

# 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  
Wednesday, September 25, 2013  
12:00 p.m. to 1:30 p.m.

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### PRESENT

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

### EXCUSED

Diane Abegglen

#### 1. Welcome and Approval of Minutes

Joan Watt

Ms. Watt welcomed everyone to the meeting.

*Judge Voros moved to approve the minutes from the August 14, 2013 meeting. Ms. Seppi seconded the motion, and it passed unanimously.*

Ms. Watt discussed moving the Global Rules discussion to the end of the agenda.

#### 2. Committee Note to Rule 24

Judge Gregory Orme

Judge Orme discussed his proposals on a Committee Note to Rule 24. He stated that there was a consensus at the previous meeting that an example of a concise statement of the case would help. He stated that any of the three fit within the scope of the language of the rule, but asked what example the committee wants to hold out as the best one. Judge Voros and Ms. Decker reviewed the proposals at the end of the previous meeting and favored the second proposal. Ms. Watt agreed that the second proposal is the best. The longer one might be too much explanation, and the short one might not cover enough.

The proposed committee note with the second example states:

The succinct statement of the nature of the case called for in Rule 24(a)(5) is intended to provide a brief explanation of the nature of the case for the purpose of orienting the reader as to the general context in which the appeal arises. It is not the place to identify all the issues on appeal, to detail the procedural history, or to make arguments. An example of what is contemplated follows.

This case involves a dispute between two neighbors about the location of the boundary dividing their backyards. Defendants prevailed on a theory of boundary by acquiescence. Plaintiffs appeal, contending that the record boundary should be enforced, essentially pursuant to the doctrine of permissive use.

*Judge Orme moved to adopt the Rule 24 committee note proposal using the second example. Judge Voros seconded the motion and it passed unanimously.*

### **3. Proposed Language Addressing Addendums to Appellate Briefs (Rules 24 and 58)**

**Alison Adams-Perlac**

Ms. Adams-Perlac discussed her proposals to address addendums involving non-public records in Rules 24 and 58. She stated that she looked at the Code of Judicial Administration. The first proposal specifically outlines each type of non-public record requiring a separate addendum. The second proposal generally states that the rule applies to records classified as something other than public. Under either proposal, if records in the addendum are not classified as public, they would be bound separately. Judge Voros noted that traditionally the addendum being bound separately has been based on size, not based on the type of record in the addendum. Ms. Romano stated that if the records are not public, they should always be bound separately, but if large, they should also be bound separately. Mr. Sabey agreed that that option should be preserved. Judge Voros wondered if the sentence about Table of Contents was something drafted by Ms. Adams-Perlac, or if it is a holdover. Adams-Perlac stated the sentence is a holdover.

Judge Voros recommended a separate subsection that provides for private records being bound separately. He asked what would happen if there were public records in an addendum with private records. He wondered if parties would have to bind the whole thing separately or bind the public documents and the private records separate from each other. Judge Orme said almost everything in a juvenile court case is protected. Mr. Sabey stated his concerns that the rule would be over broad if protected records had to be bound separately with unprotected records. Ms. Romano agreed.

Judge Voros asked what would happen under the proposal if a party had a thick addendum and one with non-public records. He stated there would be two separately bound addenda – one large, and one for non-public records. He suggested that the committee come up with a name for the special addenda, or something that flags it to have it treated differently. Ms. Romano suggested that the rule require that the addenda with non-public records be bound in a different color.

Ms. Adams-Perlac asked which version the committee preferred, version one, delineating the kinds of records, or version two stating “other than public”. Ms. Westby stated that she preferred version two. Ms. Watt agreed that version two encompassed Ms. Adams-Perlac’s concern that the committee would not need to amend it if other types of records are created.

Ms. Westby suggested that the change to Rule 58 could be as simple as requiring any addenda in juvenile cases to be separately bound, since the rule applies only to juvenile court cases. Just juvenile court cases which go to briefing. She stated the bypass procedure would wrap back into Rule 202.

