AGENDA

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, April 10, 2014
12:00 p.m. to 1:30 p.m.

12:00 p.m.	Welcome and Approval of Minutes (Tab 1)	Joan Watt
12:05 p.m.	Rule 38B (Tab 2)	Joan Watt
12:20 p.m.	Classification of Records Rule (Tab 3)	Alison Adams-Perlac
12:35 p.m.	Rule 1(f) (Tab 4)	Mary Westby
12:45 p.m.	Rule 24 and *Broderick* (Tab 5)	Committee
1:00 p.m.	Global Review of Rules (Tab 6)	Global Rules Subcommittee
1:25 p.m.	Other Business	
1:30 p.m.	Adjourn	

Next Meeting: May 1, 2014 at 12:00 p.m.

Tab 1

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 6, 2014
12:00 p.m. to 1:30 p.m.

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

1. Welcome, Introduction of Recording Secretary, and Approval of Minutes Joan Watt

Ms. Watt welcomed the committee to the meeting. Ms. Watt introduced John Plimpton as the new recording secretary. Ms. Watt explained that the role of the recording secretary is to take minutes. She stated that the recording secretary is a non-voting participant. Mr. Plimpton will take over for Ms. Adams-Perlac in preparing the minutes of the meetings, but Ms. Adams-Perlac will continue to assemble the packets and will send the minutes to committee members. Ms. Watt announced that Mr. Shea was recently appointed to be the Appellate Court Administrator. Members of the committee congratulated Mr. Shea. Ms. Watt asked the committee if there were any issues with the draft of the minutes from the previous meeting. Judge Orme stated that they are wonderful.

Mr. Booher moved to approve the minutes from the January 9, 2014 meeting. Ms. Romano seconded the motion and it passed unanimously.

2. Public Comment to Rules 3 and 8A **Joan Watt**

Three public comments were made to rule 3 as follows:

> A good change to the Rules. Please consider providing that service of briefs, etc., may be by electronic transmission.
>
> -Posted by J. Bogart November 30, 2013 08:59 AM
>
> This is a conspicuous attempt to deprive rights by complicating the process, and it is in defiance of this state's parens patriae burden to protect children. If this passes, I will personally track how much money GALs make from this, and how helpful they are to parents who try to file these in the interests of children they supposedly represent.
>
> -Posted by Matthew Falkner January 6, 2014 06:03 PM
>
> Overall, as appliccable to both rules, pioneering new rules, logistical or technical burdens or anything that may complicate or convolute the law, carries with it by nature of reason and natural duty, a very real and affirmative need to first remedy known harmful effects of existing misconstructions or logistical failures first, explicitly and dutifully justifying the need, and enacting, consolidating or repealing in conjunction, bridges that ensure the common person is not prejudiced by rules that tend to serve the government more than the People.
>
> It applies to URAP 3 as follows:
>
> An appeal as of right, (inherent to a right) indicates governmental burden to uphold and protect the right with fidelity. When there's a time window on the practical application of a right, and the application of the right is inadvertently petitioned in wrongful jurisdiction but in good faith, due government effort to preserve the practical access to the right, and not impose undue interference is affirmative. The appeal should either be forwarded to the most direct and rightful jurisdiction, with the Court seeking approval by the petitioner, or an extension of timeframe should be automatically granted with a template for making a correction.
>
> -Matthew Falkner, by email 1/15/2014.

Three public comments were made to rule 8A (Renumbered to 23C) as follows:

> WHY MAKE THE RULES SO COMPLICATED AND COMPLEX FOR TRUE EMERGENCY SITUATIONS? RULE 8A, RENUMBERED OR OTHERWISE, SHOULD BE DESIGNED TO ACCOMODATE THE NEED FOR EMERGENCY RELIF WITHOUT THE JURISDICTIONAL DEBATE AND NEED FOR SOME OTHER FILING. WHY NOT USE RULE 8A TO INVOKE JURISDICTION:

“There may be circumstances where limited provisional forms of relief (e.g., an emergency stay to preserve the status quo) can be obtained prior to the formal invocation of appellate jurisdiction,1 but rule 8A cannot be employed to independently invoke that jurisdiction.” Snow, Christensen & Martineau, 2009 UT 72, ¶ 6.

“[W]e determine that we lack jurisdiction to take further action on the rule 8A petition because no invocation of our jurisdiction was accomplished by a separate pleading.” ¶8.

-Posted by ROBERT J. FULLER November 26, 2013 05:54 PM

This is a conspicuous attempt to deprive rights by complicating the process, and it is in defiance of this state's parens patriae burden to protect children. If this passes, I will personally track how much money GALs make from this, and how helpful they are to parents who try to file these in the interests of children they supposedly represent.

-Posted by Matthew Falkner January 6, 2014 06:03 PM

Overall, as appliccable to both rules, pioneering new rules, logistical or technical burdens or anything that may complicate or convolute the law, carries with it by nature of reason and natural duty, a very real and affirmative need to first remedy known harmful effects of existing misconstructions or logistical failures first, explicitly and dutifully justifying the need, and enacting, consolidating or repealing in conjunction, bridges that ensure the common person is not prejudiced by rules that tend to serve the government more than the People.

It applies to URAP 8A as follows:

1) The People are guaranteed equal due process protections under the law. These micromanaged rules of process for identical natures of claim between courts imposes unnecessary, unequal, and wasteful burdens on both the courts and the People.

2) Courts are already logistically burdened in a manner that inadvertently deprives the People of the right to a speedy trial. To wit: Litigation extending beyond timeframes. Unnecessary rule enforcement aggravates and perpetuates prolonged litigation, causing furtherance of the overriding logistical rights issue. When existing burdens prove overwhelming to the point of harm, reason and responsible rule-making dictate that consolidation, simplification, and repeal evidencing efficacy to remove harm are in pre-requisite order to pioneering new grounds of burden.

Considering the 2004 case of judge Anderson, such burden expands the risk of removal for judicial officers.

The pleadings in conflict are by nature, emergency pleadings involving the rights of victims and witnesses. They are designed to be a form of relief free from legal and technical burdens that tend to prejudice due and necessary emergent relief.

> It is the policy of this state that it has a parens patriae burden to protect children. If a child is forced to endure prolonged abuse because a civically minded person used the wrong template to file a protective order, and spent the day learning that there are arbitrary rules that need to be files, and one but an attorney can advise them on them, now the civic ally minded person is remanded to finding short notice adequate representation, and an attorney profits on the fight for a constitutional right being deprived to the extent of irreparable harm.
>
> -Matthew Falkner, by email 1/15/2014.

The committee agreed that it had gone over the proposals for Rules 3 and 8A and that the proposals are reflective of case law.

Mr. Shea moved to recommend that the proposals on Rules 3 and 8A be approved by the Supreme Court. Ms. Taliaferro seconded the motion and it passed unanimously.

3. Classification of Records Rule **Alison Adams-Perlac**

Ms. Adams-Perlac presented her proposal addressing classification of records. The proposal takes into account three previously raised concerns: (1) that the rule needs to cover more than just briefs, (2) that the rule needs to be consistent with the records classification scheme in the Code of Judicial Administration, and (3) that the different levels need to be addressed. Ms. Adams-Perlac was unsure about where to place the proposed rule within the Rules of Appellate Procedure, but suggested that it should be in the general provisions. She suggested making it 21A, unless the committee wants to renumber many other rules to make room for it.

Ms. Adams-Perlac's proposal provides for minimal court involvement—the records would retain the classification they had in the lower court; the information can be redacted; if there is more information that needs to be protected, the party can file an addendum; and then the party can request that the information be non-public, which is where the court would get involved. Ms. Adams-Perlac suggested that the committee might want to include a provision that would allow a party to challenge a classification, but stated that she did not include this in the draft presented.

Mr. Sabey suggested that there could be a provision stating that any objection must be filed within a certain period of time. Mr. Booher asked if this motion would be governed by the rule governing general motions. Ms. Adams-Perlac stated that requesting that the information to be classified as non-public would be the motion, and Mr. Sabey agreed. Mr. Sabey stated that he would interpret the first part as creating a duty to file it that way.

Mr. Sabey stated that an opposing party or even a non-party may want to challenge a request to classify records as non-public. Mr. Booher stated that he believed the rule should be the same as it is in the district court. Mr. Shea described the three-levels of non-public classifications in the district court: (1) an entire case (or most of it), (2) certain documents in a case, and (3) information with a record. Mr. Shea stated that in circumstance (1), the clerk identifies the case as non-public (or private) in the computer case management system. He stated that in circumstance (2), the parties are directed and it is their obligation to not disclose the information or to redact it in existing documents if it is already there. He stated that there is a process to object to classifications in the district court. Mr. Shea stated that he did not know of a procedure for a party to object to a redaction.

