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

Conference Room A, 1st Floor
Thursday, April 9, 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 she did not make the comment referred to in the first sentence of the seventh full paragraph on page 5. Ms. Taliaferro said she made the comment.

Ms. Seppi moved to approve the minutes from the last meeting as amended. Ms. Taliaferro seconded the motion and it passed unanimously.

2. Subcommittee Updates **Tim Shea**

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 had met and drafted some forms that would be included with the agenda for the next meeting.

c. Federal Rules

Mr. Shea said that the Federal Rules subcommittee had met and would meet again the following Monday. He said that the subcommittee was going to recommend adopting the federal approach regarding when a post-trial proceeding does not render the underlying judgment nonfinal. Judge Voros asked what the federal rule is. Mr. Shea said that, under the federal rule, a post-trial proceeding does not render the judgment nonfinal if that is the direction given by the trial judge. Mr. Sabey asked what is the default consequence if the judge does not say anything. Mr. Shea said that he thought the default is that a post-trial proceeding renders the judgment nonfinal. Mr. Mouritsen said it was the reverse, that a judgment is final unless the judge declares that a post-trial proceeding renders it nonfinal. Mr. Sabey said that the Utah rules currently do not countenance any such declaration by a judge. Mr. Mouritsen said that the federal rules require motions for attorney's fees to be filed within 14 days after judgment, and that the Utah rules do not have an analogous timeline. Mr. Shea said that the subcommittee was going to recommend such a timeline, as well.

Mr. Booher said that the subcommittee's recommendation would overturn *Meadowbrook*, which says that a party must move for attorney's fees before the entry of final judgment. Mr. Shea said that the subcommittee was going to recommend adding a motion for relief under Rule 60 if the motion is filed no later than 28 days after the judgment. He said that motion would extend the time to appeal. Mr. Shea said, under the subcommittee's current draft, the judge would need to expressly decide that the post-trial proceedings would not delay the time for appeal. He said that the subcommittee would probably need to edit that part of the draft.

Judge Voros said that the federal rules are very convoluted. Mr. Shea said that the subcommittee was trying to emulate the substance of the federal rules with simpler language. Judge Orme asked if there is a possibility of two appeals in the same case. Mr. Sabey said that Utah rules already create the possibility of two appeals in the same case with many kinds of post-judgment motions. Judge Orme said he was worried about separate appeals from attorney's fees awards because so many cases involve litigation over attorney's fees. Mr. Sabey asked Ms. Westby how often litigants try to appeal before attorney's fees are resolved. Ms. Westby said it happens, but not often.

Mr. Booher said that the real problem is not in the appellate courts. He said that the real problem is in the civil rules, because the civil rules mirror the federal rules almost verbatim, but they have a different definition of what constitutes a final judgment. He said that this sometimes leads to paradoxical results. He said that adopting the federal definition of final judgment in the

civil rules would clear up this problem, and issues in the appellate courts can be dealt with through stays and consolidations of appeals. He said it would be worth finding out how often there are two appeals in the federal system, and how often the appeals end up getting consolidated.

Judge Orme said that adopting the federal rule would create litigation on appeal over whether a judge declared a judgment nonfinal. Ms. Westby said that if the rules create the possibility of two appeals in the same case, the timelines should be such that the appellate courts could consolidate in most cases. Mr. Sabey said that there would be no problem if the courts could treat attorney's fees as any other post-judgment motion that has its own life.

Mr. Shea said that the subcommittee's recommendation would be brought back to the committee and well as to the civil rules committee. He said that each committee would be responsible for its own set of rules, but that they needed to agree on the overarching policy. Ms. Watt asked if this sort of discussion is helpful. Mr. Shea said that the subcommittee seemed favorable to the federal rule. Ms. Watt suggested that the subcommittee look into whether the federal system results in separate appeals from attorney's fees awards. Mr. Shea indicated that that would be a good idea.

d. Efiling Subcommittee

Mr. Shea said that the Efiling subcommittee has continued to meet and is making good progress. Judge Orme said that the subcommittee is being very thorough and it is taking a while. Mr. Shea said that the subcommittee has taken on more and more tasks as it works through the Rules and it is taking a long time. He said that the end product will be good and there is no urgency because there is no projected date for efiling in the appellate courts.

