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

12:00 p.m.	Welcome and Introduction of New Members	Joan Watt
12:05 p.m.	Member Disclosures	Committee
12:10 p.m.	Approval of June and July Minutes (Tab 1)	Joan Watt
12:15 p.m.	Confidential Requests for Mediation (Tab 2)	Michele Mattsson Tim Shea
12:25 p.m.	Subcommittee Updates • Federal Rules • Efiling	Tim Shea
12:30 p.m.	Public Comment to Rule 38A (Tab 3)	Joan Watt
12:40 p.m.	Rule 24 (Tab 4) Rule 24 and *State v. Nielsen* (Tab 5) Rule 27 (Tab 6)	Troy Booher
1:25 p.m.	Other Business	
1:30 p.m.	Adjourn	

Upcoming Meetings:
October 1, 2015
November 5, 2015
January 7, 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, May 7, 2015
12:00 p.m. to 1:30 p.m.

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

1. Welcome and Approval of Minutes **Rodney Parker**

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

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

2. Subcommittee Updates **Tim Shea**

a. Public Briefs

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

Rule 21. Filing and service.

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

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

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

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

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

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

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

Advisory Committee Notes

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

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

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

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

(a) Attorney's or party's ~~certificate~~ signature. Every motion, brief, and other ~~paper of a party represented by an attorney shall~~ document must be signed by at least one attorney of record who is an active member in good standing of the Bar of this state or by a party who is self-represented. ~~The attorney shall sign his or her individual name and give his or her business address, telephone number, and Utah State Bar number. A party who is not represented by an attorney shall sign any motion, brief, or other paper and state the party's address and telephone number. Except when otherwise specifically provided by rule or statute, motions, briefs, or other papers need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate that the attorney or party has read the motion, brief, or other paper; that to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, it is not frivolous or interposed for the purpose of delay as defined in Rule 33. If a motion, brief, or other paper is not signed as required by this rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the attorney or party. If a motion, brief, or other paper is signed in violation of this rule, the authority and the procedures of the court provided by Rule 33 shall apply.~~ A person may sign a document using any form of signature recognized by law as binding.

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

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

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

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

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

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

~~(b)~~ (c) Sanctions and discipline of attorneys and parties. The court may, after reasonable notice and an opportunity to show cause to the contrary, and upon hearing, if requested, take appropriate action against any attorney or person who practices before it for inadequate representation of a client, conduct unbecoming a member of the Bar or a person allowed to appear before the court, or for failure to comply with these rules or

order of the court. Any action to suspend or disbar a member of the Utah State Bar shall be referred to the Office of Professional Conduct of the Utah State Bar.

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

~~(d)~~ (e) Appearance of counsel pro hac vice. An attorney who is licensed to practice before the bar of another state or a foreign country but who is not a member of the Bar of this state, may appear, pro hac vice upon motion, filed pursuant to~~ the Code of Judicial Administration~~ Rule 14-806 of the Rules Governing the Utah State Bar. A separate motion is not required in the appellate court if the attorney has previously been admitted pro hac vice in the~~ lower tribunal~~ trial court or agency, but the attorney shall file in the appellate court a notice of appearance pro hac vice to that effect.

Advisory Committee Notes

~~Refer to Rule 14-806 of the Rules Governing the Utah State Bar for qualification of out of state counsel to practice before the courts of Utah.~~

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

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

Rule 4-202.02. Records classification.

. . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(2)(BB)~~ (2)(CC) record of a request for a record;

~~(2)(CC)~~ (2)(DD) reports used by the judiciary if all of the data in the report is public or the Judicial Council designates the report as a public record;

~~(2)(DD)~~ (2)(EE) rules of the Supreme Court and Judicial Council;

~~(2)(EE)~~ (2)(FF) search warrants, the application and all affidavits or other recorded testimony on which a warrant is based are public after they are unsealed under Utah Rule of Criminal Procedure 40;

~~(2)(FF)~~ (2)(GG) statistical data derived from public and non-public records but that disclose only public data;

~~(2)(GG)~~ (2)(HH) Notwithstanding subsections (6) and (7), if a petition, indictment, or information is filed charging a person 14 years of age or older with a felony or an offense that would be a felony if committed by an adult, the petition, indictment or information, the adjudication order, the disposition order, and the delinquency history summary of the person are public records. The delinquency history summary shall contain the name of the person, a listing of the offenses for which the person was adjudged to be within the jurisdiction of the juvenile court, and the disposition of the court in each of those offenses.

