Agenda

Utah Supreme Court Advisory Committee
Utah Rules of Appellate Procedure

Paul C. Burke, Chair

Location: Judicial Council Room
Scott M. Matheson Courthouse, 450 S. State St., Salt Lake City, UT 84111

Date: December 5, 2019

Time: 12:00 to 1:30 p.m.

Tab 1	**Action**: Welcome and approval of November 2019 minutes	Paul C. Burke, Chairman
	Discussion: Rescheduling January meeting	Paul C. Burke
Tab 2	**Discussion & Action:** Review advisory committee notes 2, 20, 22, 24, 28A, 37, 44 (no recommended changes)	Judge Orme, Alan Mouritsen, Rodney Parker
Tab 3	**Discussion & Action**: Finalizing Rules 21 and 26	Larissa Lee
Tab 4	**Discussion & Action**: Amending Rule 3 to include requirement to serve notice of appeal on appellate court	Larissa Lee
Tab 5	**Discussion & Action:** Rules 35A and 35B (petition for rehearing and motion to modify)	Clark Sabey
Tab 6	**Discussion & Action:** Rule 8 amendments (stays when there is no means of quantifying security)	Clark Sabey
Tab 7	**Discussion & Action:** Rule 33 amendments (requests for damages)	Clark Sabey
	DISCUSSION: Other business	Paul C. Burke

Committee Webpage: https://www.utcourts.gov/utc/appellate-procedure/

Meeting schedule:

January 2, 2020
February 6, 2020
March 5, 2020
April 2, 2020
May 7, 2020
June 4, 2020
July 2, 2020
August 6, 2020
September 3, 2020
October 1, 2020
November 5, 2020
December 3, 2020

TAB 1

Minutes – November 7, 2019

MINUTES

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

Utah Supreme Court
450 South State Street
Salt Lake City, Utah 84114

Executive Dining Room
Thursday, November 7, 2019
12:00 pm to 1:30 pm

PRESENT		EXCUSED
Christopher Ballard	Alan Mouritsen	None
Troy Booher—Emeritus Member	Judge Gregory Orme	
Paul Burke—Chair	Rodney Parker	
Patrick Burt	Judge Jill Pohlman	
Lisa Collins	Clark Sabey	
Tyler Green	Nathalie Skibine	
R. Shawn Gunnarson	Scarlet Smith	
Michael Judd—Recording Secretary	Mary Westby	
Larissa Lee—Staff		

1. Welcome and approval of October 2019 minutes — **Paul Burke**

Mr. Burke welcomed the committee and thanked Judge Orme, who provided a "prelude" discussion of Item 2, advisory committee note changes. The committee reviewed the October 2019 minutes.

Shawn Gunnarson moved to approve and adopt the minutes from the October 2019 meeting. Mary Westby seconded the motion and it passed unanimously.

2. Discussion and Action: Review of Advisory Committee Notes Recommended for Repeal

Judge Orme
Alan Mouritsen
Rodney Parker

Judge Orme has identified eight sets of advisory committee notes to be recommended for repeal: Notes for Rules 4, 11, 12, 14, 29, 31, 42, and 43. Troy Booher described the changes to the group. Rodney Parker expressed his agreement that the advisory committee notes identified by Judge Orme are obsolete, and proposed that in the future, advisory committee notes include the date on which the note was passed.

Shawn Gunnarson moved to repeal the advisory committee notes at issue. Rodney Parker seconded the motion and it passed unanimously.

3. Discussion and Action: Continue Discussion of Rule 5 (Interlocutory Appeal)

Judicial Efficiency Subcommittee[1]

Mary Westby presented changes recommended by the subcommittee, including changes to subsection (j)'s procedures for designating a record in interlocutory appeals. A modified version of the proposed amendments to subsection (j) was provided to the committee. The committee worked to create language to clarify, in subsection (j)(2), that a party may cite to the record, to a separate paginated appendix, or both.

Shawn Gunnarson moved to adopt the rule as amended. Mary Westby seconded the motion and it passed unanimously.

4. Discussion and Action: Proposed Amendments to Rule 10

Judicial Efficiency Subcommittee

Mary Westby presented a set of amendments to Rule 10, describing the amendments as "fairly substantial." The goal of the amendments is to provide a "simplified appeal process," with changes designed to provide a streamlined process for summary disposition of certain categories of appeals.

[1] The members of the Judicial Efficiency Subcommittee are: Mary Westby, Christopher Ballard, Judge Pohlman, Troy Booher, Nathalie Skibine, Patrick Burt, Lisa Collins, Lori Seppi.

The committee discussed the proposed amendments, focusing on situations in which the proposed streamlined process may be useful, as well as the advantages provided by a streamlined process, in contrast to the options previously available to the appellate courts and to the parties.

Patrick Burt moved to adopt the amendments to Rule 10 as presented. Judge Pohlman seconded the motion and it passed unanimously.

5. Discussion and Action: Clark Sabey
Proposed Amendments to Rule 35
(Petition to Modify / Petition for Rehearing)

Clark Sabey introduced proposed amendments to Rule 35, which he describes as having "percolated for quite some time." The proposed amendments reflect that Rule 35 is generally used in two distinct ways: (1) more rarely, to address a perceived significant legal error in a released decision, and (2) more commonly, to seek modification of a minor aspect of a released decision that does not affect the outcome.

Shawn Gunnarson moved to reconsider these amendments more fully next month. There were no objections.

6. Discussion: Paul Burke
Other Business

None.

7. Adjourn

Lisa Collins moved to adjourn the meeting. Christopher Ballard seconded the motion. There were no objections. The committee is scheduled to meet again on December 5, 2019.

TAB 2

Advisory Committee Notes

Advisory Committee Notes Project

Recommendation: No changes

Rule 2. Suspension of rules.

In the interest of expediting a decision, the appellate court, on its own motion or for extraordinary cause shown, may, except as to the jurisdictional provisions of Rules 4(a), 4(b), 4(e), 5(a), 14(a), 48, 52, and 59, suspend the requirements or provisions of any of these rules in a particular case and may order proceedings in that case in accordance with its direction.