Judge Orme suggested that most of the time, there will not be an objection, and that most parties will figure out how to litigate the rare case without a specific rule to guide them. Judge Voros suggested that not all parties would be able to figure it out. Ms. Westby stated that, because most classifications will be sorted out at the trial level, there will be minimal need to object to a classification on appeal. She stated that problems will only arise where the non-public information is so intertwined with the arguments on appeal that the party requests the entire brief to be classified as non-public.

Judge Orme suggested leaving the rule as is for the time being, and revisiting it down the road if problems arise. Mr. Sabey and Ms. Watt agreed with Judge Orme's approach. Ms. Watt stated that currently a party can file an objection under the general rule governing motions or can ask for a suspension of the existing rule under Rule 2. Mr. Sabey suggested that the court clerks could provide guidance, even in the absence of a specific rule.

Judge Voros stated that he had some questions about the language of the proposed rule. Judge Voros read the first sentence in the draft: "Briefs and other appellate filings are generally classified as public under the code of judicial administration." Judge Voros questioned when they were not; he asked if the committee could "tighten up" the word "generally." Ms. Adams-Perlac stated that appellate filings are not public when some other classification is given to them. Mr. Shea suggested deleting the first sentence and beginning the rule with the second sentence.

Judge Voros proposed moving the reference to 4-202 to an advisory committee note. Mr. Parker stated that if the first sentence is removed, subsection (a) becomes about trial court filings. Mr. Sabey stated that the reference to briefs and other appellate filings is still needed.

Judge Voros asked what subsection (a) is really about. He stated that the first thing the rule should say is that briefs are public. Mr. Parker agreed. Judge Voros stated that there are two categories of documents, those that are part of the record on appeal which keep the classifications they had in the trial court, and those that are filed with the appellate court which are public unless otherwise designated. He suggested stating that point more directly. He suggested that the rule should then explain what to do if a party is filing something with the court which is otherwise public, but including information that is non-public, and then go on to discuss redaction and the addendum, etc. He stated that he would like to see a structure of the rule that more clearly reflects the two kinds of information and the problem of what happens when you combine them.

Judge Voros suggested the following revision: "(a) Anything filed with the appellate court is public unless otherwise designated as provided by this rule. (b) Anything in the record on appeal bears the same designation as it bore in the trial court unless otherwise designated by the appellate court pursuant to this rule." Judge Voros stated that the rule should then go on to explain how a party can include non-public information in a public brief, and then explain how a party can object to such a request. Ms. Adams-Perlac asked whether (c) should then be broken down further. Ms. Andrus suggested giving each subsection a title with the type of record. Judge Voros stated that the structure should easily reflect the problem which is the intersection of a public brief with non-public information.

Mr. Shea stated that briefs are not mentioned in CJA 4-202.02, so they are presumed public. Mr. Shea stated that the first sentence is not necessary and that the important information in the rule is that unless otherwise classified, the items in the record on appeal have the same classification that they did in the trial court. Ms. Adams-Perlac suggested that this may confuse parties because they do not know how a brief is classified. She stated that the purpose behind the proposed rule is that briefs have been more protected than they should be. Mr. Sabey agreed. Mr. Sabey suggested moving the

reference to briefs and other appellate filings into the heading because the purpose of the rule is to instruct practitioners on how to file a brief that contains non-public information. He suggested "briefs and other appellate records containing non-public information." Judge Voros agreed, and stated the rule should clearly state that if a party files a document with an appellate court, it will be public unless otherwise designated. Ms. Watt agreed, and stated the rule should provide clear guidance to practitioners, who are perhaps not very familiar with other rules, regarding public and non-public classifications on appeal.

Judge Voros stated that an advisory committee note could state that the first sentence in the rule is a restatement of the policy contained in 4-202 of the Code of Judicial Administration. Ms. Watt stated that she liked Judge Voros's suggestion for the structure of the rule, and the suggestions for the headings. Ms. Adams-Perlac said that she could revise the rule for the next meeting to incorporate the suggestions raised.

Mr. Parker suggested that the language in the rule should be expanded to include administrative agencies, not just "trial courts." Ms. Westby stated that there is another rule that provides that administrative agencies are considered "trial courts" for purposes of the appellate rules. Mr. Shea stated that the court's rules do not classify administrative agencies' records.

Mr. Booher stated that cross-references should be used as much as possible, instead of identical language, to prevent conflicts with rule changes elsewhere. Mr. Booher also stated that the rule should also have a section dealing with extraordinary writs or original proceedings, such as elections, because there you are creating the record. Judge Voros agreed. Ms. Romano stated that there was an issue on classifications with an election recently. Ms. Watt asked Ms. Romano if she could research those election cases to see how the courts dealt with the issue. Ms. Romano said she would look into it.

Mr. Parker raised an issue with language in subsection (b), which stated that the party needed to show why certain information should be redacted. Mr. Parker asked how a party is supposed to show that. Ms. Adams-Perlac stated that subsection (c) says "certify," so "show" could be changed to "certify." Ms. Romano stated that, if Ms. Adams-Perlac's suggested change is made, the title should be changed because "certification" comes before "motion" in the rule. Mr. Shea stated that the word "certify" would not work, because the provision requires a legal argument, not a certification. Ms. Westby stated that the certification would relate to the fact that the document was classified as non-public in the trial court. Mr. Sabey said the rule could require the party to file a certification explaining why the information should be redacted.

Ms. Watt asked Ms. Adams-Perlac if she looked at rules from other jurisdictions. Ms. Adams-Perlac stated that she looked at the federal rules, which she did not find to be particularly helpful, but she did not look at any other jurisdictions.

Mr. Sabey stated that the answer to the question, "how does a party show that information should be redacted?", is "by filing a certification that the information should be redacted." Mr. Booher suggested that the rule should just require a certificate, with a brief or other filing, that non-public information has been redacted, or a certificate that says nothing in the filing needs to be redacted. Ms. Adams-Perlac stated that the committee has already considered this idea and dispensed with it because it did not want to require an additional certification. Judge Voros stated that including an extra sentence about certification has merit because it puts the burden on the attorney to ensure that classifications are followed. Ms. Watt agreed.

Mr. Shea suggested deleting "something" from "something other than public." The committee agreed.

Ms. Watt stated that the committee seems to be okay with the approach, but the goal now is to revise the rule to make it more usable and succinct. Judge Voros stated that the rule should require a certification that the brief complies with rule 4-202. Judge Voros stated the rule still needs to instruct practitioners how to change the classification of a document or information on appeal. Ms. Westby asked whether the trial court needs to do it. Judge Voros stated that the appellate court can, and already does it, in some cases.

Ms. Watt stated that the certification required by the rule should just be a certification that the attorney has abided by the classifications set in the trial court. Judge Voros stated that this certification plus the public/non-public addendum would be sufficient. Mr. Parker asked if there is one more component at issue: the brief itself, as the brief may directly discuss information in addenda that is "other than public." Mr. Booher stated that the certification is simply a certification of compliance, and compliance may mean that certain words in the brief are redacted. Judge Voros stated that compliance should be explained. He asked if the certificate needs to be included with all appellate filings, or just briefs. Mr. Booher said yes, it would need to be included with all filings. Mr. Booher stated that the rules on each filing will need to include a provision requiring the certification. Ms. Westby suggested that if this certification is required for all filings, it will become meaningless to practitioners, which will undercut the purpose of the requirement.

Ms. Watt stated that the requirement is most important for addenda, so that something classified as non-public is not made public by virtue of being part of a brief. Ms. Westby stated that the rule started with briefs and that is where the rule is most likely to apply. Judge Voros asked if any committee members had seen the issue arise outside of the context of a brief. Mr. Booher raised petitions for interlocutory appeal and petitions for certiorari as possibilities. Mr. Booher clarified his earlier remarks, stating that whenever the certification is required for a certain kind of filing, the rule governing that kind of filing needs to state the requirement that the filing be accompanied by the certification. He suggested that where an "other than public" certification is necessary with regard to a particular document, the rule addressing that document should be amended to include an "other than public" certification requirement, e.g., Rule 5 and Rule 24.

Ms. Adams-Perlac will revise the proposal for the committee's review at the next meeting.

4. Rule 11(e)(4) Clark Sabey

Mr. Sabey stated that this proposal relates to the same subject matter as that dealt with by the proposed classification of records rule and that the committee should table this proposed rule for the time being. The committee members agreed.

Further discussion of this rule was tabled indefinitely.

5. Rule 1(f) Mary Westby

Ms. Westby discussed a proposal to revise Rule 1(f). Ms. Westby stated that the revision is intended to permit the application of certain summary disposition mechanisms provided in Rule 10 to apply in child welfare appeals. Ms. Westby stated that, under the revision, parties would be able to move for summary disposition for manifest error and stipulate to reversal, or move for summary disposition on a jurisdictional question. Ms. Westby stated that the insubstantial question provision

would not apply because that is a summary proceeding and child welfare petitions are already a summary proceeding.