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

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

Intent:

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

Applicability:

This rule applies to court records associated with a case.

Statement of the Rule:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 4-205. Security of court records.

. . .

(4) Management of non-public records.

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

(4)(B) Expunged records.

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

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

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

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

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

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

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

b. Forms

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

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

c. Federal Rules

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

d. Efiling Subcommittee

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

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

This item was tabled until the next meeting.

4. Adjourn

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

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON THE
UTAH RULES OF APPELLATE PROCEDURE

Administrative Office of the Courts
450 South State Street
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Judicial Council Room
Thursday, June 4, 2015
12:00 p.m. to 1:30 p.m.

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

1. Welcome and Approval of Minutes **Joan Watt**

Ms. Watt said that the meeting would be the last of Mr. Pattison's term and, on behalf of the Chief Justice, she thanked him for his twelve years of service on the committee. Ms. Watt stated that there was no quorum, so the committee could not take any action at this meeting.

2. Confidential Requests for Mediation **Tim Shea & Michele Mattsson**

Ms. Watt asked Mr. Shea to explain the issue of confidential requests for mediation. Mr. Shea said that the supreme court was uncomfortable with the idea of confidential requests for mediation, which are allowed by the appellate rules, because they are ex parte communications. He said that there is no prohibition on ex parte communications that are allowed by law, but the supreme court has prohibited confidential requests for mediation in the supreme court for policy reasons. He said that some of the judges on the court of appeals have also expressed discomfort with confidential requests for mediation, but that the appellate mediator, Ms. Mattsson, continues to support them. Mr. Shea said that the amendment addressing the issue would be simple: the word "confidential" would be deleted from the rule. He said that requests for mediation would still be allowed, but that notice would need to be given to the other side.

Mr. Booher spoke in favor of confidential mediation requests. He said that a mediation request is made to a mediator, not the court, and the mediator cannot communicate with the court about a mediation request, so there is no concern about ex parte communication with the court. He said that the mediation program would be worse off without confidential mediation requests.

Mr. Sabey said that, according to Ms. Mattsson, there are very few confidential requests for mediation per year. He said that the policy favoring such requests is to allow parties to request mediation without showing weakness in their position to the court or the other side. He said that the flip side is that, when mediation is ordered, the party who requested mediation will know about the request, but the other party will think the court ordered the mediation. Mr. Burke said he had never thought that the court ordered mediation. Mr. Sabey said that the supreme court has already decided not to allow confidential requests for mediation in that court, so the only question is whether they will be allowed in the court of appeals. He noted that the supreme court only permits stipulated mediation requests in that court.

Ms. Watt said that this issue should be set over for the next meeting when there is a quorum. She asked Ms. Adams-Perlac if she would invite Ms. Mattsson. Ms. Adams-Perlac said that Ms. Mattsson was invited to this meeting, though she did not attend, and that she would invite Ms. Mattsson to the next meeting.

3. Subcommittee Updates **Tim Shea**

a. Public Briefs

The committee did not discuss public briefs.

b. Forms

Mr. Shea said that the supreme court approved the forms in May, so they are done.

c. Federal Rules

Mr. Shea said that the federal rules subcommittee is almost done, but it is still waiting on a vote from Mr. Burke. Mr. Burke said there is one more thing he needs to look at before he votes.

d. Efiling Subcommittee

Mr. Shea said that the efiling subcommittee continues to meet, and there are about eight to ten rules remaining for it to review. He said he hopes to finish with those rules next Monday. He said that the plan is for the subcommittee to go over the rules again at the end of the summer to make sure it is satisfied with its proposals.

Mr. Shea said that the subcommittee wants the committee to be comfortable with the final product, but the subcommittee's work was extensive and the committee should not necessarily cover all the ground that the subcommittee did. Ms. Adams-Perlac suggested passing out the subcommittee's recommendations for the committee's review, and the committee would only discuss specific recommendations that members took issue with.

4. Public Comments to Rule 38A **Joan Watt**

This item was tabled until the next meeting.

5. Rules 24, Rule 24 and *State v. Nielsen*, and Rule 27 **Troy Booher**

This item was tabled until the next meeting.

