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, November 5, 2015
12:00 p.m. to 1:30 p.m.

12:00 p.m.	Welcome and Introduction of New Members	Rodney Parker
12:05 p.m.	Member Disclosures	Committee
12:10 p.m.	Approval of Minutes (Tab 1)	Rodney Parker
12:15 p.m.	Rule 28A – Appellate Mediation Office (Tab 2)	Tim Shea
12:25 p.m.	Effect of Post-judgment Proceedings on Time to Appeal (Tab 3)	Tim Shea
12:40 p.m.	Rule 24 (Tab 4) Rule 24 and *State v. Nielsen* (Tab 5) Rule 27 (Tab 6)	Committee
1:25 p.m.	Other Business	
1:30 p.m.	Adjourn	

Upcoming Meetings:
January 7, 2016
February 4, 2016

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, September 3, 2015
12:00 p.m. to 1:30 p.m.

PRESENT	**EXCUSED**
Joan Watt – Chair	Marian Decker
Alison Adams-Perlac – Staff	
Troy Booher	
Paul Burke	
R. Shawn Gunnarson	
Alan Mouritsen	
Judge Gregory Orme	
Adam Pace – Recording Secretary	
Rodney Parker	
Bridget Romano	
Clark Sabey	
Lori Seppi	
Tim Shea	
Ann Marie Taliaferro	
Judge Fred Voros	
Mary Westby	

1. Welcome and Introduction of New Members **Joan Watt**

Ms. Watt welcomed the committee to the meeting and introduced the new member of the committee, R. Shawn Gunnarson, and the new recording secretary, Adam Pace.

2. Member Disclosures **Committee**

Ms. Watt invited each of the committee members to disclose a brief summary of their practice area, as is normally done when a new member joins the committee. Each member present did so.

3. Approval of June and July Minutes **Joan Watt**

Ms. Watt invited a motion to approve the minutes from June and July meetings.

Mr. Parker moved to approve the June minutes. Ms. Romano seconded the motion and it passed unanimously. Ms. Seppi moved to approve the July minutes. Mr. Sabey seconded the motion and it passed unanimously.

4. Confidential Requests for Mediation **Michele Mattsson**
Tim Shea

Ms. Watt invited continued discussion regarding the committee's recommendation on Utah R. App. P. 28A(h) which allows confidential requests for mediation. Mr. Shea explained that the Utah Supreme Court has already decided to not allow confidential requests, so the issue is what changes should be made to the Rule, if any, and how it should apply in the Court of Appeals. He explained the underlying concern that a confidential request could be viewed as an *ex parte* communication with the Court.

Michele Mattsson, Chief Appellate Mediator, advocated for the Rule to remain as it is and to preserve the ability for parties to confidentially request mediation. She explained that other jurisdictions allow confidential mediation requests, including the Tenth Circuit. She explained that a confidential request does not affect her neutrality as a mediator; that the requests go through a screening process; that not all requests lead to a court-ordered mediation; and that there is ultimately no harm if the request does lead to a court-ordered mediation because the other side has the option of not participating if they call her and request to get out of it.

Judge Voros said that he views the appellate mediation program as significant and successful, and that in his experience, parties who participate in the mediations have generally had positive feedback. However, he expressed concern about the unilateral nature of a confidential request, and asked for comments from practitioner committee members.

Mr. Booher, Mr. Parker, Mr. Burke, and Ms. Romano all agreed that they did not see a problem with the ex parte nature of a confidential mediation request from a practitioner standpoint. Mr. Parker commented, and Mr. Burke agreed, that a confidential mediation request is similar to practice of calling a court clerk to request a hearing be scheduled. The committee members agreed that a confidential mediation request would not lead to a competitive advantage for one side or the other in the mediation.

Judge Voros commented on the separation between mediation and adjudication, and how he has no involvement in the mediation or communication with the mediator other than signing the order for the parties to mediate.

Mr. Shea commented that the Utah Supreme Court has different reasons for deciding to not allow confidential mediation requests, which has to do with its discretionary docket and with preserving policy interests in deciding cases.

The committee members discussed whether the Rule needed to be amended to account for the Utah Supreme Court practice of not allowing confidential mediation requests. Michelle Mattsson commented, and Ms. Watt agreed, that changing the rule was not necessary and that it would confuse people more than it would help.

Mr. Parker moved for the committee to recommend that Utah R. App. P. 28A(h) be left as it is. Mr. Booher seconded the motion and it passed unanimously.

5. Subcommittee Updates **Tim Shea**

Federal Rules- Mr. Shea reported that the federal rules subcommittee has completed its report and recommendation to adopt the federal model and extend the time to appeal after post-trial motions for attorney's fees are decided. This will require amendments to Utah's appellate and civil rules that will need to be discussed in the future, and will be on the Agenda for discussion in October or November.

E-filing- Mr. Shea reported that the E-filing subcommittee has completed its first cut of proposed amendments to the rules, which may be ready for discussion by the committee in October or November. The amendments include substantive edits that are not strictly related to e-filing, which will be time-consuming to discuss. Mr. Parker suggested that someone should prepare a summary of the policies behind the amendments instead of reviewing it line by line.

6. Public Comment to Rule 38A **Joan Watt**

Ms. Watt invited discussion on the two public comments that were received to Rule 38A. The first comment expressed concern that a client might lose his or her right to petition for certiorari if counsel did not file one on their behalf, due to the short time frames involved. The comment questioned whether the rule should require counsel to inform the client about deadlines, or toll the time to petition for certiorari so that rights are not lost.

Ms. Watt stated, and the committee agreed, that it is the attorney's responsibility to communicate with the client about the deadlines for filing a cert petition, and that this is a matter of attorney-client relations, not something that should be addressed directly in the Rule. Mr. Sabey commented that cert petition deadline is jurisdictional, and cannot be extended by adding a tolling provision to the Rule.

The second comment opposed adopting the amendment, expressing concern that lawyers should not be forced to represent a client throughout the appeals process. Mr. Shea stated, and the committee agreed, that this concern is adequately addressed by the exception in the Rule that allows an attorney to withdraw for good cause.

The committee discussed how the Rule was adopted to clarify that attorneys who represent indigent clients on appeal are expected to represent them throughout the appeals process, including filing a cert petition if warranted. Mr. Booher pointed out a potential ambiguity in Rule 38A(a)(2) where it states "if a party has a right to effective assistance of counsel," which could be read as limiting the representation to exclude a cert petition. Mr. Parker suggested amending that language to read "if a party has a right to effective assistance of counsel through the first appeal of right," in order to address that concern.

Mr. Booher made a motion to recommend the Rule's adoption to the Utah Supreme Court with the minor revision proposed by Mr. Parker. Mr. Parker seconded the motion, and it passed unanimously.

7. Rule 24 **Troy Booher**
Rule 24 and *State v. Nielsen*
Rule 27

Mr. Booher summarized the committee's prior discussions on the proposed amendments to Rule 24, which included subsections (a) through (b)(4). The committee discussed and agreed to reject the proposed changes to subsections (b)(5), (b)(6), and (b)(7), and to go back to using the original language that was used in the pre-amendment section (a)(5), which is now renumbered as subsection (b)(5). The proposed changes read as follows:

(a) Definitions. For purposes of this rule, the terms "appeal," "cross-appeal," "appellant," and "appellee" include the equivalent elements of original proceedings filed in the appellate court.

(b) Brief of the appellant. The ~~b~~Brief of ~~the a~~Appellant shall contain under appropriate headings and in the order indicated:

(~~a~~b)(1) List of parties. A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties and except as provided in paragraph (e). The list should be set out on a separate page ~~which appears~~ immediately inside the cover.

(~~a~~b)(2) Table of contents. A table of contents~~, including the contents of the addendum,~~ with page references to the items included in the brief, including page or tab references to items in the addendum.

(~~a~~b)(3) Table of authorities. A table of authorities including all ~~with~~ cases~~, alphabetically arranged with parallel citations,~~ rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(~~a~~b)(4) Introduction. A ~~brief~~ succinct statement of the nature of the case, intended to provide a brief explanation of the case for the purpose of orienting the reader as to the general context in which the appeal arises. s~~howing the jurisdiction of the appellate court.~~

(~~a~~b)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(~~a~~b)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(~~a~~b)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(~~a~~b)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

Judge Voros made a motion to make these changes. Mr. Parker seconded the motion, and it passed unanimously.

The committee moved on to discuss the proposed amendment to subsection (b)(7)—Statement of the Case. Judge Voros suggested that a comma should be inserted after the words "history" and "below." The proposed text reads as follows:

(~~a~~b)(7) Statement of the case. To the extent relevant to the issues on appeal, a procedural history, including the disposition(s) below, and a statement of the facts. Both the procedural history and statement of facts ~~The statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below~~ shall be supported by citations to the record in accordance with paragraph (~~e~~f) of this rule.

Mr. Parker moved to accept the proposed changes to subsection (b)(7). Ms. Westby seconded the motion, and it passed unanimously.

The committee moved on to discuss the proposed amendment to subsection (b)(8)—Summary of arguments. Mr. Burke suggested that the language should be edited to omit the words "succinct," "actually," and "mere," which gives the rule a snarky tone. "Judge Orme suggested using language "in the nature of an executive summary." Judge Voros commented, and other committee members agreed, that this is a term of art that might not be understood by everyone, and that it might incorrectly imply that Judges will only read the summary. Mr. Parker commented that the Rule should not be focused on offering practice tips to practitioners, and should instead just state the requirement. The committee agreed upon the following changes:

(~~a~~b)(8) Summary of arguments. ~~The~~ A summary of the arguments~~, suitably paragraphed, shall be a succinct condensation of the arguments actually~~ made in the body

of the brief. It shall not be a ~~mere~~ repetition of the heading under which the argument is arranged.

Mr. Parker moved to approve these changes. It was seconded, and passed unanimously.

The other items were tabled until the next meeting.

8. Other Business

The committee did not discuss other business.

9. Adjourn

The meeting was adjourned at 1:32 p.m. The next meeting will be held on Thursday, October 1, 2015.

Tab 2

Rule 28A. Appellate Mediation Office.

(a) Appellate Mediation Office; Purpose of Mediation Conference. The court may direct the attorneys for the parties and the parties to appear before a mediator appointed by the court for a mediation conference to explore the possibility of settlement and ~~such~~ any other matters ~~as~~ that may aid in the efficient management and disposition of the case.