Advisory Committee Note

The rules that the appellate court may not suspend concern procedures and time limits that confer jurisdiction on the court. Rule 4(b) lists the post-judgment motions that must be filed in a timely manner in the trial court. If the motions are not timely filed, the appellant may not take advantage of Rule 4(b), which allows 30 days from the disposition of the motion to file the appeal. Failure to file post-judgment motions in a timely manner is a jurisdictional defect. *Burgers v. Meredith*, 652 P.2d 1320 (Utah 1982).

Recommendations:

No changes.

Rule 20. Habeas corpus proceedings.

(a) Application for an original writ; when appropriate. If a petition for a writ of habeas corpus is filed in the appellate court or submitted to a justice or judge thereof, it will be referred to the appropriate district court unless it is shown on the face of the petition to the satisfaction of the appellate court that the district court is unavailable or other exigent circumstances exist. If a petition is initially filed in a district court or is referred to a district court by the appellate court and the district court denies or dismisses the petition, a refiling of the petition with the appellate court is inappropriate; the proper procedure in such an instance is an appeal from the order of the district court.

(b) Procedure on original petition.

(b)(1) A habeas corpus proceeding may be commenced by filing a petition with the clerk of the appellate court or, in emergency situations, with a justice or judge of the court. For matters pending in the Supreme court, an original petition and seven copies shall be filed in the Supreme Court. For matters pending in the Court of Appeals, an original petition and four copies shall be filed in the Court of Appeals. The petitioner shall serve a copy of the petition on the respondent pursuant to any of the methods provided for service of process in Rule 4 of the Utah Rules of Civil Procedure but, if imprisoned, the petitioner may mail by United States mail, postage prepaid, a copy of the petition to the Attorney General of Utah or the county attorney of the county if imprisoned in a county jail. Such service is in lieu of service upon the named respondent, and a certificate of mailing under oath that a copy was mailed to the Attorney General or county attorney must be filed with the clerk of the appellate court. In emergency situations, an order to show cause may be issued by the court, or a single justice or judge if the court is not available, and a stay or injunction may be issued to preserve the court's jurisdiction until such time as the court can hear argument on whether a writ should issue.

(b)(2) If the petition is not referred to the district court, the attorney general or the county attorney, as the case may be, shall answer the petition or otherwise plead within ten days after service of a copy of the petition. When a responsive pleading or motion is filed or an order to show cause is issued, the court shall set the case for hearing and the clerk shall give notice to the parties.

(b)(3) The clerk of the appellate court shall, if the petitioner is imprisoned or is a person otherwise in the custody of the state or any political subdivision thereof, give notice of the time for the filing of memoranda and for oral argument, to the attorney general, the county attorney, or the city attorney, depending on where the petitioner is held and whether the petitioner is detained pursuant to state, county or city law. Similar notice shall be given to any other person or an association detaining the petitioner not in custody of the state.

(c) Contents of petition and attachments. The petition shall include the following:

(c)(1) A statement of where the petitioner is detained, by whom the petitioner is detained, and the reason, if known, why the respondent has detained the petitioner.

(c)(2) A brief statement of the reasons why the detention is deemed unlawful. The petition shall state in plain and concise language:

(c)(2)(A) the facts giving rise to each claim that the confinement or detention is in violation of a state order or judgment or a constitutional right established by the United States Constitution or the Constitution of the State of Utah or is otherwise illegal;

(c)(2)(B) whether an appeal was taken from the judgment or conviction pursuant to which a petitioner is incarcerated; and

(c)(2)(C) whether the allegations of illegality were raised in the appeal and decided by the appellate court.

(c)(3) A statement indicating whether any other petition for a writ of habeas corpus based on the same or similar grounds has been filed and the reason why relief was denied.

(c)(4) Copies of the court order or legal process, court opinions and findings pursuant to which the petitioner is detained or confined, affidavits, copies of orders, and other supporting written documents shall be attached to the petition or it shall be stated by petitioner why the same are not attached.

(d) Contents of answer. The answer shall concisely set forth specific admissions, denials, or affirmative defenses to the allegations of the petition and must state plainly and unequivocally whether the respondent has, or at any time has had, the person designated in the petition under control and restraint and, if so, the cause for the restraint. The answer shall not contain citations of legal authority or legal argument.

(e) Other provisions.

(e)(1) If the respondent cannot be found or if the respondent does not have the person in custody, the writ and any other process issued may be served upon anyone having the petitioner in custody, in the manner and with the same effect as if that person had been made respondent in the action.

(e)(2) If the respondent refuses or avoids service, or attempts wrongfully to carry the person imprisoned or restrained out of the county or state after service of the writ, the person serving the writ shall immediately arrest the respondent or other person so

resisting, for presentation, together with the person designated in the writ, forthwith before the court.

(e)(3) At the time of the issuance of the writ, the court may, if it appears that the person detained will be carried out of the jurisdiction of the court or will suffer some irreparable injury before compliance with the writ can be enforced, cause a warrant to issue, reciting the facts and directing the sheriff to bring the detained person before the court to be dealt with according to law.

(e)(4) The respondent shall appear at the proper time and place with the person designated or show good cause for not doing so. If the person designated has been transferred, the respondent must state when and to whom the transfer was made, and the reason and authority for the transfer. The writ shall not be disobeyed for any defect of form or misdescription of the person restrained or of the respondent, if enough is stated to show the meaning and intent.

(e)(5) The person restrained may waive any rights to be present at the hearing, in which case the writ shall be modified accordingly. Pending a determination of the matter, the court may place such person in the custody of an individual or association as may be deemed proper.

Advisory Committee Note

The amendments make clear that an original writ for habeas corpus should be filed only in the District Court. An application to an appellate court must demonstrate on the face of the petition the unavailability of the District Court. Petitions that do not contain such documentation will be summarily referred to the District Court. The clarification seeks to halt the practice by some pro se petitioners of simultaneously filing the same petition in different courts.

The amendments simplify the procedures for service of petitions upon the respondent by incarcerated petitioners. The former rule required service by summons on the respondent. The amendments allow service on the Attorney General or county attorney by mail.

Recommendations:

No changes. Note: The recommendation for retaining rule 20's note requires some explanation. The first paragraph of the note really adds nothing to the rule, but the rule is so long that I think it is worth retaining this part of the note, at least, to make sure the point isn't missed. I'm less sure if the second paragraph has similar value or if, 10 years after the rule was thus amended, this is no longer noteworthy.

Rule 22. Computation and enlargement of time.