Ms. Romano suggested including the language "due to their summary nature..." to the insubstantial question provision. Judge Voros stated he liked the suggestion. Ms. Romano also suggested including language in the rule to the effect that "all other provisions of Rule 10 apply."

Judge Voros suggested that "Title VIII" should be removed and replaced with "Rules 52 through 59," because, as a practical matter, no one refers to the title divisions in the Rules.

Judge Voros moved to strike "Title VIII" in Rule 1(f) and replace it with "Rules 52 through 59." Mr. Booher seconded the motion and it passed unanimously.

Mr. Booher stated his concern that Rule 1(d) is false. He stated that Rule 1(d) is inconsistent with *Bradbury*. Mr. Sabey suggested that 1(d) might include a residual reference to an outdated statute. Judge Voros stated that he questions whether 1(d) is a problem. Mr. Booher stated that Rule 1(d) is inconsistent with *Bradbury* and Rule 4, because *Bradbury* says that if you filed your notice of appeal beyond 30 days, then Rule 4 strips the court's jurisdiction, and Rule 1(d) says the rules shall not be construed to strip the court's jurisdiction. Judge Voros stated that Rule 1(d) is focused on subject matter jurisdiction, not the manner in which the court's jurisdiction is invoked. He stated that he does not see it as a contradiction, but he is not opposed to making the rule clearer. Mr. Parker suggested that there was no reason to modify it.

Ms. Watt stated that she agreed with leaving Rule 1(d) as written because the language in the case law is in flux. The committee generally agreed that the language could be more precise. Mr. Booher agreed with Ms. Watt and stated that it would be wise to wait and see how the language changes in the case law.

Judge Voros moved to "wait and see" how the language changes in the case law. Ms. Romano seconded the motion and it passed unanimously.

Judge Voros stated that one does not really appeal from a commissioner or agency board. He stated that the committee may want to revise line 13 to state "petition for review" in lieu of "appeal" for the rule to be accurate. Ms. Westby stated that she would rework the language of line 13 as well.

Mr. Parker moved for Ms. Westby to revise Rule 1(d)-(f) for the committee's review at the next meeting. Ms. Romano seconded the motion and it passed unanimously.

6. Rule 35 **Mary Westby**

Ms. Westby stated that Rule 35 is meant to incorporate Standing Order 2. It is intended to cut off petitions for rehearing from anything that was disposed of by order of the court. She stated that opinions, memorandum decisions, or per curiam decisions may be subject to rehearing.

Judge Orme suggested revising the language since cases are not issued, but opinions are. He suggested that the proposal should state, "in which an opinion, memorandum or per curiam decision has been issued." Judge Voros asked whether a rule 31 order should be included in the list. Ms. Westby stated that she thought those were by consent, but Judge Voros stated that they do not have to be by consent. Judge Orme suggesting using, "dispositive order." Judge Voros suggested that "dispositive order" is not narrow enough.

Mr. Booher asked whether the list is meant to suggest that you a party can get a rehearing for cases in which a court has issued an opinion, but not when the court has issued an order. Ms. Westby stated that a disposition pursuant to Rule 10 may either be on the merits or jurisdictional, and this

was meant to be reflected in the distinction between some sort of decision and some sort of order. The line of distinction is whether the disposition of the case was based on the merits.

Mr. Parker suggested stating that a petition can be filed within 14 days of an opinion, memorandum, or per curiam decision, since the list may not be complete. Ms. Westby suggested that subsection (a) end after the first sentence. Judge Voros suggested changing the language to state, "A party may petition for rehearing only after the issuance of an opinion, memorandum decision, or per curiam decision." Mr. Shea suggested narrowing it even further, but Judge Voros disagreed, stating that it would be useful to have a paragraph up front explaining when a petition for rehearing is permitted, and then subsection (b) would tell a party how to file a petition. The proposal was amended to read:

Rule 35. Petition for rehearing.

(a) Petition permitted. A party may petition for rehearing only of an opinion, memorandum decision, per curiam decision, or rule 31 order.

(~~a~~b) Time for filing; contents; answer; oral argument not permitted. A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed with the clerk within 14 days after the entry of the decision of the court, unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires. Counsel for petitioner must certify that the petition is presented in good faith and not for delay. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court. The answer to the petition for rehearing shall be filed within 14 days after the entry of the order requesting the answer, unless otherwise ordered by the court. A petition for rehearing will not be granted in the absence of a request for an answer.

(~~b~~c) Form of petition; length. The petition shall be in a form prescribed by Rule 27 and shall include a copy of the decision to which it is directed. An original and six copies shall be filed with the court. Two copies shall be served on counsel for each party separately represented. Except by order of the court, a petition for rehearing and any response requested by the court shall not exceed 15 pages.

(~~c~~d) Action by court if granted. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(~~d~~e) Untimely or consecutive petitions. Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.

(~~e~~f) Amicus curiae. An amicus curiae may not file a petition for rehearing but may file an answer to a petition if the court has requested an answer under subparagraph (~~a~~b) of this rule.

Judge Voros moved to approve the proposal as amended. Mr. Sabey seconded the motion and it passed unanimously.

7. Global Review of Rules **Global Rules Subcommittee**

Mr. Booher discussed the proposal to Rule 24. Mr. Booher stated that the initial amendment had to do with informing counsel about *Broderick* because the way that the rule was written seemed exhaustive. He stated that the rule should communicate to appellees that if they fail to file a brief, then they might lose the opportunity to be heard at oral argument, but if their brief is stricken then, under *Broderick*, the consequences may be even worse. He stated that the goal of the proposal is to inform litigants that *Broderick* consequences are a possibility.

The committee discussed that *Broderick* itself stated that it was limited to its facts. Mr. Sabey stated that the curious thing about *Broderick* is that it reversed the district court without holding that it committed any error.

Ms. Watt questioned whether the committee can propose a rule that overrules the Utah Supreme Court. Mr. Shea stated that he would strongly advise the committee to run the proposal by the supreme court before opening it up for public comments. Mr. Sabey stated that the committee could send a letter to the supreme court saying that *Broderick* was "dead wrong" and ask the court to pass a rule that would effectively overrule it; or second, the committee could try to craft a rule that would limit *Broderick* to its facts.

Mr. Shea suggested writing a letter to the supreme court outlining the anomalous consequences of *Broderick* and saying that the committee would like to correct them. Judge Voros stated that he did not believe the outcome in *Broderick* would have been different if the appellee had failed to file a brief.

Ms. Watt stated her concerns about proposing a rule that would take away a remedy that the supreme court obviously thought was appropriate in a particular case. Mr. Booher stated that if he was an institutional appellant, he would love *Broderick*. Ms. Watt stated that the supreme court will likely give direction on the limitations of *Broderick* in the near future.

Judge Orme stated that Rule 24 says that an appellee *may* file a brief. He stated that frequently, the court will receive a letter from an appellee informing the court that it would not be filing a brief, for whatever reason, if that is the case. Judge Orme recommended that the committee should outline in Rule 24 what an appellee who intends not to file a brief should do, and to add an advisory note saying that the rule might undercut *Broderick*. He suggested that the committee should come at the issue less directly than the prior proposals.

Judge Voros stated that the alternative would be to codify *Broderick*. Mr. Booher said he would be happy to codify *Broderick*. Judge Voros stated he wondered how *Broderick* looks from a district judge's point of view.

Mr. Sabey said the committee could send the supreme court a letter stating the committee's concerns. Ms. Watt stated that the committee could simply ask the supreme court how it would like the committee to deal with the issue. Judge Orme said the letter could present three possible scenarios: (1) codify *Broderick*, (2) disavow it, and (3) leave it be, but in the advisory notes, call practitioners' attention to the possibility of *Broderick* consequences. Mr. Booher stated that *Broderick* stands for the proposition that an appellee is better off filing no brief than a horrible brief. Judge Voros stated that he would oppose the third option of doing nothing. Judge Voros wondered why the sanction in *Broderick* did not run to the appelee's attorney, as opposed to the district judge and the appellee. Mr. Sabey stated that the issue in *Broderick* was that the appellant had cleared a prima facie hurdle, but the supreme court was not prepared to adopt the appellant's argument as law and it did not want to commit its clerks to doing the appellee's job.

Ms. Watt stated that it was evident that the committee had not reached consensus on how to approach the issue. Ms. Watt stated that the committee members should consider whether to write a letter to the supreme court, whether to propose a rule that codifies *Broderick*, or whether to propose a rule that disavows *Broderick*. Ms. Watt stated that the committee should be ready to address this issue for the next meeting.*The committee agreed to consider what to do about Rule 24 and to be prepared to discuss it at the next meeting.*

8. Other Business

There was no other business discussed at the meeting.

9. Adjourn

The meeting was adjourned at 1:45 p.m. The next meeting will be held Thursday, April 10, 2014.

Tab 2

Rule 38B. Qualifications for Appointed Appellate Counsel.