3. Public Briefs **Tim Shea**

Mr. Shea said that all the committee members seem to agree that briefs need to be public. He said that the question in his mind is when they need to be public. He said that there is also agreement on the redaction option, under which parties would be able to protect confidential information by filing two briefs: one for the public in which confidential information is redacted, and one for the court in which there are no redactions. He said that there are three options for when a brief becomes public: immediately upon filing, seven days after filing, or seven days after filing in certain types of cases in which the trial records are nonpublic. He said that the primary reason to delay public access would be because briefs are immediately publicly available online upon filing, which is not currently the case. He said that might be the case in the future, but the committee should deal with that when the time comes. He said that currently, if briefs were immediately public, someone who wanted to see a brief would need to come to the court to do so. He also said that when electronic filing goes into effect, it will not entail immediate online public availability of briefs.

Ms. Watt asked Mr. Shea to walk the committee through the draft rules in the agenda. Mr. Shea began with Rule 21. He said that he believed the committee members agreed on

proposed Rule 21(g). Judge Voros said that the list of adjectives in proposed Rule 21(g) is long. He asked if "nonpublic" would suffice. Mr. Shea said that the list is more thorough and informative, but "nonpublic" would be just as accurate. Ms. Watt said that the list would alert parties to the distinctions between kinds of nonpublic records. Ms. Adams-Perlac said the list would be more helpful to parties because many people do not know about the different classifications. Ms. Watt agreed. Judge Voros asked if the word "records" on line 29 should be deleted. Mr. Shea said that it should be. Ms. Westby asked about confidential information in addenda. Mr. Shea said that addenda are treated differently from briefs, and proposed Rule 24 addresses them.

Judge Orme said that accidental inclusion of confidential information in addenda is of particular concern. Judge Voros said that the appellate rules would provide the only relief or consequences when someone, intentionally or otherwise, included confidential information in an addendum because GRAMA does not apply to private parties. Mr. Sabey said that courts would have contempt power. Mr. Shea said that there needs to be a process by which nonfiling parties could ask for sanctions. He said he did not know whether the appellate rules currently provide for such a process. He said that if such a process does not yet exist, then it should. The other committee members agreed. Mr. Booher said a sentence could be added saying that a failure to comply could result in sanctions. Mr. Shea said that that question can be reserved for now. Ms. Watt said Rule 40(b) provides for the possibility of sanctions for failing to comply with the Rules. Ms. Watt noted that in the draft of the committee note to Rule 21, the "and" on line 36 should be changed to "as." Mr. Shea agreed.

Mr. Shea moved on to Rule 24. He said that the only proposed change to Rule 24 is to require a separate addendum when the addendum contains classified information. Judge Voros said that the addendum should be treated just like the brief: a full addendum for the court and a redacted addendum for the public. Mr. Shea said he treated the addendum differently than the brief. Mr. Parker said that the addendum is part of the brief, so it should be treated the same. Ms. Seppi said that an addendum might be a classified document, such as a presentence report, or it might just contain some classified information, such as a social security number, in which case it could be redacted. Judge Voros said that his preference would be to get one brief that has everything in it, including the addendum, and a redacted version for the public, including the addendum. Ms. Adams-Perlac said that proposed Rule 21A, which has gone out for public comment, addresses Judge Voros's concerns. Mr. Shea said that the approach in proposed Rule 21A might render the proposed amendments to Rule 24 unnecessary.