(a) Computation of time. In computing any period of time prescribed by these rules, by an order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time under subsection (d), is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes days designated as holidays by the state or federal governments.

(b) Enlargement of time.

(b)(1) Motions for an enlargement of time for filing briefs beyond the time permitted by stipulation of the parties under Rule 26(a) are not favored.

(b)(2) The court for good cause shown may upon motion extend the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of time. This rule does not authorize the court to extend the jurisdictional deadlines specified by any of the rules listed in Rule 2. For the purpose of this rule, good cause includes, but is not limited to, the complexity of the case on appeal, engagement in other litigation, and extreme hardship to counsel.

(b)(3) A motion for an enlargement of time shall be filed prior to the expiration of the time for which the enlargement is sought.

(b)(4) A motion for enlargement of time shall state:

(b)(4)(A) with particularity the good cause for granting the motion;

(b)(4)(B) whether the movant has previously been granted an enlargement of time and, if so, the number and duration of such enlargements;

(b)(4)(C) when the time will expire for doing the act for which the enlargement of time is sought; and

(b)(4)(D) the date on which the act for which the enlargement of time is sought will be completed.

(b)(5)(A) If the good cause relied upon is engagement in other litigation, the motion shall:

(b)(5)(A)(i) identify such litigation by caption, number and court;

(b)(5)(A)(ii) describe the action of the court in the other litigation on a motion for continuance;

(b)(5)(A)(iii) state the reasons why the other litigation should take precedence over the subject appeal;

(b)(5)(A)(iv) state the reasons why associated counsel cannot prepare the brief for timely filing or relieve the movant in the other litigation; and

(b)(5)(A)(v) identify any other relevant circumstances.

(b)(5)(B) If the good cause relied upon is the complexity of the appeal, the movant shall state the reasons why the appeal is so complex that an adequate brief cannot reasonably be prepared by the due date.

(b)(5)(C) If the good cause relied upon is extreme hardship to counsel, the movant shall state in detail the nature of the hardship.

(b)(5)(D) All facts supporting good cause shall be stated with specificity. Generalities, such as "the motion is not for the purpose of delay" or "counsel is engaged in other litigation," are insufficient.

(c) Ex parte motion. Except as to enlargements of time for filing and service of briefs under Rule 26(a), a party may file one ex parte motion for enlargement of time not to exceed 14 days if no enlargement of time has been previously granted, if the time has not already expired for doing the act for which the enlargement is sought, and if the motion otherwise complies with the requirements and limitations of paragraph (b) of this rule.

(d) Additional time after service by mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper and the paper is served by mail, 3 days shall be added to the prescribed period.

Advisory Committee Note

A motion to enlarge time must be filed prior to the expiration of the time sought to be enlarged. A specific date on which the act will be completed must be provided. The court may grant an extension of time after the original deadline has expired, but the motion to enlarge the time must be filed prior to the deadline.

Recommendations:

No changes. Note: Rule 22's note really adds nothing to the rule, but the rule is long, and I think it is worth retaining the note to make sure the point isn't missed.

Rule 24. Principal and reply briefs.

(a) Principal briefs. Principal briefs must contain under appropriate headings and in the order indicated:

(a)(1) A list of current and former parties. The list of parties must include:

(a)(1)(A) all parties to the proceeding in the appellate court and their counsel; and

(a)(1)(B) listed separately, all parties to the proceeding in the court or agency whose judgment or order is under review that are not parties in the appellate court proceeding.

(a)(2) A table of contents. The table of contents must list the sections of the brief with page numbers and the items in the addendum with the item number.

(a)(3) A table of authorities. The table of authorities must list all cases alphabetically arranged, rules, statutes, and other authorities cited, with references to the pages on which they are cited.

(a)(4) An introduction. The introduction should describe the nature and context of the dispute and explain why the party should prevail on appeal.

(a)(5) A statement of the issue. The statement of the issue must set forth the issue presented for review, including for each issue:

(a)(5)(A) the standard of appellate review with supporting authority; and

(a)(5)(B) citation to the record showing that the issue was preserved for review; or a statement of grounds for seeking review of an issue not preserved.

(a)(6) A statement of the case. The statement of the case must include, with citations to the record:

(a)(6)(A) the facts of the case, to the extent necessary to understand the issues presented for review;

(a)(6)(B) the procedural history of the case, to the extent necessary to understand the issues presented for review; and

(a)(6)(C) the disposition in the court or agency whose judgment or order is under review.

(a)(7) A summary of the argument. The summary of the argument must contain a succinct statement of the arguments made in the body of the brief.

(a)(8) An argument. The argument must explain, with reasoned analysis supported by citations to legal authority and the record, why the party should prevail on appeal.

(a)(9) A claim for attorney fees. A party seeking attorney fees for work performed on appeal must state the request explicitly and set forth the legal basis for an award.

(a)(10) A short conclusion. The conclusion may summarize the party's position and must state the specific relief sought on appeal.

(a)(11) A certificate of compliance. The filer must certify that the brief complies with:

(a)(11)(A) paragraph (g), governing the number of pages or words (the filer may rely on the word count of the word processing system used to prepare the brief); and

(a)(11)(B) Rule 21, governing public and private records.

(a)(12) An addendum. Subject to Rule 21(g), the addendum must contain a copy of:

(a)(12)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(12)(B) the order, judgment, opinion, or decision under review and any related minute entries, findings of fact, and conclusions of law; and

(a)(12)(C) materials in the record that are the subject of the dispute and that are of central importance to the determination of the issues presented for review, such as challenged jury instructions, transcript pages, insurance policies, leases, search warrants, or real estate purchase contracts.

(b) Reply brief. The appellant or petitioner may file a reply brief. A reply brief must be limited to responding to the facts and arguments raised in the appellee's or respondent's principal brief. The reply brief must include:

(b)(1) a table of contents, as required by paragraph (a)(2);

(b)(2) a table of authorities, as required by paragraph (a)(3);

(b)(3) an argument, as required by paragraph (a)(8);

(b)(4) a conclusion, as required by paragraph (a)(10); and

(b)(5) a certificate of compliance, as required by paragraph (a)(11).

(c) No further briefs; joining or adopting the brief of another party. No further briefs may be filed except with leave of the appellate court. More than one party may join in a single brief. Any party may adopt by reference any part of the brief of another.

