

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, May 7, 2015
12:00 p.m. to 1:30 p.m.

PRESENT

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

EXCUSED

Joan Watt – Chair
Paul Burke
Marian Decker

1. Welcome and Approval of Minutes

Rodney Parker

Mr. Parker welcomed the committee to the meeting. He asked for any comments on the minutes from the previous meeting. There were no comments.

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

2. Subcommittee Updates

Tim Shea

a. Public Briefs

The committee proposed that Rule 21 be amended read as follows:

Rule 21. Filing and service.

(a) Filing. Papers required or permitted to be filed by these rules shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk. Except as provided in subpart (f), filing is not considered timely unless the papers are received by the clerk within the time fixed for filing, except that briefs shall be deemed filed on the date of the postmark if first class mail is utilized. If a motion requests relief which may be granted by a single justice or judge, the justice or judge may accept the motion, note the date of filing, and transmit it to the clerk.

(b) Service of all papers required. Copies of all papers filed with the appellate court shall, at or before the time of filing, be served on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel of record, or, if the party is not represented by counsel, upon the party at the last known address. A copy of any paper required by these rules to be served on a party shall be filed with the court and accompanied by proof of service.

(c) Manner of service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of service. Papers presented for filing shall contain an acknowledgment of service by the person served or a certificate of service in the form of a statement of the date and manner of service, the names of the persons served, and the addresses at which they were served. The certificate of service may appear on or be affixed to the papers filed. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

(e) Signature. All papers filed in the appellate court shall be signed by counsel of record or by a party who is not represented by counsel.

(f) Filing by inmate. Papers filed by an inmate confined in an institution are timely filed if they are deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid.

(g) Filings containing other than public information and records. If a filing, including an addendum, contains non-public information, the filer must also file a version with all such information removed. Non-public information means information classified as private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or caselaw.

Advisory Committee Notes

Paragraph (e) is added to Rule 21 to consolidate various signature provisions formerly found in other sections of the rules.

Records are classified as public, private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social by Code of Judicial Administration Rule 4-202.02. The right of public access might also be restricted by Title 63G, Chapter 2, Government Records Access and Management Act, by other statutes, rules, or caselaw, or by court order. If a filing contains information or records that are not public, Rule 21(g) requires the filer to file an unredacted version for the court and a version for the public that does not contain the confidential information.

The committee proposed that Rule 40 be amended to read as follows:

Rule 40. Attorney's or party's ~~certificate signature~~; representations to the court; sanctions and discipline.

(a) Attorney's or party's ~~certificate signature~~. Every motion, brief, and other ~~paper of a party represented by an attorney shall document~~ must be signed by at least one attorney of record who is an active member in good standing of the Bar of this state or by a party who is self-represented. ~~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. 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. A person may sign a document using any form of signature recognized by law as binding.~~

(b) Representations to court. The signature of an attorney or self-represented party certifies that to the best of the person's knowledge formed after an inquiry reasonable under the circumstances:

(b)(1) the filing is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the factual contentions are supported by the record on appeal; and

(b)(4)(A) the filing contains no information or records classified as private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social or any other information or records to which the right of public access is restricted by statute, rule, order, or caselaw; or

(b)(4)(B) a filing required by Rule 21(g) that does not contain information or records classified as private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social or any other information or records to which the right of public access is restricted by statute, rule, order, or caselaw is being filed simultaneously.

~~(b)~~(c) 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.

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

~~(d)~~**(e) 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~~ Rule 14-806 of the Rules Governing the Utah State Bar. A separate motion is not required in the appellate court if the attorney has previously been admitted pro hac vice in the ~~lower tribunal trial court or agency~~, 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.~~

Records are classified as public, private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social by Code of Judicial Administration Rule 4-202.02. The right of public access might also be restricted by Title 63G, Chapter 2, Government Records Access and Management Act, by other statutes, rules, or caselaw, or by court order. If a filing contains information or records that are not public, Rule 21(g) requires the filer to file an unredacted version for the court and a version for the public that does not contain the confidential information.