Mr. Sabey said that redacting addenda is a substantial burden. Judge Voros said parties will just leave addenda out, and addenda will be outmoded once briefs are electronic. Mr. Parker said that Mr. Sabey had a point and that the committee might be underestimating the burden of redacting. He recalled a case he had years back where the question was whether a juvenile could be tried as an adult. He said that he would not have been able to redact that brief. Judge Voros said that, in such a situation, the attorney can move to classify the entire brief as nonpublic. Mr. Parker said that his case attracted a lot of media attention and classifying it as nonpublic could have started a firestorm. Judge Voros said that striking the right balance between public and private interests will inevitably involve something of a burden.

Mr. Booher noted that the Utah classification system does not exist in federal law, so it might create some issues with adopting the federal rules. He said that writing a public brief based on a nonpublic record is problematic. Mr. Sabey said that the brief can just be filed as nonpublic. Ms. Westby noted that many of the facts of the case will become public once the appellate decision is issued. Mr. Parker said that the Rules cannot address judgment calls about what information should be redacted. He expressed his view that appellate courts are a public setting, and parties who take advantage of that setting need to deal with the realities of it. Judge Orme said he is more concerned about respecting the privacy of nonparties, or "innocent bystanders." Ms. Adams-Perlac said that people should not need to sacrifice their privacy just because they seek relief from an erroneous trial court decision. Mr. Pattison said that ideally cases on appeal will be treated the same way as they are at trial. Ms. Adams-Perlac said that is a sticking point because no one is suggesting that all the records of a case that is nonpublic in the trial court will be nonpublic on appeal, and the problem is deciding what records become public on appeal in such a case.

Judge Voros said that, as a judge considering an appeal, he would want a brief that contains everything, including the addendum, unredacted; he would not want a separate addendum. Mr. Booher said that the judges should know which parts of the brief are nonpublic so that appellate decisions do not quote material that is redacted from the briefs. Mr. Parker said that the addendum issue would probably disappear with electronic filing. Mr. Booher said addenda are included with petitions as well as briefs, and the rule for addenda should apply to all addenda.

Mr. Shea said that his takeaway from the discussion was that the committee rejects the proposed change to Rule 24. The other committee members agreed.

Mr. Shea moved on to Rule 40. He said that the significant proposed amendments to Rule 40 are subparagraphs (b)(4)(A) and (b)(4)(B). He said that those subparagraphs provide that filing a document entails certifying that nonpublic information is kept nonpublic in the briefs. Judge Voros said that the language tracks Rule 11, which he favors. The other committee members agreed. Ms. Decker pointed out that "and" in the first line of the committee note should be changed to "as." Mr. Shea agreed.

Mr. Shea moved on to Rule 4-202.02. He asked the committee members if an appellate brief should be public immediately upon filing. Mr. Booher said that he did not mind if briefs are immediately public so long as nonfiling parties (opposing parties and third-parties) could seek a remedy and sanctions. The committee members agreed that appellate briefs should be public upon filing. Mr. Parker asked if the language "an appellate brief" is not so broad that it would include redacted briefs. Mr. Shea said proposed Rule 21(g) would control redacted briefs. Mr. Booher asked if all documents filed in the appellate courts, such as petitions and motions, would be public as well. Mr. Shea said that all documents that are filed in the appellate courts other than briefs would be governed by the other parts of Rule 4-202.02. Mr. Parker asked about a petition for interlocutory appeal. Mr. Shea said that he did not recall a rule governing other appellate records, but that all records filed with the courts are presumed to be public. Mr. Booher asked, if

that is the case, then why do appellate briefs need to be expressly listed as public. Mr. Shea said that the list of records that are expressly public is there because people otherwise could not believe that certain records are public. He said that there are a lot of records that clerks are treating as nonpublic when they should not be. Mr. Sabey said that either the presumption should govern or all appellate records should expressly be public. Judge Voros suggested that "appellate briefs" be replaced with "appellate filings." Mr. Shea said that he was comfortable with the change.

Judge Voros asked if the committee could approve the proposed Rules of Judicial Administration. Mr. Shea said no, but the committee's recommendations would go to the Judicial Council.