(d) References in briefs to parties and others. Parties and other persons and entities should be referred to consistently by the term, phrase, or name most pertinent to the issues on appeal. These may include descriptive terms based on the person or entity's role in the dispute, or the designations used in the trial court or agency, or the names of parties. Unless germane to an issue on appeal, a party should not be described solely by the party's procedural role in the case. The identity of minors should be protected by use of descriptive terms, initials, or pseudonyms. In child welfare appeals, the surname of a minor must not be used nor may a surname of a minor's biological, adoptive, or foster parent be used.

(e) References to the record.

(e)(1) Statements of fact and references to proceedings in the court or agency whose judgment or order is under review must be supported by citation to the record. A citation must identify the page of the record as marked by the clerk.

(e)(2) A reference to an exhibit must set forth the exhibit number. If the reference is to evidence the admissibility of which is in controversy, the reference must set forth the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) References to legal authority. A reference to an opinion of the Utah Supreme Court or the Utah Court of Appeals issued on or after January 1, 1999, must include the universal citation (e.g., 2015 UT 99, ¶ 3; or 2015 UT App 320, ¶ 6).

(g) Length of briefs.

(g)(1) Unless a brief complies with the following page limits, it must comply with the following word limits:

Type of brief	Page limit	Word limit
Legality of death sentence, principal brief	60	28,000
Legality of death sentence, reply brief	30	14,000
Other cases, principal brief	30	14,000
Other cases, reply brief	15	7,000

(g)(2) Headings, footnotes, and quotations count toward the page or word limit, but the table of contents, table of authorities, and addendum, and any certificates of counsel do not.

(h) Permission to file over length brief. Although over length briefs are disfavored, a party may file a motion for leave to file a brief that exceeds the page, or word limitations of this rule. The motion must state with specificity the issues to be briefed, the number of additional pages, or words requested, and good cause for granting the motion. A motion filed at least 7 days before the brief is due or seeking three or fewer additional pages, or 1,400 or fewer additional words need not be accompanied by a copy of the proposed brief. Otherwise, a copy of the proposed brief must accompany the motion. If the motion is granted, the responding party is entitled to an equal number of additional pages, or words without further order of the court. Whether the motion is granted or denied, the court will destroy the proposed brief.

(i) Sanctions. The court on motion or on its own initiative may strike or disregard a brief that contains burdensome, irrelevant, immaterial, or scandalous matters, and the court may assess an appropriate sanction including attorney fees for the violation.

(j) Notice of supplemental authorities. When authority of central importance to an issue comes to the attention of a party after briefing or oral argument but before decision, that party may file a notice of supplemental authority setting forth:

(j)(1) the citation to the authority;

(j)(2) a reference either to the page of the brief or to a point argued orally to which the authority applies; and

(j)(3) relevance of the authority. The body of the notice must not exceed 350 words. Any other party may file a response no later than 7 days after service of the notice. The body of the response must not exceed 350 words.

Advisory Committee Notes

The 2017 amendments substantially change the organization and content of briefs. An important objective of the amendments is to present the party's case in logical order, in measured increments, and without unnecessary repetition. The principal brief of each party must meet the same requirements.

Paragraph (a)(4). A party's principal brief should include an introduction. The author should focus the introduction on the important features of the case. The introduction to one case may be only a few sentences, while a more complex case may require a few paragraphs or perhaps a few pages. The objective of the introduction is to give the reader a sense of the forest before detailing the trees.

Paragraph (a)(6). The statement of the case should describe the facts surrounding the dispute and procedural history of the litigation, but only to the extent that these are necessary to understand the issues. Describing a fact or circumstance or proceeding that has no bearing on the issues adds words of no value and distracts the reader. When stating a fact or describing a proceeding, a concise narrative is sometimes a better presentation than a numbered, itemized list. The party must cite to the places in the record that support the statement.

Paragraph (a)(8). The 2017 amendments remove the reference to marshaling. State v. Nielsen, 2014 UT 10, 326 P.3d 645, holds that the failure to marshal is not a technical deficiency resulting in default, but is a manner in which an appellant may carry its burden of persuasion when challenging a finding or verdict.

Paragraph (a)(11). The certificate of compliance is expanded to include not only compliance with the limit on the length of the brief, but also compliance with the public/private record requirements of Rule 21. Briefs, including the addendum containing trial court records, are public documents, increasingly available on the Internet. However, many trial court records are not public. If the author needs to include a non-public document in an addendum or non-public information in the body of the brief, Rule 21 requires that an identical, public brief be filed, but with the non-public information removed.

Paragraph (b). The purpose of a reply brief is to respond to the facts and arguments presented in an appellee's principal brief, not to reiterate points already made in the appellant's principal brief, nor to introduce new matters that should have been raised in that brief. Although not required, it is good practice to identify the point that is being responded to.

Paragraph (d). Describing the actors in a dispute and litigation presents a challenge to the author of a brief. Consistency promotes clarity; having chosen a term, phrase, name, or initials to define a party, person, or entity, the author should use it throughout a brief.

The name of a minor is often a private record and caution should be used to avoid including other names or information from which a minor might be identified. A minor's surname should be used only with the informed consent of a mature minor. The author may file a private brief for the parties and the court using the minor's name while

simultaneously filing an otherwise identical public brief with the minor's name omitted, redacted, reduced to initials, or substituted with a placeholder name. A minor may be referred to by a descriptive term such as "the child," "the 11-year old," or "the sister." The biological, adoptive, or foster parents of minors may be referred to by their relation to the minor, such as "mother," "adoptive parent," or "foster father."

While the name of an adult is usually a public record, the author should recognize the intrusion into the lives of victims, witnesses, and others who are not principals in the dispute caused by a brief published on the Internet. Also, the use of names is disfavored when clarity and discretion can be promoted by use of a reference based on the person's role in the dispute or the case. Parties and other persons and entities should generally be referred to by their role in the dispute, such as "employee," "Defendant Employer," or "the Taxpayer." Descriptions such as "witness" or "neighbor" can also be useful while respecting the interests of non-parties. The reference chosen should be the one most relevant to the matters on appeal.

Paragraph (g). Because of the increasing rarity of monospaced font, the 2017 amendments eliminated the number of lines as a measure of a brief's length. And to improve the clarity of Rule 24, the 2017 amendments moved the requirements for briefs in a cross-appeal to Rule 24A.

