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: March 5, 2020

Time: 12:00 to 2:00 p.m.

Action: Welcome and approval of February 6, 2020 minutes	Tab 1	Paul C. Burke, Chair
Discussion: Legislative update (if any)		Paul C. Burke, Judge Jill Pohlman, Christopher Ballard
Discussion & Action: Remaining advisory committee notes (3, 9, 21, 27, 33, 37, 38B, 40, & 41)	Tab 2	Judge Orme
Discussion & Action: Rule 8	Tab 3	Clark Sabey
Discussion & Action: Rule 35 (and related Rules 36, 48)	Tab 4	Clark Sabey
DISCUSSION: Other business		Paul C. Burke

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

Meeting schedule:

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

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, February 6, 2020
12:00 pm to 1:30 pm

PRESENT		EXCUSED
Christopher Ballard	Alan Mouritsen	Patrick Burt
Troy Booher—Emeritus Member	Rodney Parker	R. Shawn Gunnarson
Paul C. Burke—Chair	Judge Jill Pohlman	Judge Gregory Orme
Lisa Collins	Clark Sabey	
Tyler Green	Nathalie Skibine	
Michael Judd—Recording Secretary	Scarlet Smith	
Larissa Lee—Staff	Mary Westby	

1. Welcome and approval of January 2020 minutes — Paul C. Burke

Paul C. Burke welcomed the committee, and the committee discussed their review of the January 2020 minutes. A change to the Section 1 header was proposed, to correct a description of the previous month's minutes (specifically, to change "November 2019" to "December 2019"). No objections to that change were noted, and no additional changes were proposed.

Mr. Burke moved to approve and adopt the minutes from the January 2020 meeting. Judge Jill Pohlman seconded the motion and it passed unanimously.

2. Action: Paul C. Burke
Creation of New Subcommittees

The committee discussed the creation of two new subcommittees: (1) legislative outreach, and (2) public outreach. Mr. Burke reported that the committee had been asked to designate committee members who could be made available to interface with legislators and members of the public to discuss matters that bear some relationship to the Rules of Appellate Procedure and to the Utah Courts more broadly. Mr. Burke also reported that he had proposed himself, Judge Pohlman, and Christopher Ballard as "ambassadors" for the legislative issues, and those proposals were accepted.

The "public outreach" subcommittee would include not only interfacing with members of the public, but also with the Utah State Bar, on an as-needed basis as concerns arise. Tyler Green and Scarlet Smith volunteered to serve as members of that subcommittee, and Judge Orme was identified as a third potential member, subject to his agreement.

3. Discussion and Action: Larissa Lee
Review Comments on Proposed Rules Changes

Ms. Lee provided the committee with public comments submitted in response to the proposed changes to Rules 5, 10, 21, and 26. The committee noted a comment submitted in response to Rules 21 and 26 that did not appear to address either of those rules and thus did not discuss it any further.

The committee discussed a comment regarding Rule 5, which suggested that in following the "modernizing" approach taken with respect to other rules, the time for petitioning be extended from 20 days to 21 days.

Rodney Parker moved to advance the proposal to change the time prescribed in Rule 5 from 20 to 21 days to the Supreme Court. Clark Sabey seconded the motion and it passed unanimously.

The committee also discussed a comment proposing that the committee delete references in Rule 5 to email addresses and to email and paper copies, because this information is covered in the new Rule 21.

Judge Pohlman moved to amend Rule 5 to delete the language regarding emailing versus paper copies. Ms. Smith seconded the motion and it passed unanimously.

The committee discussed several comments related to Rule 10 that relate to "well-settled law" and its relationship to the Rule 10 standard. The committee workshopped several potential versions of Rule 10 and settled on a proposed amendment.

Judge Pohlman moved to amend Rule 10(a)(1) to the form of the rule reached by the committee at its meeting. Alan Mouritsen seconded the motion and it passed unanimously.