~~**(b) Case referral.** When a case is referred to the Appellate Mediation Office, the clerk of the appellate court shall forthwith forward to the Appellate Mediation Office all filings in the case.~~ The court will advise the parties by order that the case has been referred to the Appellate Mediation Office. All decisions regarding conduct of the mediation conference ~~shall be~~ are within the sole discretion of the mediator ~~appointed by the court~~.

~~**(c) Transmittal of record on appeal.** The record will be transmitted by the clerk of the trial court to the clerk of the appellate court upon request. Following the mediation conference, the record will be returned to the clerk of the trial court.~~

~~**(d) Participation of Counsel and Parties.** Upon receipt of the order referred to in section (b),~~ ~~p~~Participation by counsel and clients in the mediation process or related discussions ~~shall be~~ is mandatory.

~~**(e)**~~ **(b) Confidentiality.** Unless contained in a written settlement agreement ~~as contemplated~~ under ~~section (i)~~ paragraph (f), statements and comments made during mediation conferences and in related discussions, and any record of those statements, are confidential and ~~shall~~ may not be disclosed by anyone (including the appellate mediation office, counsel, or the parties; and their agents or employees) to anyone not participating in the mediation process. Proceedings under this rule may not be recorded by counsel or the parties. ~~Pursuant to Utah Code Ann. § 78-2a-6, the records of the Appellate Mediation Office are protected as defined by Utah Code Ann. § 63-2-304 and may be disclosed only as provided by Utah Code Ann. § 63-2-202. Mediators shall not be called as witnesses, and the information and records of the Appellate Mediation Office shall not be disclosed to judges, staff, or employees of any court.~~

~~**(f)**~~ **(c) Continuances.** Mediation conferences will not be rescheduled or continued absent good cause as determined by the mediator ~~appointed by the court~~.

~~**(g)**~~ **(d) Extensions/Tolling.** The time for filing briefs~~,~~ or motions for summary disposition ~~or~~ and for other appellate proceedings is not automatically tolled pending a mediation conference. ~~In cases in which a mediation conference has been scheduled, counsel~~ The parties may seek an extension by motion or stipulation as provided in Rule 22~~, Utah Rules of Appellate Procedure~~.

~~**(h)**~~ **(e) Request for Mediation Conference by a Party.**

(e)(1) For cases pending in the Supreme Court, the parties may request a mediation conference by stipulated motion filed with the Court. The Court will determine whether the case will be referred to mediation. If a mediation conference is ordered, the mediation will be conducted in accordance with this rule.

(e)(2) ~~Counsel~~ For cases pending in the Court of Appeals, the parties may request a mediation conference ~~either~~ by motion, letter, or confidential request. The Chief Appellate Mediator ~~shall~~ will determine whether a mediation conference will be conducted. The decision of the Chief Appellate Mediator is final and not subject to ~~further~~ review. If a mediation conference is ~~scheduled~~ ordered, the mediation ~~shall~~ will be conducted in accordance with ~~the provisions in~~ this rule.

~~(i)~~ (f) Settlement/Termination. In appeals settled in whole or in part pursuant to this rule, the court will enter an appropriate order upon written stipulation of all parties, or in the case of voluntary dismissal by the appellant pursuant to these rules, and send ~~notice of~~ the order to the parties. In appeals not settled and terminated from mediation, the court ~~shall~~ will enter an appropriate order and send ~~notice of~~ the order to the parties. A motion to enforce a settlement agreement will be considered only if the alleged agreement is in writing. The motion and related documents shall be filed under seal.

~~(j)~~ (g) Sanctions. The court may impose sanctions, including costs, fees or dismissal, for the failure of counsel or a party to comply with the provisions of this rule or with orders entered pursuant to this rule.

Tab 3

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

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August 4, 2015

To: Civil Rules Committee and Appellate Rules Committee
From: Rod Andreason, Paul Burke, Amber Mettler, Alan Mouritsen, Tim Shea
Re: Effect of post-judgment proceedings on time to appeal

Introduction

The supreme court invited the two advisory committees to form a joint workgroup to examine the policies influencing whether post-judgment proceedings should extend the time in which to file a notice of appeal. Amber Mettler and Rod Andreason were appointed from the civil rules committee, and Alan Mouritsen and Paul Burke were appointed from the appellate rules committee.

Effect of post-judgment proceedings on time to appeal under state and federal rules

URAP 4 is similar to its federal counterpart, recognizing the following motions as extending the time to appeal until 30 days after the order disposing of the motion:

- a motion for judgment;
- a motion to amend or make additional findings of fact;
- a motion to alter or amend the judgment; and
- a motion for a new trial.

However, FRAP 4 also recognizes in certain circumstances a motion for attorney fees and a motion for relief under FRCP 60 as extending the time to appeal, but the state rule does not. We recommend appropriate amendments to adopt the federal model.

FRAP 4 was amended in 1993 to recognize a motion for attorney fees as extending the time to appeal, but only if the judge expressly provides for that result. In the same set of amendments, a motion for relief under Rule 60 also was recognized as extending the time to appeal, but only if the motion was filed within 10 days—later extended to 28 days—after the judgment.

The distinction in state law that requires attorney fees to be resolved before a judgment is final was established in *ProMax Development Corp. v. Raile*, 2000 UT 4, 998 P.2d 254. Most recently, in *Migliore v. Livingston Financial*, 2015 UT 9, ¶ 20, the supreme court applied the principles in *ProMax* to require that an order to show cause for Rule 11 sanctions entered before or contemporaneously with a judgment had to be resolved before the judgment is final.

Whether to include a motion under Rule 60 as extending the time to appeal seems never to have been considered by either committee. Whether to include a motion for attorney fees seemed precluded by *ProMax* until the supreme court invited us to re-examine these distinctions and to make recommendations.

Federal model recommended

Our competing objectives are to broadly extend the principle of judicial economy, which also benefits the parties, by allowing a single appeal to resolve as many issues between the parties as possible, yet not delay the appeal while collateral issues are being resolved in the trial court. The federal rule has struck an appropriate balance, and both committees support state rules that parallel the federal rules, unless there are reasons to differ.

Attorney fees

Although attorney fees are collateral to the factual and legal disputes in the cause of action, whether to appeal a judgment sometimes hinges on the amount owed, which in turn depends in part on the amount of costs, attorney fees, and financial penalties. The supreme court recognized this motivation in *ProMax*, citing *Meadowbrook v. Flower*, 959 P.2d 115 (Utah 1998).

FRAP 4 and FRCP 58 address the point by giving to the trial court judge the discretion to treat a motion for attorney fees as extending the time to appeal. The judge can decide, based on the circumstances of the case, whether a single appeal of all issues, including attorney fees, would serve judicial economy or whether the time needed to determine attorney fees would deny a party justice by delaying the appeal for an inordinate amount to time.

We sought the assistance of the administrative office of the courts to search the district court database for post-judgment claims for attorney fees. In fiscal year 2014 there were only 75. We surmised that, given the *ProMax* decision, attorney fees were being determined, for the most part, before the judgment is entered and so not showing up in a search for post-judgment activity. A second query confirmed this hypothesis, showing 399 pre-judgment claims for attorney fees.

Casetype	Pre-Judgment	Post-Judgment	Total
Adoption	3		3
Civil Rights	1		1
Civil Stalking	2	1	3
Conservatorship	2		2
Contracts	60	12	72
Custody and Support	15		15
Debt Collection	41	7	48
Divorce/Annulment	118	24	142
Estate Personal Representative		2	2
Eviction	7	2	9
Grandparent Visitation	10		10
Guardianship	7	2	9
Interpleader	4		4
Judgment by Confession		1	1
Lien/Mortgage Foreclosure	8		8
Minor's Settlement	3	1	4
Miscellaneous	38	8	46
Other Probate	1		1
Paternity	19	5	24

Casetype	Pre-Judgment	Post-Judgment	Total
Personal Injury	16	1	17
Property Damage	10		10
Property Rights	10	2	12
Protective Orders	5	1	6
Small Claims Trial De Novo	5	1	6
Separate Maintenance		1	1
Trust	7	1	8
UCCJEA Child Custody Jurisdiction	1	2	3
UIFSA	1		1
Writs	1		1
Wrongful Lien	3	1	4
Wrongful Termination	1		1
Total	399	75	474

Effect of change

By adopting the federal model regarding the effect of post-judgment claims for attorney fees, we believe judgments will be entered more quickly after the decision on the merits, whether by verdict or by summary judgment. We also believe the amendments will help to protect the appellate rights of parties and avoid the cost of premature appeals.

Under *ProMax* and *Meadowbrook* a judgment is not final until the claim for attorney fees has been resolved. An appeal filed before a claim for attorney fees has been resolved is premature and will be dismissed.

Under the federal rule and our proposed amendments, a claim for attorney fees ordinarily does not extend the time to appeal, but the trial court judge has the discretion to order that it does. And, under the federal rule, filing a notice of appeal does not deprive the trial court of jurisdiction to decide the motion for attorney fees—regardless of whether the motion is filed before or after the notice of appeal. As was noted in *Neroni v. Becker*, No. 13-3909, 2015 WL 1810508, at *1 (2d Cir. Apr. 22, 2015)

> First, the district court properly exercised jurisdiction over the defendants' application for attorneys' fees. "We have consistently held that '[w]henever a district court has federal jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney's fees.' " *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 225 (2d Cir.2004) (quoting *In re Austrian & Ger. Bank Holocaust Litig.*, 317 F.3d 91, 98 (2d Cir.2003)). Moreover, "notwithstanding a pending appeal, a district court retains residual jurisdiction over collateral matters, including claims for attorneys' fees." *Id*. Thus, the Neronis' argument that the district court lacked jurisdiction to rule on the defendants' fee application because a judgment and notice of appeal had been already filed is without merit.

Thus a party considering an appeal would be well-advised to file the notice of appeal within 30 days after entry of the judgment, even if there is a pending claim for attorney fees. The appellant who waits does so at its peril because the process for a motion under Rule 7 usually requires more than 30 days and the judge might not extend the time to appeal.

Under our proposed amendments, if the notice of appeal is filed within 30 days after the judgment, the appellant is protected regardless of the judge's decision. If the judge

does not extend the time to appeal, the notice nevertheless was filed within 30 days of the judgment as required by URAP 4(a). If the judge does extend the time to appeal, the earlier-filed notice becomes effective on the date of the order under URAP 4(b)(2)—renumbered as paragraph (b)(3) in our proposal. In either event, the notice of appeal can be amended to include any errors claimed in the award of attorney fees.