Recommendations:

No changes.

Rule 28A. Appellate Mediation Office.

(a) Appellate Mediation Office; Purpose of Mediation Conference. The court may direct the attorneys for the parties and the parties to appear before a mediator appointed by the court for a mediation conference to explore the possibility of settlement and any other matters that may aid in the efficient management and disposition of the case. The court will advise the parties by order that the case has been referred to the Appellate Mediation Office. All decisions regarding conduct of the mediation conference are within the sole discretion of the mediator.

(b) Confidentiality. Unless contained in a written settlement agreement under paragraph (f), statements and comments made during mediation conferences and in related discussions, and any record of those statements, are confidential and may not be disclosed by anyone (including the appellate mediation office, counsel, or the parties; and their agents or employees) to anyone not participating in the mediation process. Proceedings under this rule may not be recorded by counsel or the parties. Mediators shall not be called as witnesses, and the information and records of the Appellate Mediation Office shall not be disclosed to judges, staff, or employees of any court.

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

(d) Extensions/Tolling. The time for filing briefs or motions for summary disposition and for other appellate proceedings is not automatically tolled pending a mediation conference. The parties may seek an extension by motion or stipulation as provided in Rule 22.

(e) Request for Mediation Conference by a Party.

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

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

(e)(3) The denial of a mediation request will not prevent the parties from engaging in private settlement negotiations or private mediation.

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

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

Advisory Committee Note

Although former paragraph (d), requiring the participation of parties and counsel when mediation is ordered, has been repealed, parties and counsel will still be required to participate under the court order.

Recommendations:

No changes.

Rule 37. Suggestion of mootness; voluntary dismissal.

(a) Suggestion of mootness. Any party aware of circumstances that render moot one or more of the issues presented for review must promptly file a "suggestion of mootness" in the form of a motion under Rule 23.

(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 and stipulate to a motion for voluntary dismissal, the appeal will be promptly dismissed. The stipulation must specify the terms as to payment of costs and fees, if any.

(c) Affidavits. If the appellant has the right to effective assistance of counsel, a motion to voluntarily dismiss the appeal for reasons other than mootness must be accompanied by appellant's personal affidavit or declaration under Section 78B-5-705 demonstrating that the appellant's decision to dismiss the appeal is voluntary and is made with knowledge of the right to an appeal and the consequences of voluntary dismissal. If counsel for the appellant is unable to obtain the required affidavit or declaration from the appellant, the motion must be accompanied by counsel's affidavit or declaration stating that, after reasonable efforts, counsel is unable to obtain the required affidavit and certifying that counsel has a reasonable factual basis to believe that the appellant no longer wishes to pursue the appeal.

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).

Recommendations:

No changes.

Rule 44. Transfer of improperly pursued appeals.

If a notice of appeal, a petition for permission to appeal from an interlocutory order, or a petition for review is filed in a timely manner but is pursued in an appellate court that does not have jurisdiction in the case, the appellate court, either on its own motion or on motion of any party, shall transfer the case, including the record on appeal, all motions and other orders, and a copy of the docket entries, to the court with appellate jurisdiction in the case. The clerk of the transferring court shall give notice to all parties and to the clerk of the trial court of the order transferring the case. The time for filing all papers in a transferred case shall be calculated according to the time schedule of the receiving court.

Advisory Committee Note

Rule 44 permits the transfer of an appeal that is timely but improperly filed between the Supreme Court and the Court of Appeals. It also permits the transfer of improperly filed petitions for review of informal adjudicative proceedings of administrative agencies from an appellate court to a district court that has jurisdiction to review those proceedings.

Recommendations:

No changes. Note: The recommendation to retain Rule 44's note is a soft one. Rule 44 is not especially long, so the note's plain-English explanation is not strictly necessary, but it might be helpful as reinforcement of an important principle. On the other hand, this rule regulates traffic between courts, so there may be no need for reinforcement for the benefit of practitioners.

TAB 3

Rules 21 & 26

Rule 21. Filing and service.

(a) **Filing**. A paper may be filed by email, by mail, or in person. Papers required or permitted to be filed by these rules must be filed with the appellate clerk ~~of the appropriate court~~. ~~Filing may be accomplished by mail addressed to the clerk, or by email sent to the appropriate court.~~ If emailed, a paper must be in a searchable PDF format of no more than 25 megabytes. Papers filed by email in the Supreme Court must be sent to supremecourt@utcourts.gov. Papers filed by email in the Court of Appeals must be sent to courtofappeals@utcourts.gov. Except as provided in paragraph (~~f~~g):

(a)(1) papers other than briefs are timely:

(a)(1)(A) if received by email to the appropriate court by 11:59 p.m. of the due date; or.

(a)(1)(~~A~~B) if received by mail or hand delivery to the Appellate Clerks' Office before 5 p.m. of the due date.~~; or~~

~~(a)(1)(B) if received by email to the appropriate court by 11:59 p.m. of the due date.~~

(a)(2) briefs are timely:

(a)(2)(~~C~~A) if received by email to the appropriate court by 11:59 p.m. of the due date;.

(a)(2)(~~A~~B) if postmarked by the due date; or

(a)(2)(~~B~~C) if received by hand delivery to the Appellate Clerks' Office before 5 p.m. of the due date.~~; or~~

~~(a)(2)(C) if received by email to the appropriate court by 11:59 p.m. of the due date.~~

(b) **Filing Fees**. If a statute or rule establishes a fee for the filing, the party must pay the fee to the appellate clerk no more than 7 days after the filing, or the filing will be stricken.

(c) Service of all papers required. Copies of all papers filed with the appellate court must, 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 must be made on counsel of record, or, if the party is not represented by counsel, upon the party at the last known address or email address provided to the

appellate court. A copy of any paper required by these rules to be served on a party must be filed with the court and accompanied by proof of service.

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

(~~d~~e) **Proof of service**. Papers presented for filing must 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 must designate the name of the party represented by that counsel.

(~~e~~f) **Signature**. All papers filed in the appellate court must be signed by counsel of record or by a party who is not represented by counsel. For papers filed by email, the papers may be electronically signed as follows: /s/ name of unrepresented party or name of counsel of record.

(~~f~~g) **Filing by inmate**.

