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 4, 2014
12:00 p.m. to 1:30 p.m.

12:00 p.m.	Welcome and Approval of Minutes (Tab 1)	Joan Watt
12:05 p.m.	2015 Meeting Schedule Discussion	Joan Watt
12:15 p.m.	Public Comment to Rule 38B (Tab 2)	Joan Watt
12:25 p.m.	Rule 35 without Public Comment (Tab 3)	Joan Watt
12:35 p.m.	Rule 5 (Tab 4)	Troy Booher
12:50 p.m.	Rule 23B (Tab 5)	Lori Seppi
1:05 p.m.	Rule 24 (Tabs 6) Rule 24 and *State v. Nielsen* (Tab 7) Rule 27 (Tab 8)	Troy Booher Joan Watt Troy Booher
1:25 p.m.	Other Business	
1:30 p.m.	Adjourn	

Next Meeting: October 2, 2014 at 12:00 p.m.

Tab 1

MINUTES

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

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Executive Dining Room
Thursday, June 11, 2014
12:00 p.m. to 1:30 p.m.

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

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

Ms. Watt welcomed the committee to the meeting. She asked for any comments on the minutes from the previous meeting. There were no comments.

Ms. Westby moved to approve the minutes from the meeting held on April 10, 2014. Mr. Booher seconded the motion and it passed unanimously.

2. Rules Without Comment **Alison Adams-Perlac**

The committee amended Rule 5 to read as follows:

Rule 5. Discretionary appeals from interlocutory orders.

(a) Petition for permission to appeal. An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory

order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action. A timely appeal from an order certified under Rule 54(b), Utah Rules of Civil Procedure, that the appellate court determines is not final may, in the discretion of the appellate court, be considered by the appellate court as a petition for permission to appeal an interlocutory order. The appellate court may direct the appellant to file a petition that conforms to the requirements of paragraph (c) of this rule.

(b) Fees and copies of petition. For a petition presented to the Supreme Court, the petitioner shall file with the Clerk of the Supreme Court an original and five copies of the petition, together with the fee required by statute. For a petition presented to the Court of Appeals, the petitioner shall file with the Clerk of the Court of Appeals an original and four copies of the petition, together with the fee required by statute. The petitioner shall serve the petition on the opposing party and notice of the filing of the petition on the trial court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition, to the trial court where the petition and order shall be filed in lieu of a notice of appeal.

(c) Content of petition.

(c)(1) The petition shall contain:

(c)(1)(A) A concise statement of facts material to a consideration of the issue presented and the order sought to be reviewed;

(c)(1)(B) The issue presented expressed in the terms and circumstances of the case but without unnecessary detail, and a demonstration that the issue was preserved in the trial court. Petitioner must state the applicable standard of appellate review and cite supporting authority;

(c)(1)(C) A statement of the reasons why an immediate interlocutory appeal should be permitted, including a concise analysis of the statutes, rules or cases believed to be determinative of the issue stated; and

(c)(1)(D) A statement of the reason why the appeal may materially advance the termination of the litigation.

(c)(2) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the phrase "Subject to assignment to the Court of Appeals" shall appear immediately under the title of the document, i.e. Petition for Permission to Appeal. Appellant may then set forth in the petition a concise statement why the Supreme Court should decide the case ~~in light of the relevant factors listed in Rule 9(c)(9)~~.

(c)(3) The petitioner shall attach a copy of the order of the trial court from which an appeal is sought and any related findings of fact and conclusions of law and opinion. Other documents that may be relevant to determining whether to grant permission to appeal may be referenced by identifying trial court docket entries of the documents.

(d) Page limitation. A petition for permission to appeal shall not exceed 20 pages, excluding table of contents, if any, and the addenda.

(e) Service in criminal and juvenile delinquency cases. Any petition filed by a defendant in a criminal case originally charged as a felony or by a juvenile in a

delinquency proceeding shall be served on the Criminal Appeals Division of the Office of the Utah Attorney General.

(~~e~~f) ~~Answer~~Response; no reply. No petition will be granted in the absence of a request by the court for a response. No response to a petition for permission to appeal will be received unless requested by the court. Within 10 days after an order requesting a response~~service of the petition~~, any other party may oppose or concur with the petition. ~~file an answer in opposition or concurrence. If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the answer may contain a concise response to the petitioner's contentions under Rule 5(c).~~ Any response to a petition for permission to appeal shall be subject to the same page limitation set out in subsection (d). An original and five copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The respondent shall serve the ~~answer~~response on the petitioner. The petition and any ~~answer~~response shall be submitted without oral argument unless otherwise ordered. No reply in support of a petition for permission to appeal shall be permitted, unless requested by the court. (~~f~~g) Grant of permission. An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. The clerk of the appellate court shall immediately give the parties and trial court notice by mail or by electronic service of any order granting or denying the petition. If the petition is granted, the appeal shall be deemed to have been filed and docketed by the granting of the petition. All proceedings subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments except that no docketing statement shall be filed under Rule 9 unless the court otherwise orders, and no cross-appeal may be filed under rule 4(d).

(~~g~~h) Stays pending interlocutory review. The appellate court will not consider an application for a stay pending disposition of an interlocutory appeal until the petitioner has filed a petition for interlocutory appeal.

(i) Cross-petitions not permitted. A cross-petition for permission to appeal a non-final order is not permitted by this rule. All parties seeking to appeal from an interlocutory order must comply with subsection (a) of this rule.

Ms. Decker moved to approve Rule 5 as amended. Mr. Sabey seconded the motion, and it passed unanimously.

The committee amended Rule 37 to read as follows:

Rule 37. Suggestion of mootness; voluntary dismissal.

(a) Suggestion of mootness. It is the duty of each party at all times during the course of an appeal or other proceeding to inform the court of any circumstances which have transpired subsequent to the filing of the appeal or other proceeding which render moot

one or more of the issues raised. If a party determines that one or more, but less than all, of the issues have been rendered moot, the party shall promptly advise the court by filing a "suggestion of mootness" in the form of a motion under Rule 23. If all parties to an appeal or other proceeding agree as to the mootness of one or more, but less than all, of the issues raised, a stipulation to that effect shall be filed with the suggestion of mootness. If an appellant determines all issues raised in the appeal or other proceeding are moot, a motion for voluntary dismissal shall be filed pursuant to the provisions of paragraph (b) of this rule.

(b) Voluntary dismissal. At any time prior to the issuance of a decision an appellant may move to voluntarily dismiss an appeal or other proceeding. If all parties to an appeal or other proceeding agree that dismissal is appropriate, a stipulation to that effect shall be filed with the motion for voluntary dismissal. Any such stipulation shall specify the terms as to payment of costs, if applicable, and provide for payment of whatever fees are due.

(c) If appellant has the right to effective assistance of counsel, a motion to voluntarily dismiss for reasons other than mootness shall be accompanied by appellant's personal affidavit demonstrating that appellant's decision to dismiss the appeal is voluntary and made with knowledge of the right to an appeal and an understanding of the consequences of voluntary dismissal.

~~(c)~~(d) A suggestion of mootness or motion for voluntary dismissal shall be subject to the appellate court's approval.