(a) In all criminal appeals where a party is entitled to appointed counsel, only an attorney eligible under Chapter 11, Article 4, of the Supreme Court Rules of Professional Practice ~~proficient in appellate practice~~ may be appointed to represent such a party before either the Utah Supreme Court or the Utah Court of Appeals.

~~(b) The burden of establishing proficiency shall be on counsel. Acceptance of the appointment constitutes certification by counsel that counsel is eligible for appointment in accordance with this rule.~~

~~(c) Counsel is presumed proficient in appellate practice if any of the following conditions are satisfied:~~

~~(c)(1) Counsel has briefed the merits in at least three appeals within the past three years or in 12 appeals total; or~~

~~(c)(2) Counsel is directly supervised by an attorney qualified under subsection (c)(1); or~~

~~(c)(3) Counsel has completed the equivalent of 12 months of full time employment, either as an attorney or as a law student, in an appellate practice setting, which may include but is not limited to appellate judicial clerkships, appellate clerkships with the Utah Attorney General's Office, or appellate clerkships with a legal services agency that represents indigent parties on appeal; and during that employment counsel had significant personal involvement in researching legal issues, preparing appellate briefs or appellate opinions, and experience with the Utah Rules of Appellate Procedure.~~

~~(d) Counsel who do not qualify for appointment under the presumptions described above in subsection (c) may nonetheless be appointed to represent a party on appeal if the appointing court concludes there is a compelling reason to appoint counsel to represent the party and further concludes that counsel is capable of litigating the appeal. The appointing court shall make findings on the record in support of its determination to appoint counsel under this subsection.~~

(~~e~~b) Notwithstanding counsel's apparent eligibility for appointment under subsection (~~c~~a) ~~or (d)~~ above, counsel may not be appointed to represent a party before the Utah Supreme Court or the Utah Court of Appeals and is subject to removal from existing

appointments if, during the three-year period immediately preceding counsel's proposed appointment, counsel was the subject of an order issued by either appellate court imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before either appellate court.

(~~f~~c) The fact that appointed counsel does not meet the requirements of this rule shall not establish a claim of ineffective assistance of counsel.

Advisory Committee Note

This rule does not alter the general method by which counsel is selected for indigent persons entitled to appointed counsel on appeal. In particular, it does not change the expectation that such appointed counsel will ordinarily be appointed by the trial court rather than the appellate court. The rule only addresses the qualifications of counsel eligible for such appointment. See generally State v. Hawke, 2003 UT App 448 (2003).

Tab 3

Rule 21A. Briefs and other appellate filings containing other than public information and records; motion to classify a filing as other than public.

(a) Anything filed with the appellate court is public unless otherwise designated as provided by this rule.

(b) Anything in the record on appeal bears the same designation as it bore in the trial court unless otherwise designated by the appellate court under this rule.

(c) *Appellate filing containing information classified as other than public.* Where an appellate filing contains some specific information that is classified as other than public, a party shall file an extra copy of the filing with the court, with all non-public information redacted. The party must certify why the information should be redacted and identify the classification. The redacted copy will be identified as the public copy. All other copies will be designated for the use of the court and shall not be redacted and shall not be made public.

(d) *Appellate filing containing records classified as other than public.* Where an appellate filing includes records classified as other than public, the party shall file a separately bound, non-public addendum, including only those records requiring protection. The party submitting the addendum must file a certification explaining that the addendum is properly classified and identifying the classification. Non-public addenda will be designated for the use of the court and shall not be made public.

(e) *Motion to classify appellate filing as other than public.* A party may request that a brief or other appellate filing be classified as non-public if the issues on appeal require the disclosure of records classified as other than public. The moving party must certify that a non-public classification is necessary and that the party is unable to make an argument on appeal without the disclosure of non-public records, and must identify the appropriate classification. A motion to classify a brief or other appellate filing as non-public will be granted only where a

non-public record is integral to the issues on appeal and cannot otherwise be protected from disclosure as provided in subsection (c) and (d).

(f) *Motion to change the classification of a record or information.* A party seeking to change the classification of a document or information on appeal may file a motion under Rule 23 and Utah Code of Judicial Administration, Rule 4-202.04(2)(C).

Advisory Committee Notes

Paragraph (a) is a restatement of the policy contained in Utah Code of Judicial Administration, Rule 4-202.02. Because briefs are not specifically classified by Rule 4-202.02, they are presumed to be public. All classifications referred to in this rule are governed by Rule 4-202.02.

Motions to classify a brief or other filing as non-public should establish that the non-public material so permeates the argument that it is not feasible to redact or otherwise separate out non-public material. For example, if the issue on appeal regards the enforcement of a confidential settlement agreement, it is likely that the protected material is so integral to the argument that it cannot be protected on appeal without classifying the brief as non-public as well. In contrast, if a brief contains a few lines of a non-public document that are not integrated into the entire argument, the brief may remain classified as public with the redaction of those few lines.

Tab 4

Rule 1. Scope of rules.

(a) Applicability of rules. These rules govern the procedure before the Supreme Court and the Court of Appeals of Utah in all cases. Applicability of these rules to the review of decisions or orders of administrative agencies is governed by Rule 18. When these rules provide for a motion or application to be made in a trial court or an administrative agency, commission, or board, the procedure for making such motion or application shall be governed by the Utah Rules of Civil Procedure, Utah Rules of Criminal Procedure, and the rules of practice of the trial court, administrative agency, commission, or board.

(b) Reference to "court." Except as provided in Rule 43, when these rules refer to a decision or action by the court, the reference shall include a panel of the court. The term "trial court" means the court or administrative agency, commission, or board from which the appeal is taken. The term "appellate court" means the court whose ruling is under reviewto which the appeal is taken.

(c) Procedure established by statute. If a procedure is provided by state statute as to the appeal or review of an order of an administrative agency, commission, board, or officer of the state which is inconsistent with one or more of these rules, the statute shall govern. In other respects, these rules shall apply to such appeals or reviews.

(d) Rules not to affect jurisdiction. These rules shall not be construed to extend or limit the jurisdiction of the Supreme Court or Court of Appeals as established by law.

(e) Title. These rules shall be known as the Utah Rules of Appellate Procedure and abbreviated Utah R. App. P.

(f) Rules for appeals in child welfare proceedings. Appeals taken from juvenile court orders related to abuse, neglect, dependency, termination, and adoption proceedings are governed by Title VIII, Rules 52 through 59, except for orders related to substantiation proceedings under Section 78-3a-320. Rules 9, 10 and 23B do not apply,: due to the summary nature of child welfare appeals, Rule 10(a)(2)(A) does not apply but other provisions of Rule 10 apply. but the oOther appellate rules apply if not inconsistent with Rules 52 through 59.

Tab 5

This opinion is subject to revision before final publication in the Pacific Reporter

2012 UT 17

IN THE

SUPREME COURT OF THE STATE OF UTAH

JENNIFER BRODERICK, KATHLEEN CHRISTENSEN, SHANNON MILLER, KEVIN MILLER, TYRONE ROGERS, GERTRUDE SCHEIDECKER, VERONICA SIGUA, SAVANNAH BRANDEWIE, LISA MORGAN, GRANT HARKNESS, MARK SHUMATE, and MICHAEL KEMP,
Appellants and Plaintiffs,

v.

APARTMENT MANAGEMENT CONSULTANTS, L.L.C., HOWARD SCHMIDT, DAVID SCHMIDT, COLORADO CASUALTY COMPANY, JASON (JAKE) LEONCINI, CANYON COVE PROPERTIES, LLC, and JOHN DOES 1–15,
Appellees and Defendants.

Nos. 20100276, 20100320
May 4, 2012

Second District, Ogden Dep't
No. 050907436

Attorneys:

James R. Hasenyager, Peter W. Summerill, Ogden, for appellants

Gregory J. Sanders, Patrick C. Burt, Salt Lake City, for appellee Apartment Management Consultants, L.L.C.

Scott T. Evans, Scot A. Boyd, Salt Lake City, for appellee Canyon Cove Properties, LLC

CHIEF JUSTICE DURRANT authored the opinion of the Court, in which ASSOCIATE CHIEF JUSTICE NEHRING, JUSTICE DURHAM, JUSTICE PARRISH, and JUSTICE LEE joined.

CHIEF JUSTICE DURRANT, opinion of the Court:

INTRODUCTION

¶1 In this case, a group of residential tenants (collectively, Tenants) allege claims of negligence against Canyon Cove Properties, LLC, and Apartment Management Consultants, L.L.C. (collectively, AMC). AMC argues that it was relieved from liability because Tenants signed a Residential Release Agreement (Agreement) that

included a limited liability provision (Exculpatory Clause or Clause) waiving the right to bring an action for negligence against AMC. The district court concluded that the Agreement and the Exculpatory Clause did "not violate public policy" and were therefore "valid and enforceable." Accordingly, it granted summary judgment for AMC.