*The committee agreed that Ms. Adams-Perlac will reconfigure her proposals for Rules 24 and 58 and recirculate them for the next meeting.*

#### 4. Rule 8A

#### Clark Sabey

Mr. Sabey discussed his proposal on Rule 8A. Mr. Sabey discussed his proposal with the staff attorneys from the Court of Appeals. He stated they agreed it would be helpful to describe it as a Motion for Emergency Relief, rather than a Petition, to help clarify that it is attached to an existing case, since it does not stand alone. He stated that seemed to be the primary issue addressed in *Snow, Christensen & Martineau v. Lindberg*, 2009 UT 72, 222 P.3d 1141. This amendment was drafted in response to that case. Mr. Parker stated that he thought there was a mechanism that an 8A petition could be filed on its own, without a jurisdictional basis; as long jurisdiction was fixed reasonably promptly, that a petition could lead out. Mr. Sabey stated that the mechanism does exist, and that the word “contemporaneously” in his proposal addresses that issue. He stated that clerks should not reject the motion if an underlying petition is filed within a few hours. However, the court has to have some reassurance that its jurisdiction has been properly invoked.

Mr. Booher stated that calling it a motion is helpful, but that doing so is also misleading and makes it seem substantive vs. procedural. He stated that the intent seems to be trying to expedite the relief sought for in something else, but the motion for emergency relief makes it sound like the basis for the relief you are seeking is contained in this document. He stated that the relief has to be requested through a motion to stay under Rule 8A. He asked what the relief is after *Snow, Christensen*, other than to expedite. Mr. Booher stated the relief is in the jurisdictional document. He stated that a motion under the proposed rule is really a motion to expedite the decision on something else you file. Mr. Sabey said he thinks it can be. Judge Voros asked what else it can be besides a motion to expedite. He stated that it is a motion for expedited treatment. Ms. Romano asked if it is possible in an interlocutory appeal, to file a 23C to stay the proceedings. Mr. Booher stated the scope of the relief is determined by the other document you file. The document under this rule just determines when you will get that relief. He stated that this is what leads to the confusion. It looks like the relief is stemming from the filing of the motion, when the relief is actually stemming from the other thing you filed.

Mr. Sabey stated that the relief asked for under Rule 8A is typically simple. Calling it a motion for expedited decision exacerbates the problem because it suggests that you are asking for the whole case to be resolved, rather than just part of it, as suggested by the *Snow Christensen* case.

Judge Voros stated that what Mr. Booher is saying is that this document just speeds up the relief you get pursuant to another filing, and that Mr. Sabey is saying the relief is only sped up on the part on which a party is requesting.

Judge Voros discussed a hypothetical case involving an order to medicate an attorney’s client the same day at 5:00 p.m. He stated that the attorney needs to stay the order in district court, and that the 23C Motion does not get the attorney there. The attorney would need to file a motion under 23C plus something else, e.g., a stay motion.

Judge Voros left the meeting at 12:30 p.m.

Ms. Westby stated that under Rule 5, a motion to stay will not be considered before a petition. Mr. Booher stated that the requirement is impossible. He stated that he can draft a motion to stay in a short

time, but not a Rule 5 petition. Mr. Sabey stated that is the debate about what Rule 8 accomplishes, and that he would like to keep that debate out of the committee's considerations of this rule.

Mr. Parker asked what the word "contemporaneously" means, and how much time it allows. Ms. Westby stated that the court will start looking at the circumstances when this motion under this rule is filed, but they will not act on it until a writ or petition is filed. Mr. Sabey stated that the question comes back to what the committee should do with Rule 8A. Ms. Westby stated that a Rule 5 petition is not speedy and adequate if you are medicating at 5 p.m. She stated that a writ should be filed. Since a writ opens the case, she stated, that is your provisional document.

Mr. Sabey stated that the question is whether Rule 8 applies to stays, and can a party rely on that instead of a Rule 19 petition. He stated that he cannot answer that question. Mr. Booher stated that the opinion suggests you can, but it is not clear.

Mr. Sabey stated that he would prefer to leave the Rule 8 discussion aside. He stated that the Court of Appeals attorneys felt strongly about using the word "contemporaneously". Whether you think Rule 8 or Rule 19 gets you there, even if it is a few hours or a couple of days, you need to get a jurisdictional document to the court because the court doesn't look at motion without jurisdiction.