Advisory Committee Note. Criminal defendants have a constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); State v. Arguelles, 921 P.2d 439, 441 (Utah 1996). Parties in juvenile court proceedings have a statutory right to effective assistance of counsel. State ex rel. E.H. v. A.H., 880 P.2d 11, 13 (Utah App. 1994); see Utah Code Ann. § 78-3a-913(1)(a)(Supp. 1998). To protect these rights and the right to appeal, Utah Code Ann. § 77-18a-1(1)(Supp. 1998); id. § 78-3a-909(1)(1996), the last sentence was added to rule 37(b) to assure that the decision to abandon an appeal is an informed choice made by the appellant, not unilaterally by appellant's attorney.

Ms. Seppi moved to approve Rule 37 as amended. Mr. Booher seconded the motion, and it passed unanimously.

3. Rule 9 **Joan Watt**

The committee amended Rule 9 to read as follows:

Rule 9. Docketing statement.

(a) Purpose. A docketing statement has two principal purposes: (1) to demonstrate that the appellate court has jurisdiction over the appeal, and (2) to identify at least one substantial issue for review. The docketing statement is a document used for jurisdictional and screening purposes. It should not include argument.

(b) Time for filing. Within 21 days after a notice of appeal, cross-appeal, or a petition for review of an administrative order is filed, the appellant, cross-appellant, or

petitioner shall file an original and two copies of a docketing statement with the clerk of the appellate court and serve a copy with any required attachments on all parties. The Utah Attorney General shall be served in any appeal arising from a crime charged as a felony or a juvenile court proceeding.

~~(b) Interlocutory appeals. When a petition for interlocutory review is granted under Rule 5, a docketing statement shall not be filed, unless otherwise ordered.~~

(c) Content of docketing statement in a civil case. The docketing statement in an appeal arising from a civil case shall include ~~contain the following information~~:

(c)(1) A concise statement of the nature of the proceeding and the effect of the order appealed, and the district court case number, e.g., "This appeal is from a final judgment ~~or decree~~ of the First District Court granting summary judgment in case number 001900055." ~~or "This petition is from an order of the Utah State Tax Commission."~~

~~(c)(2) The statutory provision that confers jurisdiction on the appellate court.~~

(c)(~~3~~2) The following dates relevant to a determination of the timeliness of the notice of appeal and the jurisdiction of the appellate court:

(c)(2~~3~~)(i~~A~~) The date of entry of the final judgment or order from which the appeal is taken.

(c)(2~~3~~)(ii~~B~~) The date the notice of appeal ~~or petition for review~~ was filed in the trial court.

(c)(2~~3~~)(iii~~C~~) If the notice of appeal was filed after receiving an extension of the time to file pursuant to Rule 4(e), the date the motion for an extension was granted.

(c)(2)(iv) If any motions listed in Rule 4(b) were filed, the date such motion was filed in the trial court and the date of entry ~~The date of any motions filed pursuant to Rules 50(b), 52(b), or 59, Utah Rules of Civil Procedure, or Rule 24, Utah Rules of Criminal Procedure, and the date and effect~~ of any order~~s~~ disposing of such motion~~s~~.

(c)(2)(v) If the appellant is an inmate confined in an institution and is invoking Rule 21(f), the date the notice of appeal was deposited in the institution's internal mail system.~~a statement to that effect.~~

(c)(2~~5~~)(vi) If a motion to reinstate the time to appeal was filed pursuant to Rule 4(g), the date of the order disposing of such motion.

(c)(3) If the ~~an~~ appeal is taken from an order ~~in a multiple-party or a multiple-claim case, and the judgment has been~~ certified as ~~a~~ final ~~judgment by the trial court~~ pursuant to Rule 54(b) of the~~,~~ Utah Rules of Civil Procedure,~~:~~ a statement of what claims and parties remain before the trial court for adjudication.~~(c)(5)(A) a statement of what claims and parties remain before the trial court for adjudication, and~~

~~(c)(5)(B) a statement of whether the facts underlying the appeal are sufficiently similar to the facts underlying the claims remaining before the trial court to constitute res judicata on those clai~~

(c)(~~4~~6) A statement of at least one substantial issue appellant intends to assert on appeal. An issue not raised in the docketing statement may nevertheless be raised in the brief of the appellant; conversely, an issue raised in the docketing statement does not have to be included in the brief of the appellant.

(c)(5) A concise summary of the facts necessary to provide context for the issues presented.

(c)(6) A reference to all related or prior appeals in the case, with case numbers and citations.~~If the case is criminal,~~

~~(c)(6)(A) the charges of which the defendant was convicted or, if the defendant is not convicted, the dismissed or pending charges;~~

~~(c)(6)(B) any sentence imposed;(c)(6)(C) whether the defendant is currently incarcerated.~~

~~(c)(7) A statement of the issues appellant intends to assert on appeal, including, for each issue,~~

~~(c)(7)(A) citations to determinative statutes, rules, or cases;~~

~~(c)(7)(B) the applicable standard of appellate review, with supporting authority.~~

~~(c)(8) A succinct summary of facts material to a consideration of the issues presented.~~

~~(c)(9) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, and the appellant advocates or opposes such an assignment, a succinct statement of reasons why the Supreme Court should or should not assign the case. The Supreme Court may, for example, consider whether the case presents or involves one or more of the following:~~

~~(c)(9)(A) a novel constitutional issue;~~

~~(c)(9)(B) an important issue of first impression;~~

~~(c)(9)(C) a conflict in Court of Appeals decisions;~~

~~(c)(9)(D) any other persuasive reason why the Supreme Court should or should not resolve the issue.~~

~~(c)(10) A reference to all related or prior appeals in the case, with case numbers and citations~~

(d) Content of a docketing statement in a criminal case. The docketing statement in an appeal arising from a criminal case shall include:

(d)(1) A concise statement of the nature of the proceeding, including the highest degree of any of the charges in the trial court, and the district court case number, e.g., "This appeal is from a judgment of conviction and sentence of the Third District Court on a third degree felony charge in case number 001900055."

(d)(2) The following dates relevant to a determination of the timeliness of the appeal and the jurisdiction of the appellate court:

(d)(2)(i) The date of entry of the final judgment or order from which the appeal is taken.

(d)(2)(ii) The date the notice of appeal was filed in the district court.

(d)(2)(iii) If the notice of appeal was filed after receiving an extension of the time to file pursuant to rule 4(e), the date the motion for an extension was granted.

(d)(2)(iv) If a motion pursuant to Rule 24 of the Utah Rules of Criminal Procedure was filed, the date such motion was filed in the trial court and the date of entry of any order disposing of such motion.

(d)(2)(v) If a motion to reinstate the time to appeal was filed pursuant to Rule 4(f), the date of the order disposing of such motion.

(d)(2)(vi) If the appellant is an inmate confined to an institution and is invoking Rule 21(f), the date the notice of appeal was deposited in the institution's internal mail system.

(d)(3) The charges of which the defendant was convicted, and any sentence imposed; or, if the defendant was not convicted, the dismissed or pending charges.

(d)(4) A statement of at least one substantial issue appellant intends to assert on appeal. An issue not raised in the docketing statement may nevertheless be raised in the brief of the appellant; conversely, an issue raised in the docketing statement does not have to be included in the brief of the appellant.

(d)(5) A concise summary of the facts necessary to provide context for the issues presented. If the conviction was pursuant to a plea, the statement of facts should include whether a motion to withdraw the plea was made prior to sentencing, and whether the plea was conditional.

(d)(6) A reference to all related or prior appeals in the case, with case numbers and citations.