The committee proposed that Utah Code of Judicial Administration Rule 4-202.02(2) be amended to read as follows:

Rule 4-202.02. Records classification.

...

(2) Public court records include but are not limited to:

(2)(A) abstract of a citation that redacts all non-public information;

(2)(B) aggregate records without non-public information and without personal identifying information;

(2)(C) appellate filings, including briefs;

~~(2)(C)~~ (2)(D) arrest warrants, but a court may restrict access before service;

~~(2)(D)~~ (2)(E) audit reports;

~~(2)(E)~~ (2)(F) case files;

~~(2)(F)~~ (2)(G) committee reports after release by the Judicial Council or the court that requested the study;

~~(2)(G)~~ (2)(H) contracts entered into by the judicial branch and records of compliance with the terms of a contract;

~~(2)(H)~~ (2)(I) drafts that were never finalized but were relied upon in carrying out an action or policy;

~~(2)(I)~~ (2)(J) exhibits, but the judge may regulate or deny access to ensure the integrity of the exhibit, a fair trial or interests favoring closure;

~~(2)(J)~~ (2)(K) financial records;

~~(2)(K)~~ (2)(L) indexes approved by the Management Committee of the Judicial Council, including the following, in courts other than the juvenile court; an index may contain any other index information:

~~(2)(K)(i)~~ (2)(L)(i) amount in controversy;

~~(2)(K)(ii)~~ (2)(L)(ii) attorney name;

~~(2)(K)(iii)~~ (2)(L)(iii) case number;

~~(2)(K)(iv)~~ (2)(K)(iv) case status;

~~(2)(K)(v)~~ (2)(L)(v) civil case type or criminal violation;

~~(2)(K)(vi)~~ (2)(L)(vi) civil judgment or criminal disposition;

~~(2)(K)(vii)~~ (2)(L)(vii) daily calendar;

~~(2)(K)(viii)~~ (2)(L)(viii) file date;

~~(2)(K)(ix)~~ (2)(L) party name;

~~(2)(L)~~ (2)(M) name, business address, business telephone number, and business email address of an adult person or business entity other than a party or a victim or witness of a crime;

~~(2)(M)~~ (2)(N) name, address, telephone number, email address, date of birth, and last four digits of the following: driver's license number; social security number; or account number of a party;

~~(2)(N)~~ (2)(O) name, business address, business telephone number, and business email address of a lawyer appearing in a case;

~~(2)(O)~~ (2)(P) name, business address, business telephone number, and business email address of court personnel other than judges;

~~(2)(P)~~ (2)(Q) name, business address, and business telephone number of judges;

~~(2)(Q)~~ (2)(R) name, gender, gross salary and benefits, job title and description, number of hours worked per pay period, dates of employment, and relevant qualifications of a current or former court personnel;

~~(2)(R)~~ (2)(S) unless classified by the judge as private or safeguarded to protect the personal safety of the juror or the juror's family, the name of a juror empaneled to try a case, but only 10 days after the jury is discharged;

~~(2)(S)~~ (2)(T) opinions, including concurring and dissenting opinions, and orders entered in open hearings;

~~(2)(T)~~ (2)(U) order or decision classifying a record as not public;

~~(2)(U)~~ (2)(V) private record if the subject of the record has given written permission to make the record public;

~~(2)(V)~~ (2)(W) probation progress/violation reports;

~~(2)(W)~~ (2)(X) publications of the administrative office of the courts;

~~(2)(X)~~ (2)(Y) record in which the judicial branch determines or states an opinion on the rights of the state, a political subdivision, the public, or a person;

~~(2)(Y)~~ (2)(Z) record of the receipt or expenditure of public funds;

~~(2)(Z)~~ (2)(AA) record or minutes of an open meeting or hearing and the transcript of them;

~~(2)(AA)~~ (2)(BB) record of formal discipline of current or former court personnel or of a person regulated by the judicial branch if the disciplinary action has been completed, and all time periods for administrative appeal have expired, and the disciplinary action was sustained;