Attorney fees as a result of sanctions

We recommend treating the determination of attorney fees that are the result of sanctions the same as any other. The process for determining the amount of fees imposed as a result of sanctions can be abbreviated, as described below, but the effect on the timeliness of an appeal should be the same. Consequently, the exemption found in FRCP 54(d)(2)(E) is not contained in our proposals for URCP 54 or URCP 73. Although different from the federal rule, our recommended approach is ultimately simpler. We also believe the federal exemption goes too far, leaving important procedural questions unanswered.

FRCP 54(d)(2)(E) exempts the balance of the section, which establishes the timing and procedures for motions for attorney fees, from "claims for fees and expenses as sanctions for violating these rules…." What timing and procedures do apply are not stated. Whether a trial court judge has the discretion under FRCP 58(e) to extend the time to appeal as part of a claim for attorney fees as a sanction is an open question because Rule 58(e) requires as a condition of that discretion "a timely motion for attorney's fees …made under Rule 54(d)(2)," which expressly does not apply to claims for attorney fees as a sanction.

Relief under Rule 60

FRAP 4 treats a motion for relief under FRCP 60 similarly to other post-trial motions directed at the judgment: to extend the time to appeal, the motion must be filed within 28 days after the judgment. When the federal rule was amended in 1993 the advisory committee noted:

> [The amendment] eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4).

The federal appellate rule was amended in 2009 to recognize the longer time—28 days—allowed by the civil rules in which to file these motions.

Treating a motion under URCP 60 filed within 28 days after the judgment the same as a timely motion under URCP 59 makes eminent sense. We see no reason not to follow the federal lead.

Rule 11 sanctions and other miscellaneous post-judgment proceedings

Migliore answers the question whether an order to show cause for Rule 11 sanctions needs to be resolved before a judgment is final. More generally, it raises the questions: What other post-judgment proceedings might there be? And should they be resolved before a judgment is final?

To try to answer the first question we again sought the assistance of the administrative office of the courts to search the district court database for post-judgment motions generally. In fiscal year 2014 there were almost 1900 of them, about 200 of

which arguably would qualify to extend the time to appeal under current law. (Given the inventiveness with which attorneys title motions, it is sometimes difficult to tell.)

The results of the research show the futility of trying to describe in a rule these further proceedings and the effect they might have on the timeliness of an appeal. We recommend that the state rules go only so far as the federal rules and no farther. This means that, although *Migliore* was based on applying the attorney-fee rule from *ProMax*, and we recommend that Utah adopt the federal approach for attorney fees, we nevertheless recommend against any changes to recognize Rule 11 sanctions—or any of the other 1900 types of proceedings pending at the time of the judgment—as extending the time to appeal. Some of these proceedings will fall within the current and expanded rules that extend the time to appeal, but most will not.

Thus, *Migliori* continues to stand for the principle that an order to show cause for Rule 11 sanctions entered before or contemporaneously with a judgment must be resolved before the judgment is final. Whether the post-judgment "motion to determine subjective intent" that we found in our research has the same effect may have to await development by caselaw.

Summary

We recommend amending URAP 4 to recognize motions for relief under URCP 60 and the determination of attorney fees as extending the time in which to appeal in the same circumstances as those described in the federal rule.

Process for claiming attorney fees

We also take this opportunity to recommend improving the process for claiming attorney fees, adopting not only the federal policy respecting claims for attorney fees, but also much of the process. The effect is to modify another aspect of *Meadowbrook*. In *Meadowbrook*, the court stated "there must come a time of closure, or finality, in a case when a claim for attorney fees must be raised or waived. That time is the signed entry of final judgment." *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 118 (Utah 1998). We recommend that, as in the federal district courts, a party have up to 14 days after entry of judgment to claim attorney fees.

As part of a broader effort to remove from the Code of Judicial Administration rules governing civil, criminal and appellate procedures, the judicial council in 2003 repealed four rules governing attorney fees: Code of Judicial Administration Rule 4-505; Rule 4-505.1; Rule 6-501; and Rule 6-502. The supreme court simultaneously adopted Rule of Civil Procedure 73. The federal rules govern the process for claiming attorney fees as part of Rule 54.

If one considers the chronology of events in civil litigation, attorney fees, like costs, should be part of Rule 54 on judgments, arguing in favor of moving the attorney fee provisions in the state rules. However, leaving the process for claiming attorney fees in Rule 73 serves the interest of stability in the rules. After discussing the competing interests, we recommend continuing to use Rule 73 as the vehicle for claiming attorney fees, and we recommend adopting some of the federal provisions that establish a better process.

- The state rule does not have a maximum time in which to claim attorney fees; the federal rule requires that attorney fees be claimed no later than 14 days after the judgment.
- The state rule requires that the affidavit supporting the claim describe the "basis" for the award; we favor the more specific federal rule requiring that

the motion describe the "judgment and the statute, rule, or other grounds" for the award. To this we recommend adding "contract."

- The federal rule authorizes the court to require disclosure of "the terms of any agreement about fees" and to determine liability for fees independent of the amount; the state rule includes only agreements about fee-sharing and a statement that the attorney will not share fees in violation of Rule of Professional Conduct 5.4.
- The federal rule expressly allows the court to determine liability for attorney fees independent of determining the amount; the state rule is silent.

Claiming attorney fees as a consequence of the outcome in the litigation should continue to be by motion. However, if the court has previously established liability for attorney fees, the process for determining the amount is appropriately simpler than the usual motion process. With liability established—for example, in an order on a discovery dispute or an order for sanctions—the amount can be fixed by filing an affidavit and allowing an objection. In URCP 73, therefore, we recognize two procedures distinguished by whether the court has previously entered an order establishing liability for attorney fees. If it has, the amount probably will be determined soon after the order that creates the obligation, but the final deadline remains 14 days after the judgment.

Process to add costs and attorney fees to the judgment

The civil rules committee asked that, as part of this examination, we consider the best process for adding attorney fees and costs to a judgment. The supreme court has amended URCP 54 effective November 1, 2015, to remove paragraph (e):

> (e) Interest and costs to be included in the judgment. The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

When published for comment, removing this paragraph was seen by some as eliminating costs and interest from the judgment. That was never the committee's intent. Paragraph (e) simply describes a process—one that is not being followed; it does not establish rights.

Pre-judgment and post-judgment interest are governed by statute or contract. The interest rates are known at the time of the judgment, and they should be included when the judgment is first entered. Costs are not necessarily known when the judgment is first entered and must be added to the judgment afterward. Thus the quaint requirement for "a blank left in the judgment for that purpose." Although not included in paragraph (e), attorney fees also fall into this category of later-known amounts that affect the judgment principal. The simplest method for including costs and attorney fees in a judgment is to amend the judgment.

Since there would already have been a process to determine the liability for and the amount of costs and attorney fees, the judgment creditor should be able simply to file an amended judgment without a Rule 59 motion. Expressly recognizing an amended judgment as the means of adding costs and attorney fees raises the question of whether the amended judgment extends the time to appeal. The answer for attorney fees under the federal rules and under our recommendations is that the trial court judge has the discretion to make that decision. We recommend extending the same policy to a

determination of costs, although this is different from state caselaw. See *Nielson v. Gurley*, 888 P.2d 130 (Utah App 1994).

Costs typically are much less than attorney fees, and so should seldom be a factor in deciding whether to appeal. But costs can sometimes be significant. More important, both costs and attorney fees have the effect of amending the judgment, and we see value in applying a consistent rule to that circumstance. Under current law, a timely notice of appeal can be amended to include later-added costs. Permitting the trial court judge to extend the time to appeal achieves a similar result. As with attorney fees, the default is that a claim for costs does not extend the time to appeal, but the trial court judge could order that result.

Effect of our recommendations on civil rules already proposed for amendment

Independent of this effort, the civil rules committee has proposed amendments to Rule 54 and Rule 58A that have been approved by the supreme court but will not be effective until November 1, 2015. We recommend further amendments to Rules 54 and 58A, and we present as the baseline the rules as they will be on November 1.

The civil rules committee also is considering amendments to Rules 50, 52, 59 and 60 that will modify the process for post-trial motions. Those changes do not affect the principles discussed here, nor do our recommendations require further amendment of those rules.

Summary of amendments

Rule of Appellate Procedure 4. Adds to the list of post-judgment proceedings that extend the time to appeal:

- a motion for relief under URCP 60, if filed within 28 days after judgment; and
- a determination of attorney fees under URCP 73 if the court so orders.

Rule of Civil Procedure 54. Adds a provision for amending a judgment to include costs and attorney fees.

Rule of Civil Procedure 58A. Exempts from the requirement for a separate document an order awarding attorney fees. As in the federal court, a separate document is not required because the order is not a judgment. However, to include the award in the judgment, the party must file an amended judgment which does fall within the separate document requirement.

Includes a provision similar to that of federal Rule 58(e) that ordinarily a determination of costs or attorney fees does not extend the time to appeal but allows the trial judge to order otherwise. Includes costs as well as attorney fees. Includes attorney fees awarded as a sanction.

Rule of Civil Procedure 73. Establishes the deadline and the procedures for claiming attorney fees. Similarities with federal Rule 54(d):

- claim fees by motion;
- deadline for filing is 14 days after the judgment;
- state the grounds for the award;
- disclose the terms of any agreement about attorney fees if ordered by the court;
- state the amount claimed; and
- establishes court authority to decide liability independent of amount.

Differences:

- describe factors supporting the reasonableness of the claim if reasonableness is applicable;
- support the claim by affidavit or declaration describing for each item of work the name, position and hourly rate of the persons who performed the work; and
- if liability for fees has been previously determined, the amount can be determined by affidavit or declaration alone.

Encl: Rule of Appellate Procedure 4
Rule of Civil Procedure 54
Rule of Civil Procedure 58A
Rule of Civil Procedure 73

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 relief under Rule 60 of the Utah Rules of Civil Procedure if the motion is filed no later than 28 days after the judgment is entered; or

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

(b)(2) If a party files a motion or claim for attorney fees under Rule 73 of the Utah Rules of Civil Procedure or a claim for costs under Rule 54 of the Utah Rules of Civil Procedure and if the trial court extends the time to appeal under Rule 54, the time for all parties to appeal from the judgment runs from the entry of the order disposing of the motion or claim.

(b)(3) 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~~ paragraph (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~~ paragraph (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.