~~(d) Necessary attachments. Copies of the following must be attached to each copy of the docketing statement:~~

~~(d)(1) The final judgment or order from which the appeal is taken;~~

~~(d)(2) Any rulings or findings of the trial court or administrative tribunal included in the judgment from which the appeal is taken;~~

~~(d)(3) In appeals arising from an order of the Public Service Commission, any application for rehearing filed pursuant to Utah Code Section 54-7-15;~~

~~(d)(4) The notice of appeal and any order extending the time for the filing of a notice of appeal.~~

~~(d)(5) Any notice of claim.~~

~~(d)(6) Any motions filed pursuant to Rules 50(b), 52(b), 54(b), or 59, Utah Rules of Civil Procedure, or Rule 24, Utah Rules of Criminal Procedure, and orders disposing of such motions; and~~

~~(d)(7) If the appellant is an inmate confined in an institution and is invoking Rule 4(g), the notarized statement or written declaration required by that provision.~~

(e) Content of a docketing statement in a review of an administrative order. The docketing statement in a case arising from an administrative proceeding shall include:

(e)(1) A concise statement of the nature of the proceedings and the effect of the order appealed, e.g., "This petition is from an order of the Workforce Appeals Board denying reconsideration of the denial of benefits."

(e)(2) The statutory provision that confers jurisdiction on the appellate court.

(e)(3) The following dates relevant to a determination of the timeliness of the petition for review:

(e)(3)(i) The date of entry of the final order from which the petition for review is filed.

(e)(3)(ii) The date the petition for review was filed.

(e)(4) A statement of at least one substantial issue petitioner intends to assert on review. An issue not raised in the docketing statement may nevertheless be raised in the brief of petitioner; conversely, an issue raised in the docketing statement does not have to be included in the brief of petitioner.

(e)(5) A concise summary of the facts necessary to provide context for the issues presented.

(e)(6) If applicable, a reference to all related or prior petitions for review in the same case.

(e)(7) Copies of the following documents must be attached to each copy of the docketing statement:

(e)(7)(i) The final order from which the petition for review is filed.

(e)(7)(ii) In appeals arising from an order of the Public Service Commission, any application for rehearing filed pursuant to Utah Code section 54-7-15.

~~(e) Appellee's statement regarding assignment. If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, an appellee may within 10 days of service of the docketing statement file a succinct statement of reasons why the appeal should or should not be assigned.~~

(f) Consequences of failure to comply. Failure to file a ~~D~~docketing statement~~s~~ within the time period provided in subsection (b) ~~which fail to comply with this rule will not be accepted. Failure to comply~~ may result in dismissal of a civil ~~the~~ appeal or ~~the~~ a petition for review. Failure to file a docketing statement within the time period provided in subsection (b) in a criminal case may result in a finding of contempt or other sanction if appellant is represented by counsel, and may result in dismissal of the appeal if appellant is not represented by counsel. ~~An issue not listed in the docketing statement may nevertheless be raised in appellant's opening brief.~~

(g) Appeals from interlocutory orders. When a petition for permission to appeal from an interlocutory order is granted under Rule 5, a docketing statement shall not be filed unless otherwise ordered.

Advisory Committee Notes

The content of the docketing statement has been slightly reordered to first state information governing the jurisdiction of the court.

The docketing statement and briefs contain a new section requiring a statement of the applicable standard of review, with citation of supporting authority, for each issue presented on appeal.

The content of the docketing statement has been reordered and brought into conformity with revised Rule 4, Utah Rules of Appellate Procedure. This rule is satisfied by a docketing statement in compliance with form 7.

Mr. Booher moved to approve Rule 9 as amended. Mr. Mouritsen seconded the motion, and it passed unanimously.

4. Rule 23B **Joan Watt**

Ms. Watt stated that, at the last meeting, the committee tabled consideration of Rule 23B pending communication with Laura Dupaix regarding circumstances where an appellee might want to file a motion for a 23B remand. She stated that Ms. Decker was the committee member who had communicated with Ms. Dupaix on this issue.

Ms. Decker stated that Ms. Dupaix told her about an instance in which the Attorney General's office (AG) had moved for a 23B remand. She explained that, in that case, the appellant claimed that trial counsel was ineffective due to a conflict of interest. She stated that the State

wanted a remand to establish on the record that there was in fact no conflict of interest. She stated that the AG's motion was denied in that case. Ms. Decker stated the AG might also move for a 23B remand is if it was concerned that the appellate court might construe a record gap against the State.

Mr. Booher raised a concern that if the appellee could successfully move for a 23B remand, the appellant's brief, which would have been filed already, would not address the facts found on remand. Ms. Decker and Ms. Romano stated that the court, in its discretion, could order supplemental briefing. Mr. Booher asked whether supplemental briefing would be available in this circumstance. Mr. Sabey stated that the rule should make clear that the court has discretion to order supplemental briefs or replacement briefs. Ms. Watt stated that, in that circumstance, she would file a motion for leave to file a replacement brief pursuant to Rule 23B and Rule 2. Ms. Watt stated that most cases would only call for supplemental briefing, but in the rare case that the facts found on remand pervasively affect the arguments raised on appeal, she would hope the appellate court would allow a replacement brief. Ms. Decker stated that the AG would probably not oppose a motion to allow a replacement brief in those circumstances.

Mr. Sabey said he would defer to the appellate attorneys who file motions for 23B remands. Ms. Seppi stated that it would be a very rare situation to need to file a replacement brief after a 23B remand. Mr. Sabey stated that he agreed with Ms. Watt that a party could always file a motion for a replacement brief pursuant to Rules 23B and 2. He stated he does not see a downside to leaving the Rule the way it is because an appellate court would probably always grant leave to file a replacement brief if it was requested. Ms. Watt agreed. She stated that the Rule could provide for supplemental or replacement briefs, but her concern is that if it did, then parties would routinely move to file replacement briefs, even where unnecessary, and filing replacement briefs significantly slows down the appellate process. Ms. Westby agreed.

Ms. Seppi stated that the committee could add a line to (b)(1) that says something about if the facts found on remand affect the opening brief, there's an opportunity to file a new brief. She stated that such a line would not be necessary, however, because the decision on whether to remand would not come until after the reply brief is filed. Mr. Booher and Mr. Sabey agreed, and stated that the Rule should remain as is.

Mr. Booher stated he had one cosmetic change in subsection (c), at lines 38-39. He stated he would change that sentence to: "The motion shall be accompanied by admissible evidence, including affidavits." He said that affidavits contain evidence, so it is funny to say "alleging facts." Ms. Seppi stated that the subcommittee had a difficult time with this sentence. Ms. Westby stated that affidavits presented to the appellate court are not evidence because an appellate court cannot take evidence. Judge Orme suggested saying, "The motion shall be accompanied by affidavits or admissible evidence." He stated that an affidavit would be superfluous for a self-authenticating document. Mr. Booher stated that appellate courts do take evidence, because evidence is defined as things a court takes judicial notice of. Ms. Westby said that does not constitute taking evidence.

Ms. Watt stated that language requiring affidavits was intended to account for the fact that there is no subpoena power on appeal; it was designed to set a threshold for obtaining a 23B remand but not make it so high that it is impossible to meet. Mr. Shea stated that the distinction between an

affidavit and other facts likely to be admissible is not important if an appellate court cannot receive evidence. He also that there is a statute providing that if a court rule requires an affidavit, a declaration under penalty of perjury is sufficient. He suggested that the Rule should inform parties that something less than an affidavit will suffice.