6. Other Business

The committee did not discuss other business.

7. Adjourn

The meeting was adjourned at 12:32 p.m. The next meeting will be held on Thursday, September 3, 2015.

Tab 2

MEMORANDUM

TO: Appellate Rules Committee

FROM: Michele Mattsson,
Chief Appellate Mediator

DATE: August 26, 2015

RE: Utah Rule of Appellate Procedure 28A(h)—
Confidential request for mediation

A. Appellate Mediation Office--Background

The Appellate Mediation Office (AMO) began operations in 1998 as a result of the considerable effort of Utah appellate court judges. The mediation program has been successful and cost-effective for the appellate courts and participants. The program was modeled after the 10th Circuit Mediation Office. Utah Rule of Appellate Procedure 28A, which governs the Appellate Mediation Office, was patterned after rules governing the 10th Circuit program--Federal Rule of Appellate Procedure 33 and 10th Circuit Rule 33.1.

B. How Cases Get to the Appellate Mediation Office

Virtually all of the cases handled by the AMO are Court of Appeals' cases. Most are referred to appellate mediation through an internal process—recommendation by the AMO and then order from the Court of Appeals (COA). Cases are most commonly referred to mediation after review of docketing statements, though referral can come at later stages of the appellate process. A few cases are sent to mediation as a result of a request of one or more parties. Some of those requests are confidential.

The AMO does not review docketing statements from the Utah Supreme Court so the only way a Supreme Court case would come to the AMO is by party request. (When requests to mediate Supreme Court cases are received, the AMO forwards them to the Chief Justice with an explanatory memorandum.) This happens infrequently.

The number of COA cases sent to mediation by party request is small, less than six a year. The number of Supreme Court cases whereby requests are made is even smaller, 0-2 a year. However, the option to request mediation, particularly confidentially, is of great importance as was recognized both by the original drafters of Utah Rule of Appellate Procedure 28A and by the drafters of the 10th Circuit Court mediation rule.

C. Utah and Tenth Circuit Court Rules Allow for Parties to Request Mediation Confidentially

According to 10th Circuit Rule 33(G), "Counsel may request a mediation conference by contacting the circuit mediation office. The office will determine whether a conference will be held."

The 10th Circuit further explains:

> A request for mediation may be made by calling or writing the Circuit Mediation Office at any time during the pendency of the appeal. **If a party prefers that a request for mediation be confidential, the Mediation Office will not disclose that the conference was requested. Requested conferences are scheduled and approached in the same manner as those initiated by the Circuit Mediation Office**. *Frequently Asked Questions, emphasis added*.

Pursuant to Utah Rule of Appellate Procedure 28A (h), entitled "Request for mediation conference by a party," "**Counsel may request a mediation conference either by motion, letter or confidential request**." *Emphasis added*.

D. Why the Option to Make a Confidential Mediation Request is Beneficial

Confidential requests for mediation are not common, but are an important option for counsel and parties for several reasons:

1) Nearly all cases mediated by confidential request settle. Such cases have a higher settlement rate than those cases selected internally at the court.

2) Parties and counsel often want the opportunity to mediate, but rarely feel comfortable admitting this publically for fear of being viewed as weak or not confident in their case, especially at the appellate level.

3) All mediation cases are treated the same. There is no difference in the appearance of cases for which a confidential request is receive as compared to those selected by the AMO. The order looks the same; the procedure is identical. Moreover, how a case gets to mediation has no impact on the outcome. In fact, by the time the mediation takes place, the AMO rarely remembers, and never focuses on, how the case came to us.

4) There is no advantage to a party who requests mediation confidentially. There is no disadvantage to a party who did not seek mediation. Whether a case settles, or not, is up to the parties.

5) A confidential request is not out of the ordinary, nor is it inappropriate. Ex parte communications occur before, during, and after mediations. It is the nature of the mediation process. The AMO frequently talks with attorneys privately about cases. The AMO, like all mediators, sometimes receives confidential mediation briefs that cannot be shared with the other side. This is a common, acceptable practice and there is no advantage or disadvantage to the other side even if they are not given a copy of the other side's brief. Similarly, there is no advantage or disadvantage to any party if one elects to submit a mediation brief and the other does not.

6) The AMO likes getting requests for mediation because good cases, which may not be apparent from the record or docketing statement, are identified for mediation. Not every case can be mediated so it helps to have tips on cases that would most benefit from the process.