The committee also discussed changes to Rule 10(c)(2)(B) related to preservation failure. After discussion, the committee determined that the proposed changes were unnecessary, as a failure to preserve may simply be argued as part of an overall failure to carry burden.

With those approved changes in hand, the committee agreed to send the Rules at issue, as amended, to the Supreme Court.

4. Discussion and Action: Clark Sabey
Rule 35A/B and Related Rules 36 & 48

Mr. Sabey guided the committee in further discussion related to Rule 35A/B, which relates to petitions for rehearing and petitions to modify, along with the related Rules 36 and 48 which, as Judge Pohlman pointed out at the January 2020 meeting, relate to Rule 35. The recommendation made to the committee was that the reference to deferral of remittitur in 35A/B could be removed, as that issue is already addressed in Rules 36 and 48.

The committee discussed slight changes to Rule 35A(a) and (b) to ensure consistency.

Troy Booher raised a concern about situations in which it is not clear whether the relief a party seeks under the Rule 35 regime would fall within the scope of Rule 35A or 35B. The committee also discussed adding a requirement in 35B(c) related to stating the other parties' position as to the relief requested. Following those discussions, the committee opted to recast the division between Rules 35A and 35B as a distinction between *opposed* Petitions for Rehearing and *stipulated or unopposed* Motions to Amend. Mr. Parker suggested that the same goal could be accomplished by revising Rule 35 itself.

The committee ultimately decided that while the changes made represented significant progress, the best approach is for the committee to consider a recombined Rule 35 with the discussed changes at the next committee meeting.

Ms. Lee guided the committee's discussion of Rules 36 and 48. The amendments to those rules are largely clean-ups, but because they are related to Rule 35, the committee will also hold on further discussion of those rules until Rule 35 is finalized.

5. Discussion and Action: Larissa Lee
References to Physical Copies of Non-Briefs

Ms. Lee pointed the committee to Rules 9, 11, 12, and 19, all of which contain references to physical copies of non-briefs, making them inconsistent with the committee's goal to align the rules with the provisions of Standing Order No. 11.

The committee first reviewed proposed amendments to modernize and clean-up Rule 9.

Judge Pohlman moved to approve the amendments to Rule 9 as indicated. Lisa Collins seconded the motion and it passed unanimously.

The committee then turned to Rule 11 amendments. The committee determined references to "papers" are outdated and will use the more accurate term "documents."

Lisa Collins moved to approve the approve the amendments to Rule 11 as indicated on the screen at the committee meeting. Rodney Parker seconded the motion and it passed unanimously.

The committee also discussed Rule 12, to which Ms. Lee had proposed changes after further discussions with the clerk's office. The committee had no objection to the proposed changes.

Lisa Collins moved to approve the amendments to Rule 12 as indicated. Mary Westby seconded the motion and it passed unanimously.

Similarly, the committee discussed proposed changes to Rule 19, which again elicited no objections from the committee.

Lisa Collins moved to approve the amendments to Rule 19 as indicated. Judge Pohlman seconded the motion and it passed unanimously.

6. Discussion: Paul C. Burke
Other Business

None.

7. Adjourn

Mr. Burke adjourned the meeting. The committee is scheduled to meet again on March 5, 2020.

Tab 2

Advisory Committee Notes Project

Remaining Notes
as of February 2020

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Rule 3. Appeal as of right: how taken.

(a) Filing appeal from final orders and judgments. An appeal may be taken from a district or juvenile 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 clerk of the trial court within the time allowed by Rule 4. 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 deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award 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) Designation of parties. The party taking the appeal shall be known as the appellant and the adverse party as the appellee. 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 original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) Content of notice of appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) Service of notice of appeal. The party taking the appeal shall give notice of the filing of a notice of appeal by serving 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 designate the name of the party represented by that counsel.