Judge Orme proposed using some of the language from Rule 56 of the Utah Rules of Civil Procedure. He stated that there ought to be an umbrella term that avoids the admissible evidence question.

Ms. Watt stated that the point is to create an achievable threshold for obtaining a 23B remand. Mr. Sabey stated that the goal is to strike a balance between the extremes of speculation and proof. Mr. Booher stated that the rule does not establish an evidentiary threshold; it only tells parties what they must submit to obtain a 23B remand. He stated that, accordingly, it may be more appropriate for a committee note. He asked if there was a case from which the proposed affidavit requirement was derived. Ms. Decker stated that the AG regularly cites to *Johnson* to support the proposition that an appellant must supply supporting affidavits. Mr. Booher suggested adding a committee note alerting parties to *Johnson*. Ms. Seppi volunteered to revise lines 38-39 and draft a committee note on *Johnson*.

Judge Orme suggested cross-referencing Rule 56 of the Utah Rules of Civil Procedure and providing a list of acceptable documentation. Mr. Shea suggested that the Rule should require that a response be due within 30 days, rather than require the court to set a time within 30 days.

The committee tabled Rule 23B until the next meeting, where Ms. Seppi will present her proposed revision to lines 38-39 and a draft of a committee note on Johnson.

5. Rule 4(e) and 48 **Paul Burke**

The committee amended Rules 4 and 48 to read as follows:

Rule 4. Appeal as of right: when taken.

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

(b) Time for appeal extended by certain motions.

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

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

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

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

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

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

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

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

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

(e) Motion for ~~E~~extension of time ~~to appeal~~.

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

(e)(2) The trial court, upon a showing of good cause or excusable neglect ~~or good cause~~, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. ~~A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court.~~ The court may rule at any time after the filing of the motion. That a movant did not file a notice of appeal to which subsection (c) would apply is not relevant to the determination of good cause or excusable neglect. No extension shall exceed 30 days ~~past~~ beyond the prescribed time or 14~~0~~ days ~~from~~beyond the date of entry of the order granting the motion, whichever occurs later.

(f) Motion to reinstate period for filing a direct appeal in criminal cases. Upon a showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the sentencing court and serve the

prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that the defendant was deprived of the right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

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

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

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

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

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

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

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

Advisory Committee Note

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

Rule 48. Time for petitioning.

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

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

(c) Effect of petition for rehearing. The time for filing a petition for a writ of certiorari runs from the date the decision is entered by the Court of Appeals, not from the date of the issuance of the remittitur. If a petition for rehearing that complies with Rule 35(a) is timely filed by any party, the time for filing the petition for a writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or of the entry of a subsequent decision entered upon the rehearing.

(d) Time for cross-petition.

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

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

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

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

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

(d)(4) A cross-petition for a writ of certiorari may not be joined with any other filing. The clerk of the court shall refuse any filing so joined.

(e) Extension of time.

(e)(1) The Supreme Court, upon a showing of good cause, may extend the time for filing a petition or a cross-petition for a writ of certiorari upon motion filed before the expiration of the time prescribed by paragraph (a) or (c) of this rule. Responses to such motions are disfavored and the court may rule at any time after the filing of the motion. No extension shall exceed 30 days past the prescribed time or 14 days from the date of entry of the order granting the motion, whichever occurs later, and no more than one extension will be granted.

(e)(2) The Supreme Court, upon a showing of good cause or excusable neglect ~~or good cause~~, may extend the time for filing a petition or a cross-petition for a writ of certiorari upon motion filed ~~not later than 30 days~~ after the expiration of the time prescribed by paragraph (a) or (c) of this rule, whichever is applicable. ~~Any such motion which is filed before expiration of the prescribed time may be ex parte, unless the Supreme Court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties.~~ No extension shall exceed 30 days past the prescribed time or 14~~0~~ days from the date of entry of the order granting the motion, whichever occurs later, and no more than one extension will be granted.

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

Mr. Burke moved to approve Rules 4 and 48 as amended. Mr. Booher seconded the motion, and it passed unanimously.

6. Nonpublic Records—Rules 21, 21A, 55, and 56 Alison Adams-Perlac

The committee proposed or amended Rules 21, 21A, 55, and 56 to 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) 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) Representations to court. By filing papers in the appellate court, an attorney or unrepresented party is certifying that to the best of the person's knowledge formed after an inquiry reasonable under the circumstances:

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

(g)(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;

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

(g)(4) the filing complies with Rule 21A and Rule 4-202.02 of the Utah Code of Judicial Administration.

Advisory Committee Notes

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

Rule 21A. Appellate filings containing other than public information and records.

(a) Record on appeal. All parts of the record on appeal retain the same classification as in the trial court or administrative agency unless otherwise classified by the appellate court.

(b) Appellate filings. If any appellate filing contains information or records classified as other than public, the filing party shall also file a copy with all non-public information redacted accompanied by a certification that identifies the appropriate

classification, including a citation to the statute, rule or order that supports that classification.

Advisory Committee Notes

Rule 4-202.02 of the Utah Code of Judicial Administration classifies judicial records generally.

Rule 11 defines "record on appeal."

Rule 55. Petition on appeal.

(a) Filing; dismissal for failure to timely file. The appellant shall file with the clerk of the Court of Appeals an original and four copies of the petition on appeal. The petition on appeal must be filed with the appellate clerk within 15 days from the filing of the notice of appeal or the amended notice of appeal. If the petition on appeal is not timely filed, the appeal shall be dismissed. It shall be accompanied by proof of service. The petition shall be deemed filed on the date of the postmark if first-class mail is utilized. The appellant shall serve a copy on counsel of record of each party, including the Guardian ad Litem, or, if the party is not represented by counsel, then on the party at the party's last known address, in the manner prescribed in Rule 21(c).

(b) Preparation by trial counsel. The petition on appeal shall be prepared by appellant's trial counsel. Trial counsel may only be relieved of this obligation by the juvenile court upon a showing of extraordinary circumstances. Claims of ineffective assistance of counsel do not constitute extraordinary circumstances but should be raised by trial counsel in the petition on appeal.

(c) Format. All petitions on appeal shall substantially comply with the Petition on Appeal form that accompanies these rules. The petition shall not exceed 15 pages, excluding the attachments required by Rule 55(d)(6). The petition 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 ½ inches wide and 11 inches long. 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. Either a proportionally spaced or monospaced typeface in a plain, roman style may be used. A proportionally spaced typeface must be 13-point or larger for both text and footnotes. Examples are CG Times, Times New Roman, New Century, Bookman and Garamond. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes. Examples are Pica and Courier.

(d) Contents. The petition on appeal shall include all of the following elements:

(d)(1) A statement of the nature of the case and the relief sought.

(d)(2) The entry date of the judgment or order on appeal.

(d)(3) The date and disposition of any post-judgment motions.

(d)(4) A concise statement of the material adjudicated facts as they relate to the issues presented in the petition on appeal.

(d)(5) A statement of the legal issues presented for appeal, how they were preserved for appeal, and the applicable standard of review. The issue statements should be concise in nature, setting forth specific legal questions. General, conclusory statements

such as "the juvenile court's ruling is not supported by law or the facts" are not acceptable.

(d)(6) The petition should include supporting statutes, case law, and other legal authority for each issue raised, including authority contrary to appellant's case, if known.

(d)(7) The petition on appeal shall have attached to it:

(d)(7)(A) a copy of the order, judgment, or decree on appeal;

(d)(7)(B) a copy of any rulings on post-judgment motions.

