to the same page limitation set out in subsection (d). An original and five copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The respondent shall serve the ~~answer~~response on the petitioner. The petition and any ~~answer~~response shall be submitted without oral argument unless otherwise ordered. No reply in support of a petition for permission to appeal shall be permitted, unless requested. No petition will be granted in the absence of a request for a response.

(~~f~~g) Grant of permission. An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. The clerk of the appellate court shall immediately give the parties and trial court notice by mail or by electronic service of any order granting or denying the petition. If the petition is granted, the appeal shall be deemed to have been filed and docketed by the granting of the petition. All proceedings subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments except that no docketing statement shall be filed under Rule 9 unless the court otherwise orders, and no cross-appeal may be filed under rule 4(d).

(~~g~~h) Stays pending interlocutory review. The appellate court will not consider an application for a stay pending disposition of an interlocutory appeal until the petitioner has filed a petition for interlocutory appeal.

(i) Cross-petitions not permitted. A cross-petition for permission to appeal a non-final order is not permitted by this rule. All parties seeking to appeal from an interlocutory order must comply with subsection (a) of this rule.

Mr. Sabey moved to approve the proposal as amended. Mr. Booher seconded the motion and it passed unanimously.

6. Rule 37(b) Joan Watt

Ms. Watt discussed rule 37(b). She stated that in a criminal case, when all of the issues are moot, court-appointed counsel are required to obtain an affidavit from their client saying that the issues are moot and that they intend to waive their right to appeal. Ms. Watt stated that it is difficult to obtain these affidavits, and so there are cases that go forward, despite being moot, because there is no affidavit.

Ms. Westby suggested that the rule be amended as follows:

> (b) Voluntary dismissal. At any time prior to the issuance of a decision an appellant may move to voluntarily dismiss an appeal or other proceeding. If all parties to an appeal or other proceeding agree that dismissal is appropriate, a stipulation to that effect shall be filed with the motion for voluntary dismissal. Any such stipulation shall specify the terms as to payment of costs, if applicable, and provide for payment of whatever fees are due.
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> (c) If appellant has the right to effective assistance of counsel, a motion to dismiss for reasons other than mootness shall be accompanied by appellant's personal affidavit demonstrating that appellant's decision to dismiss the appeal is voluntary and made with knowledge of the right to an appeal and an understanding of the consequences of voluntary dismissal.
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> (~~c~~d) A suggestion of mootness or motion for voluntary dismissal shall be subject to the appellate court's approval.

Ms. Romano asked whether the rule should be modified to require an attorney to certify the issues as moot. Judge Orme suggested that there be a requirement to explain why the issues are moot. Ms. Watt stated her concerns about explaining why the issues are moot. Mr. Sabey stated that appellate court staff is very careful to make sure that mootness has been established in the motion.

Mr. Booher moved to approve the proposal as amended. Ms. Romano seconded the motion and it passed unanimously.

7. Global Review of Rules Troy Booher

Rule 5 was approved earlier in the meeting. Mr. Booher discussed rule 19. The proposal is amended to change references to 8A to 23C in line with renumbering rule 8A to 23C.

Judge Voros moved to approve the proposal to amend rule 19. Ms. Westby seconded the motion and it passed unanimously.

Judge Voros expressed concern with the language of 23(c) stating "the court shall not postpone action…" He stated that rules do not typically place restrictions or requirements on the courts. Mr. Sabey suggested changing the language from "shall" to "need not".

Rule 23 was amended as follows:

(b) *Response*. Any party may file a response ~~in opposition~~ to a motion within 10 days after service of the motion; however, the court may, for good cause shown, dispense with, shorten or extend the time for responding to any motion.

(c) *Reply*. The moving party may file a reply only to answer new matter raised in the response. A reply, if any, may be filed no later than 5 days after service of the response, but the court may rule on the motion without awaiting a reply. ~~The court shall not postpone action on the motion to await the reply.~~

Judge Voros moved to approve the proposal as amended. Judge Orme seconded the motion, and it passed unanimously.

Mr. Booher discussed the proposal to amend 24(k). He stated that this proposal is meant to address *Broderick*. Rule 24(k) appeared to be written in a way that suggested the things the court could do to address an inadequate brief, and suggesting that there were no other actions the court could take. He stated that the rule should advise attorneys that there are more consequences than just those listed. Judge Orme stated that the committee does not want to tie the court's hands, but wants to make parties aware that the court has a range of options if a brief is inadequate.

Mr. Shea stated that the rules are used to codify law, but they can be used to change the law. He suggested giving the court the opportunity to recognize its mistake and state that when a brief is inadequate, there are certain options. Ms. Romano stated that the Supreme Court will need to review the rule. Mr. Shea stated that the committee could propose an amendment and take it to the Supreme Court prior to public comment.

Judge Orme stated that the rule should reflect what the committee thinks is best practices, and *Broderick* should then be addressed in the committee note even to call attention to the fact that *Broderick* suggests that there may be additional sanctions. The note should point out conflict with the case law. Judge Voros asked whether *Broderick* has spawned any progeny. The committee suggested that it has not.

Ms. Watt suggested that the committee consider what to do about 24(k) and discuss it at the next meeting. Mr. Booher will consider whether the proposal should be amended.

8. Other Business

There was no other business discussed at the meeting.

9. Adjourn

The meeting was adjourned at 1:40 p.m. The next meeting will be held Thursday, March 6, 2014.