¶2 On appeal, Tenants contend that the Exculpatory Clause is unenforceable because it violates Utah's public policy of encouraging landlords to act with care, and it falls within the public interest exception under the factors set forth in *Tunkl v. Regents of the University of California*.[1] AMC fails to respond meaningfully to Tenants' claim. Indeed, AMC's brief largely ignores Tenants' points and instead puts forth unrelated arguments that fail to address or refute Tenants' position. Thus, without reaching the merits of the issues before us, we reject AMC's brief and accept Tenants' claim that the Exculpatory Clause in the Agreement is unenforceable. Accordingly, we reverse the grant of summary judgment in favor of AMC and remand this case to the district court for proceedings consistent with this opinion.

BACKGROUND

¶3 Tenants resided in an apartment complex in Ogden, Utah. The apartment complex was owned and operated by AMC. Between March and August 2005, every Tenant signed an Agreement to lease an apartment in the complex. The Agreements each included an Exculpatory Clause containing the following language:

> Owner will not be liable for any damages or losses to person or property caused by any Resident or any other person including, but not limited to, any theft, burglary, assault, vandalism or other crimes. Owner shall not be liable for personal injury or for damage to or loss of Resident's personal property (furniture, jewelry, clothing, etc.) or Resident from fire . . . or negligent behavior of Owner or its agents unless such injury or damage is caused by **gross negligence** of

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[1] 383 P.2d 441, 444–46 (Cal. 1963). We have used the *Tunkl* standard to evaluate preinjury releases on two occasions. *Pearce v. Utah Athletic Found.*, 2008 UT 13, ¶ 18, 179 P.3d 760 (holding that, as a matter of law, recreational activities do not meet the *Tunkl* criteria to fall within public interest exception); *Berry v. Greater Park City Co.*, 2007 UT 87, ¶¶ 15, 24, 171 P.3d 442 (holding that skiercross racing does not meet the *Tunkl* criteria).

> owner or its agents. **OWNER STRONGLY RECOMMENDS THAT RESIDENT SECURE RENTERS INSURANCE TO PROTECT AGAINST ALL OF THE ABOVE OCCURRENCES**.[2]

¶4 In November 2005, an arsonist started a fire at the apartment complex. As a result of the fire, Tenants suffered property damage and personal injuries. They filed suit against AMC, alleging that its negligence contributed to their damages from the fire. Specifically, Tenants claimed that AMC was negligent because it failed to (1) warn residents that the building did not contain fire blocking, (2) take any measures to reduce or eliminate fire hazards when it knew about a previous fire at the apartment complex, (3) have a functional fire alarm system, (4) have security at the premises, (5) remove a couch from a stairwell that served as the ignition for the fire, and (6) provide adequate access to firefighters.

¶5 After discovery, AMC filed a motion for summary judgment on the ground that Tenants' negligence claims were barred by the Exculpatory Clause in the Agreement. Specifically, AMC argued that, by signing the Agreement containing the Exculpatory Clause, Tenants had released it from liability for negligence claims and claims arising from fire and arson. Tenants opposed the motion for summary judgment, arguing that the Exculpatory Clause violates public policy and is unenforceable. The court concluded that the Exculpatory Clause "do[es] not violate public policy" and is "valid and enforceable." It therefore concluded that Tenants' causes of action for negligence were barred by the Clause. Accordingly, it granted summary judgment in favor of AMC.

¶6 On appeal to this court, Tenants argue that the district court erred in granting summary judgment because the Exculpatory Clause violates Utah's public policy of encouraging landlords to act with care, and the Clause falls within the public interest exception under the factors set forth in *Tunkl v. Regents of the University of California*.[3] AMC ignores Tenants' main arguments on appeal.

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[2] Some of the Agreements contain wording that varies slightly from the quoted provision, but is substantively the same for purposes of the issues before us.

[3] 383 P.2d 441, 444–46 (Cal. 1963). Tenants also argue that *all* exculpatory clauses in residential leases immunizing landlords from negligence violate public policy and the public interest. Because (continued...)

Instead of addressing Tenants' points, it argues that the Exculpatory Clause is clear and unambiguous, that the fact that an arsonist started the fire weighs against finding the Clause unenforceable, that Tenants have not established that AMC's negligence caused their damages, and that the Agreement and Exculpatory Clause were not contracts of adhesion.

¶7 We have jurisdiction to hear this appeal under section 78A-3-102(3)(j) of the Utah Code.

STANDARD OF REVIEW

¶8 "We review the district court's decision to grant summary judgment for correctness, granting no deference to the district court."[4]

ANALYSIS

¶9 Rule 24 of the Utah Rules of Appellate Procedure governs the contents and format of briefs submitted to the court. In particular, rule 24(a) requires that the argument section of a brief "contain the contentions and reasons of the appellant with respect to the issues presented . . . with citations to the authorities, statutes, and parts of the record relied on."[5] Further, we have explained that "a party must plead his claims with sufficient specificity for this court

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[3] (...continued)
AMC has not provided us with adequate briefing to aid us in our analysis of this question, we do not consider whether exculpatory clauses in residential leases are categorically unenforceable on public policy and public interest grounds. *See infra* ¶ 19.

[4] *Alliant Techsystems, Inc. v. Salt Lake Cnty. Bd. of Equalization*, 2012 UT 4, ¶ 17, 270 P.3d 441 (alteration omitted) (internal quotation marks omitted).

[5] UTAH. R. APP. P. 24(a)(9). We have reprimanded appellants for failing to adequately brief issues on numerous occasions. *See, e.g.*, *Smith v. Four Corners Mental Health Ctr., Inc.*, 2003 UT 23, ¶ 46, 70 P.3d 904 (declaring an appellant's brief inadequate when it merely cited a few cases and did not conduct any substantial analysis); *State v. Lafferty*, 2001 UT 19, ¶ 95, 20 P.3d 342 (noting that the appellate court is entitled to have the issues clearly defined in the briefs); *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) (holding that "bald citation[s] to authority [without] development of that authority and reasoned analysis based on that authority" render a brief inadequate).

to make a ruling on the merits"[6] and that a brief "must provide the reasoning and legal authority that will assist this court in resolving th[e] concerns" on appeal.[7] Indeed, "a reviewing court is not simply a depository in which [a] party may dump the burden of argument and research,"[8] and, accordingly, "[w]e will not assume a party's burden of argument and research."[9]

¶10 Rule 24(b) makes the requirements of rule 24(a) applicable to the brief of the appellee.[10] Accordingly, we expect that both appellants and appellees will adhere to the standard of legal analysis set forth in rule 24(a).[11] In addition, we also require "the brief of the

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[6] *Angel Investors, LLC v. Garrity*, 2009 UT 40, ¶ 35, 216 P.3d 944 (internal quotation marks omitted).

[7] *Neff v. Neff*, 2011 UT 6, ¶ 69, 247 P.3d 380; *see also id.* (disregarding the appellant's argument because he had not complied with rule 24 of the Utah Rules of Appellate Procedure).

[8] *State v. Honie*, 2002 UT 4, ¶ 67, 57 P.3d 977.

[9] *Angel Investors*, 2009 UT 40, ¶ 35 (alterations omitted) (internal quotation marks omitted).

[10] UTAH R. APP. P. 24(b) (providing that "[t]he brief of the appellee shall conform to the requirements of paragraph (a) of this rule," except that, under some circumstances, the appellee need not include a statement of the issues, a statement of the case, or an addendum).

[11] *See, e.g.*, *Angel Investors*, 2009 UT 40, ¶¶ 34–36 (declining to address the appellee's assertion that the appellants were not valid representatives of the corporation because their "argument lack[ed] the detail and citations to the record that are necessary before we will consider an argument on appeal"). Indeed, although Utah appellate courts have discussed the appellee's responsibility to adequately brief less frequently than that of the appellant, both this court and the Utah Court of Appeals have declined to address appellees' arguments because they were inadequately briefed. *See id.*; *Advanced Restoration, L.L.C. v. Priskos*, 2005 UT App 505, ¶ 36, 126 P.3d 786 (declining to award attorney fees to the appellee because the appellee provided no legal basis for why it should receive them in its brief); *State v. Montoya*, 937 P.2d 145, 150 (Utah Ct. App. 1997) (declining to affirm the trial court's decision on other proper grounds when the appellee failed to brief an element of its theory in

(continued...)

appellee [to] contain the contentions and reasons of the appellee with respect to the issues presented in the opposing brief."[12]

¶11 Under our rules of appellate procedure, we need not address briefs that fail to comply with rule 24. Specifically, rule 24(k) states that "[b]riefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court."[13] And we have "discretion to not address an inadequately briefed argument."[14]

¶12 In this case, AMC fails to address Tenants' plausible arguments that the Exculpatory Clause is unenforceable because it violates Utah public policy and falls within the public interest exception. Indeed, we have held that limited liability provisions may be unenforceable under certain circumstances, including when such releases "offend public policy" or "fit within the public interest exception."[15] Accordingly, in their opening brief, Tenants maintain that it is against public policy to allow AMC to immunize itself for harm caused by its own negligence because landlords have statutory and common law duties to keep premises reasonably safe. Further, Tenants contend that the Exculpatory Clause is unenforceable because it falls within the public interest exception under the standard set forth in *Tunkl v. Regents of the University of California*,[16] which we have used to evaluate pre-injury releases on two occasions.[17]

¶13 Under the *Tunkl* standard, an exculpatory clause may be unenforceable on public interest grounds when the party seeking to enforce the clause (1) is involved in "business of a type generally thought suitable for public regulation"; (2) "is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public"; (3) "holds himself out as willing to perform this service for any member of the public who seeks it"; (4) "possesses a decisive

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[11] (...continued)
its brief).