(e) Compliance with Rule 21A. Petitions made under this rule that contain information or records classified as other than public shall comply with Rule 21A.

Rule 56. Response to petition on appeal.

(a) Filing. Any appellee, including the Guardian ad Litem, may file a response to the petition on appeal. An original and four copies of the response must be filed with the clerk of the Court of Appeals within 15 days after service of the appellant's petition on appeal. It shall be accompanied by proof of service. The response shall be deemed filed on the date of the postmark if first-class mail is utilized. The appellee shall serve a copy on counsel of record of each party, including the Guardian ad Litem, or, if the party is not represented by counsel, then on the party at the party's last known address, in the manner prescribed in Rule 21(c).

(b) Format. A response shall substantially comply with the Response to Petition on Appeal form that accompanies these rules. The response shall not exceed 15 pages, excluding any attachments, and shall comply with Rule 27(a) and (b), except that it may be printed or duplicated on one side of the sheet.

(c) Compliance with Rule 21A. Responses made under this rule that contain information or records classified as other than public shall comply with Rule 21A.

Mr. Booher moved to approve Rules 21, 21A, 55, and 56 as proposed or amended. Mr. Burke seconded the motion, and it passed unanimously.

7. **Rules 24 and 27** **Troy Booher**

Mr. Booher stated that some of the changes have been discussed or even approved by the committee, but have never been out for public comment. He stated that other changes are the product of a subcommittee that discussed global changes to briefs and how they are structured. He stated that the subcommittee decided that briefs ought to be structured as appellate judges read them. He stated almost all of the changes were presented at a conference of appellate judges, and there was almost no resistance to the changes among the judges. He stated there was a lot of support for streamlining briefs. He said that one of the primary goals of the changes is to eliminate redundancy in briefs.

The committee members will review the proposed changes to Rules 24 and 27 for discussion at the next meeting.

8. Rule 24 and *State v. Nielsen* **Joan Watt**

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

9. Other Business

There was no other business discussed at the meeting.

10. Adjourn

The meeting was adjourned at 1:45 p.m. The next meeting will be held Thursday, September 4, 2014.

Tab 2

Rule 38B. Qualifications for Appointed Appellate Counsel.

(a) In all appeals where a party is entitled to appointed counsel, only an attorney proficient in appellate practice may be appointed to represent such a party before either the Utah Supreme Court or the Utah Court of Appeals.

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

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

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

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

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

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

(e) Notwithstanding counsel's apparent eligibility for appointment under subsection (c) or (d) above, counsel may not be appointed to represent a party before the Utah Supreme Court or the Utah Court of Appeals if, during the three-year period immediately preceding counsel's proposed appointment, counsel was the subject of an

order issued by either appellate court imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before either appellate court.

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

(g) Appointed appellate counsel shall represent his or her client throughout the first right of appeal, including the filing of a petition for writ of certiorari if appointed counsel determines that such a petition is warranted and briefing on the merits if the Supreme Court grants certiorari review.

Advisory Committee Note

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

Public Comment to Rule 38B

I think the amendment to Rule 38B would be helpful if I am interpreting it correctly. As full-time appointed appellate counsel, all of my clients would elect to pursue a cert petition on every case. This creates unnecessary work for both counsel and the court. If the rule allows counsel the discretion as to when cert review is appropriate, then this could eliminate a lot of unnecessary appellate work. Some cases simply do not merit cert review. The rule is unclear, however, that if counsel elects to forego a cert petition and his or her client wishes to pursue review the process for withdrawl and allowance for the client to file a pro se petition. Perhaps that can be governed by other rules currently in place, but I foresee some difficulties there.

Posted by Sam July 10, 2014 09:25 AM

Tab 3

Rule 35. Petition for rehearing.

(a) Petition for rehearing permitted. A rehearing will not be granted in the absence of a petition for rehearing. A petition for rehearing may be filed only in cases that have received plenary review and the court has issued an opinion, memorandum decision, or per curiam decision. No other petitions for rehearing will be considered.

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

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

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

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

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

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

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

(i) Color of cover. The cover of a petition for rehearing shall be tan; that of any response to a petition for rehearing filed by a party, white; and that of any response filed by an amicus curiae, green. All brief covers shall be of heavy cover stock. There shall be adequate contrast between the printing and the color of the cover.

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

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

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

Committee Concerns about Rule 35 Proposal

Judge Fred Voros:
On rule 35, our amendment states, "A petition for rehearing may be filed only in cases that have received *plenary review* and the court has issued an opinion, memorandum decision, or per curiam decision." What do we mean by *plenary review* in this sentence? I agree that petitions for rehearing should be permitted from per curiam decisions. But we use per curiam decisions to resolve cases on summary disposition, which seems the opposite of plenary review. Furthermore, in the federal system "plenary review" refers to nondeferential appellate review, which might cause some confusion.

What if we said simply, "A petition for rehearing may be filed only after the court has issued an opinion, memorandum decision, or per curiam decision." (This sentence is also more grammatical than the original.)

I apologize for the lateness of this comment, especially since I suspect the source of "plenary review" was me.

Troy Booher:
My concern with the Rule 35 suggestion is that it would allow a petition for rehearing if a motion for summary disposition is granted with a per curiam decision. The standing order we incorporated expressly forbade such petitions, so this would be a change in the scope of the rule. But I also agree that “plenary review” is not clear.
Perhaps we want to allow petitions for rehearing from a summary disposition, especially if raised sua sponte by the court. Or perhaps we want to allow rehearing from any type of decision but only after full briefing.

In my view, the rule 5 amendment is more important, timing wise, than the rule 35 amendment, so perhaps we can to wait and discuss together.

Mary Westby
Regarding rule 35, my recollection is that an earlier version had the suggested list of opinion, memorandum decision, and per curiams. Even though the per curiams would wrap in some cases disposed on a summary disposition track, the intent to limit petitions for rehearing would be intact for the most part. Summary dispositions may be by order or per curiam decision. Orders are typically used for jurisdictional defects or when an appellant fails to respond. The per curiam decisions are more common for summary dispositions based on the lack of a substantial question for review, so it is a merit based decision which arguably should be eligible for a petition for rehearing. Even though the list would permit petitions for rehearing on some number of summary dispositions, I think the effect would be minimal.

Judge Fred Voros
I had forgotten that we intended to forbid petitions for rehearing following summary dispositions. If so, perhaps we should just say that a petition for rehearing may be filed when an

appeal is disposed of by opinion or memorandum decision but not when it is disposed of by per curiam decision or order.

Judge Gregory Orme

Against the possibility of some gross miscarriage of justice in one of the ineligible categories, we took some comfort in the ability of the would-be petitioner to ask that the rule be suspended so as to permit the petition to be filed and considered in the anomalous case.

Tab 4

Rule 5. Discretionary appeals from interlocutory orders.

(a) Petition for permission to appeal. An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action. A timely appeal from an order certified under Rule 54(b), Utah Rules of Civil Procedure, that the appellate court determines is not final may, in the discretion of the appellate court, be considered by the appellate court as a petition for permission to appeal an interlocutory order. The appellate court may direct the appellant to file a petition that conforms to the requirements of paragraph (c) of this rule.