~~(2)(BB)~~ ~~(2)(CC)~~ record of a request for a record;
~~(2)(CC)~~ ~~(2)(DD)~~ reports used by the judiciary if all of the data in the report is public or the Judicial Council designates the report as a public record;
~~(2)(DD)~~ ~~(2)(EE)~~ rules of the Supreme Court and Judicial Council;
~~(2)(EE)~~ ~~(2)(FF)~~ search warrants, the application and all affidavits or other recorded testimony on which a warrant is based are public after they are unsealed under Utah Rule of Criminal Procedure 40;
~~(2)(FF)~~ ~~(2)(GG)~~ statistical data derived from public and non-public records but that disclose only public data;
~~(2)(GG)~~ ~~(2)(HH)~~ Notwithstanding subsections (6) and (7), if a petition, indictment, or information is filed charging a person 14 years of age or older with a felony or an offense that would be a felony if committed by an adult, the petition, indictment or information, the adjudication order, the disposition order, and the delinquency history summary of the person are public records. The delinquency history summary shall contain the name of the person, a listing of the offenses for which the person was adjudged to be within the jurisdiction of the juvenile court, and the disposition of the court in each of those offenses.

The committee proposed that Utah Code of Judicial Administration Rule 4-202.04 be amended to read as follows:

Rule 4-202.04. Request to access a record associated with a case; request to classify a record associated with a case.

Intent:

To establish the process for accessing a court record associated with a case.

Applicability:

This rule applies to court records associated with a case.

Statement of the Rule:

(1) A request to access a public court record (1) shall be presented in writing to the clerk of the court unless the clerk waives the requirement. A request to access a non-public court record to which a person is authorized access shall be presented in writing to the clerk of the court. A written request shall contain the requester's name, mailing address, daytime telephone number and a description of the record requested. If the record is a non-public record, the person making the request shall present identification.

(2)(A) If a written request to access a court record is denied by the clerk of court, the person making the request may file a motion to access the record.

(2)(B) A person not authorized to access a non-public court record may file a motion to access the record. If the court allows access, the court may impose any reasonable conditions to protect the interests favoring closure.

~~(2)(C)~~ ~~A~~ ~~(3)(A)~~ If the court record is associated with a case over which the court has jurisdiction, a person with an interest in a court record may file a motion to classify the record as private, protected, or sealed, safeguarded, juvenile court legal, or juvenile court social; or to have information redacted from the record. The court shall deny access to the record until the court enters an order ~~is entered~~.

(3)(B) If the court record is associated with a case over which the court no longer has jurisdiction, a person with an interest in the record may file a petition to classify the record as private, protected, sealed, safeguarded, juvenile court legal, or juvenile court social; or to have information redacted from the record. The court shall deny access to the record until the court enters an order.

(4) The court may classify the record as private, protected, ~~or sealed~~, if it safeguarded, juvenile court legal, or juvenile court social, or redact information from the record if the record or information :

(2)(C)(i)-(4)(A) is so-classified as private, protected, sealed, or safeguarded under Rule 4-202.02;

(2)(C)(ii)-(4)(B) is classified as private, controlled, or protected by a governmental entity and shared with the court under the Government Records Access and Management Act;

(2)(C)(iii)-(4)(C) is a record regarding the character or competence of an individual;
or

(2)(C)(iv)-(4)(D) is a record containing information the disclosure of which constitutes an unwarranted invasion of personal privacy.

(2)(D) Motions-(5) As appropriate for the nature of the case with which the record is associated, the motion or petition shall be filed and proceedings shall be conducted under Utah Rule of Civil Procedure 7 and served under Utah Rule of Civil Procedure 5 the rules of civil procedure, criminal procedure, juvenile procedure, or appellate procedure. The person filing the motion or petition shall serve any representative of the press who has requested notice in the case. The court shall conduct a closure hearing when a motion or petition to close a record is contested, when the press has requested notice of closure motions or petitions in the particular case, or when the judge-court decides public interest in the record warrants a hearing.

