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

PRESENT	**EXCUSED**
Joan Watt – Chair	none
Alison Adams-Perlac – Staff	
Troy Booher	
Paul Burke (by phone)	
Marian Decker	
Alan Mouritsen	
Judge Gregory Orme	
Rodney Parker	
Bryan Pattison	
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 pointed out that on page 5, line 3, the word "stated" should be "statute."

Mr. Burke moved to approve the minutes from the meeting held on September 4, 2014, as amended. Ms. Seppi seconded the motion and it passed unanimously.

2. Public Comment to Rules 21A, 55, and 56 **Joan Watt**

Ms. Watt said that the two public comments seemed to be well-taken. Ms. Adams-Perlac said she disagreed with Carol Verdoia's comment because if the petition is private, there need not be a redaction. Ms. Romano said that Ms. Verdoia's comment was that the private nature of the juvenile court briefs is not clear from the rule change. Ms. Adams-Perlac said that a committee note might be appropriate to address Ms. Verdoia's concern, but redaction need not occur with private briefs.

Ms. Westby said she thinks Ms. Verdoia's point is that Rule 21A does not apply to petitions and responses because they are already covered in other rules. She stated that there should be language in Rule 58 requiring briefs ordered pursuant to that rule to be filed in compliance with Rule 21A, but that the language in Rules 55 and 56 requiring petitions and responses to be filed in compliance with Rule 21A is unnecessary and should be removed. The committee members agreed with Ms. Westby. Ms. Westby volunteered to draft the relevant changes to Rules 21A and 58.

Ms. Romano explained that Kelly Wright's comment was largely driven by concerns of tax attorneys about appellate records of tax commission proceedings, which have a different classification scheme than courts and to which Rule 4-202.02 does not apply. She said that she can ask the tax attorneys to elaborate on their concerns. She stated that the tax attorneys had a proposed solution, but it was complicated and she needed clarification on it. Ms. Watt said the committee would want to know how the tax commission handles classification now, and whether it is satisfactory. Ms. Romano said her understanding is that the tax commission is inconsistent in how it handles classification. She said the tax commission and other agencies are working on streamlining their classification procedures. Mr. Shea said the classification procedure on appeal would be similar to the classification procedure in the agency proceeding. Mr. Sabey agreed that it would not be difficult for appellate courts to follow the classification procedures of agencies, and that the real problem is that the agencies need to square away their classification procedures. Mr. Shea said that Rule 21A already defers to the agency classification procedures. Ms. Romano said she will find out more about exactly what the tax attorneys' concerns are.

The committee took no action on Rules 21A, 55, and 56 at this time.

3. Public Comment to Rule 40 **Alison Adams-Perlac**

The committee amended Rule 40 to read as follows:

Rule 40. Attorney's or party's certificate; sanctions and discipline.

(a) Attorney's or party's certificate. Every motion, brief, and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member in good standing of the Bar of this state. The attorney shall sign his or her individual name and give his or her business address, telephone number, and Utah State Bar number. A party who is not represented by an attorney shall sign any motion, brief, or other paper and state the party's address and telephone number. Except when otherwise specifically provided by rule or statute, motions, briefs, or other papers need not be verified or accompanied by affidavit. The signature of an attorney or party

constitutes a certificate that the attorney or party has read the motion, brief, or other paper; that to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, it is not frivolous or interposed for the purpose of delay as defined in Rule 33; and that the filing complies with Rule 21A and Rule 4-202.02 of the Utah Code of Judicial Administration. If a motion, brief, or other paper is not signed as required by this rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the attorney or party. If a motion, brief, or other paper is signed in violation of this rule, the authority and the procedures of the court provided by Rule 33 shall apply.

(b) Sanctions and discipline of attorneys and parties. The court may, after reasonable notice and an opportunity to show cause to the contrary, and upon hearing, if requested, take appropriate action against any attorney or person who practices before it for inadequate representation of a client, conduct unbecoming a member of the Bar or a person allowed to appear before the court, or for failure to comply with these rules or order of the court. Any action to suspend or disbar a member of the Utah State Bar shall be referred to the Office of Professional Conduct of the Utah State Bar.

(c) Rule does not affect contempt power. This rule shall not be construed to limit or impair the court's inherent and statutory contempt powers.

(d) Appearance of counsel pro hac vice. An attorney who is licensed to practice before the bar of another state or a foreign country but who is not a member of the Bar of this state, may appear, pro hac vice upon motion, filed pursuant to the Code of Judicial Administration. A separate motion is not required in the appellate court if the attorney has previously been admitted pro hac vice in the lower tribunal, but the attorney shall file in the appellate court a notice of appearance pro hac vice to that effect.