(b) Fees and copies of petition. For a petition presented to the Supreme Court, the petitioner shall file with the Clerk of the Supreme Court an original and five copies of the petition, together with the fee required by statute. For a petition presented to the Court of Appeals, the petitioner shall file with the Clerk of the Court of Appeals an original and four copies of the petition, together with the fee required by statute. The petitioner shall serve the petition on the opposing party and notice of the filing of the petition on the trial court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition, to the trial court where the petition and order shall be filed in lieu of a notice of appeal.

(c) Content of petition.

(c)(1) The petition shall contain:

(c)(1)(A) A concise statement of facts material to a consideration of the issue presented and the order sought to be reviewed;

(c)(1)(B) The issue presented expressed in the terms and circumstances of the case but without unnecessary detail, and a demonstration that the issue was preserved in the trial court. Petitioner must state the applicable standard of appellate review and cite supporting authority;

(c)(1)(C) A statement of the reasons why an immediate interlocutory appeal should be permitted, including a concise analysis of the statutes, rules or cases believed to be determinative of the issue stated; and

(c)(1)(D) A statement of the reason why the appeal may materially advance the termination of the litigation.

(c)(2) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the phrase "Subject to assignment to the Court of Appeals" shall appear immediately under the title of the document, i.e. Petition for Permission to Appeal. Appellant may then set forth in the petition a concise statement why the Supreme Court should decide the case ~~in light of the relevant factors listed in Rule 9(c)(9)~~.

(c)(3) The petitioner shall attach a copy of the order of the trial court from which an appeal is sought and any related findings of fact and conclusions of law and opinion. Other documents that may be relevant to determining whether to grant permission to appeal may be referenced by identifying trial court docket entries of the documents.

(d) Page limitation. A petition for permission to appeal shall not exceed 20 pages, excluding table of contents, if any, and the addenda.

(e) Service in criminal and juvenile delinquency cases. Any petition filed by a defendant in a criminal case originally charged as a felony or by a juvenile in a delinquency proceeding shall be served on the Criminal Appeals Division of the Office of the Utah Attorney General.

(~~e~~f) ~~Answer~~Response; no reply. No response to a petition for permission to appeal will be received unless requested by the court. Within 10 days after an order requesting a response~~service of the petition~~, any other party may oppose or concur with the petition. ~~file an answer in opposition or concurrence. If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the answer may contain a concise response to the petitioner's contentions under Rule 5(c).~~ Any response to a petition for permission to appeal shall be subject to the same page limitation set out in subsection (d). An original and five copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The respondent shall serve the ~~answer~~response on the petitioner. The petition and any ~~answer~~response shall be submitted without oral argument unless otherwise ordered. No reply in support of a petition for permission to appeal shall be permitted, unless requested. No petition will be granted in the absence of a request for a response.

(~~f~~g) Grant of permission. An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. The clerk of the appellate court shall immediately give the parties and trial court notice by mail or by electronic service of any order granting or denying the petition. If the petition is granted, the appeal shall be deemed to have been filed and docketed by the granting of the petition. All proceedings subsequent to the granting of the petition shall be as, and within

the time required, for appeals from final judgments except that no docketing statement shall be filed under Rule 9 unless the court otherwise orders, and no cross-appeal may be filed under rule 4(d).

(~~g~~h) Stays pending interlocutory review. The appellate court will not consider an application for a stay pending disposition of an interlocutory appeal until the petitioner has filed a petition for interlocutory appeal.

(i) Cross-petitions not permitted. A cross-petition for permission to appeal a non-final order is not permitted by this rule. All parties seeking to appeal from an interlocutory order must comply with subsection (a) of this rule.

Utah State Courts

Rule 5 Proposal

tbooher@zjbappeals.com <tbooher@zjbappeals.com> Thu, Aug 14, 2014 at 3:46 PM
To: Joan Watt <JWATT@sllda.com>, Alison Adams-Perlac <alisonap@utcourts.gov>, Alan Mouritsen <amouritsen@parsonsbehle.com>, Ann Marie Taliaferro <ann@brownbradshaw.com>, Bridget Romano <bromano@utah.gov>, "Bryan J. Pattison" <bpattison@djplaw.com>, Clark Sabey <clarks@utcourts.gov>, John Plimpton <jbplimpton@gmail.com>, "Judge Gregory Orme (jorme@utcourts.gov)" <jorme@utcourts.gov>, "Judge Fred Voros (jfvoros@utcourts.gov)" <jfvoros@utcourts.gov>, Lori Seppi <lseppi@sllda.com>, Marian Decker <mdecker@utah.gov>, Mary Westby <maryw@utcourts.gov>, Paul Burke <pburke@rqn.com>, Rodney Parker <rparker@scmlaw.com>, "Tim Shea (tims@utcourts.gov)" <tims@utcourts.gov>

Committee,

Judge Blanch called today to ask whether our committee would consider changing the rule 5 deadline to file a petition from 20 days to 30 days so district court judges do not have to research whether an order is interlocutory or final when advising a defendant of the deadline to appeal. *State v. Millward*, 2014 UT App 174. During the discussion, it struck me that it may be unclear to parties whether there is a right to appeal in a number of circumstances, such as certain sentencing issues, preliminary hearing issues, and certain family law orders where the court has continuing jurisdiction over pending collateral issues. I'm sure there are other examples. There also is a potential trap when there is a statutory right to appeal an interlocutory order but the losing party assumes that rule 5 is the only option.

After discussing how changing the deadline to 30 days might help and how it might not really address the problem, the following proposal emerged. I said I would bring to the committee to consider when it can, so here it is.

Amend rule 5 to allow the filing of a petition for review of a interlocutory order within 30 days of the entry of the order. When coupled with our amendment allowing appellate courts to deny petitions without waiting for a response, the rule still should shorten the current average time from entry of an order to adjudication of a petition. This way, when a district court says 30 days, it will be correct regardless of which rule actually applies.

Rule 5(b) currently requires that "[t]he petitioner shall serve the petition on the opposing party **and notice of the filing of the petition on the trial court**." We could amend rule 5 to require that the notice of the filing of the petition have certain content, such as specifying the parties wishing to take the appeal, as well as designating the order they wish to appeal from, the court from which the appeal will be taken, and the court to which the appeal will be taken. *See* Rule 3(d). If that is done, then the notice contemplated in rule 5(b) could function as a notice of appeal in the event that there was an appeal of right and therefore the party should have filed a notice of appeal under rules 3 and 4 instead of a petition under rule 5. The Utah Supreme Court has held that the filing of a rule 5 petition **in the district court** can operate as a notice of appeal. *Cedar Surgery Ctr., L.L.C. v. Bonelli*, 2004 UT 58, PP10-12, 96 P.3d 911. Where the court determines that the petitioner who filed a rule 5 petition had an appeal of right, the petitioner need only file belatedly the filing fee and cost bond that would have been required with a notice of appeal. A party will not lose the right to appeal where the party mistakenly believed that the order was not final or was unaware of a statutory right to appeal.

The corresponding issue is less pressing and does not admit of a simple solution. If a party files a notice of appeal where a rule 5 petition is required, the stakes typically will not be that high. This is because the order typically can be appealed later, after final judgment. Again, see *State v. Millward*. But this is not always the case, or at least is not always meaningfully the case. Where an order would otherwise qualify as a collateral order in federal court--because an appeal after final judgment would not be practical (denied bail, qualified immunity, perhaps *Millward*, etc.)--there would be no meaningful review later where the rule 5 deadline has passed. My own view is that, while this may be a problem in a few cases, I do not see a solution to this problem that is not worse than the problem itself.