(f) Filing fee in civil appeals. At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court the filing fee established by law. The clerk of the trial court shall 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 filing of the notice of appeal, the clerk of the trial court shall immediately transmit a certified copy of the notice of appeal, showing the date of its filing, and a statement by the clerk indicating whether the filing fee was paid and whether the cost bond required by Rule 6 was filed. Upon receipt of the copy of the notice of appeal, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall 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 be added to the title.

Advisory Committee Note

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.

Proposed Note:

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

The rule ~~is amended to~~ makes 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.

Rule 9. Docketing statement (recently amended, approved for public comment).

(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 must file the docketing statement with the appellate court clerk and serve the docketing statement with any required attachments on all parties. The Utah Attorney General must be served in any appeal arising from a crime charged as a felony or a juvenile court proceeding.

(c) Content of docketing statement in a civil case. The docketing statement in an appeal arising from a civil case must include:

(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 of the First District Court granting summary judgment in case number 001900055."

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

(c)(2)(A) The date the final judgment or order from which the appeal is taken is entered.

(c)(2)(B) The date the notice of appeal was filed in the trial court.

(c)(2)(C) If the notice of appeal was filed after receiving a time extension under Rule 4(e), the date the motion for an extension was granted.

(c)(2)(D) If any motions listed in Rule 4(b) were filed, the date such motion was filed in the trial court and the date any order disposing of such motion was entered.

(c)(2)(E) 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.

(c)(2)(F) If a motion to reinstate the time to appeal was filed under Rule 4(g), the date the order disposing of such motion was entered.

(c)(3) If the appeal is taken from an order certified as final under Rule 54(b) of the Utah Rules of Civil Procedure, a statement of what claims and parties remain for adjudication before the trial court.

(c)(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 appellant's brief; conversely, an issue raised in the docketing statement does not have to be included in the appellant's brief.

(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.

(d) Content of a docketing statement in a criminal case. The docketing statement in an appeal arising from a criminal case must 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 appeal's timeliness and the appellate court's jurisdiction:

(d)(2)(A) The date the final judgment or order from which the appeal is taken is entered.

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

(d)(2)(C) If the notice of appeal was filed after receiving a time extension under rule 4(e), the date the motion for an extension was granted.

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

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

(d)(2)(F) 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 appellant's brief; conversely, an issue raised in the docketing statement does not have to be included in appellant's brief.

(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 before 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.

(e) Content of a docketing statement in a review of an administrative order. The docketing statement in a case arising from an administrative proceeding must 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)(A) The date the final order from which the petition for review is filed.

(e)(3)(B) 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 petitioner's brief; conversely, an issue raised in the docketing statement does not have to be included in petitioner's brief.

(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) The following documents must be attached to the docketing statement:

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

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

(f) Consequences of failure to comply. In a civil appeal, failure to file a docketing statement within the time period provided in subsection (b) may result in dismissal of a civil appeal or a petition for review. In a criminal case, failure to file a docketing statement within the time period provided in subsection (b) may result in a finding of contempt or other sanction.

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

Advisory Committee Note

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.

Proposed Note:

~~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.

Rule 21. Filing and service (recently amended, approved for publication).

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

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

(a)(2) Briefs are timely:

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

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

(a)(2)(C) if received by hand delivery to the Appellate Clerks' Office before 5 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 may be stricken.

(c) Service of all documents required. All documents 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, on the party at the last known address or email address provided to the appellate court. Any document required by these rules to be served on a party must be filed with the court and accompanied by proof of service.

(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.

(e) Proof of service. Documents 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 documents filed. If counsel of record is served, the certificate of service must designate the name of the party represented by that counsel.

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

(g) Filing by inmate.

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

(g)(2) Documents filed by an inmate are timely filed if they are deposited in the institution's internal mail system on or before the due date. 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 documents are received by the court.

(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.

Effective February 19, 2020.

Advisory Committee Note (not online, in book version only)

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

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

Proposed Note:

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

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

Rule 27. Form of briefs.