7) The ability to make confidential requests creates good will with the Bar. Over the years, the AMO has developed a rapport with attorneys who have had cases ordered into mediation. It is those same attorneys who make mediation requests, often confidential ones. They know the benefits of mediation and are good predictors of cases that will settle. It is helpful to be able to grant requests from attorneys (and parties), including those who have dutifully followed past court orders to mediate.

8) Parties request appellate mediation because it saves them money. It is a valued resource for people wanting to exit the court system in a cost effective way.

E. Safeguards

There are several safeguards in place to ensure the sanctity of the mediation process. First, regardless of how a case comes to mediation, parties and their counsel have the right to settle or not. The AMO cannot, and does not, force any settlement. Second, if a party truly feels that a scheduled mediation would be fruitless, he or she may contact the AMO and ask that the mediation order be withdrawn. Third, the appellate courts and AMO always have the discretion to deny mediation requests they consider inappropriate.

F. Conclusion

It would be far more detrimental to remove the option for a confidential mediation request, from Rule 28A, than to keep it. The 10th Circuit Court of Appeals, after which the AMO was patterned, has always recognized this important option for counsel and parties—"if a party prefers that a request for mediation be confidential, the Mediation Office will not disclose that the conference was requested. Rule 33(G), *Frequently Asked Questions*.

There is no advantage to a person who requests mediation. In fact, the order and procedure are the same for all mediations. Moreover, if a case turns out not to be well-suited for mediation, the mediation order can be withdrawn. Or, a party can elect not to settle if he or she is not satisfied with settlement offers.

Even under the present rule, an appellate court or the AMO has the option to deny a mediation request or to place conditions on it. If the Supreme Court requires both sides to agree, the AMO will honor that policy.

There are comparatively few cases for which mediation is requested confidentially, but for those cases, the option is significant. Cases for which mediation is requested have a high yield. Settlement rates are nearly 100%. The court's docket is reduced. Money is saved. Counsel and participants are happy.

Based on these benefits and the infrequency of the requests, a change in Rule 28A(h) would be detrimental to the mediation process and to the participants.

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900
Fax 801-578-3999

December 29, 2014

To: Appellate Rules Committee
From: Tim Shea
Re: Confidential requests for mediation

The Supreme Court has requested that the advisory committee consider the policies relevant to confidential requests for mediation. URAP 28A(h) provides:

> Counsel may request a mediation conference either by motion, letter or confidential request. The Chief Appellate Mediator shall 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, the mediation shall be conducted in accordance with the provisions in this rule.

Mediation in the Court of Appeals has been very successful. There are about 25 appeals under mediation at any given time, accounting for an average of 45 dispositions annually. Mediation in the Supreme Court is much less frequent. On average there is only one appeal under mediation, and frequently there are none. I do not have any data on how appeals come to be under mediation—by motion, letter, or confidential request—although I am given to understand that most are selected by the appellate mediator without a request from either party.

In discussing the topic, the justices' primary concern is the *ex parte* nature of a confidential request. In relevant part, Rule 2.9 of the Code of Judicial Conduct provides:

> (A) A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
>
> (1) When circumstances require it, *ex parte* communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
>
> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication; and
>
> (b) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and gives the parties an opportunity to respond.
>
> ….
>
> (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
>
> (5) A judge may initiate, permit, or consider any *ex parte* communication when expressly authorized by law to do so.
>
> ….

Rule 2.12(A) extends these requirements to court staff: "A judge shall take reasonable measures to require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's fulfillment of his or her obligations under this Code."

Since a confidential request for mediation is permitted by URAP 28A(h), CJC 2.9(A)(5) is satisfied, and there is no violation of the Code. But the justices raised the question whether this type of communication should be permitted. It may be argued that a confidential request does create an advantage for the requesting party. At least the requesting party appears to believe that a request served on the other party would create a disadvantage.

There is no emergency, although the matter should be concluded reasonably soon. The Supreme Court, under suspension of the rules, is permitting only requests for mediation that are agreed to all parties. However, there needs to be a more permanent solution, so the court has asked the committee to re-examination the policies affecting confidential requests.

copy: Michele Mattsson

Tab 3

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Rules of Appellate Procedure Committee
From: Alison Adams-Perlac
Date: May 28, 2015
Re: Public Comment to Rule 38A, Withdrawal of Counsel

The comment period to rule 38A has recently closed.

