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, March 5, 2015
12:00 p.m. to 1:30 p.m.

PRESENT	**EXCUSED**
Joan Watt – Chair	Bridget Romano
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	
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. Decker pointed out that on page 2, in the fourth sentence of the second paragraph, "public available" should be "publicly available." The committee agreed. Ms. Decker also pointed out that on page 3, in the first full sentence, "avoid omitting" should be "omit." The committee agreed. Ms. Watt pointed out that on page 4, in the sixth sentence of the second paragraph, "it some cases" should be "in some cases." The committee agreed.

Mr. Parker moved to approve the minutes from the meeting held on March 5, 2015, as amended. Mr. Shea seconded the motion and it passed unanimously.

2. Meeting Dates

The committee rescheduled the next meeting, which had been scheduled for April 2, 2015, to April 9, 2015.

Ms. Watt said she would be unable to attend the meeting scheduled for May 7, 2015. The committee could not agree on a different date for the meeting. The committee agreed that the meeting would remain scheduled for May 7 and that Mr. Parker would chair it.

3. Subcommittee Updates

Ms. Watt said that the committee had recently formed three subcommittees. She said that the first subcommittee is the Public Briefs subcommittee. She said the second is the Forms subcommittee, which is tasked with updating forms to comply with rule amendments. Mr. Shea said that there are about eight or nine forms that need to be updated. Ms. Watt said that Mr. Parker and Ms. Seppi are on the Forms subcommittee. Ms. Watt said that the third subcommittee is the Federal Rules subcommittee, which is a joint subcommittee between the appellate rules committee and the civil rules committee. Ms. Watt said that the purpose of the Federal Rules subcommittee is to consider whether Utah should adopt federal rules regarding finality of judgments in civil cases. Ms. Watt said that Mr. Burke and Mr. Mouritsen are on the Federal Rules subcommittee.

a. Public Briefs

Mr. Shea said that the committee would be discussing public briefs later in the meeting.

b. Forms

Mr. Shea said that the Forms subcommittee just scheduled its first meeting that morning.

c. Federal Rules

Mr. Shea said that the Federal Rules subcommittee would be scheduling its first meeting soon.

d. Efiling

Mr. Shea said that the Efiling subcommittee was making good progress.

4. Supreme Court Update and Rule 38A **Joan Watt**

Ms. Watt said that the supreme court adopted the committee's proposed amendments to Rule 9, the rule governing docketing statements. She said that the amended Rule would go into effect on May 1, 2015.

Ms. Watt said that the committee had approved a proposed amendment to Rule 38B that would add a provision regarding the duration of representation by court-appointed appellate counsel.

She said that the supreme court suggested that the provision should be located in Rule 38A, not Rule 38B.

The committee proposed that Rule 38A to be amended read as follows:

Rule 38A. Withdrawal of counsel.

(a)(1) Withdrawal in criminal cases and certain civil cases. An attorney may not withdraw from a criminal case or from a civil case in which ~~appellant~~that attorney's client has the right to effective assistance of counsel except upon motion and order of the court. Absent good cause shown, leave to withdraw will not be granted unless the motion to withdraw is accompanied by an entry of proposed appearance by new counsel or a representation by the withdrawing attorney that the ~~defendant~~client is entitled to the appointment of new counsel.

(a~~b~~)(2) Duration of representation by court-appointed counsel. Absent good cause shown for withdrawal, if a party has a right to effective assistance of counsel, an attorney appointed to represent that party on appeal shall represent that party throughout the first appeal as of right, respond to a petition for writ of certiorari, file a petition for writ of certiorari if appointed counsel determines that such a petition is warranted, and brief and argue the merits if the Supreme Court grants certiorari review.

(c) Withdrawal in other civil cases.

(~~b~~c)(1) When oral argument not scheduled. An attorney may withdraw without leave of court in any other civil case that has not been scheduled for oral argument. The withdrawing attorney shall serve notice of the withdrawal with the court and upon all parties, including his or her client.

(~~b~~c)(2) When oral argument scheduled. An attorney may not withdraw from any other civil case that has been scheduled for oral argument except upon motion and order of the court. Absent good cause shown, leave to withdraw will not be granted unless the motion to withdraw is accompanied by an entry of proposed appearance of new counsel and new counsel's representation that oral argument may proceed as scheduled.