[12] *Brown v. Glover*, 2000 UT 89, ¶ 22, 16 P.3d 540.

[13] UTAH R. APP. P. 24(k).

[14] *Angel Investors*, 2009 UT 40, ¶ 35.

[15] *Pearce,* 2008 UT 13, ¶ 14, 179 P.3d 760.

[16] 383 P.2d 441, 444–46 (Cal. 1963).

[17] *See supra* ¶ 2 n.1.

advantage of bargaining strength against any member of the public who seeks his services"; (5) "confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser [or lessee] may pay additional reasonable fees and obtain protection against negligence"; and (6) places "the person or property of the purchaser [or lessee] . . . under the control of the seller [or lessor], subject to the risk of carelessness by the seller [or lessor,] or his agents."[18] "Consideration of these traits is a flexible endeavor; the activity at issue need exhibit only a sufficient number of *Tunkl* characteristics such that one may be convinced of the activity's affinity to the public interest."[19] Tenants put forth credible arguments that *all* of the *Tunkl* factors apply in this case. But they also argue that each of these factors "standing on its own" provides a basis for concluding that the Exculpatory Clause is unenforceable.

¶14 On the other hand, AMC's brief largely ignores the points in Tenants' brief. Instead, it makes arguments that are unrelated to the issues Tenants raise and that fail to address or refute Tenants' points. First, AMC contends that the Exculpatory Clause is enforceable because it is clear and unambiguous. But Tenants do not claim that the Clause is unclear or ambiguous. And AMC's argument on this matter does not refute Tenants' claim that the Clause is unenforceable on public policy and public interest grounds. Thus, the argument that the Exculpatory Clause is clear and unambiguous is both uncontested and irrelevant to the issues Tenants present on appeal.

¶15 Second, AMC contends that the fire was caused by an intentional act of arson, rather than by AMC's negligence, and accordingly, that it is inappropriate for us to find the Exculpatory Clause unenforceable as a matter of public policy. But this argument ignores Tenants' position that, regardless of who started the fire, AMC's negligence contributed to the damages resulting from the spread of the fire throughout the apartment complex. Further, AMC's focus on the fact that an arsonist started the fire does not address Tenants' plausible claim that AMC's statutory and common law duties to provide safe premises create a public policy that disfavors AMC's attempt to immunize itself from the consequences of its negligence through the Exculpatory Clause.

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[18] *Berry v. Greater Park City Co.*, 2007 UT 87, ¶15, 171 P. 3d 442 (internal quotation marks omitted).

[19] *Id.* ¶ 16.

¶16 Third, AMC argues that, even if Tenants' assertions of its negligence were true, "Tenants have not established anywhere in the record . . . that this contributed to their loss." It states that "Tenants simply point to miscellaneous things they contend were inadequate and ask this court to make the unbridged leap to negligence." But the question of whether AMC's acts contributed to Tenants' loss is a question of causation, and that issue is not before us. On appeal, Tenants argue that the district court erred in its conclusion that the Exculpatory Clause did "not violate public policy" and was "valid and enforceable," such that Tenants' negligence claims were precluded. Whether tenants have established that AMC's acts "contributed to their loss" is irrelevant to Tenants' claim that the Exculpatory Clause is unenforceable on public interest and public policy grounds and that it therefore should not bar their claims of negligence.

¶17 Finally, AMC attempts to circumvent Tenants' arguments that the Exculpatory Clause violates public policy and the public interest by asserting that the Agreement and the Exculpatory Clause were not contracts of adhesion. But AMC does not point out that this argument relates to one of the *Tunkl* factors set forth in Tenants' brief. In fact, it never recognizes Tenants' argument that the Clause is unenforceable under the *Tunkl* factors at all. Thus, AMC fails to provide us with meaningful analysis of how its assertion that the Agreement and the Exculpatory Clause are not contracts of adhesion relates to the enforceability of the Clause under the *Tunkl* factors set forth in Tenants' brief. Moreover, even if the Agreement and the Exculpatory Clause are not contracts of adhesion, such that the relevant *Tunkl* factor does not apply in this case, AMC never refutes Tenants' argument that the other five *Tunkl* factors apply here and are sufficient bases for concluding that the Exculpatory Clause is unenforceable.

¶18 Thus, AMC fails to meaningfully address Tenants' claim that the Clause is unenforceable or provide us with legal analysis addressing the points Tenants raise. Indeed, Tenants note in their reply brief that AMC does not squarely address their arguments. Further, at oral argument, counsel for AMC conceded that its brief failed to address Tenants' arguments regarding the unenforceability of the Clause under the *Tunkl* factors. When asked why AMC did not address these arguments in its brief, counsel for AMC admitted that he had not personally reviewed the brief before submitting it to the court.

¶19 We recognize that appellants bear the burden of persuasion on appeal,[20] but we are convinced that Tenants have met their burden in this case. Tenants have presented a plausible claim that the Exculpatory Clause at issue is unenforceable. Specifically, Tenants have argued that the Clause is unenforceable on public policy and public interest grounds. AMC has failed to address Tenants' arguments, and Tenants' claim that the Clause is unenforceable therefore remains unrebutted. We will not bear the burden of argument and research on behalf of AMC. Nor will we create arguments on behalf of AMC in an attempt to respond to Tenants. Further, without adequate briefing from AMC in response to Tenants' arguments, we are not comfortable addressing the merits of the broader questions of whether exculpatory clauses in residential leases violate public policy or whether they fall within the public interest exception. Without adequate briefing, we have insufficient information to make a ruling that would affect countless landlords and tenants throughout Utah.

¶20 Accordingly, because of AMC's inadequate briefing of the issues raised by Tenants, we reject AMC's brief. And thus, without reaching the merits of the broader issues before us, we accept Tenants' claim that the Exculpatory Clause in the Agreement is unenforceable.

CONCLUSION

¶21 In this case, Tenants claim that the district court erred in concluding that their claims of negligence were barred by the Exculpatory Clause and in granting summary judgment for AMC. They argue that the Exculpatory Clause is unenforceable because it violates Utah public policy and negatively affects the public interest under the factors set forth in *Tunkl v. Regents of the University of California*.[21] Because AMC failed to directly address Tenants' arguments, we accept Tenants' claim that the Exculpatory Clause in the Agreement with AMC is unenforceable and do not reach the

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[20] *See, e.g.*, *Chen v. Stewart,* 2004 UT 82, ¶ 79, 100 P.3d 1177 ("[A]ppellants rather than appellees bear the greater burden on appeal."(internal quotation marks omitted)); *Polyglycoat Corp. v. Holcomb*, 591 P.2d 449, 450–51 (Utah 1979) ("On appeal, it is appellant's burden to convince this Court that the trial court exceeded its authority.").

[21] 383 P.2d 441, 444–46 (Cal. 1963).

merits of the issues before us. Accordingly, we reverse the district court's grant of summary judgment in favor of AMC and remand the case to the district court for further proceedings consistent with this opinion.

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Tab 6

Rule 4. Appeal as of right: when taken.

(a) *Appeal from final judgment and order*. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) *Time for appeal extended by certain motions*.

(b)(1) If a party timely files in the trial court any of the following motions, the time for all parties to appeal from the judgment runs from the entry of the order disposing of the motion:

(b)(1)(A) a motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(b)(1)(B) a motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(b)(1)(C) a motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(D) a motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure; or

(b)(1)(E) a motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(b)(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in Rule 4(b), shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in Rule 4(b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) *Filing prior to entry of judgment or order*. A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) *Additional or cross-appeal*. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal is docketed in the court in which it was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires. **4(d) Approved 11/14/2013.**

(e) *Extension of time to appeal*. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. The trial court may rule at any time after the filing of those motions made before the expiration of the prescribed time. ~~A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court.~~ No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Rule 24. Briefs.

(k) *Requirements and sanctions*. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs ~~which~~ that are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer, but a party does not satisfy its burden of persuasion on appeal by another party's failure to file a brief in compliance.

Advisory Committee Notes

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

Rule 24(k) now reflects that Utah appellate courts will no longer grant relief to the Appellant under the circumstances described in *Broderick v. Apartment Mgmt. Consultants, L.L.C.*, 2012 UT 17, ¶ 19, 279 P.3d 391.

Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only by leave of court granted on motion or at the request of the court. The motion for leave may be accompanied by a proposed amicus brief, provided it complies with applicable rules and the number of copies specified by Rule 26(b) are submitted to the court. A motion for leave shall identify the interest of the ~~applicant~~ movant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except for a motion for leave to participate in support of, or in opposition to, a petition for writ of certiorari filed pursuant to Rule 50(f), ~~The~~ the motion for leave shall be filed at least ~~twenty-one~~21 days prior to the date on which the brief of the party whose position as to affirmance or reversal the amicus curiae or guardian ad litem will support is due, unless the court for cause shown otherwise orders. Parties to the proceeding may indicate their support for, or opposition to, the motion. Any response of a party to a motion for leave shall be filed within seven days of service of the motion. If leave is granted, an amicus curiae or guardian ad litem shall file its brief within ~~seven~~ 7 days of the time allowed the party whose position the amicus curiae or guardian ad litem will support, unless the order granting leave otherwise indicates. The time for responsive briefs under Rule 26(a) shall run from the timely service of the amicus or guardian ad litem brief or from the

timely service of the brief of the party whose position the amicus curiae or guardian ad litem supports, whichever is later. A motion of an amicus curiae or guardian ad litem to participate in the oral argument will be granted when circumstances warrant in the court's discretion.

Rule 27. Form of briefs.

(a) *Paper size; printing margins*. Briefs shall be typewritten, printed or prepared by photocopying or other duplicating or copying process that will produce clear, black and permanent copies equally legible to printing, on opaque, unglazed paper 8 1/2 inches wide and 11 inches long, and shall be securely bound along the left margin. Paper may be recycled paper, with or without deinking. The printing must be double spaced, except for matter customarily single spaced and indented. Margins shall be at least one inch on the top, bottom and sides of each page. Page numbers may appear in the margins.

(b) *Typeface*. Either a proportionally spaced or monospaced typeface in a plain, roman style may be used. A proportionally spaced typeface must be 13-point or larger for both text and footnotes. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes.

(c) *Binding*. Briefs shall be printed on both sides of the page, and bound with a compact-type binding so as not unduly to increase the thickness of the brief along the bound side. Coiled plastic and spiral-type bindings are not acceptable.

(d) *Color of cover*~~; contents of cover~~. The cover of the opening brief of appellant shall be blue; that of appellee, red; that of intervenor, guardian ad litem, or amicus curiae, green; and that of any reply brief, or in cases involving a cross-appeal, the appellant's second brief, gray~~; that of any petition for rehearing, tan; that of any response to a petition for rehearing, white; that of a petition for certiorari, white; that of a response to a petition for certiorari, orange; and that of a reply to the response to a petition for certiorari, yellow~~. All brief covers shall be of heavy cover stock. There shall be adequate contrast between the printing and the color of the cover.

(e) *Contents of cover*. The cover of all briefs shall set forth in the caption the full title given to the case in the court or agency from which the appeal was taken, as modified pursuant to Rule 3(g), as well as the designation of the parties both as they appeared in the lower court or agency and as they appear in the appeal. In addition, the covers shall contain: the name of the appellate court; the number of the case in the appellate court opposite the case title; the title of the document (e.g., Brief of Appellant); the nature of the proceeding in the appellate court (e.g., Appeal, Petition for Review); the name of the court and judge, agency or board below; and the names and addresses of counsel for the respective parties designated as attorney for appellant, petitioner, appellee, or respondent, as the case may be. The names of counsel for the party filing the document shall appear in the lower right and opposing counsel in the lower left of the cover. In criminal cases, the cover of the defendant's brief shall also indicate whether the defendant is presently incarcerated in connection with the case on appeal and if the brief is an Anders brief.

(~~e~~f) *Effect of non-compliance with rules*. The clerk shall examine all briefs before filing. If they are not prepared in accordance with these rules, they will not be filed but shall be returned to be properly prepared. The clerk shall retain one copy of the non-complying brief and the party shall file a brief prepared in compliance with these rules within 5 days. The party whose brief has been rejected under this provision shall immediately notify the opposing party in writing of the lodging. The clerk may grant additional time for bringing a brief into compliance only under extraordinary circumstances. This rule is not intended to permit significant substantive changes in briefs.

Rule 35. Petition for rehearing.

(a) *Petition for rehearing permitted.* A petition for rehearing may be filed in cases that have received plenary review and the court has issued as an opinion, memorandum decision, or per curiam decision. No petitions for rehearing will be considered regarding the denial of a petition for permission to appeal an interlocutory order, the denial of a petition for writ of certiorari, the denial of a motion for remand pursuant to rule 23B, or the grant or denial of any motion for summary disposition pursuant to rule 10.

(b)*Time for filing*~~; contents; answer; oral argument not permitted~~. A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed with the clerk within 14 days after the entry of the decision of the court, unless the time is shortened or enlarged by order.

(c) *Contents of petition*. The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires. Counsel for petitioner must certify that the petition is presented in good faith and not for delay.

(d) *Oral argument*. Oral argument in support of the petition will not be permitted.

(e) *Response*. No ~~answer~~ response to a petition for rehearing will be received unless requested by the court. ~~The~~ Any ~~answer~~ response ~~to the petition for rehearing~~ shall be filed within 14 days after the entry of the order requesting the ~~answer~~response, unless otherwise ordered by the court. A petition for rehearing will not be granted in the absence of a request for a response~~n answer~~.

(~~b~~f) *Form of petition*~~; length~~. The petition shall be in a form prescribed by Rule 27 and shall include a copy of the decision to which it is directed.

(g). *Number of copies to be filed and served.* An original and ~~six~~ 6 copies shall be filed with the court. Two copies shall be served on counsel for each party separately represented.

(h) *Length*. Except by order of the court, a petition for rehearing and any response requested by the court shall not exceed 15 pages.

(i) *Color of cover*. The cover of a petition for rehearing shall be tan; that of any response to a petition for rehearing filed by a party, white; and that of any response filed by an amicus curiae, green.

(~~c~~j) *Action by court if granted*. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, or may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(~~d~~k) *Untimely or consecutive petitions*. Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.

(~~e~~l) *Amicus curiae*. An amicus curiae may not file a petition for rehearing but may file a~~n answer~~ response to a petition if the court has requested a~~n answer~~ response under subparagraph (~~a~~e) of this rule.

Rule 47. ~~Certification and~~ Transmission of record; joint and separate petitions; cross-petitions; parties.

(a) Joint and separate petitions; cross-petitions. Parties interested jointly, severally, or otherwise in a decision may join in a petition for a writ of certiorari; any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari and involve identical or closely related questions, it

will suffice to file a single petition for a writ of certiorari covering all the cases. A cross-petition for writ of certiorari shall not be joined with any other filing.

(b) Parties. All parties to the proceeding in the Court of Appeals shall be deemed parties in the Supreme Court, unless the petitioner notifies the Clerk of the Supreme Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below, and a party noted as no longer interested may remain a party by notifying the clerk, with service on the other parties, that the party has an interest in the petition.

(c) ~~Motion for certification and~~ Transmission of record. ~~A party intending to file a petition for certiorari, prior to filing the petition or at any time prior to action by the Supreme Court on the petition, may file a motion for an order to have the Clerk of the Court of Appeals or the clerk of the trial court certify the record, or any part of it, and provide for its transmission to the Supreme Court. Motions to certify the record prior to action on the petition by the Supreme Court should rarely be made, only when the record is essential to the Supreme Court's proper understanding of the petition or the brief in opposition and such understanding cannot be derived from the contents of the petition or the brief in opposition, including the appendix. If a motion is appropriate, it shall be made to the Supreme Court after the filing of a petition but prior to action by the Supreme Court on the petition. In the case of a stay of execution of a judgment of the Court of Appeals, such a motion may be made before the filing of the petition. Thereafter, the Clerk of the Supreme Court or any party to the case may request that additional parts of the record be certified and transmitted to the Supreme Court.~~ When a petition for writ of certiorari is granted, the Clerk of the Supreme Court shall notify the Clerk of the Court of Appeals to transmit the record on appeal to the Supreme Court.

Rule 48. Time for petitioning.

(a) Timeliness of petition. A petition for a writ of certiorari must be filed with the Clerk of the Supreme Court within 30 days after the entry of the final decision by the Court of Appeals. The docket fee shall be paid at the time of filing the petition.

(b) Refusal of petition. The clerk will refuse to receive any petition for a writ of certiorari which is beyond the time indicated in paragraph (a) of this rule or which is not accompanied by the docket fee.

(c) Effect of petition for rehearing. The time for filing a petition for a writ of certiorari runs from the date the decision is entered by the Court of Appeals, not from the date of the issuance of the remittitur. If a petition for rehearing is timely filed by any party, the time for filing the petition for a writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or of the entry of a subsequent decision entered upon the rehearing.