(e) Motion for extension of time.

(e)(1) The trial court, upon a showing of good cause, may extend the time for filing a notice of appeal upon motion filed before the expiration of the time prescribed by paragraphs (a) and (b) of this rule. Responses to such motions for an extension of time are disfavored and the court may rule at any time after the filing of the motion. No extension shall exceed 30 days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(e)(2) The trial court, upon a showing of good cause or excusable neglect, 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 court may rule at any time after the filing of the motion. That a movant did not file a notice of appeal to which paragraph (c) would apply is not relevant to the determination of good cause or excusable neglect. No extension shall exceed 30 days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(f) Motion to reinstate period for filing a direct appeal in criminal cases. Upon a showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the sentencing court and serve the prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that the defendant was deprived of the right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

(g) Motion to reinstate period for filing a direct appeal in civil cases.

(g)(1) The trial court shall reinstate the thirty-day period for filing a direct appeal if the trial court finds by a preponderance of the evidence that:

(g)(1)(A) The party seeking to appeal lacked actual notice of the entry of judgment at a time that would have allowed the party to file a timely motion under paragraph (e) of this rule;

(g)(1)(B) The party seeking to appeal exercised reasonable diligence in monitoring the proceedings; and

(g)(1)(C) The party, if any, responsible for serving the judgment under Rule 58A(d) of the Utah Rules of Civil Procedure did not promptly serve a copy of the signed judgment on the party seeking to appeal.

(g)(2) A party seeking such reinstatement shall file a written motion in the trial court within one year from the entry of judgment. The party shall comply with Rule 7 of the Utah Rules of Civil Procedure and shall serve each of the parties in accordance with Rule 5 of the Utah Rules of Civil Procedure.

(g)(3) If the trial court enters an order reinstating the time for filing a direct appeal, a notice of appeal must be filed within 30 days after the date of entry of the order.

Advisory Committee Note

Paragraph (f) was adopted to implement the holding and procedure outlined in Manning v. State, 2005 UT 61, 122 P.3d 628.

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree or order that adjudicates all claims and the rights and liabilities of all parties or any other order from which an appeal of right lies. A judgment should not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims and/or involving multiple parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, cross claim, or third party claim—and/or when multiple parties are involved, the court may enter judgment as to one or more but fewer than all of the claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs.

(d)(1) To whom awarded. Unless a statute, these rules, or a court order provides otherwise, costs should be allowed to the prevailing party. Costs against the state of Utah, its officers and agencies may be imposed only to the extent permitted by law.

(d)(2) How assessed. The party who claims costs must within 14 days after the entry of judgment file and serve a verified memorandum of costs. A party dissatisfied with the costs claimed may, within 7 days after service of the memorandum of costs, object to the claimed costs.

(d)(3) Memorandum filed before judgment. A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, is deemed served and filed on the date judgment is entered.

(e) Amending the judgment to add costs or attorney fees. If the court awards costs under paragraph (d) or attorney fees under Rule 73 after the judgment is entered, to include the award in the judgment, the party must file and serve an amended judgment including the costs or attorney fees, and the court will enter the amended judgment unless another party objects within 7 days after the amended judgment is filed.

Advisory Committee Notes

Rule 58A. Entry of judgment; abstract of judgment.

(a) Separate document required. Every judgment and amended judgment must be set out in a separate document ordinarily titled "Judgment"—or, as appropriate, "Decree."

(b) Separate document not required. A separate document is not required for an order disposing of a post-judgment motion:

(b)(1) for judgment under Rule 50(b);

(b)(2) to amend or make additional findings under Rule 52(b);

(b)(3) for a new trial, or to alter or amend the judgment, under Rule 59; or

(b)(4) for relief under Rule 60; or

(b)(5) for attorney fees under Rule 73.

(c) Preparing a judgment.

(c)(1) Preparing and serving a proposed judgment. The prevailing party or a party directed by the court must prepare and serve on the other parties a proposed judgment for review and approval as to form. The proposed judgment shall be served within 14 days after the jury verdict or after the court's decision. If the prevailing party or party directed by the court fails to timely serve a proposed judgment, any other party may prepare a proposed judgment and serve it on the other parties for review and approval as to form.

(c)(2) Effect of approval as to form. A party's approval as to form of a proposed judgment certifies that the proposed judgment accurately reflects the verdict or the court's decision. Approval as to form does not waive objections to the substance of the judgment.

(c)(3) Objecting to a proposed judgment. A party may object to the form of the proposed judgment by filing an objection within 7 days after the judgment is served.

(c)(4) Filing proposed judgment. The party preparing a proposed judgment must file it:

(c)(4)(A) after all other parties have approved the form of the judgment; (The party preparing the proposed judgment must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.)

(c)(4)(B) after the time to object to the form of the judgment has expired; (The party preparing the proposed judgment must also file a certificate of service of the proposed judgment.) or

(c)(4)(C) within 7 days after a party has objected to the form of the judgment. (The party preparing the proposed judgment may also file a response to the objection.)

(d) Judge's signature; judgment filed with the clerk. Except as provided in paragraph (h) and Rule 55(b)(1), all judgments must be signed by the judge and filed with the clerk. The clerk must promptly record all judgments in the docket.

(e) Time of entry of judgment.

(e)(1) If a separate document is not required, a judgment is complete and is entered when it is signed by the judge and recorded in the docket.

(e)(2) If a separate document is required, a judgment is complete and is entered at the earlier of these events:

(e)(2)(A) the judgment is set out in a separate document signed by the judge and recorded in the docket; or

(e)(2)(B) 150 days have run from the clerk recording the decision, however designated, that provides the basis for the entry of judgment.

(f) Award of costs or attorney fees. Ordinarily the time for appeal is not extended by a determination of costs or attorney fees, but the court may order that the time to appeal runs from entry of the order of award. To accomplish this result, the court must act before a notice of appeal has been filed and becomes effective.

(g) Notice of judgment. The party preparing the judgment shall promptly serve a copy of the signed judgment on the other parties in the manner provided in Rule 5 and promptly file proof of service with the court. Except as provided in Rule of Appellate Procedure 4(g), the time for filing a notice of appeal is not affected by this requirement.

~~**(g)**~~ **(h) Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be entered.

~~**(h)**~~ **(i) Judgment by confession.** If a judgment by confession is authorized by statute, the party seeking the judgment must file with the clerk a statement, verified by the defendant, as follows:

~~(h)(1)~~ (i)(1) If the judgment is for money due or to become due, the statement must concisely state the claim and that the specified sum is due or to become due.

~~(h)(2)~~ (i)(2) If the judgment is for the purpose of securing the plaintiff against a contingent liability, the statement must state concisely the claim and that the specified sum does not exceed the liability.

~~(h)(3)~~ (i)(3) The statement must authorize the entry of judgment for the specified sum.

The clerk must sign the judgment for the specified sum.

~~**(i)**~~ **(j) Abstract of judgment.** The clerk may abstract a judgment by a signed writing under seal of the court that:

~~(i)(1)~~ (j)(1) identifies the court, the case name, the case number, the judge or clerk that signed the judgment, the date the judgment was signed, and the date the judgment was recorded in the registry of actions and the registry of judgments;

~~(i)(2)~~ (j)(2) states whether the time for appeal has passed and whether an appeal has been filed;

~~(i)(3)~~ (j)(3) states whether the judgment has been stayed and when the stay will expire; and

~~(i)(4)~~ (j)(4) if the language of the judgment is known to the clerk, quotes verbatim the operative language of the judgment or attaches a copy of the judgment.

Advisory Committee Note

2015 amendments

The 2015 amendments to Rule 58A adopt the requirement, found in Rule 58 of the Federal Rules of Civil Procedure, that a judgment be set out in a separate document. In the past, problems have arisen

when the district court entered a decision with dispositive language, but without the other formal elements of a judgment, resulting in uncertainty about whether the decision started the time for appeals. This problem was compounded by uncertainty under Rule 7 about whether the decision was the court's final ruling on the matter or whether the prevailing party was expected to prepare an order confirming the decision.

The 2015 amendments of Rule 7, Rule 54 and Rule 58A are intended to reduce this confusion by requiring "that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment." See Advisory Committee Notes to 1963 Amendments to Fed. R. Civ. P. 58. Courts and practitioners are encouraged to use appropriate titles with separate documents intended to operate as judgments, such as "Judgment" or "Decree," and to avoid using such titles on documents that are not appealable. The parties should consider the form of judgment included in the Appendix of Forms. On the question of what constitutes a separate document, the Committee refers courts and practitioners to existing case law interpreting Fed. R. Civ. P. 58. For example, *In re Cendant Corp.*, 454 F.3d 235, 242-244 (3d Cir. 2006) offers three criteria:

1) the judgment must be set forth in a document that is independent of the court's opinion or decision;

2) it must contain ordering clauses stating the relief to which the prevailing party is entitled, and not merely refer to orders made in other documents or state that a motion has been granted; and

3) it must substantially omit recitation of facts, procedural history, and the reasons for disposing of the parties' claims.

While "some trivial departures" from these criteria—such as a one-sentence explanation of reasoning, a single citation to authority, or a reference to a separate memorandum decision—"must be tolerated in the name of common sense," any explanation must be "very sparse." *Kidd v. District of Columbia*, 206 F.3d 35, 39 (D.C. Cir. 2000).

The concurrent amendments to Rule 7 remove the separate document requirement formerly applicable to interlocutory orders. Henceforward, the separate document requirement will apply only to judgments, a change that should reduce the tendency to confuse judgments with other orders. Rule 7 has also been amended to modify the process by which orders on motions are prepared. The process for preparing judgments is the same.

Under amended Rule 7(j), a written decision, however designated, is complete—is the judge's last word on the motion—when it is signed, unless the court expressly requests a party to prepare an order confirming the decision. But this should not be confused with the need to prepare a separate judgment when the decision has the effect of disposing of all clams in the case. If a decision disposes of all claims in the action, a separate judgment is required whether or not the court directs a party to prepare an order confirming the decision.