(~~b~~c)(3) Notice to appoint or appear in person. If an attorney withdraws under subdivision (b)(1), dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall, and the court may, serve a notice on the unrepresented party, informing the party of the responsibility to appoint new counsel or, if the unrepresented party is a natural person, the responsibility to appear personally or appoint new counsel. A copy of the notice served by the opposing party shall be filed with the court. No further proceedings shall be held in the case until 20 days after such a notice is served, unless the unrepresented party waives the time requirement or unless the court otherwise orders.

Mr. Parker moved to approve the proposal to amend Rule 38A. Mr. Sabey seconded the motion, and it passed unanimously.

5. Public Briefs

Mr. Shea said that the Public Briefs subcommittee finished its work. He said that during the last meeting the committee wanted to include a redaction option. He said that with the redaction option, a brief would be presumptively public, but a party could move either to classify the entire brief as private or to file a redacted brief for the public along with a separate unredacted brief for the court.

Mr. Shea said that the subcommittee proposed a seven-day window during which the brief would be classified as private. He said that the window would provide parties with an opportunity to move to classify the entire brief as private or to redact further information. He said that, after the seven-day window closed, the brief would be presumptively classified as public. He said that the redaction option is contained in a proposed amendment to Rule 21(f). He said that the committee had been considering putting the redaction option in a new rule, Rule 21A, but that he thought it fit better in Rule 21. He said that other provisions in proposed Rule 21A were already covered by the Utah Code of Judicial Administration, so proposed Rule 21A is not necessary.

Mr. Booher asked if the last sentence of Rule 21(a)(1) means that paper briefs are no longer to be bound. Mr. Shea said yes, that once efiling is in effect, parties will not file paper briefs at all. Mr. Parker said that that sentence is directed at pro se litigants who file paper briefs. He said that the briefs should not be bound so that the court can easily scan them. Mr. Shea said that that sentence is part of the Efiling subcommittee's work. He said that the committee should consider proposed Rule 21(f) on an independent basis. Ms. Watt said that Rule 21(f) is the only thing the committee needs to consider at the moment.

Ms. Watt asked if the committee was the appropriate body to consider the proposed seven-day window rule. Mr. Shea responded that it was. He said that although the rule would be located in the Code of Judicial Administration, the committee would recommend to the supreme court that the judicial council amend the Code of Judicial Administration.

Ms. Watt asked if the seven-day window rule would prevent an attorney from giving a copy of a brief to a client immediately after filing the brief. Mr. Shea said it would not. He said that the rule would only apply to the appellate courts, and that an attorney would not be precluded from disseminating the brief to his or her client.

Judge Voros asked if the seven-day window rule needs to be included in the Rules of Appellate Procedure. Mr. Shea said he had considered that because the appellate rules have a higher profile than the Code of Judicial Administration. He said that a committee note referring to the Code of Judicial Administration might be appropriate. Ms. Watt said that a committee note is a good idea.

Judge Voros said he is concerned that attorneys might disseminate briefs to the media during the seven-day window. Mr. Parker said that he shared Judge Voros's concern. He said that the media often asks attorneys for copies of briefs. He said he didn't think the seven-day window rule would be practical or appropriate.

Mr. Shea said that the seven-day window rule would only apply to the courts. He said that the rule would not prohibit another entity, such as an attorney, from disseminating a brief during the seven-day window. Mr. Parker said that, if that is the case, then the rule might not accomplish its objective.

Judge Voros said that the rule would only apply to briefs, not private information, so that opposing counsel could move to protect contents of the brief from being published by the court. Mr. Parker said that if the purpose of the rule is to prevent the publication of certain briefs or parts of briefs, then the rule would need to prevent dissemination by attorneys as well. Mr. Shea said that the rules could not do that. He said that GRAMA and the Code of Judicial Administration only apply to government entities.

Mr. Booher said that the seven-day window rule would not create any problems for attorneys. He said that they are already subject to discipline for disseminating nonpublic information. Judge Voros noted that in the vast majority of cases, the briefs will ultimately be public. He said that the rule would only prevent the court from publishing the brief for seven days to allow parties to make motions regarding the classification of the brief or parts of it.

Mr. Shea said that if there is a motion filed during the seven-day window, the court would keep the brief classified as private until ruling on the motion.

Judge Voros said that there is value in preventing the court from disseminating briefs for seven days because it is usually more difficult to get briefs from parties or attorneys than from the court. Mr. Parker said that the rule proposes a big change. He said that a blanket classification of all briefs as private for seven days is not justified. He said that the news media would not put up with it.