(d) Time for cross-petition.

(d)(1) A cross-petition for a writ of certiorari must be filed:

(d)(1)(A) within the time provided in Subdivisions (a) and (c) of this rule; or

(d)(1)(B) within 30 days of the filing of the petition for a writ of certiorari.

(d)(2) Any cross-petition timely only pursuant to paragraph (d)(1)(B) of this rule will not be granted unless a timely petition for a writ of certiorari of another party to the case is granted.

(d)(3) The docket fee shall be paid at the time of filing the cross-petition. The clerk shall refuse any cross-petition not accompanied by the docket fee.

(d)(4) A cross-petition for a writ of certiorari may not be joined with any other filing. The

clerk of the court shall refuse any filing so joined.

(e) Extension of time. The Supreme Court, upon a showing of excusable neglect or good cause, may extend the time for filing a petition or a cross-petition for a writ of certiorari upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) or (c) of this rule, whichever is applicable. The court may rule at any time after the filing of those motions made before the expiration of the prescribed time. ~~Any such motion which is filed before expiration of the prescribed time may be ex parte, unless the Supreme Court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties.~~ No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later, and only one extension may be granted.

~~(f) Seven copies of the petition for a writ of certiorari, one of which shall contain an original signature, shall be filed with the Clerk of the Supreme Court.~~

Rule 49. Petition for writ of certiorari.

(a) Contents. The petition for a writ of certiorari shall contain, under appropriate headings and in the order indicated:

(a)(1) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in the Supreme Court contains the names of all parties.

(a)(2) A table of contents with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, agency rules, court rules, statutes, and authorities cited, with references to the pages of the petition where they are cited.

(a)(4) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. General conclusions, such as "the decision of the Court of Appeals is not supported by the law or facts," are not acceptable. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Supreme Court.

(a)(5) A reference to the official and unofficial reports of any opinions issued by the Court of Appeals.

(a)(6) A concise statement of the grounds on which the jurisdiction of the Supreme Court is invoked, showing:

(a)(6)(A) the date of the entry of the decision sought to be reviewed;

(a)(6)(B) the date of the entry of any order respecting a rehearing and the date of the entry and terms of any order granting an extension of time within which to petition for certiorari;

(a)(6)(C) reliance upon Rule 47(c), where a cross-petition for a writ of certiorari is filed, stating the filing date of the petition for a writ of certiorari in connection with which the cross-petition is filed; and

(a)(6)(D) the statutory provision believed to confer jurisdiction on the Supreme Court.

(a)(7) Controlling provisions of constitutions, statutes, ordinances, and regulations set forth verbatim with the appropriate citation. If the controlling provisions involved are lengthy, their citation alone will suffice and their pertinent text shall be set forth in the appendix referred to in subparagraph (10) of this paragraph.

(a)(8) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the lower courts. There shall follow a statement of the facts relevant to the issues presented for review. All statements of fact and references to the proceedings below shall be supported by citations to the record on appeal or to the opinion of the Court of Appeals.

(a)(9) With respect to each question presented, a direct and concise argument explaining the special and important reasons as provided in Rule 46 for the issuance of the writ.

(a)(10) An appendix containing, in the following order:

(a)(10)(A) copies of all opinions, including concurring and dissenting opinions, and all orders, including any order on rehearing, delivered by the Court of Appeals in rendering the decision sought to be reviewed;

(a)(10)(B) copies of any other opinions, findings of fact, conclusions of law, orders, judgments, or decrees that were rendered in the case or in companion cases by the Court of Appeals and by other courts or by administrative agencies and that are relevant to the questions presented. Each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of its entry; and

(a)(10)(C) any other judicial or administrative opinions or orders that are relevant to the questions presented but were not entered in the case that is the subject of the petition.

If the material that is required by subparagraphs (7) and (10) of this paragraph is voluminous, they may be separately presented.

(b) *Form of petition; number of copies*. The cover of the petition for a writ of certiorari shall be white and shall otherwise comply with the form of a brief as specified in Rule 27. Seven copies of the petition, one of which shall contain an original signature, shall be filed with the Clerk of the Supreme Court.

(c) *No separate brief.* All contentions in support of a petition for a writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (a)(9) of this rule. The petitioner shall not file a separate brief in support of a petition for a writ of certiorari. If the petition is granted, the petitioner will be notified of the date on which the brief in support of the merits of the case is due.

(d) *Page limitation.* The petition for a writ of certiorari shall be as short as possible, but may not exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations required by subparagraph (a)(7) of this rule, and the appendix.

(e) *Absence of accuracy, brevity, and clarity.* The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

Rule 50. ~~Brief in opposition~~Response to the petition; reply brief; brief of amicus curiae.

(a) ~~*Brief in opposition*~~*Response to petition*. Within 30 days after service of a petition the respondent ~~shall~~ may file a response to the petition~~n opposing brief~~, disclosing any matter or ground ~~why~~ concerning whether the case should ~~not~~ be reviewed by the Supreme Court. The cover of the response shall be orange and ~~Such brief~~ shall otherwise comply with Rules 27 and, as applicable, 49. The number of copies to be filed shall be as described in Rule 49(b). ~~Seven copies of the brief in opposition, one of which shall contain an original signature, shall be filed with the Clerk of the Supreme Court.~~

(b) *Page limitation*. A ~~brief in opposition~~response to the petition shall be as short as possible and may not, in any single case, exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations required by Rule 49(a)(7), and the appendix.

(c) *Objections to jurisdiction*. No motion by a respondent to dismiss a petition for a writ of certiorari will be received. Objections to the jurisdiction of the Supreme Court to grant the petition for writ of certiorari may be included in the response~~brief in opposition~~.

(d) *Distribution of filings*. Upon the filing of a ~~brief in opposition~~response, the expiration of the time allowed therefor, or express waiver of the right to file, the petition and the response~~brief in opposition~~, if any, will be distributed by the clerk for consideration. However, if a cross-petition for a writ of certiorari has been filed, distribution of both it and the petition for a writ certiorari will be delayed until the filing of a ~~brief in opposition by~~response to the cross-

~~respondent~~petition, the expiration of the time allowed therefor, or express waiver of the right to file.

(e) *Reply ~~brief~~*. A reply ~~brief~~ addressed to arguments first raised in the response ~~brief in opposition~~ may be filed by any petitioner no later than 5 days after service of the response, but distribution under paragraph (d) of this rule will not be delayed pending the filing of any ~~such brief~~reply. ~~Such brief~~A reply shall be as short as possible, but may not exceed five pages. ~~Such brief~~The cover of the reply shall be yellow and shall otherwise comply with Rule 27. The number of copies to be filed shall be as described in Rule 49~~50~~(b~~a~~).

(f) ~~Brief~~ *Motion of amicus curiae relating to petition*. A motion for leave to participate as ~~brief of~~ an amicus curiae in support of, or in opposition to, a petition for writ of certiorari shall be filed within 5 days ~~concerning a petition for certiorari may be filed only by leave of the Supreme Court granted on motion or at the request of the Supreme Court. The motion for leave shall be accompanied by a proposed amicus brief, not to exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations required by Rule 49(a)(7), and the appendix. The proposed amicus brief shall comply with Rule 27, and, as applicable, Rule 49. The number of copies of the proposed amicus brief submitted to the Supreme Court shall be the same as dictated by Rule 48(f). A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. The motion for leave shall be filed on or before the date~~ of the filing of the timely petition or response of the party whose position the amicus curiae will support, unless the Supreme Court for cause shown otherwise orders. A motion for leave shall identify the interest of the movant, shall explain why the petition for writ of certiorari should or should not be granted, and shall explain the benefit that would be provided to the Supreme Court by a brief of amicus curiae on the merits if the petition is granted. Parties to the proceeding in the Court of Appeals may indicate their support for, or opposition to, the motion. Any response of a party to a motion for leave shall be filed within ~~seven~~ 7 days of service of the motion. The Supreme Court may elect to consider the motion in conjunction with its review of the petition for writ of certiorari. If the petition is granted and leave to participate as amicus curiae on the merits is granted, the timing for the filing of the brief of amicus curiae on the merits and for any responsive brief of a party is governed by Rule 25.~~If leave is granted, the proposed amicus brief will be accepted as filed and, unless the order granting leave otherwise indicates, amicus curiae also will be permitted to submit a brief on the merits, provided it is submitted in compliance with the briefing schedule of the party the amicus curiae supports. Denial of a motion for leave to file brief of an amicus curiae concerning a petition for certiorari shall not preclude a subsequent amicus motion relating to the merits after a grant of certiorari. All motions for leave to file brief of an amicus curiae on the merits after a grant of certiorari are governed by Rule 25.~~

(g) *Motion of amicus curiae filed after grant of petition.* All motions for leave to participate as an amicus curiae on the merits filed after a grant of a petition for writ of certiorari are governed by Rule 25.