~~Rule 58A is similar to Fed. R. Civ. P. 58 in listing the instances where a separate document is not required. The state rule differs from the federal rule regarding an order for attorney fees. Fed. R. Civ. P. 58 includes an order for attorney fees as one of the orders not requiring a separate document. That~~

~~particular order is omitted from the Utah rule because under Utah law a judgment does not become final for purposes of appeal until the trial court determines attorney fees. See *ProMax Development Corporation v. Raile*, 2000 UT 4, 998 P.2d 254. See also Utah Rule of Appellate Procedure 4, which states that the time in which to appeal post-trial motions is from the disposition of the motion.~~

State Rule 58A is ~~also~~ similar to Fed. R. Civ. P. 58 in determining the time of entry of judgment when a separate document is required but not prepared. This situation involves the "hanging appeals" problem that the Supreme Court asked this Committee to address in *Central Utah Water Conservancy District v. King*, 2013 UT 13, ¶27. Under the 2015 amendments, if a separate document is required but is not prepared, judgment is deemed to have been entered 150 days from the date the decision—or the order confirming the decision—was entered on the docket.

2016 amendments

The 2016 amendments adopt in paragraph (f) the policy of the Federal Rules of Civil Procedure governing the finality of a judgment when there is a claim for attorney fees, effectively overturning *ProMax Development Corp. v. Raile*, 2000 UT 4, 998 P.2d 254 and *Meadowbrook v. Flower*, 959 P.2d 115 (Utah 1998). Paragraph (f) clearly extends that new policy to costs as well as attorney fees, a question on which the federal rules are ambiguous.

Under *ProMax* and *Meadowbrook* a judgment was not final until the claim for attorney fees had been resolved. An appeal filed before a claim for attorney fees had been resolved was premature and would be dismissed. Under the 2016 amendments, a claim for attorney fees or costs ordinarily does not extend the time to appeal, but the trial court judge has the discretion to order that it does.

As the Advisory Committee said of the 1993 amendment of Federal Rule of Civil Procedure 58:

> Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision permits, but does not require, the court to delay the finality of the judgment for appellate purposes under revised Fed. R. App. P. 4 (a) until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate purposes.

Under the federal model, filing a notice of appeal does not deprive the trial court of jurisdiction to decide the motion for attorney fees—regardless of whether the motion is filed before or after the notice of appeal. As was noted in *Neroni v. Becker*, No. 13-3909, 2015 WL 1810508, at *1 (2d Cir. Apr. 22, 2015):

> First, the district court properly exercised jurisdiction over the defendants' application for attorneys' fees. "We have consistently held that '[w]henever a district court has federal jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney's fees.' " *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d

220, 225 (2d Cir. 2004) (quoting *In re Austrian & Ger. Bank Holocaust Litig.*, 317 F.3d 91, 98 (2d Cir. 2003)). Moreover, "notwithstanding a pending appeal, a district court retains residual jurisdiction over collateral matters, including claims for attorneys' fees." *Id*. Thus, the Neronis' argument that the district court lacked jurisdiction to rule on the defendants' fee application because a judgment and notice of appeal had been already filed is without merit.

Thus a party considering an appeal would be well advised to file the notice of appeal within 30 days after entry of the judgment, even if there is a pending claim for attorney fees. The appellant who waits does so at its peril because the process for a motion under Rule 7 usually requires more than 30 days and the judge might not extend the time to appeal.

Under the 2016 amendments, if the notice of appeal is filed within 30 days after the judgment, the appellant is protected regardless of the judge's decision. If the judge does not extend the time to appeal, the notice nevertheless was filed within 30 days of the judgment as required by Rule of Appellate Procedure 4(a). If the judge does extend the time to appeal, the earlier filed notice becomes effective on the date of the order under Rule of Appellate Procedure 4(b)(3). In either event, the notice of appeal can be amended to include any errors claimed in the award of attorney fees.

Although the 2016 amendments change a policy of long standing in the Utah state courts, the amendments will help to protect the appellate rights of parties and avoid the cost of premature appeals.

Rule 73. Attorney fees.

(a) Time in which to claim. ~~When attorney fees are authorized by contract or by law, a request for attorney fees shall be supported by affidavit or testimony~~ Attorney fees must be claimed by filing a motion for attorney fees no later than 14 days after the judgment is entered unless the party claims attorney fees in accordance with the schedule in ~~subsection (d)~~ paragraph (f) or in accordance with Utah Code Section 75-3-718 and no objection to the fee has been made.

(b) Content of motion. ~~An affidavit supporting a request for or augmentation of attorney fees shall set forth~~ The motion must:

(b)(1) ~~the basis for~~ specify the judgment and the statute, rule, contract, or other grounds entitling the party to the award;

(b)(2) ~~a reasonably detailed description of the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work~~ disclose, if the court orders, the terms of any agreement about fees for the services for which the claim is made;

(b)(3) specify factors showing the reasonableness of the fees, if applicable;

(b)(4) specify the amount of attorney fees claimed and any amount previously awarded; and

(b)(5) disclose if the ~~affidavit is in support of~~ attorney fees are for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney ~~is not sharing~~ will not share the fee ~~or any portion thereof~~ in violation of Rule of Professional Conduct 5.4.

(c) Supporting affidavit. The motion must be supported by an affidavit or declaration that reasonably describes the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work.

(d) Liability for fees. The court may decide issues of liability for fees before receiving submissions on the value of services. If the court has established liability for fees, the party claiming them may file an affidavit and a proposed order. The court will enter an order for the claimed amount unless another party objects within 7 days after the affidavit and proposed order are filed.

~~(c)~~ (e) Fees claimed in complaint. If a party ~~requests~~ claims attorney fees ~~in accordance with the schedule in subsection (d)~~ under paragraph (f), the ~~party's~~ complaint ~~shall~~ must state the basis for attorney fees, state the amount of attorney fees allowed by the schedule, cite the law or attach a copy of the contract authorizing the award, and, if the attorney fees are for services rendered to an assignee or a debt collector, a statement that the attorney will not share the fee ~~or any portion thereof~~ in violation of Rule of Professional Conduct 5.4.

~~(d)~~ (f) Schedule of fees. Attorney fees awarded under the schedule may be augmented only for considerable additional efforts in collecting or defending the judgment and only after further order of the court.

Amount of Damages, Exclusive of Costs, Attorney Fees and Post-Judgment Interest, Between	and:	Attorney Fees Allowed
0.00	1,500.00	250.00
1,500.01	2,000.00	325.00
2,000.01	2,500.00	400.00
2,500.01	3,000.00	475.00
3,000.01	3,500.00	550.00
3,500.01	4,000.00	625.00
4,000.01	4,500.00	700.00
4,500.01	or more	775.00

Advisory Committee Notes

Tab 4

Rule 24. Briefs.

(a) Definitions. For purposes of this rule, the terms “appeal,” “cross-appeal,” “appellant,” and “appellee” include the equivalent elements of original proceedings filed in the appellate court.

(b) Brief of the appellant. The ~~b~~Brief of ~~the a~~Appellant shall contain under appropriate headings and in the order indicated:

(~~a~~b)(1) List of parties. A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties and except as provided in paragraph (e). The list should be set out on a separate page ~~which appears~~ immediately inside the cover.

(~~a~~b)(2) Table of contents. A table of contents ~~, including the contents of the addendum,~~ with page references to the items included in the brief, including page or tab references to items in the addendum.

(~~a~~b)(3) Table of authorities. A table of authorities including all ~~with~~ cases, ~~alphabetically arranged and with parallel citations,~~ rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(~~a~~b)(4) Introduction. A ~~brief~~succinct statement of the nature of the case, intended to provide a brief explanation of the case for the purpose of orienting the reader as to the general context in which the appeal arises. ~~showing the jurisdiction of the appellate court.~~

(~~a~~b)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(~~a~~b)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(~~a~~b)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is

lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(~~a~~b)(7~~5~~) ~~A s~~Statement of the case. To the extent relevant to the issues on appeal, a procedural history, including the disposition(s) below~~.~~, and a statement of the facts. Both the procedural history and statement of facts ~~The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below~~ shall be supported by citations to the record in accordance with paragraph (~~e~~f) of this rule.

(~~a~~b)(8) Summary of arguments. ~~The~~ A summary of the arguments~~, suitably paragraphed, shall be a succinct condensation of the arguments actually~~ made in the body of the brief. It shall not be a ~~mere~~ repetition of the heading under which the argument is arranged.

(~~a~~b)(9~~6~~) ~~An a~~Argument. ~~For each ground for relief presented, T~~the argument ~~section shall contain the~~ following under appropriate subheadings and in the order indicated:

~~(b)(6)(A) Contention statement. A statement of error that the appellant contends warrants relief on appeal. contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.~~

~~(b)(6)(B) Preservation. A citation to the record in accordance with paragraph (f) of this rule showing that the contention was preserved in the trial court or administrative agency. An appellant contending that evidence was erroneously admitted or excluded shall identify the pages of the record where the evidence was identified, offered, and admitted or excluded. If the contention was not preserved, a statement of the grounds for seeking review of the unpreserved claimcontention of error.~~

~~(b)(6)(C) Standard of review. The standard of review governing the contention, with supporting authority.~~

(ab)(106)(D) Relief sought. A statement of short conclusion stating the precise relief sought. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(b)(6)(E) Grounds for relief requested. An argument setting forth controlling legal authority together with reasoned analysis explaining why that authority requiressupports reversal of the order or verdict challenged on appeal.

(b)(109)(A) Emphasis. No text in a brief shall be bold, underlined, or in ALL CAPS unless it is a quotation. Headings and the cover may contain bold text.

(b)(109)(B) Citations. The legal citations shall conform to the public domain citation format and shall use italics. No text in a brief shall be bold, underlined or in ALL CAPS unless it is a quotation.

(b)(109)(C) Unpublished Opinions. The unpublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State. Other unpublished decisions may also be cited, so long as all parties and the court are supplied with accurate copies at the time all such decisions are first cited.

(b)(109)(D) Reference to the Record. References to the proceedings below shall be accompanied with citations to the relevant pages of the record. Where the appellant contends that a finding or verdict is not supported by sufficient evidence, the appellant should marshal the record evidence supporting the finding or verdict.

(b)(101) Attorney fee request. A party requesting an award of attorney fees on appeal shall state the request explicitly and shall set forth the legal basis for an award. A party not seeking an award of attorney fees on appeal may omit this section from the brief.

(b)(7112) Conclusion and . A brief conclusion.Rrelief sought. A statement of the precise relief sought.

(b)(8123) Signature. A signature in compliance with Rule 21(e).

(b)(9134) Proof of Sservice. A proof of service in compliance with Rule 21(d).

(b)(1450) Certificate of cCompliance. If applicable, a certificate of compliance in accordance with paragraph (g)(1)(C) of this rule.