Advisory Committee Notes

Refer to Rule 14-806 of the Rules Governing the Utah State Bar for qualification of out of state counsel to practice before the courts of Utah.

Mr. Booher moved to approve Rule 40 as amended. Judge Voros seconded the motion, and it passed unanimously.

4. Efiling Subcommittee **Joan Watt**

Mr. Shea said that the appellate courts have a goal of making efiling completely available by April, 2015. He said there is a component that is expected to be available for court employees in October or November, 2014. He said the rollout for efiling in the appellate courts will follow the district court model. He said at some point efiling in the appellate courts for lawyers will be mandatory.

He said that one aspect of efiling in the district courts that is not present for the appellate courts is rules. He said the appellate rules are very specific about paper filings and records, and they need to be amended to govern efiling and electronic records. He said a subcommittee should be assembled to work on drafting amendments. Mr. Sabey, Ms. Westby, Judge Orme, Judge Voros, Mr. Burke, and Mr. Parker, as well Mr. Shea, all volunteered to be on the efiling subcommittee.

5. *Ralphs v. McClellan* and Rule 4(f) Joan Watt

Ms. Watt said that *Ralphs* extended *Manning*, which permits the reinstatement of time to file an appeal for litigants whose right to appeal has been denied, to appeals from justice court. She said that *Ralphs* discusses a lack of clarity in procedural rules, but she believes the lack of clarity is more in the criminal rules than the appellate rules. She said that *Ralphs* mentioned there should be a time limit in the rules for filing a *Manning* motion. She said the question is whether the committee wants to put a time limit on filing a *Manning* motion and, if so, how long.

Mr. Burke asked whether the committee could constitutionally impose a time limit. Ms. Watt said that is a good point, because the *Manning* rule concerns the constitutional right to appeal. Ms. Romano said that laches applies to constitutional claims and could limit the time for filing a *Manning* motion. Ms. Watt said that most *Manning* motions are not filed with much delay and when they are it is because the defendant thought there was already an appeal pending. In *Ralphs*, the court said Rule 4(f) should impose a time limit for filing a *Manning* motion.

Mr. Booher asked whether Rule 4(f) generally applies to appeals from justice court. He said the time limit for a *Manning* motion in justice court, if there is to be one, should be in Rule 38 of the Utah Rules of Criminal Procedure. Judge Voros noted that, under Rule 1(a) of the Rules of Appellate Procedure, appeals from justice court to district court are outside the scope of the appellate rules. The committee agreed that Rule 4(f) is not the appropriate place for a time limit on *Manning* motions in justice court; the better place for it is Rule 38 of the Utah Rules of Criminal Procedure.

Mr. Sabey noted that the language in *Ralphs* is broad and also applies to *Manning* motions in district court, to which Rule 4(f) squarely applies. Mr. Booher said he would like to see data on how many *Manning* motions are granted. Ms. Watt said that many *Manning* motions are stipulated to. She said that because appeals often take so long, defendants will sometimes not know that an appeal has not been filed in their case for a year or more. Ms. Decker said that the Attorney General prefers a one-year time limit or none at all.

Ms. Westby said she thinks a time limit might be useful for *Manning* motions in justice court because often they are filed many years later after the defendant faces a collateral consequence of his misdemeanor conviction. But she said she would not want to impose a time limit on *Manning* motions in district court for felony convictions because most of those are filed within a reasonable time, given that the defendant is usually serving a prison sentence. Judge Voros asked if Ms. Westby had seen delayed *Manning* motions in district court. Ms. Westby said the large majority of them are filed in a reasonable time, and many are stipulated to. Judge Voros proposed that the committee tell the supreme court that the committee did not see a strong need for a time limit in Rule 4(f), and the criminal rules, not the appellate rules, are the appropriate place for a time limit for *Manning* motions in justice court. Mr. Sabey said the committee could ask the supreme court if it would also like a time limit for *Manning* motions in district court. Ms. Romano said, based on language in *Ralphs*, the supreme court seems to think that if there is no time limit, there can never be waiver or forfeiture of reinstatement of appeal. Judge Voros said that laches could still apply. Ms. Westby said that a lack of a time limit on a *Manning* motion just means a *Manning* motion can be filed at any time; it does not mean that the trial court cannot deny the motion. Ms. Romano said that a trial court might think