While we can take the sting out of guessing incorrectly that a rule 5 petition was required, I don't think we can take the sting out of guessing incorrectly that a notice of appeal under rule 3,4 was required. But I raise that for discussion as well.

Troy L. Booher

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Alison Adams-Perlac <alisonap@utcourts.gov> Thu, Aug 14, 2014 at 4:14 PM
To: "tbooher@zjbappeals.com" <tbooher@zjbappeals.com>, Joan Watt <jwatt@sllda.com>

Joan,

I can add this to our next agenda.

Thank you,

Alison Adams-Perlac, J.D.
Staff Attorney
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Marian Decker <mdecker@utah.gov> Thu, Aug 14, 2014 at 4:33 PM
To: "tbooher@zjbappeals.com" <tbooher@zjbappeals.com>
Cc: Joan Watt <JWATT@sllda.com>, Alison Adams-Perlac <alisonap@utcourts.gov>, Alan Mouritsen <amouritsen@parsonsbehle.com>, Ann Marie Taliaferro <ann@brownbradshaw.com>, Bridget Romano <bromano@utah.gov>, "Bryan J. Pattison" <bpattison@djplaw.com>, Clark Sabey <clarks@utcourts.gov>, John Plimpton <jbplimpton@gmail.com>, "Judge Gregory Orme (jorme@utcourts.gov)" <jorme@utcourts.gov>, "Judge Fred Voros (jfvoros@utcourts.gov)" <jfvoros@utcourts.gov>, Lori Seppi <lseppi@sllda.com>, Mary Westby <maryw@utcourts.gov>, Paul Burke <pburke@rqn.com>, Rodney Parker <rparker@scmlaw.com>, "Tim Shea (tims@utcourts.gov)" <tims@utcourts.gov>

I don't think we can amend rule 5. Rule 2 states that "in the interest of expediting a decision, the appellate court, on its own motion or for extraordinary cause shown, may, **except as to provisions of Rules 4(a), 4(b), 4(e), 5(a),** 48, 52, and 59, suspend the requirements or provisions of any of these rules in a particular case . . . " Moreover there is no right to a rule 5 appeal, it is wholly discretionary.

On Thu, Aug 14, 2014 at 3:46 PM, tbooher@zjbappeals.com <tbooher@zjbappeals.com> wrote:
[Quoted text hidden]

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Marian Decker
Section Chief
Criminal Appeals Division
Utah Attorney General's Office

Clark Sabey <clarks@utcourts.gov> Thu, Aug 14, 2014 at 4:39 PM
To: "tbooher@zjbappeals.com" <tbooher@zjbappeals.com>
Cc: Joan Watt <JWATT@sllda.com>, Alison Adams-Perlac <alisonap@utcourts.gov>, Alan Mouritsen <amouritsen@parsonsbehle.com>, Ann Marie Taliaferro <ann@brownbradshaw.com>, Bridget Romano <bromano@utah.gov>, "Bryan J. Pattison" <bpattison@djplaw.com>, John Plimpton <jbplimpton@gmail.com>, "Judge Gregory Orme (jorme@utcourts.gov)" <jorme@utcourts.gov>, "Judge Fred Voros (jfvoros@utcourts.gov)" <jfvoros@utcourts.gov>, Lori Seppi <lseppi@sllda.com>, Marian Decker <mdecker@utah.gov>, Mary Westby <maryw@utcourts.gov>, Paul Burke <pburke@rqn.com>, Rodney Parker <rparker@scmlaw.com>, "Tim Shea (tims@utcourts.gov)" <tims@utcourts.gov>

I have some concerns about the proposal, particularly the burdens that fall on the appellate courts when litigants fail to properly designate an appeal of right versus a request for permission to appeal, but I would be happy to discuss those concerns in greater detail if and when the Committee would like to address the proposal.

Clark

On Thu, Aug 14, 2014 at 3:46 PM, tbooher@zjbappeals.com <tbooher@zjbappeals.com> wrote:
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Judge Gregory Orme <jorme@utcourts.gov> Thu, Aug 14, 2014 at 5:48 PM
To: "tbooher@zjbappeals.com" <tbooher@zjbappeals.com>
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Let's talk about this at an upcoming meeting. I'd be particularly interested in hearing more about the origin and scope of a trial judge's duty to definitively advise the parties of their appellate options.

On Thu, Aug 14, 2014 at 3:46 PM, tbooher@zjbappeals.com <tbooher@zjbappeals.com> wrote:
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Tab 5

Utah R. App. P. 23B – Proposed Amendment

(a) *Grounds for motion*. A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact and conclusions of law relative to a claim of ineffective assistance of counsel. Remand shall be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective. ~~The motion must be supported by affidavits alleging facts likely to be admissible or by other likely admissible evidence.~~

…

(c) *Contents of motion for remand*. The contents of the motion for remand shall conform to the requirements of Rule 23. The memorandum in support of the motion or the response, excluding supporting documents, shall not exceed 7,000 words. The motion shall be accompanied by affidavits **or evidence** alleging facts ~~likely to be admissible or other likely admissible evidence~~ not fully appearing in the record on appeal that **support the motion** ~~would support a finding of deficient performance of the counsel and a finding of prejudice~~. Affidavits and ~~other~~ evidence submitted in support of a motion are not part of the record on appeal and will be considered only to determine whether to grant or deny the motion. Any reply shall be limited to 3,500 words.

…

Advisory Committee Note. — Paragraph (c) requires a party to support a motion for remand with affidavits or evidence alleging facts not fully appearing in the record on appeal that support the motion. As stated in Utah Code §78B-5-705, an unsworn declaration may be used in lieu of an affidavit. The affidavit requirement is explained in *State v. Johnson*, 2000 UT App 290, 13 P.3d 175.

Rule 23B. Motion to remand for findings necessary to determination of ineffective assistance of counsel claim.

(a) *Grounds for motion*~~; time~~. A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact~~, necessary for the appellate court's determination of~~ and conclusions of law relative to a claim of ineffective assistance of counsel. ~~The motion~~ Remand shall be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective. The motion must be supported by affidavits alleging facts likely to be admissible or by other likely admissible evidence.

(b) *Time for filing; response; reply.* Except as provided in paragraph (b)(2), an appellant's motion for remand shall be filed contemporaneously with the Brief of Appellant. The motion and supporting documents shall be separate from the brief, and any facts alleged in connection with the motion shall not be argued in the brief. The response to ~~T~~the motion shall be filed ~~prior to the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. In no event shall the court permit a motion to be filed after oral argument. Nothing in this rule shall prohibit the court from remanding the case under this rule on its own motion at any time if the claim has been raised and the motion would have been available to a party.~~with the Brief of Appellee and shall be separate from the brief. A reply, if any, shall be filed within 30 days after the response to the motion is filed. Any reply shall be limited to responding to new matter set forth in the response to the motion.

(b)(1) An appellee's motion for remand shall be filed contemporaneously with the Brief of Appellee. The motion and supporting documents shall be separate from the brief, and any facts alleged in connection with the motion shall not be argued in the brief. The response to the motion shall be filed within 30 days. A reply, if any, shall be filed within 30 days after the response to the motion is filed. Any reply shall be limited to responding to new matter set forth in the response to the motion.

(b)(2) An appellant may request leave to file a motion for remand before filing the Brief of Appellant. The request must be accompanied by the motion for remand and shall state why the motion should be considered before briefing. Absent an order granting a separate motion for stay, the briefing schedule will not be stayed pending action on a request for early consideration of a motion for remand.