Mr. Parker asked what does contemporaneously mean. Ms. Romano suggested adding "absent extraordinary circumstances," before "must be contemporaneously filed with that motion." Mr. Sabey stated that using "contemporaneously" gives the clerk's office some leeway to look at it, but a jurisdictional document is still needed. Ms. Westby stated that there would be no decision without a jurisdictional document. Mr. Burke stated that he reads it that the petition/writ would have to be filed at the same time as the 23C motion, and that he would not have known differently if not for being in the meeting. Ms. Westby agreed and said the same thing happens in the Supreme Court.

Ms. Watt asked if there is a standard order on interlocutories now. She stated that she tells all her attorneys they must have a petition and the stay together. She stated that is the practice right now. Mr. Sabey stated that is the right mind set. Ms. Watt asked if what is being allowed is the filing and you can follow up with the jurisdictional document, whether the committee wanted to capture that practice in the rule. Ms. Westby and Mr. Sabey stated that these are exceptions, and they do not want the rule to invite this to be the practice. This procedure should be reserved for extraordinary circumstances.

Mr. Booher asked whether a party can file multiple Rule 5 petitions from the same order if they are within 20 days. For example, can a party say they care about an issue right now, but in 19 days file an amended Rule 5 petition including the other issues? Mr. Sabey stated that he does not see why that cannot be done.

Mr. Booher stated that the purpose of this rule is to deal with extraordinary cases, and it is not being used that way which is why the proposal tries to temper the use of it. The rule is for those special cases, so we need to make sure people know what they can do. He stated he thinks it is important that people in extraordinary cases know they can use it.

Ms. Westby stated the proposal covers it. The proposal gives a party the opportunity for relief. It reflects the *Lindberg* case. Mr. Booher suggested adding a committee note pointing people to the *Lindberg* case. Ms. Romano stated that she thought the reference was already in the Advisory Committee Note. She also stated that it would be beneficial for the Appellate Section to have a CLE addressing this change.

Ms. Watt asked if the committee is comfortable that the proposal reflects what was said in *Lindberg*. Ms. Westby stated that *Lindberg* gave provisional relief, but declined to file. She stated that the proposal reflects the takeaway, that a jurisdictional document is required, and that this relief has to be narrowly tailored to the emergency aspects of your case.

Ms. Watt stated that by using the word "contemporaneously", "simultaneously" is unnecessary. Judge Orme stated that there is more wiggle room in "contemporaneously" than in "simultaneously". Mr.

Parker stated that the proposal really trying to say that if you have an emergency, the court cannot solve it until you file the underlying document. Ms. Romano stated that the reading is narrowed where it states the jurisdictional document must have preceded the motion, or been contemporaneously filed. She reads that statement to mean before or at the same time.

The Committee discussed changes to section (a) as follows:

(a) Emergency relief; exception. Emergency relief is any relief sought within a time period shorter than specified by otherwise applicable rules. A motion for emergency relief filed under this Rule is not sufficient to invoke the jurisdiction of the appellate court. A separately filed petition or notice that invokes the appellate jurisdiction of the court under another provision of these rules must have preceded the motion for emergency relief or must be contemporaneously filed with that motion. No emergency relief will be granted in the absence of a separately filed petition or notice under another provision of these rules that invokes the appellate jurisdiction of the court.

Ms. Romano asked whether something is needed in section (d) to tie it back to section (a). Ms. Westby stated that the “unless” clause is not deciding the petition, it is just giving a party time to respond. She stated that a party would have to invoke jurisdiction. Ms. Watt asked whether to committee wants to tie back in and clarify in section (d) that jurisdiction still has to be invoked. Mr. Sabey stated that it is not necessary. Ms. Romano asked whether (d) is referring to a response to 23C or to the underlying petition.

Mr. Booher stated that this provision is what is confusing. “No motion shall be granted.” The motion is just requesting expedited relief. The response referred to in section (d) is no reason to grant relief. Mr. Parker stated the provision is clear to him. Mr. Booher stated that the motion just asks the court to make a decision fast. Mr. Sabey stated that subpart (d) is clearly limited to when a party has to file a response to a 23C motion for emergency relief. He said that the “unless” clause states the circumstance where the court can grant relief prior to receiving that response. He stated that (d) says nothing about jurisdiction, that it is not linked to section (a).