that it could not deny a *Manning* motion based on timeliness. Ms. Watt said that a long delay is a factual consideration that could be important in a trial court's determination as to whether to grant or deny a *Manning* motion. Judge Voros said that on a delayed appeal from justice court, evidence might be gone for the de novo appeal in district court, so it makes a lot of sense to have a time limit on *Manning* motions in justice court. He said that it makes less sense for *Manning* motions in district court because the appeal from district court is not de novo and the record is already complete. Ms. Westby said that the longest sentence from which you can appeal a justice court conviction is a year, so there should be a one-year time limit on filing a *Manning* motion in justice court. Ms. Romano said that *Ralphs* seems to hold that if there is no time limit, a trial court cannot deny a *Manning* motion based on timeliness. Judge Voros said that *Ralphs* did not contemplate the doctrine of laches, so the supreme court may still apply laches to a *Manning* motion. Mr. Booher said the language in *Ralphs* may have created the need for a time limit in Rule 4(f). Ms. Decker said the Attorney General had not considered that.

The committee members agreed that there seems to be no problem with Rule 4(f) not imposing a time limit for *Manning* motions in district court. They also agreed that there should be a time limit for *Manning* motions in justice court, but that the criminal rules, not the appellate rules, are the appropriate place for such a time limit. The committee decided not to amend Rule 4(f) at this time. It decided to contact the chair of the criminal rules committee about putting into the criminal rules a time limit for *Manning* motions in justice court. It also agreed that committee members may want to consider whether *Ralphs* created the need for a time limit in Rule 4(f) for possible reconsideration of Rule 4(f) by the committee at a later time.

The committee took no action on Rule 4(f) at this time.

6. Rule 24 **Troy Booher**

Mr. Booher led the committee through an overview of the proposed amendments to Rule 24. The committee intended not to take any action on Rule 24 at this time.

Mr. Shea proposed amending the second sentence of Rule 3(c) to read, "The title of the action or proceeding shall include only the names of the parties to the appeal." The committee determined that oftentimes it is uncertain who all of the appellees will be at the time the notice of appeal is filed. Mr. Parker said that the rule governs the parties listed in the caption, not who can be a party to an appeal. Ms. Westby said that the caption in the notice of appeal does need to be fairly broad to include all the parties at the trial level, and the parties listed in the caption can change as parties join or withdraw from the appeal. Judge Voros said that the appellate court can name the case as it sees fit. Ms. Watt said Rule 3(c) should not be changed because as it is now there is no confusion created by the notice of appeal about the case that is being appealed. Mr. Parker said he thinks Rule 3(c) should not be changed. Mr. Booher said Rule 24 can say that the caption on the cover page should include only parties to the appeal, but there needs to be a list inside the brief of all the parties to the proceeding. Judge Orme said the rule could clarify that the appellate court can change the caption as it deems appropriate. Ms. Watt said she thinks a rule governing the parties in the caption should be in Rule 24 and that it should be permissive, not mandatory. Mr. Booher said perhaps it should be in Rule 27. Judge Orme said giving parties the responsibility of naming the case

is problematic. Mr. Shea said the goal of the proposed amendment is to standardize naming conventions between the appellate courts. Mr. Sabey said changes to case names between appellate courts is unavoidable. The committee decided not to take action on Rule 3(c) at this time.

After the discussion about Rule 3(c) concluded, Mr. Booher resumed leading the committee through the proposed amendments to Rule 24. He said that one main goal of the proposed amendments is to eliminate redundancy in briefs. Mr. Booher noted that the prohibition on bold typeface does not apply to headings. Mr. Burke questioned whether the prohibition on bold, underline, and capitalized typeface should be in the "grounds for relief requested" section of the rule. Mr. Parker said he thinks underlining should not be prohibited. Judge Voros said he does not object to bolded typeface, but underlining is antiquated with the availability of italicization and now has no place in a brief. Mr. Parker said he likes underlining because it sets emphasis apart from italicized case names. Mr. Shea said the committee needed to be careful not to impose typeface restrictions on lawyers that judges do not abide by. Judge Voros said he would not prohibit bold typeface.

Ms. Watt said the committee was not going to take any action on Rule 24 at this meeting, but committee members should be prepared to take action on it first thing at the next meeting. Judge Voros asked Ms. Adams-Perlac to prepare a clean copy of Rule 24 with the proposed amendments so the committee members could see what it would look like. Ms. Adams-Perlac said she would. Ms. Decker said the AG would prepare a sample brief illustrating some changes it would like to see to Rule 24.

The committee took no action on Rule 24 at this time, but it is on the agenda for the next meeting.

7. Other Business

There was no other business discussed at the meeting.

8. Adjourn

The meeting was adjourned at 1:50 p.m. The next meeting will be held Thursday, November 6, 2014.