(~~a~~b)(~~11~~16) Addendum. An addendum ~~to the brief or a statement that no addendum is necessary under this paragraph. The addendum~~ shall be bound as part of the brief unless doing so makes the brief unreasonably thick, in which case it shall be separately bound and contain a table of contents. ~~If the addendum is bound separately, the addendum shall contain a table of contents.~~ The addendum shall contain ~~a~~ copies~~y~~ of the following:

~~(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;~~

(~~a~~b)(~~11~~16)(~~B~~A) in cases ~~being reviewed~~ on certiorari, a copy of the decision of the Court of Appeals under review~~opinion~~; ~~in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and~~

(b)(1~~1~~6)(B) the text of any constitutional provision, statute, rule, or regulation whose interpretation is necessary to a resolution on the contentions set forth in the brief;

(b)(1~~1~~6)(C) the order or judgment appealed from or sought to be reviewed, together with any related minute entries, memorandum decisions, and findings of fact and conclusions of law; and

(~~a~~b)(~~11~~16)(~~C~~D) ~~those~~other parts of the record necessary to an understanding of the issues on appeal such as jury instructions, insurance policies, leases, search warrants, real estate purchase contracts, and transcript pages. ~~that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.~~

~~[(b)(12) Citation of decisions. Published decisions of the Supreme Court and the Court of Appeals, and unpublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State. Other unpublished decisions may also be cited, so long as all parties and the court are supplied with accurate copies at the time all such decisions are first cited.]~~

(~~b~~c) Brief of the appellee. The ~~b~~Brief of ~~the a~~Appellee shall conform to the requirements of paragraph (~~a~~b) of this rule, except that the brief of appellee need not include:

(~~b~~c)(1) a contention statement, the standard of review, or a citation to the record showing that a contention was preserved unless the appellee is dissatisfied with those subsections of the brief of appellant; ~~of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or~~

(~~b~~c)(2) an addendum, except to provide relevant material not included in the addendum of the ~~appellant~~Brief of Appellant. ~~The appellee may refer to the addendum of the appellant.~~

(~~c~~d) Reply brief. The appellant may file a Reply ~~b~~Brief of Appellant, ~~in reply to the brief of the appellee,~~ and if the appellee has cross-appealed, the appellee may file a Reply Brief of Cross-Appellant.~~brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule.~~ No further briefs may be filed except with leave of the appellate court.

(d)(1) A reply shall conform to the requirements of paragraphs (b)(2), (3), (4), (~~7~~10), (~~8~~11), (~~9~~12), (13), and (1~~0~~4) of this rule.

(d)(2) A reply brief shall be limited to addressing arguments raised in the Brief of Appellee or the Brief of Cross-Appellee. The beginning of each section of a reply brief shall specify those pages in the Brief of Appellee or the Brief of Cross-Appellee where the arguments being addressed appear.

(~~d~~e) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee~~.~~" or by initials. ~~It~~To promote~~s~~ clarity, counsel are encouraged to use the designations used in the lower court or in the agency proceedings~~,~~; ~~or the actual names of parties, or~~ descriptive terms such as "the employee," "the injured person,~~"~~ "the taxpayer~~,~~"; or the actual names of parties. Counsel shall avoid references by name to minors or to biological, adoptive, or foster parents in cases involving child

abuse, neglect, or dependency, termination of parental rights, or adoption. With respect to the names of minors or parents in those cases, counsel are encouraged to use descriptive terms such as “child,” “the 11-year old,” “mother,” “adoptive parent,” and “foster father.”~~etc.~~

(~~e~~f) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. References to “Trial Transcript” or “Memorandum in Support of Motion for Summary Judgment” do not comply with this rule unless accompanied by the relevant page numbers in the record on appeal.~~If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.~~

(~~f~~g) Length of briefs.

(~~f~~g)(1) Type-volume limitation.

(~~f~~g)(1)(A) In an appeal involving the legality of a death sentence, a principal brief is acceptable if it contains no more than 28,000 words or it uses a monospaced face and contains no more than 2,600 lines of text; and a reply brief is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text. In all other appeals, ~~A~~a principal brief is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text; and a reply brief is acceptable if it contains no more than 7,000 words or it uses a monospaced face and contains no more than 650 lines of text.

(~~f~~g)(1)(B) Headings, footnotes and quotations count toward the word and line limitations, but the table of contents, table of citations, and any addendum containing statutes, rules, regulations or portions of the record as required by paragraph (~~a~~b)(11) of this rule do not count toward the word and line limitations.

(~~f~~g)(1)(C) Certificate of compliance. A brief submitted under Rule 24(~~f~~g)(1) must include a certificate by the attorney or an unrepresented party that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word processing system used to prepare the brief. The certificate must state either the number of words in the brief or the number of lines of monospaced type in the brief.

(~~f~~g)(2) Page limitation. Unless a brief complies with Rule 24(~~f~~g)(1), a principal brief~~s~~ shall not exceed 30 pages, and a reply brief~~s~~ shall not exceed 15 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (~~a~~b)(11) of this rule. In cases involving cross-appeals, paragraph (~~g~~h) of this rule sets forth the length of briefs.

(~~g~~h) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs.

(~~g~~h)(1) Brief of appellant. The appellant shall file a Brief of Appellant~~, which shall present the issues raised in the appeal~~ in compliance with paragraph (b) of this rule.

(~~g~~h)(2) Brief of appellee and cross-appellant. The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant.~~,~~ The brief ~~which~~ shall respond to the ~~issues raised in the~~ Brief of Appellant and present the issues raised in the cross-appeal and shall comply with the relevant provisions in paragraphs (b) and (c) of this rule.

(~~g~~h)(3) Reply brief of appellant and brief of cross-appellee. The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee.~~,~~ The brief ~~which~~ shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant and shall comply with the relevant provisions in paragraphs (c) and (d) of this rule.

(~~g~~h)(4) Reply brief of cross-appellant. The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee. The brief shall comply with paragraph (d) of this rule.

(~~g~~h)(5) Type-Volume Limitation.

(~~g~~h)(5)(A) The ~~appellant's~~ Brief of Appellant is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.

(~~g~~h)(5)(B) The ~~appellee's~~ Brief of Appellee and Cross-Appellant is acceptable if it contains no more than 16,500 words or it uses a monospaced face and contains no more than 1,500 lines of text.

(~~g~~h)(5)(C) The ~~appellant's~~ Reply Brief of Appellant and Brief of Cross-Appellee is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.

(~~g~~h)(5)(D) The ~~appellee's~~ Reply Brief of Cross-Appellant is acceptable if it contains no more than half of the type volume specified in Rule 24(~~g~~h)(5)(A).

(~~g~~h)(6) Certificate of Compliance. A brief submitted under Rule 24(~~g~~h)(5) must comply with Rule 24(~~f~~g)(1)(C).

(~~g~~h)(7) Page Limitation. Unless it complies with Rule 24(~~g~~h)(5) and (6), the ~~appellant's~~ Brief of Appellant must not exceed 30 pages; the ~~appellee's~~ Brief of Appellee and Cross-Appellant, 35 pages; the ~~appellant's~~ Reply Brief of Appellant and Brief of Cross-Appellee, 30 pages; and the ~~appellee's~~ Reply Brief of Cross-Appellant, 15 pages.

(~~h~~i) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the page, word, or line limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages, words, or lines requested, and the good cause for granting the motion. A motion filed at least seven days prior to the date the brief is due or seeking three or fewer additional pages, 1,400 or fewer additional words, or 130 or fewer lines of text need not be accompanied by a copy of the brief. A motion filed within seven days of the date the brief is due and seeking more than three additional pages, 1,400 additional words, or 130 lines of text shall be accompanied by a copy of the finished brief. If the motion is granted, the responding party is entitled to an equal number of additional pages, words, or lines without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(~~i~~j) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(~~j~~k) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after briefing or ~~that party's brief has been filed, or after~~ oral argument but before decision, ~~a~~that party may promptly advise the clerk of the appellate court, by letter ~~setting forth the citations~~. The letter shall identify the authority, indicate the page of the brief or point argued orally to which it pertains, and briefly state its relevance. Any other party may respond by letter within seven days of the filing of the original letter. The body of any letter filed pursuant to this rule may not exceed 350 words. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. ~~There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within seven days of filing and shall be similarly limited.~~

(~~k~~l) Compliance with Rule 21A. Any filing made under this rule that contains information or records classified as other than public shall comply with Rule 21A.

(m) 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.

Advisory Committee Notes

~~Paragraph (a) clarifies that in briefs governed by this rule the parties should use the terms "appellant" and "appellee" rather than "petitioner" and respondent."~~

The 2014 amendments eliminate, add, and change a number of requirements. The rule eliminates the statement of jurisdiction, the setting forth of determinative provisions, and the nature of the case. ~~, and the summary of the argument.~~ The rule adds to what

must be included in the addendum, an introduction that replaces some of the eliminated requirements, and a citation requirement at the beginning of each section of a reply brief. And the rule changes the statement of issues to contention statements ~~and moves the contention statements, standards of review, and preservation requirements to the argument section of the brief~~.

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

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

Examples of the public domain citation format referenced in paragraph (b)(6)(E) are as follows:

Before publication in Utah Advanced Reports:

Smith v. Jones, 1999 UT 16.

Smith v. Jones, 1999 UT App 16.

Before publication in Pacific Reporter but after publication in Utah Advance Reports:

Smith v. Jones, 1999 UT 16, 380 Utah Adv. Rep. 24.

Smith v. Jones, 1999 UT App 16, 380 Utah Adv. Rep. 24.

After publication in Pacific Reporter:

Smith v. Jones, 1999 UT 16, 998 P.2d 250.

Smith v. Jones, 1999 UT App 16, 998 P.2d 250.

Examples of a pinpoint citation to a Utah Supreme Court opinion or a Utah Court of Appeals opinion issued on or after January 1, 1999, would be as follows:

Before publication in Utah Advance Reports:

Smith v. Jones, 1999 UT 16, ¶ 21.

Smith v. Jones, 1999 UT App 16, ¶ 21.

Smith v. Jones, 1999 UT App 16, ¶¶ 21-25.

Before publication in Pacific Reporter but after publication in Utah Advance Reports:

Smith v. Jones, 1999 UT 16, ¶ 21, 380 Utah Adv. Rep. 24.

Smith v. Jones, 1999 UT App 16, ¶ 21, 380 Utah Adv. Rep. 24.