(~~f~~g)(1) For purposes of this paragraph (f), an inmate is a person confined to an institution or committed to a place of legal confinement.

(~~f~~g)(2) Papers filed by an inmate 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 contemporaneously filed notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, or that the inmate has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court.

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

Rule 26. ~~Filing~~ Filing and ~~service of~~serving briefs.

~~(a) **Filing of briefs.** Briefs may be filed in person, by mail, or by email if the electronic document is a searchable PDF file of no more than 25MB. Briefs will be deemed filed on the date of the postmark if first-class mail is used. Briefs filed by email will be considered timely if the email is sent before midnight on the last day for filing. All risks associated with email are borne by the sender. Briefs emailed to the Supreme Court must be sent to: supremecourt@utcourts.gov. Briefs emailed to the Court of Appeals must be sent to: courtofappeals@utcourts.gov. The sending of an email constitutes an electronic signature and is within the scope of rule 40 of the Utah Rules of Appellate Procedure.~~

(~~b~~a) **Tim~~ing~~e ~~for~~to serv~~ic~~e and fil~~ing~~e ~~of~~a brief~~s~~**. The appellant must file and serve ~~and file~~ a principal brief within 40 days after date of notice from the clerk of the appellate court pursuant to Rule 13. If a motion for summary disposition of the appeal or a motion to remand for determination of ineffective assistance of counsel is filed after the Rule 13 briefing notice is sent, ~~service and~~ filing and serving ~~of~~an appellant's principal brief must be within 30 days from the denial of such motion. The appellee, or in cases involving a cross-appeal, the cross-appellant, may ~~serve and~~ file and serve a principal brief within 30 days after service of the appellant's principal brief. In cases involving cross-appeals, the appellant may ~~serve and~~ file and serve the appellant's reply brief described in Rule 24A(d) within 30 days after service of the cross-appellant's principal brief. A reply brief may be ~~served and~~ filed and served by the appellant or the cross-appellant in cases involving cross-appeals. If a reply brief is filed, it must be ~~served and~~ filed and served within 30 days after the filing and service of the appellee's principal brief or the appellant's reply brief in cases involving cross-appeals. If oral argument is scheduled fewer than 35 days after the filing of appellee's principal brief, the reply brief must be filed at least 5 days prior to oral argument. By stipulation filed with the court in accordance with Rule 21(a), the parties may extend each of such periods for no more than 30 days. A motion for enlargement of time need not accompany the stipulation. No such stipulation will be effective unless it is filed prior to the expiration of the period sought to be extended.

(~~c~~b) **Number of copies ~~to be filed and served~~**. For matters pending in the Supreme Court, eight (8) paper copies of each brief, one of which shall contain an original signature, must be filed with the Clerk of the Supreme Court. For matters pending in the Court of Appeals, six (6)

paper copies of each brief, one of which shall contain an original signature, must be filed with the Clerk of the Court of Appeals. If a brief was filed by email, the required paper copies of the brief must be delivered no more than seven days after filing. If a brief is served by email, upon request two paper copies must be delivered to counsel for each party separately requesting paper copies.

(~~d~~c) **Consequence of fail~~ure~~ing to file a principal brief~~s~~**. If an appellant fails to file a principal brief within the time provided in this rule, or within the time as may be extended by order of the appellate court, an appellee may move for dismissal of the appeal. If an appellee fails to file a principal brief within the time provided by this rule, or within the time as may be extended by order of the appellate court, an appellant may move that the appellee not be heard at oral argument.

(~~e~~d) **Return of record to the clerk**. Each party, upon the filing of its brief, must return the record to the clerk of the court having custody pursuant to these rules.

TAB 4

Rule 3 (Notice of Appeal)

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

Larissa Lee
Appellate Court Administrator

Nicole I. Gray
Clerk of Court

Appellate Clerks' Office
Telephone 801-578-3900
Email:supremecourt@utcourts.gov

MEMORANDUM

To: Utah Rules of Appellate Procedure Committee

From: Larissa Lee

Date: December 5, 2019

Re: Updating Rule 3 Notice of Appeal

Dear Committee:

The appellate courts have been experiencing delays in receiving the notice of appeal from the district/juvenile courts, sometimes up to several months. This will be automated once we deploy appellate efiling, but in the interim the courts have decided an easy way to solve this problem would be to require that the parties serve a copy of the notice to the appropriate appellate court clerk.

The attached amendments to Rule 3 incorporate this change, as well as several stylistic edits. Many of the style edits mirror the corresponding federal rule.

Rule 3. Appeal as of right~~: —~~how taken.

(a) **Filing ~~appeal from final orders and judgments~~the notice of appeal**.

(a)(1) Except as otherwise provided by law, ~~An~~a party may appeal ~~may be taken~~a final order or judgment from a ~~district or juvenile~~trial court to the appellate court ~~with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law,~~ by filing a notice of appeal with the trial court clerk ~~of the trial court~~ within the time allowed by Rule 4.

(a)(2) An appellant's ~~F~~failure ~~of an appellant~~ to take any step other than ~~the~~ timely filing ~~of~~ a notice of appeal does not affect the validity of the appeal, but is ground only for ~~such action as~~ the appellate court to act as it ~~deems~~considers appropriate, ~~which may~~ include ing dismiss~~al of~~ing the appeal or other sanctions short of dismissal, ~~as well as~~and ~~the~~ award~~ing of~~ attorney fees.

(b) **Joint or consolidated appeals**. If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Party Designation ~~of parties~~**. The party taking the appeal ~~shall be~~is known as the appellant and the adverse party as the appellee. Unless otherwise directed by the appellate court, ~~T~~the appeal will not change the title of the action or proceeding ~~shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court~~. ~~In~~For original proceedings in the appellate court, the party making the original application ~~shall be~~is known as the petitioner and any other party as the respondent.

(d) **Content of notice of appeal**.

(d)(1) The notice of appeal ~~shall~~ must:

(d)(1)(A) specify the party or parties taking the appeal;

(d)(1)(B) ~~shall~~ designate the judgment, ~~or~~ order, or part thereof~~,~~ being appealed ~~from~~;

(d)(1)(C) ~~shall designate~~name the court from which the appeal is taken; and

(d)(1)(D) ~~shall designate~~ name the court to which the appeal is taken.

(e) **Servi~~ce of~~ng the notice of appeal**.