(3)-(6) In deciding whether to allow access to a court record or whether to classify a court record as private, protected, ~~or sealed~~, or safeguarded or to redact information from the record, the court may consider any relevant factor, interest, or policy presented by the parties, including but not limited to the interests described in Rule 4-202. In ruling on a motion or petition under this rule the judge-court shall:

(3)(A)-(6)(A) make findings and conclusions about specific records;

(3)(B)-(6)(B) identify and balance the interests favoring opening and closing the record; and

(3)(C)-(6)(C) if the record is ordered closed, determine there are no reasonable alternatives to closure sufficient to protect the interests favoring closure.

(7)(A) If an appellate brief is sealed, the clerk of the court shall seal the brief under Rule 4-205. If an appellate brief is classified as private, protected, or safeguarded, the clerk of the court shall allow access only to persons authorized by Rule 4-202.03. If the court orders information redacted from the brief, the clerk of the court shall obliterate the information and allow public access to the edited brief.

(7)(B) If the petitioner serves the order on the director of the State Law Library, the director shall comply with the order in the same manner as the clerk of the court under paragraph (7)(A).

(7)(C) The order is binding only on the court, the parties to the petition, and the state law library. Compliance with the order by any other person is voluntary.

(4)-(8) A request under this rule is governed also by Rule 4-202.06. A motion or petition under this rule is not governed by Rule 4-202.06 or Rule 4-202.07.

The committee proposed that Utah Code of Judicial Administration Rule 4-205(4) be amended to read as follows:

Rule 4-205. Security of court records.

•••

(4) Management of non-public records.

(4)(A) Method of sealing and storage. Non-public records which are part of a larger public record shall be filed apart from the public record or in a manner that clearly distinguishes the record as not public. Sealed records shall be placed in an envelope which is securely sealed. The clerk of the court shall record the case number and record classification on the envelope and shall inscribe across the sealed part of the envelope the words "Not to be opened except upon permission of the court."

(4)(B) Expunged records.

(4)(B)(i) Upon entry of an order of expungement, the clerk of the court shall:

(4)(B)(i)(a) obliterate or destroy all reference to the expunged portion of the record in the paper copy of the index and maintain a separate index of expunged records not available to the public;

~~(4)(B)(ii)-(4)(B)(i)(b)~~ cover, without obliterating or destroying, all entries in the paper copy of the register of actions, including case identifying information other than the court docket number; and

~~(4)(B)(iii)-(4)(B)(i)(c)~~ place an entry in the computer record that restricts retrieval of case identifying information and the register of actions to court personnel with authorization to review such information. The security restriction shall not be removed except upon written order of the court.

(4)(B)(ii) Upon being served with an order of expungement, the clerk of an appellate court shall comply with paragraph (4)(B)(i). A brief will not be classified as private, protected, sealed, or safeguarded unless a motion or petition to do so under Rule 4-202.04 is granted.

(4)(C) Record of event. The record of expunging or sealing a record shall be entered in the register of actions.

Mr. Shea moved to approve the proposals to amend Rules 21 and 40 and Utah Code of Judicial Administration Rules 4-202.02(2), 4-202.04, and 4-205(4). Judge Orme seconded the motion, and it passed unanimously.

b. Forms

The committee agreed on three recommendations to make to the supreme court and court of appeals regarding forms. First, the committee agreed that the caption in the notice of appeal form should indicate that the notice of appeal is filed in the district court, not the appellate court.

Second, the committee agreed that the notice of appeal form should track Rule 3 and read, “I am appealing the final order or judgment in this case.” Third, the committee agreed that the docketing statement form should include probation revocation in the list of orders or judgments from which the appeal is taken.

c. Federal Rules

Mr. Shea said that the next scheduled meeting for the Federal Rules subcommittee might be the last. He said there is no rush because the civil rules committee will not be able to consider the subcommittee’s proposals until September.

d. Efiling Subcommittee

Mr. Shea said that the Efiling subcommittee has continued to work and is almost two-thirds of the way through the rules.

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

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

4. Adjourn

The meeting was adjourned at 1:35 p.m. The next meeting will be held on Thursday, June 4, 2015.