After publication in Pacific Reporter:

Smith v. Jones, 1999 UT 16, ¶ 21, 998 P.2d 250.

Smith v. Jones, 1999 UT App 16, ¶ 21, 998 P.2d 250.

If the immediately preceding authority is a post-January 1, 1999, opinion, cite to the paragraph number:

Id. ¶ 15.

~~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. Briefs.

(a) Definitions. For purposes of this rule, the terms “appeal,” “cross-appeal,” “appellant,” and “appellee” include the equivalent elements of original proceedings filed in the appellate court.

(b) Brief of the appellant. The Brief of Appellant shall contain under appropriate headings and in the order indicated:

(b)(1) List of parties. A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties and except as provided in paragraph (e). The list should be set out on a separate page immediately inside the cover.

(b)(2) Table of contents. A table of contents with page references to the items included in the brief, including page or tab references to items in the addendum.

(b)(3) Table of authorities. A table of authorities including all cases, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(b)(4) Introduction. A succinct statement of the nature of the case, intended to provide a brief explanation of the case for the purpose of orienting the reader as to the general context in which the appeal arises.

(b)(5) Contention statement. A statement of error that the appellant contends warrants relief on appeal.

(b)(6) Preservation. A citation to the record in accordance with paragraph (f) of this rule showing that the contention was preserved in the trial court or administrative agency. An party contending that evidence was erroneously admitted or excluded shall identify the pages of the record where the evidence was identified, offered, and admitted or excluded. If a contention was not preserved, a statement of the grounds for seeking review of the unpreserved contention of error.

(b)(7) Standard of review. The standard of review governing the contention, with supporting authority.

(b)(8) Statement of the case. To the extent relevant to the contentions on appeal, a procedural history including the disposition(s) below and a statement of the facts. Both the procedural history and statement of facts shall be supported by citations to the record in accordance with paragraph (f) of this rule.

(b)(9) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(b)(10) Argument. An argument setting forth controlling legal authority together with reasoned analysis explaining why that authority supports reversal.

(b)(10)(A) Emphasis. No text in a brief shall be bold, underlined, or in ALL CAPS unless it is a quotation. Headings and the cover may contain bold text.

(b)(10)(B) Citations. The legal citations shall conform to the public domain citation format and shall use italics.

(b)(10)(C) Unpublished Opinions. The unpublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State. Other unpublished decisions may also be cited, so long as all parties and the court are supplied with accurate copies at the time all such decisions are first cited.

(b)(10)(D) Reference to the Record. References to the proceedings below shall be accompanied with citations to the relevant pages of the record. Where the appellant contends that a finding or verdict is not supported by sufficient evidence, the appellant should marshal the record evidence supporting the finding or verdict.

(b)(11) Attorney fee request. A party requesting an award of attorney fees on appeal shall state the request explicitly and shall set forth the legal basis for an award. A party not seeking an award of attorney fees on appeal may omit this section from the brief.

(b)(12) Conclusion and relief sought. A statement of the precise relief sought.

(b)(13) Signature. A signature in compliance with Rule 21(e).

(b)(14) Proof of service. A proof of service in compliance with Rule 21(d).

(b)(15) Certificate of compliance. If applicable, a certificate of compliance in accordance with paragraph (g)(1)(C) of this rule.

(b)(16) Addendum. An addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick, in which case it shall be separately bound and contain a table of contents. The addendum shall contain copies of the following:

(b)(16)(A) in cases on certiorari, a copy of the decision of the Court of Appeals under review;

(b)(16)(B) the text of any constitutional provision, statute, rule, or regulation whose interpretation is necessary to a resolution on the contentions set forth in the brief;

(b)(16)(C) the order or judgment appealed from or sought to be reviewed, together with any related minute entries, memorandum decisions, and findings of fact and conclusions of law; and

(b)(16)(D) other parts of the record necessary to an understanding of the issues on appeal such as jury instructions, insurance policies, leases, search warrants, real estate purchase contracts, and transcript pages.

(c) Brief of the appellee. The Brief of Appellee shall conform to the requirements of paragraph (b) of this rule, except that the brief of appellee need not include:

(c)(1) a contention statement, the standard of review, or a citation to the record showing that a contention was preserved unless the appellee is dissatisfied with those subsections of the brief of appellant;

(c)(2) an addendum, except to provide relevant material not included in the addendum of the Brief of Appellant.

(d) Reply brief. The appellant may file a Reply Brief of Appellant, and if the appellee has cross-appealed, the appellee may file a Reply Brief of Cross-Appellant. No further briefs may be filed except with leave of the appellate court.

(d)(1) A reply shall conform to the requirements of paragraphs (b)(2), (3), (4), (10), (11), (12), (13), and (14) of this rule.

(d)(2) A reply brief shall be limited to addressing arguments raised in the Brief of Appellee or the Brief of Cross-Appellee. The beginning of each section of a reply brief shall specify those pages in the Brief of Appellee or the Brief of Cross-Appellee where the arguments being addressed appear.

(e) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee" or by initials. To promote clarity, counsel are encouraged to use the designations used in the lower court or in the agency proceedings; descriptive terms such as "the employee," "the injured person," "the taxpayer"; or the actual names of parties. Counsel shall avoid references by name to minors or to biological, adoptive, or foster parents in cases involving child abuse, neglect, or dependency, termination of parental rights, or adoption. With respect to the names of minors or parents in those cases, counsel are encouraged to use descriptive terms such as “child,” “the 11-year old,” “mother,” “adoptive parent,” and “foster father.”

(f) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. References to “Trial Transcript” or “Memorandum in Support of Motion for Summary Judgment” do not comply with this rule unless accompanied by the relevant page numbers in the record on appeal.(g) Length of briefs.

(g)(1) Type-volume limitation.

(g)(1)(A) In an appeal involving the legality of a death sentence, a principal brief is acceptable if it contains no more than 28,000 words or it uses a monospaced face and contains no more than 2,600 lines of text; and a reply brief is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text. In all other appeals, a principal brief is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text; and a reply brief is acceptable if it contains no more than 7,000 words or it uses a monospaced face and contains no more than 650 lines of text.

(g)(1)(B) Headings, footnotes and quotations count toward the word and line limitations, but the table of contents, table of citations, and any addendum containing statutes, rules, regulations or portions of the record as required by paragraph (b)(11) of this rule do not count toward the word and line limitations.

(g)(1)(C) Certificate of compliance. A brief submitted under Rule 24(g)(1) must include a certificate by the attorney or an unrepresented party that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word processing system used to prepare the brief. The certificate must state either the number of words in the brief or the number of lines of monospaced type in the brief.

(g)(2) Page limitation. Unless a brief complies with Rule 24(g)(1), a principal brief shall not exceed 30 pages, and a reply brief shall not exceed 15 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (b)(11) of this rule. In cases involving cross-appeals, paragraph (h) of this rule sets forth the length of briefs.

(h) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs.

(h)(1) Brief of appellant. The appellant shall file a Brief of Appellant in compliance with paragraph (b) of this rule.

(h)(2) Brief of appellee and cross-appellant. The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant. The brief shall respond to the Brief of Appellant and present the issues raised in the cross-appeal and shall comply with the relevant provisions in paragraphs (b) and (c) of this rule.

(h)(3) Reply brief of appellant and brief of cross-appellee. The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee. The brief shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant and shall comply with the relevant provisions in paragraphs (c) and (d) of this rule.

(h)(4) Reply brief of cross-appellant. The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee. The brief shall comply with paragraph (d) of this rule.

(h)(5) Type-Volume Limitation.

(h)(5)(A) The Brief of Appellant is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.

(h)(5)(B) The Brief of Appellee and Cross-Appellant is acceptable if it contains no more than 16,500 words or it uses a monospaced face and contains no more than 1,500 lines of text.

(h)(5)(C) The Reply Brief of Appellant and Brief of Cross-Appellee is acceptable if it contains no more than 14,000 words or it uses a monospaced face and contains no more than 1,300 lines of text.

(h)(5)(D) The Reply Brief of Cross-Appellant is acceptable if it contains no more than half of the type volume specified in Rule 24(h)(5)(A).

(h)(6) Certificate of Compliance. A brief submitted under Rule 24(h)(5) must comply with Rule 24(g)(1)(C).

(h)(7) Page Limitation. Unless it complies with Rule 24(h)(5) and (6), the Brief of Appellant must not exceed 30 pages; the Brief of Appellee and Cross-Appellant, 35 pages; the Reply Brief of Appellant and Brief of Cross-Appellee, 30 pages; and the Reply Brief of Cross-Appellant, 15 pages.

(i) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the page, word, or line limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages, words, or lines requested, and the good cause for granting the motion. A motion filed at least seven days prior to the date the brief is due or seeking three or fewer additional pages, 1,400 or fewer additional words, or 130 or fewer lines of text need not be accompanied by a copy of the brief. A motion filed within seven days of the date the brief is due and seeking more than three additional pages, 1,400 additional words, or 130 lines of text shall be accompanied by a copy of the finished brief. If the motion is granted, the responding party is entitled to an

equal number of additional pages, words, or lines without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(j) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(k) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after briefing or oral argument but before decision, that party may promptly advise the clerk of the appellate court, by letter. The letter shall identify the authority, indicate the page of the brief or point argued orally to which it pertains, and briefly state its relevance. Any other party may respond by letter within seven days of the filing of the original letter. The body of any letter filed pursuant to this rule may not exceed 350 words. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals.

(l) Compliance with Rule 21A. Any filing made under this rule that contains information or records classified as other than public shall comply with Rule 21A.

(m) 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 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.

Advisory Committee Notes

The 2014 amendments eliminate, add, and change a number of requirements. The rule eliminates the statement of jurisdiction, the setting forth of determinative provisions, and the nature of the case. The rule adds to what must be included in the addendum, an introduction that replaces some of the eliminated requirements, and a citation requirement at the beginning of each section of a reply brief. And the rule changes the statement of issues to contention statements.

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

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

Examples of the public domain citation format referenced in paragraph (b)(6)(E) are as follows:

Before publication in Utah Advanced Reports:

Smith v. Jones, 1999 UT 16.

Smith v. Jones, 1999 UT App 16.

Before publication in Pacific Reporter but after publication in Utah Advance Reports:

Smith v. Jones, 1999 UT 16, 380 Utah Adv. Rep. 24.

Smith v. Jones, 1999 UT App 16, 380 Utah Adv. Rep. 24.