Judge Voros asked whether a private party can disseminate information that is classified as private by the court. Mr. Shea said that generally a private party can because prohibiting the private party from doing so creates First Amendment problems.

Mr. Shea said that Mr. Parker's point is well-taken because the seven-day window rule would be built around the small minority of cases. He said that, however, the rule keeps with the time provided in GRAMA for government entities to respond to requests for information. He said that the rule anticipates a publicly accessible electronic filing system in the appellate courts. He added that the rule would only apply to briefs, not docketing statements or other documents.

Ms. Taliaferro asked if, before filing the brief, a party could file a motion notifying the court that the brief or certain parts of it might need to be classified as private. Mr. Shea said he had considered that option, as well as one that required a party to serve the brief on the opposing party seven days before filing it with the court. He suggested that these options would be impractical.

Mr. Shea said that there could be a rule providing that briefs have the same classification as the records that were filed in the trial court. Ms. Watt said she thought such a rule might be a good idea. She asked if there is anything like the seven-day window rule in the trial courts. Mr. Shea said

there isn't. He said that records are classified as public or nonpublic initially, but a party can file a motion with a document to classify the document as private.

Ms. Adams-Perlac said that the media has been particularly sensitive about the accessibility of court filings, and that is something to be considered. Mr. Burke said that the application of the seven-day window rule in a highly publicized case is very problematic. He said that the appellate courts are doing the people's business, and it is problematic for the court to say that it will not make briefs in high-profile cases accessible, with the implication that the media should try to get the briefs from the lawyers or parties in the case. He said that the seven-day window rule is inconsistent with the idea that the courts are a public institution doing the people's business.

Mr. Parker said that the rule is an attempt to balance the public interest in being able to access the work of the courts with the parties' privacy interests. He said that, in his view, the public interest carries more weight. He said that, once filed, briefs should be public unless there's some special reason for them not to be.

Mr. Booher agreed with Mr. Parker that the rule is an attempt to balance the public interest with the parties' privacy interests. But he said that the current practice is that the drafter of the brief gets to decide whether the contents of a brief are public or private, at least until the court rules on it. He said that there should be some way for the opposing party to have a say in how the content of a brief is classified. He said that one benefit of the seven-day window rule is that it gives the opposing party a say.

Judge Voros suggested that the opposing party could file a motion anticipating that some information in the brief will need to be classified as private. Ms. Adams-Perlac suggested that, to trigger the seven-day window, a party could be required to file a notice of intent to move to classify the brief (or parts of it) as private. She said that, without such a notice of intent requirement, it might be difficult for opposing counsel to file a motion within the seven-day window. She said that the public needs to have access to briefs, but only appropriate access. Mr. Sabey said that it would make sense to limit the seven-day window rule to certain categories of cases, such as those in which trial court records are nonpublic.

Mr. Shea said that the point of the seven-day window rule is to provide parties who did not write the brief with an opportunity to have information in the brief classified as nonpublic. He said that the rule could be limited to cases in which records were classified as nonpublic in the trial court. He said that, right now, all briefs are public once filed. Ms. Westby said that, under the Code of Judicial Administration, appellate records, except for the briefs, in certain protected types of cases are classified as nonpublic. Mr. Parker said that his understanding of the Code of Judicial Administration was that in those types of cases, the appellate records and briefs are nonpublic. Judge Voros asked what the Code of Judicial Administration says. Mr. Shea said that Mr. Parker's analysis is incorrect. Mr. Shea said that appellate briefs in cases that are protected at the trial level are currently public. Judge Voros said that the Code of Judicial Administration needs to make that explicit, because it seems ambiguous. Mr. Booher said that extending the nonpublic classification to the appellate level would render appellate decisions nonpublic, because court orders in protected cases are nonpublic.

Judge Voros said that the committee should decide what the rule should be regarding the relationship between classification on appeal and classification at trial. He said that the committee should then make a recommendation based on what it decides. Ms. Watt said that, whatever the rule is, it should be clear and easily accessible to help parties and attorneys follow it. She said that the rule should be included in the appellate rules, as well.

Judge Voros said that we are currently at a transformational time due to the rapidly increasing accessibility of information. He said that the committee should take time and care to consider the ramifications of the rules it proposes on the public availability of appellate records and filings, and it should not be bothered if it moves slowly and carefully. Ms. Watt agreed.

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

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

7. Adjourn

The meeting was adjourned at 1:33 p.m. The next meeting will be held on Thursday, April 9, 2015.