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

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

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

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

Proposed 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

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Rule 33. Damages for delay or frivolous appeal; recovery of attorney fees (recently amended—out for public comment).

(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 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 document 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 document 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 document.

(c) Procedures.

(c)(1) The court may award damages on any party's request or on 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 document.

(c)(2) If the award of damages is on the court's motion, the court will issue to the party, the party's attorney, or both an order to show cause why such damages should not be awarded. The order to show cause will set forth the allegations 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.

(c)(3) The court will not award damages without affording the party against whom damages may be awarded an opportunity to file a written objection. If a request for damages is included in a filing to which a response or reply is permitted by applicable rules or by a court order, any written objection to the request must be included in that response or reply. When applicable rules or a court order do not provide for a response or reply, the court will issue a notice affording the opposing party an opportunity to

submit a written objection to the request for damages. Any hearing will be at the court's discretion.

Advisory Committee Note

Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages -- single or double costs or attorney fees or both -- is left to the discretion of the court. Rule 33 is amended to make express the authority of the court to impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by Anders v. California, 386 US 738 (1967) and State v. Clayton, 639 P.2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.

Proposed Note:

~~Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.~~

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages—single or double costs or attorney fees or both—is left to the discretion of the court. Rule 33 ~~is amended to~~ makes express the court's authority ~~of the court~~ to impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by *Anders v. California*, 386 U.S. 738 (1967) and *State v. Clayton*, 639 P.2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.

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).

Proposed Note (Mary's changes):

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).~~Parents subject to proceedings regarding abuse, neglect, or dependency, or the termination of

parental rights have a statutory right to effective assistance of counsel. Minors in juvenile court proceedings have a statutory right to effective assistance of counsel.

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.

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).

Proposed 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).~~ Qualifying appointed appellate counsel is now largely governed by Code of Judicial Administration Rule 11-401. Rule 38B applies only to certain appointed attorneys operating under contracts predating the adoption of Rule 11-401. Upon termination, expiration, or renewal of such contracts, the attorney is subject to Rule 11-401 exclusively. Rule 38B will be repealed once no such contracts remain in effect.

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

(a) Attorney's or party's signature. Every motion, brief, and other document must be signed by at least one attorney of record who is an active member in good standing of the Bar of this state or by a party who is self-represented. A person may sign a document using any form of signature recognized by law as binding.

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

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

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

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

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

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

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

(d) Rule does not affect contempt power. This rule does not limit or impair the court's inherent and statutory contempt powers.

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

Advisory Committee Note

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

Proposed Note:

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

Rule 41. Certification of questions of law by United States courts.

(a) Authorization to answer questions of law. The Utah Supreme Court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court acting in accordance with the provisions of this rule if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain.

(b) Procedure to invoke. Any court of the United States may invoke this rule by entering an order of certification as described in this rule. When invoking this rule, the certifying court may act either sua sponte or upon a motion by any party.

(c) Certification order.

(c)(1) A certification order shall be directed to the Utah Supreme Court and shall state:

(c)(1)(A) the question of law to be answered;

(c)(1)(B) that the question certified is a controlling issue of law in a proceeding pending before the certifying court; and

(c)(1)(C) that there appears to be no controlling Utah law.

(c)(2) The order shall also set forth all facts which are relevant to the determination of the question certified and which show the nature of the controversy, the context in which the question arose, and the procedural steps by which the question was framed.

(c)(3) The certifying court may also include in the order any additional reasons for its entry of the certification order that are not otherwise apparent.

(d) Form of certification order; submission of record. A certification order shall be signed by the judge presiding over the proceeding giving rise to the certification order and forwarded to the Utah Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require that all or any portion of the record before the certifying court be filed with the Supreme Court if the record or a portion thereof may be necessary in determining whether to accept the certified question or in answering that question. A copy of the record certified by the clerk of the certifying court to conform to the original may be substituted for the original as the record.