After publication in Pacific Reporter:

Smith v. Jones, 1999 UT 16, 998 P.2d 250.

Smith v. Jones, 1999 UT App 16, 998 P.2d 250.

Examples of a pinpoint citation to a Utah Supreme Court opinion or a Utah Court of Appeals opinion issued on or after January 1, 1999, would be as follows:

Before publication in Utah Advance Reports:

Smith v. Jones, 1999 UT 16, ¶ 21.

Smith v. Jones, 1999 UT App 16, ¶ 21.

Smith v. Jones, 1999 UT App 16, ¶¶ 21-25.

Before publication in Pacific Reporter but after publication in Utah Advance Reports:

Smith v. Jones, 1999 UT 16, ¶ 21, 380 Utah Adv. Rep. 24.

Smith v. Jones, 1999 UT App 16, ¶ 21, 380 Utah Adv. Rep. 24.

After publication in Pacific Reporter:

Smith v. Jones, 1999 UT 16, ¶ 21, 998 P.2d 250.

Smith v. Jones, 1999 UT App 16, ¶ 21, 998 P.2d 250.

If the immediately preceding authority is a post-January 1, 1999, opinion, cite to the paragraph number:

Id. ¶ 15.

Tab 5

State offers two lines of response. First it asks us to stop short of reaching the merits in light of Nielsen's purported failure to marshal the evidence—specifically, his failure to present, "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *Chen v. Stewart*, 2004 UT 82, ¶ 77, 100 P.3d 1177 (internal quotation marks omitted). Second, and alternatively, the State challenges Nielsen's position on the merits, identifying evidence in the record that it sees as sufficient to sustain an inference that Trisha was taken against her will.

¶32 We reject the State's first point but agree with its second. Before addressing the merits of Nielsen's challenge to the sufficiency of the evidence, we first consider the State's marshaling argument—acknowledging some dicta in our prior cases that appears to support it, but refining and clarifying the standard going forward.

1. Marshaling

¶33 Our rules of appellate procedure prescribe standards for the form, organization, and content of a brief on appeal. *See* UTAH R. APP. P. 24. Some of the standards in rule 24 are sufficiently clear and objective that the failure to follow them may result in the rejection of a noncompliant brief by our clerk's office. A brief that exceeds the rule's limits on length, for example, would be rejected by our clerk's office, as would a brief that fails to include a table of contents or statement of the standard of review. *See id.* 24(a)(2), (5). Typically a party filing a noncompliant brief would be given an opportunity to correct these sorts of deficiencies. But failure to do so theoretically could result in our failure to reach the merits on the basis of the party's procedural default under rule 24.

¶34 Other standards in rule 24 are more subjective, and not susceptible to rejection by the clerk's office or to procedural default by the court. Such standards are often an outgrowth of a party's burden of persuasion on appeal. Thus, rule 24 requires the appellant's brief to set forth "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." *Id.* 24(a)(9). Our clerk's office makes no attempt to police this rule at the outset. That assessment is left to the court. And we perform it not as a matter of gauging procedural compliance with the rule, but as a necessary component of our evaluation of the case on its

merits, as viewed through the lens of the applicable standard of review. *See State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) ("While failure to cite to pertinent authority may not always render an issue inadequately briefed, it does so when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court."); *Salt Lake Cnty. v. Butler, Crockett & Walsh Dev. Corp.*, 2013 UT App 30, ¶ 37 n.5, 297 P.3d 38 (holding that the appellant "has not met its burden of persuasion on appeal by adequately briefing a plausible claim").

¶35 Historically, our marshaling requirement was understood to fall into the latter category. For many years, we conceived of the responsibility to marshal the evidence supporting a challenged factual finding as a mere component of an appellant's broader burden of overcoming the weighty deference granted to factual determinations in the trial court. Thus, when a party failed to marshal and distinguish evidence supportive of a challenged verdict or finding of fact, our response was not to decline to reach the merits as a matter of default, but simply to affirm on the ground that the appellant had failed to carry its heavy burden of persuasion.

¶36 This version of the marshaling principle was announced in our cases as early as 1961. *See Charlton v. Hackett*, 360 P.2d 176, 176 (Utah 1961). We followed this approach consistently for several decades thereafter. *See, e.g., Nyman v. Cedar City*, 361 P.2d 1114, 1115 (Utah 1961); *Egbert & Jaynes v. R.C. Tolman Constr. Co.*, 680 P.2d 746, 747 (Utah 1984). We coined the term "marshal[ing]" in 1985, *see Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985), but still continued to view marshaling as part of the overall burden necessary to meet the clear error standard of review on appeal. *See, e.g., IFG Leasing Co. v. Gordon*, 776 P.2d 607, 616–17 (Utah 1989).

¶37 Over time our caselaw occasionally has migrated in the other direction—toward the hard-and-fast *default* notion of a procedural rule. Instead of noting an appellant's failure to marshal as a step toward concluding that it had failed to establish clear error, we sometimes have identified a marshaling deficiency as a ground for an appellant's procedural default—citing a lack of marshaling as a basis for not reaching the merits. *See, e.g., United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶¶ 38, 41, 140 P.3d 1200.

¶38 Over a similar span of time, we also added some additional teeth to the rule. Thus, while rule 24(a)(9) itself (adopted in 1999) speaks only of "marshal[ing] all record evidence that supports the challenged finding," our caselaw has sometimes extended this principle to require an appellant to "present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists," and to do so in a manner in which he "temporarily remove[s] [his] own prejudices and fully embrace[s] the adversary's position" by assuming the role of "devil's advocate." *Chen*, 2004 UT 82, ¶¶ 77–78 (internal quotation marks omitted).

¶39 Our commitment to the hard-and-fast default notion of the marshaling rule has been less than complete. Sometimes we have openly overlooked a failure to marshal and proceeded to the merits. *See, e.g., State v. Green*, 2005 UT 9, ¶¶ 12–13, 108 P.3d 710. In many other cases, moreover, we have reverted to our earlier conception of marshaling, and disposed of the case on its merits despite an alleged failure to marshal "every scrap" of contrary evidence. And in all events we have declined to state a limiting principle, leaving the question of whether to treat marshaling as a basis for a default or instead as a component of the burden of persuasion purely a matter of our discretion. *See Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶¶ 19–20, 164 P.3d 384 (noting that parties risk forfeiting their challenges to factual questions when they fail to marshal but sustaining the court of appeals' choice to resolve the case on its merits because "[t]he reviewing court . . . retains discretion to consider independently the whole record and determine if the decision below has adequate factual support").

¶40 The time has come to reconcile and regularize our cases in this field. In so doing, we recognize and reiterate the importance of the requirement of marshaling. It is a boon to both judicial economy and fairness to the parties. *See Chen*, 2004 UT 82, ¶ 79. Thus, an appellant who seeks to prevail in challenging the sufficiency of the evidence to support a factual finding or a verdict on appeal should follow the dictates of rule 24(a)(9), as a party who fails to identify and deal with supportive evidence will never persuade an appellate court to reverse under the deferential standard of review that applies to such issues. That said, we now conclude that the hard-and-fast default notion of marshaling is more problematic than helpful—particularly when compounded by the heightened requirements of our caselaw (to present "every scrap" of evidence and to play "devil's advocate") and our retention of

discretion to disregard a marshaling defect where we deem it appropriate.

¶41 We therefore repudiate the default notion of marshaling sometimes put forward in our cases and reaffirm the traditional principle of marshaling as a natural extension of an appellant's burden of persuasion. Accordingly, from here on our analysis will be focused on the ultimate question of whether the appellant has established a basis for overcoming the healthy dose of deference owed to factual findings and jury verdicts—and not on whether there is a technical deficiency in marshaling meriting a default.

¶42 In so holding, we do not mean to minimize the significance of our longstanding requirement of marshaling. Instead we aim only to clarify it and put it in proper perspective. Thus, we reiterate that a party challenging a factual finding or sufficiency of the evidence to support a verdict will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal. Our point is only that that will be the question on appeal going forward. The focus should be on the merits, not on some arguable deficiency in the appellant's duty of marshaling.

¶43 Too often, the appellee's brief is focused on this latter point, and not enough on the ultimate merits of the case. To encourage the latter and discourage the former, we also hereby repudiate the requirements of playing "devil's advocate" and of presenting "every scrap of competent evidence" in a "comprehensive and fastidious order." *Supra* ¶ 38. That formulation is nowhere required in the rule. And its principal impact on briefing has been to incentivize appellees to conduct a fastidious review of the record in the hope of identifying a scrap of evidence the appellant may have overlooked. That is not the point of the marshaling rule, and will no longer be an element of our consideration of it.

¶44 Under this standard as now clarified, we reject the State's request that we treat Nielsen's failure to marshal every scrap of evidence supporting the jury's verdict as a stand-alone basis for rejecting his challenge to his kidnapping conviction. We proceed instead to the merits of Nielsen's argument, while emphasizing that our assessment of his claim on appeal is certainly affected (and greatly undermined) by the overbroad assertions in his brief regarding the absence of evidence in the record and by his general failure to identify and deal with that evidence.

Tab 6

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~~Font. All briefs shall use one of the following fonts: Book Antiqua or Garamond. ~~Either a proportionally spaced or monospaced typeface in a plain, roman style may be used. A proportionally spaced typeface~~All text 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; 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. The cover of an addendum shall be the same color as the brief with which it is

filed. All brief covers shall be of heavy cover stock. There shall be adequate contrast between the printing and the color of the 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) 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.

Advisory Committee Note

~~The change from the term "pica size" to "ten characters per inch" is intended to accommodate the widespread use of word processors. The definition of pica is print of approximately ten characters per inch. The amendment is not intended to prohibit proportionally spaced printing.~~

An Anders brief is a brief filed pursuant to Anders v. California, 386 U.S. 793, 97 S.Ct. 1396 (1967), in cases where counsel believes no nonfrivolous appellate issues exist. In order for an Anders-type brief to be accepted by either the Utah Court of Appeals or the Utah Supreme Court, counsel must comply with specific requirements that are more rigorous than those set forth in Anders. See, e.g. State v. Wells, 2000 UT App 304, 13 P.3d 1056 (per curiam); In re D.C., 963 P.2d 761 (Utah App. 1998); State v. Flores, 855 P.2d 258 (Utah App. 1993) (per curiam); Dunn v. Cook, 791 P.2d 873 (Utah 1990); and State v. Clayton, 639 P.2d 168 (Utah 1981).