(e)(1) The ~~party taking the appeal shall~~appellant must ~~give notice of the filing of a~~ serve the notice of appeal ~~by serving~~on each party to the judgment or order in accordance with the requirements of the court from which the appeal is taken. If counsel of record is served, the certificate of service ~~shall~~ must ~~designate~~ include the name of the party represented by that counsel.

(e)(2) The appellant must provide a courtesy copy of the notice of appeal to the appellate court clerk. If emailed, a notice of appeal must be sent to supremecourt@utcourts.gov for the Supreme Court and courtofappeals@utcourts.gov for the Court of Appeals.

(f) **Filing fee in civil appeals**. ~~At the time of~~When filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal ~~shall~~must pay the filing fee established by law to the clerk of the trial court ~~the filing fee established by law~~. The trial court clerk ~~of the trial court shall~~will accept a notice of appeal regardless of whether the filing fee has been paid. Failure to pay the filing fee within a reasonable time may result in dismissal.

(g) **Docketing of appeal**. ~~Upon the~~

(g)(1) **Transmitting notice of appeal to the appellate court.** After an appellant file~~sing of the~~the notice of appeal, the clerk of the trial court ~~shall~~ will immediately ~~transmit a certified~~email a copy of the notice of appeal to the appellate court clerk. This will include~~,~~:

(g)(1)(A) ~~showing~~ the date the notice of appeal was filed~~of its filing,~~; ~~and~~

(g)(1)(B) the clerk's~~a~~ statement ~~by the clerk indicating~~ declaring whether the filing fee was paid; and

(g)(1)(C) whether the cost bond required by Rule 6 was filed.

(g)(2) **Docketing the appeal.** ~~Upo~~On recei~~pt of~~ving the copy of the notice of appeal from the trial court clerk, the appellate court clerk ~~of the appellate court shall~~ will enter the appeal ~~upon~~ on the docket. An appeal ~~shall~~ will be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name ~~shall~~will be added to the title.

Advisory Committee Notes

~~The designation of parties is changed to conform to the designation of parties in the federal appellate courts.~~

The ~~rule is amended to make clear that the~~ mere designation of an appeal as a "cross-appeal" does not eliminate liability for payment of the filing and docketing fees. But for the order of filing, the cross-appellant would have been the appellant and so should be required to pay the established fees.

TAB 5

Rules 35A & 35B

Rule 35A. 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 requesting an alteration of a decision that affects the substantive rights of the parties or any mandate or rule of law established by the decision, may be filed only in cases in which the court has issued an opinion, memorandum decision, or per curiam decision. ~~No other petitions for rehearing will be considered.~~

(b) **Time for filing**. A petition for rehearing may be filed with the clerk within 14 days after issuance of the opinion, memorandum decision, or per curiam decision of the court, unless the time is shortened or enlarged by order. Remittitur of the case will be deferred pending a decision on any timely motion complying with the requirements of this subpart (a).

(c) **Contents of petition**. The petition ~~shall~~ must succinctly state and explain~~with particularity~~ the points of law or fact ~~which~~that 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~~The 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~~d) **Response**. No response to a petition for rehearing will be received unless requested by the court. Any response shall be filed within 14 days after the entry of the order requesting the response, unless otherwise ordered by the court. A petition for rehearing will not be granted in whole or in part in the absence of a request for a response.

(~~f~~e) **Form of petition**. The petition shall be in ~~a~~the form prescribed by Rule 27 and

shall include a copy of the decision to which it is directed.

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

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

(~~i~~h) **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.

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

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

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

Rule 35B. Motion to modify.

(a) A motion to modify a decision may be filed by a party seeking an alteration to a decision that does not affect the substantive rights of the parties or any mandate or rule of law established by the decision.

(b) **Time for filing**. A motion to modify may be filed with the clerk within 14 days after issuance of any decision of an appellate court that includes an explanation of the reasoning for the decision.

(c) **Contents of motion**. The motion must identify the portions of the decision that should be modified and must state or suggest how it should be modified. The movant must certify that the motion is presented in good faith and not for delay.

(d) **Response**. Any party to the case may choose to respond to a motion to modify. Any response shall be filed within 14 days after service of the motion to modify. Remittitur of the case will be deferred pending a decision on the motion; and the court will not act on the motion until all other parties have responded or the response time has elapsed.

(e) **Length**. A motion to modify, and any response, may not exceed 10 pages.

(f) This provision does not affect the court's authority to make non-substantive amendments or corrections to a decision in the absence of a motion by a party or notice to the parties.

TAB 6

Rule 8 amendments

Agenda

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

Dianne C. Nelson and
Russell A. Nelson,

Appellees,

v. No. 20190182-SC

Burke A. Hills, Vicki Hills, and
H&N Holdings, LLC,

Appellants.

ORDER

This matter is before the Court on a motion to stay the district court's dissolution order pending appeal. The Court previously issued a provisional stay to afford it the opportunity to reevaluate the standard for granting stays under Rule 8(b) of the Rules of Appellate Procedure. The order specified that the provisional stay did not apply to the award of attorney fees and that "Appellants [could] obtain a stay of that separate order by complying with the provisions of Rule 62(d) of the Rules of Civil Procedure." In connection with its consideration of whether to grant a more permanent stay, the Court solicited supplemental briefing from the parties to address the following questions:

1. In cases involving judgments not susceptible to a supersedeas bond, should the Court adopt the standard set forth in the Court of Appeals' per

curiam opinion in Jensen v. Schwendiman, 744 P.2d 1026 (Utah Ct. App. 1987), or should it adopt a more flexible standard that treats the factors listed in that decision and any other pertinent considerations as potentially relevant but not necessarily mandatory conditions for obtaining a stay? In answering that question, the parties should specifically address whether the standard the Court adopts ought to require that parties seeking a stay "make a strong showing that [they are] likely to succeed on the merits of the appeal" as a mandatory condition. See id. at 1027.

2. Assuming the Court were to adopt a more flexible standard, would a stay pending the duration of the appeal in this case be appropriate under that standard?

The parties submitted supplemental pleadings addressing those issues. Appellants advocated that we adopt a "flexible balancing approach," particularly with respect to "the likelihood of success factor" referenced in Jensen. Appellees requested that we retain the Jensen standard and require movants for a stay to meet a "high burden" and make "at least some showing of each of the traditional stay factors."