URAP 38A. Withdrawal of Counsel. Amend. Requires that appointed appellate counsel represent a client through the first appeal as of right.

The proposal received the following public comments:

I think the rule is a good one in cases where the client insists on pursuing a cert petition and counsel does not believe it will be meritorious, but there is a serious problem with how the client might lose his or her right to petition if counsel decides not to file on their behalf. Since the deadlines are so short, I worry about how the client will be able to pursue their petition if counsel insists on not doing it. My practice would be to inform the client of the deadline and send them a pro se petition form. But I worry about clients wanting to petition and missing the quick deadline for the petition. I don't know if the rule needs to have a provision that requires counsel to inform the client of the decision and the deadline or if it needs something that tolls the cert petition time period for a slightly longer period so that no rights are lost in the interim.
Posted by Sam April 16, 2015 01:04 PM

Although it is important that the client have continuity of counsel throughout an appeals process, there are instances where the counselor needs to withdraw representation. To force counsel to remain throughout the entire appeal process may in fact hurt the client in the long run. I can foresee instances where counsel is needed on a last minute appeal, and counsel may decide to not take on that client because counsel will be

forced to represent client throughout the entire appeal process. This rule should not be adopted.

Posted by Raquel M April 1, 2015 06:38 AM

If the committee votes to recommend the amendments, the proposal will be sent to the Supreme Court for its consideration.

Encl. URAP 38A

Rule 38A. Withdrawal of counsel.

(a)(1) Withdrawal in criminal cases and certain civil cases. An attorney may not withdraw from a criminal case or from a civil case in which ~~appellant~~that attorney's client has the right to effective assistance of counsel except upon motion and order of the court. Absent good cause shown, leave to withdraw will not be granted unless the motion to withdraw is accompanied by an entry of proposed appearance by new counsel or a representation by the withdrawing attorney that the ~~defendant~~client is entitled to the appointment of new counsel.

(a)(2) Duration of representation by court-appointed counsel. Absent good cause shown for withdrawal, if a party has a right to effective assistance of counsel, an attorney appointed to represent that party on appeal shall represent that party throughout the first appeal as of right, respond to a petition for writ of certiorari, file a petition for writ of certiorari if appointed counsel determines that such a petition is warranted, and brief and argue the merits if the Supreme Court grants certiorari review.

(b) Withdrawal in other civil cases.

(b)(1) When oral argument not scheduled. An attorney may withdraw without leave of court in any other civil case that has not been scheduled for oral argument. The withdrawing attorney shall serve notice of the withdrawal with the court and upon all parties, including his or her client.

(b)(2) When oral argument scheduled. An attorney may not withdraw from any other civil case that has been scheduled for oral argument except upon motion and order of the court. Absent good cause shown, leave to withdraw will not be granted unless the motion to withdraw is accompanied by an entry of proposed appearance of new counsel and new counsel's representation that oral argument may proceed as scheduled.

(b)(3) Notice to appoint or appear in person. If an attorney withdraws under subdivision (b)(1), dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall, and the court may, serve a notice on the unrepresented party, informing the party of the responsibility to appoint new counsel or, if the unrepresented party is a natural person, the responsibility to appear personally or appoint new counsel. A copy of the notice served by the opposing party shall be filed with the court. No further proceedings shall be held in the case until 20 days after such a notice is served, unless the unrepresented party waives the time requirement or unless the court otherwise orders.

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.~~

(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.

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

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

~~(a)(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~~85) ~~A s~~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 ~~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.

(b~~a~~)(9~~8~~) 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.

(a~~b~~)(~~9~~610) ~~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 ~~requires~~supports reversal ~~of the order or verdict challenged on appeal~~.

(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. ~~No text in a brief shall be bold, underlined or in ALL CAPS unless it is a quotation.~~

(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)(~~7~~12) Conclusion and ~~. A brief conclusion.R~~relief sought. A statement of the precise relief sought.

(b)(~~8~~13) Signature. A signature in compliance with Rule 21(e).

(b)(~~9~~14) Proof of ~~S~~service. A proof of service in compliance with Rule 21(d).

(b)(15~~0~~) Certificate of c~~C~~ompliance. 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:

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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.

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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).