(c) *Contents of motion for remand*~~; response; reply~~. The contents of the motion for remand shall conform to the requirements of Rule 23. The memorandum in support of the motion or the response, excluding supporting documents, shall not exceed 7,000 words. The motion shall ~~include or~~ be accompanied by affidavits alleging facts likely to be admissible or other likely admissible evidence ~~facts~~ not fully appearing in the record on appeal that ~~show the claimed~~ would support a finding of deficient performance of the ~~attorney~~counsel~~. The affidavits shall also allege facts that show~~ and a finding ~~the claimed~~ of prejudice~~ suffered by the appellant as a result~~. Affidavits and other evidence submitted in support of a motion are not part of the record on appeal and will be considered only to determine whether to grant or deny the motion. Any reply shall be limited to 3,500 words.~~ claimed deficient performance. The motion shall also be accompanied by a proposed order or remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed on remand.~~

~~A response shall be filed within 20 days after the motion is filed. The response shall include a proposed order of remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed by the trial court in the event remand is granted, unless the responding party accepts that proposed by the moving party. Any reply shall be filed within 10 days after the response is served.~~

(~~c~~d) *Order of the court.* If the requirements of parts (a) ~~and~~through (~~b~~c) of this rule have been ~~met~~satisfied, the court may order that the case be temporarily remanded to the trial court for the purpose of entry of findings of fact relevant to a claim of ineffective assistance of counsel. The order of remand shall identify the ineffectiveness claims and specify the factual issues relevant to each such claim to be addressed on remand.

~~ by the trial court. The order shall also direct the trial court to complete the proceedings on remand within 90 days of issuance of the order of remand, absent a finding by the trial court of good cause for a delay of reasonable length.~~

~~If it appears to the appellate court that the appellant's attorney of record on the appeal faces a conflict of interest upon remand, the court shall direct that counsel withdraw and that new counsel for the appellant be appointed or retained.~~

(~~d~~e) *Effect on appeal proceedings*.

(e)(1) A motion for remand will be addressed in the normal course of plenary consideration of the case on appeal unless the appellate court orders otherwise. If a motion for remand is granted, resolution of the appeal will be deferred until the completion of the proceedings on remand. After the proceedings on remand are complete and the supplemental record has been received by the appellate court, ~~Oral argument and the deadlines for~~ the parties shall file supplemental briefs pursuant to a scheduling order. The scope of the supplemental briefing shall be limited to the issues addressed on remand. Supplemental briefs shall~~ be vacated upon the filing of a motion to remand under this rule. Other procedural steps required by these rules shall not be stayed by~~ be limited to no more than 5,000 words for an initial brief and 2,500 words for a reply brief.

(e)(2) An order granting a request to file a motion for remand~~, unless a stay is ordered by the court upon stipulation or motion of the parties or upon the court's motion.~~ before briefing automatically vacates the briefing schedule. The court shall set a time for a response to the motion of no less than 30 days. A reply, if any, shall be filed no later than 14 days after the response and shall be limited to responding to new matter set forth in the response to the motion. The court may resolve the motion before briefing or may defer the motion pending briefing and plenary consideration of the merits of the case. If a motion for remand is granted before briefing, the appeal will be stayed pending the completion of the proceedings on remand. If the motion for remand is denied or deferred pending plenary consideration, the court may reset the briefing schedule if necessary.

(~~e~~f) *Proceedings before the trial court.* Upon remand the trial court shall promptly conduct hearings and take evidence as necessary to enter the findings of fact ~~necessary to determine~~relative to the claim of ineffective assistance of counsel. ~~Any claims~~Compulsory process shall be available to the parties for the purpose of the hearing. The trial court may not consider any allegation of ineffectiveness not identified in the order of remand~~, shall not be considered by the trial court on remand,~~ unless the trial court determines that the interests of justice or judicial efficiency require ~~consideration of issues not specifically identified in the order of remand~~doing so. Evidentiary hearings shall be conducted without a jury and as soon as practicable after remand. The burden of proving a fact shall be upon the proponent of the fact. The standard of proof shall be a preponderance of the evidence. The trial court shall enter written findings of fact and conclusions of law concerning the claimed deficient performance by counsel and the claimed prejudice ~~suffered by appellant as a result, in accordance with the order of remand~~. Proceedings on remand shall be completed within 90 days of entry of the order of remand, unless the trial court finds good cause for a delay of reasonable length.

(~~f~~g) *Preparation and transmittal of the record*. At the conclusion of all proceedings before the trial court, the clerk of the trial court ~~and the court reporter~~ shall immediately prepare the record of the supplemental proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court shall immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court shall transmit the record of the supplemental proceedings upon the preparation of the entire record.

(~~g~~h) *Subsequent proceedings in the ~~A~~appellate court ~~determination~~*. Upon receipt of the record from the trial court, the clerk of the court shall notify the parties of the ~~new~~ schedule for briefing or ~~oral argument~~ supplemental briefing under ~~these~~this rule~~s~~. Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in

other appeals. ~~The f~~Findings of fact and conclusions of law entered pursuant to this rule are reviewable under the same standards ~~as the review of findings of fact in~~ applicable to other appeals.

Tab 6

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 provide 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~~concise statement of the nature of the case, the contentions on appeal, and a summary of the arguments made in the body of the brief. ~~showing the jurisdiction of the appellate court.~~

~~(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~~5) ~~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.

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

(b)(6)(A) Contention statement. A statement of error that the appellant contends warrants relief on appeal. ~~contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first~~

~~marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.~~

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

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

(~~a~~b)(~~10~~6)(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 reversal ~~of the order or verdict challenged on appeal~~. The legal citations shall conform to the public domain citation format and shall use italics. No text in a brief shall be underlined or in ALL CAPS unless it is a quotation. 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)(7) Conclusion. A brief conclusion.

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

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

(b)(10) Certificate of c~~C~~ompliance. If applicable, a certificate of compliance in accordance with paragraph (g)(1)(C) of this rule.

(~~a~~b)(11) 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)(~~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)(11)(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)(11)(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)(~~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), (7), (8), (9), and (10) 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, 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, ___ P.3d ___, which holds that the failure to marshal is no longer a technical deficiency that will result in default, but is the manner in which an appellant carries its burden of persuasion when challenging a finding or verdict based upon evidence.

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

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

Before publication in Utah Advanced Reports:

Smith v. Jones, 1999 UT 16.

Smith v. Jones, 1999 UT App 16.

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

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

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

After publication in Pacific Reporter:

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

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

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

Before publication in Utah Advance Reports:

Smith v. Jones, 1999 UT 16, ¶ 21.

Smith v. Jones, 1999 UT App 16, ¶ 21.

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

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

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

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

After publication in Pacific Reporter:

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

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

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

Id. ¶ 15.

~~Rule 24(a)(9) now reflects what Utah appellate courts have long held. See In re Beesley, 883 P.2d 1343, 1349 (Utah 1994); Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1052-53 (Utah App. 1994)(alteration in original)(quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991)). See also State ex rel. M.S. v. Salata, 806 P.2d 1216, 1218 (Utah App. 1991); Bell v. Elder, 782 P.2d 545, 547 (Utah App. 1989); State v. Moore, 802 P.2d 732, 738-39 (Utah App. 1990).~~

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

Tab 7

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 8

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).