We note some significant concerns with the Jensen standard. First, that standard was adopted by the Court of Appeals; and, although this Court referenced Jensen in Utah Resources Int'l v. Mark Technologies Corp., 2014 UT 60, ¶¶ 14 -21, 342 P.3d 779; and Richards v. Baum, 914 P.2d 719, 720 (Utah 1996); it has never endorsed Jensen's standard. Thus, this Court's decision to grant or deny a stay in a civil case is governed by the text of Rule 8 of the Rules of Appellate Procedure and the corollary provisions of Rule 62 of the Rules of Civil Procedure.

Second, Jensen's criteria were derived from federal standards for preliminary injunctions. But it does not automatically follow that a preliminary injunction and a stay pending appeal inevitably are so equivalent that they ought to be governed by precisely the same standard. And, to the extent the standard for preliminary injunctions provides useful guidance for a standard for stays pending appeal, Utah's rule governing preliminary injunctions differs from the federal approach on which Jensen relied. Rule 65A(e) of the Rules of Civil Procedure is not rigidly limited to a likelihood of prevailing on the merits. Instead, it states a restraining order or preliminary injunction may issue upon a showing that "there is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, *or the case presents serious issues on the merits which should be the subject of further litigation.*" (Emphasis added).

Finally, fidelity to the mandates of Rule 8 of the Rules of Appellate Procedure may militate in favor of a more flexible approach to treatment of requests for stay in cases where a supersedeas bond or other security is not available. In particular, Rule 8(a) clearly anticipates that the appellate court should be the last resort for obtaining a stay pending appeal and that the trial court is in the best position to determine whether a stay is appropriate because of its familiarity with the case; but a strict requirement to demonstrate a likelihood of prevailing on appeal effectively nullifies that directive because trial courts cannot be expected to determine that their decisions warrant reversal. Additionally, practical considerations may limit an appellate court's ability to conduct a proper assessment of the merits of an appeal in the context of a request for a stay pending appeal. Motions for stay ordinarily should be resolved promptly; and some of them may involve genuine emergencies or other imminent deadlines relating to circumstances beyond the control of the parties or the courts. Yet, Jensen's first requirement appears to impose on appellate courts the burden of conducting a full preliminary evaluation of the merits of the case, including presumably a review of any record materials necessary to properly predict a likely outcome and to ensure a sound procedural and jurisdictional foundation for reaching the substantive issues—and all without the benefit of full briefing and the extensive, careful, and collaborative consideration of the issues an appellate court typically undertakes before making a final decision on the merits.

In light of those concerns, Appellants' motion for a stay of the dissolution order pending disposition of the appeal is granted. Additionally, with those same concerns in mind, the Court will direct its standing committee on the Rules of Appellate Procedure to consider revisions to Rule 8 that will provide more useful guidance to trial courts and appellate courts in determining whether to grant a stay in circumstances where there is no reasonable means of quantifying the security referenced by Rule 62 of the Rules of Civil Procedure in monetary or other terms.

FOR THE COURT:

Oct. 18, 2019
Date

Thomas R. Lee
Associate Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2019, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

DOUGLAS M. MONSON
BRENT D. WRIDE
MICHAEL R. JOHNSON
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R. STEPHEN MARSHALL
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THIRD DISTRICT, SALT LAKE
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450 S STATE ST BX 1860
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julier@utcourts.gov

By Sarah C. Roberts
Sarah Roberts
Judicial Assistant

Case No. 20190182
THIRD DISTRICT, SALT LAKE, 150900638

Rule 8. Stay or injunction pending appeal.

(a) **Stay must ordinarily be sought in the first instance in trial court; motion for stay in appellate court**. Application for a stay of the judgment or order of a trial court pending appeal, or disposition of a petition under Rule 5, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the trial court. A motion for such relief may be made to the appellate court, but the motion ~~shall~~ must show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion ~~shall~~ must also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion ~~shall~~ must be supported by copies of affidavits or other sworn statements ~~or copies thereof~~. The movant must include ~~With the motion shall be filed such~~ relevant parts of the record ~~as are relevant~~, including a copy of the order sought to be stayed. Any motion for stay ~~shall~~ must comply with ~~be filed under~~ rule 23.

(b)(1) **Stay may be conditioned upon giving of bond**. For cases to which the Utah Rules of Civil Procedure apply, ~~R~~relief available ~~in the appellate court~~ under this rule ~~may~~will be conditioned upon the filing of a bond or other appropriate security in the trial court, unless there is no reasonable means of quantifying the security referenced by Utah R. Civ. P. 62 in monetary or other terms.

(b)(2) **Criteria for stays in cases not conditioned upon giving of bond**. If a trial or appellate court readily and reliably can determine that the appeal clearly lacks merit, then the motion will be denied. Otherwise, the considerations justifying a stay ordinarily should consist of serious issues on the merits warranting appellate review and irreparable injury to the appellant, such as mootness of the claims on appeal, or a significant harm to a public interest. The injury to the appellant or harm to the public interest ordinarily should outweigh any harm suffered by another party. The court also may consider any extraordinary circumstance that militates in favor of or against a stay.

(c) **Stays in criminal cases**. Stays pending appeal in criminal cases in which the defendant has been sentenced are governed by Utah Code Ann. Section 77-20-10 and Rule 27, Utah. R. Crim. P. Stays in other criminal cases are governed by this rule.

TAB 7

Rule 33 amendments

Rule 33. Damages for delay or frivolous appeal; recovery of attorney~~'s~~ fees.

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it ~~shall~~ will award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court ~~shall~~ will issue to the party, ~~or~~ the party's attorney, or both an order to show cause why such damages should not be awarded. The order to show cause ~~shall~~will set forth the allegations ~~which~~ that form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to

show cause may be part of the notice of oral argument.

(3) If a request for damages under this rule is included in a pleading to which a response or reply is permitted by the rules or by an order of the court, any written response to the request must be included in that pleading. Otherwise, the court must permit a separate filing for the purpose of responding to the request for damages or to any notice that the court is considering an award for damages on its own motion. ~~If requested by a~~A party against whom damages may be awarded also may include a request for a hearing in that party's timely written response; ~~the court shall grant a hearing,~~ but any hearing will be at the discretion of the court.