Mr. Shea moved onto Rule 4-202.04. He said that he forgot to include "juvenile court legal and social" in paragraph (3). Ms. Westby asked if paragraph (3) could be divided into (3)(a) and (3)(b). Mr. Shea said yes. Judge Voros asked if (3)(a) and (3)(b) could have parallel construction. Mr. Shea said yes. Mr. Burke asked if the word "redact" was broad enough to apply to things like videos and photographs. The committee concluded that it was.

Mr. Parker asked why paragraph (7)(C) was necessary. Mr. Shea said that it is not necessary because an order under Rule 4-202.04 is not binding on anyone or anything other than the court, the parties, and the State Law Library. He said that (7)(C) was included because law school libraries wanted to be notified of an order issued under Rule 4-202.04, even though such an order is not binding on them. Judge Voros said it seems strange to say that the order can be "served" on parties not bound by it. He said that it makes more sense to say that they can be notified of the order. Mr. Parker said (7)(C) should not be in there because it makes it seem like there is a consequence for someone served with or notified of an order. Mr. Sabey suggested that it might be appropriate for a committee note. Mr. Parker said that, at the very least, the Rule needs to say that compliance is voluntary. Ms. Watt agreed. Mr. Shea said he could revise the Rule to reflect voluntary compliance.

Mr. Shea moved on to Rule 4-202.09. Mr. Shea said that it was not particularly important that the committee consider this Rule. Mr. Shea said that paragraph (10) was being deleted because it was obsolete. Mr. Booher asked if Greenfiling constitutes a "vendor," in which case paragraph (10) might not be obsolete. Mr. Shea said he was unfamiliar with the Greenfiling service. Mr. Booher explained that he could access records in cases that are not his through Greenfiling. Mr. Parker noted that appellate efiling will be hosted by the appellate courts, so the committee need not concern itself with paragraph (10).

Mr. Shea moved on to Rule 4-205. He said that proposed paragraph (4)(B)(ii) provides that an order of expungement in a case will not affect the classification of appellate briefs that were filed in the case. Mr. Burke asked why the court would not sequester briefs in its possession. Mr. Shea said it would make sense to require the court to sequester briefs in its possession, in which case Rule 4-205 need not be amended. He noted, however, that many briefs will no longer be in the court's possession, and the court would not be responsible for those. Judge Voros asked about opinions, whether the court would need to sequester the opinion. Mr.

Parker said the interest in public access to appellate opinions outweighs the private interest in sequestering opinions in expunged cases. Ms. Watt said that this is something the committee should discuss further at a later time.

4. Rule 24 and *State v. Nielsen*

The committee amended the advisory committee note to Rule 24 read as follows:

Rule 24. Briefs.
Advisory Committee Note

~~Rule 24(a)(9) now reflects what Utah appellate courts have long held. See In re Beesley, 883 P.2d 1343, 1349 (Utah 1994); Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1052-53 (Utah App. 1994)(alteration in original)(quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991)). See also State ex rel. M.S. v. Salata, 806 P.2d 1216, 1218 (Utah App. 1991); Bell v. Elder, 782 P.2d 545, 547 (Utah App. 1989); State v. Moore, 802 P.2d 732, 738-39 (Utah App. 1990).~~

The rule reflects the marshaling requirement articulated in *State v. Nielsen*, 2014 UT 10, 326 P.3d 645, which holds that the failure to marshal is no longer a technical deficiency that will result in default, but is the manner in which an appellant carries its burden of persuasion when challenging a finding or verdict based upon evidence.

Briefs that do not comply with the technical requirements of this rule are subject to Rule 27(e).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

Mr. Burke moved to approve the amendment to the advisory committee note to Rule 24. Judge Voros seconded the motion, and it passed unanimously.

5. Rules 24 and 27

The committee did not discuss Rule 24 or Rule 27.

6. Adjourn

The meeting was adjourned at 1:54 p.m. The next meeting will be held on Thursday, May 7, 2015.