Mr. Booher asked whether a response to a rule 19 petition is the same as a response to a rule 23C motion. Mr. Booher stated that all the motion is asking for is to speed up the relief, not for an independent claim for relief. Mr. Sabey stated his disagreement, that it is tied to the relief. He stated that it is a subset of the relief asked for in the jurisdictional document. Ms. Romano stated that the response can be the same, but sometimes they are different. They can be separate. Mr. Sabey stated that he does not think the issue needs to be addressed here. He stated that a Rule 19 petition might be coextensive with a Rule 23c motion, but it might not be.

Mr. Booher stated that the court does not want to review Rule 19 or Rule 5 petitions before addressing a Motion for Emergency Relief, but it wants to know that it exists. Mr. Sabey stated that it depends on the case. The scope of relief may vary, or it may be the same.

Ms. Romano – we can’t have a rule full of illustrative examples.

Mr. Parker stated that he would strike, “No emergency relief will be granted in the absence of a separately filed petition or notice that invokes the jurisdiction of the court under another provision of these rules.” The committee discussed this suggestion and settled on keeping the sentence, but deleting “under another provision of these rules.”

The proposal then read as follows:

(a) Emergency relief; exception. Emergency relief is any relief sought within a time period shorter than specified by otherwise applicable rules. A motion for emergency relief filed under this Rule is not sufficient to invoke the jurisdiction of the appellate court. A separately filed petition or notice that invokes the appellate jurisdiction of the court under another provision of these rules must have preceded the motion for emergency relief or must be contemporaneously filed with that motion. No emergency relief will be granted in the absence of a separately filed petition or notice that invokes the appellate jurisdiction of the court.

*Mr. Parker moved to approve the Rule 8A proposal with the amendments. Mr. Booher seconded the motion and it passed unanimously.*

**5. Committee Note to Rule 44**

**Clark Sabey**

Mr. Sabey discussed his proposed committee note to Rule 44. He stated that the intent was to clarify how Rule 44 works and to update it. He also stated that he deleted the reference to Rule 4C, the rule was changed from 4C long ago. Ms. Westby stated that she thinks Mr. Sabey's proposal captures his intent.

*Mr. Booher moved to approve the Rule 44 proposal. Mr. Mouritsen seconded the motion, and it passed unanimously.*

**6. Rule 5**

**Committee**

This item was tabled for discussion after the Global Review of Rules update.

**7. Global Review of Rules Update**

**Troy Booher**

Mr. Booher discussed proposed Rule 3 updates. He stated that the intent was to update 3(e) to account for e-filing, and to point them to the requirements of the court in which the appeal is taken. Mr. Parker stated that the update is a good idea. He inquired as to the purpose of the last sentence in (e). He asked whether it has internal significance.

Ms. Westby agreed that the sentence is for the court, since this information is not always obvious from the docket.

*Mr. Parker moved to adopt the Rule 3 proposal. Ms. Decker seconded the motion and it passed unanimously.*

The Global Rules Review was then tabled for further discussion at the next meeting.

**8. 2014 Meeting Schedule**

**Joan Watt**

The committee discussed the 2014 meeting schedule. Ms. Adams-Perlac suggested a standing date for committee meetings. Judge Orme suggested meeting on the first Thursday of the month at noon, except for when Mr. Pattison has a disciplinary meeting, in which case we will have it on the first Friday of the month at noon.

The next meeting will be held on November 14<sup>th</sup>, 2013 at 12:00 p.m. There will be no December meeting. The first meeting of the year will be January 9, 2014 at 12:00 p.m. Meetings will be held the first Friday of the month in February, April, and June. Meetings will be held on the first Thursday of all other months.

*Ms. Adams-Perlac will send outlook appointments for all of the meetings.*

9. **Other Business**  
No other business.

10. **Adjourn**  
*Mr. Parker moved to adjourn the meeting. The motion passed unanimously, and the meeting adjourned at 1:16 p.m.*