(e) Acceptance or rejection of certification. Upon filing of the certification order and accompanying papers with the clerk, the Supreme Court shall promptly enter an order either accepting or rejecting the question certified to it, and the clerk shall serve copies of the order upon the certifying court and all parties identified in the certification order. If the Supreme Court accepts the question, the Court will set out in the order of acceptance (1) the specific question or questions accepted, (2) the deadline for notifying the Supreme Court as to those portions of the record which shall be copied and filed with the Clerk of the Supreme Court, and (3) information as to when the briefing schedule will be established.

(f) Briefing; oral argument. The form of briefs and proceedings on oral argument will be governed by these rules except as such rules may be modified by the Supreme Court to accommodate the differences between the appeal process and the determination of a certified question. The clerk of the Supreme Court will provide written notice to the parties as to the schedule for the filing of briefs and content requirements, as well as the schedule and procedures for oral argument.

(g) Appearance of counsel pro hac vice. Upon acceptance by the Supreme Court of the question of law presented by the certification order, counsel for the parties not licensed to practice law in the state of Utah may appear pro hac vice upon motion filed pursuant to the Code of Judicial Administration.

(h) Issuance of opinion on certified questions. The Supreme Court will issue a written opinion that will be published and reported. A copy of the opinion shall be transmitted by the clerk under the seal of the Supreme Court to the certifying court and to the parties identified in the certification order.

Advisory Committee Note

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

Proposed Note:

Out of state counsel must comply with all pro hac vice admission rules~~Refer to Rule 14-806 of the Rules Governing the Utah State Bar for qualification of out of state counsel~~ to practice before the courts of Utah.

Tab 3

Rule 8. Stay or injunction pending appeal.

(a) **Motion for stay**.

(a)(1) **Initial motion in the trial court**. A party must ordinarily move first in the trial court for the following relief:

(a)(1)(A) a stay of the judgment or order of a district court pending appeal or disposition of a petition under Rule 5;

(a)(1)(B) approval of a bond or other security provided to obtain a stay of judgment; or

(a)(1)(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(a)(2) **Motion in the appellate court**.

(a)(2)(A) Except in the most extraordinary circumstances, an appellate court will not act on a motion for a stay, unless the movant first requested relief in the trial court and that court denied the request.

(a)(2)(B) The motion must include:

(a)(2)(B)(i) the reasons the trial court denied the stay request;

(a)(2)(B)(ii) the reasons for granting the relief requested and the facts relied on;

(a)(2)(B)(iii) copies of affidavits or other sworn statements supporting facts subject to dispute; and

(a)(2)(B)(iv) relevant parts of the record, including a copy of the order sought to be stayed.

(a)(2)(C) Any motion for stay must comply with Rule 23.~~**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 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 also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant, including a copy of the order sought to be stayed. Any motion for stay shall be filed under rule 23.~~

(b) **Bond requirement.**

(b)(1) **Stay ~~may be~~ordinarily conditioned ~~up~~on giving of bond**. For cases to which Rule 62(d) of the Utah Rules of Civil Procedure applied below, ~~R~~relief available ~~in the appellate court under this rule~~ on appeal ~~may~~will be conditioned ~~up~~on ~~the~~ filing ~~of~~ a bond or other appropriate security in the trial court, unless there is no reasonable means of quantifying the security in monetary or other terms.

(b)(2) **Stay in cases not conditioned on giving of bond**. Ordinarily a stay without a bond or other security will not be granted unless the case presents serious issues on the merits warranting appellate review and the appellant demonstrates:

(b)(2)(A) a likelihood of irreparable harm to the appellant outweighing the harm to any other party, a significant harm to the public interest, and a likelihood of success of the merits; or

(b)(2)(B) an extraordinary circumstance that justifies issuing 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.

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:

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By Sarah C. Roberts
Sarah Roberts
Judicial Assistant

Case No. 20190182
THIRD DISTRICT, SALT LAKE, 150900638

Tab 4

Rule 35. Petition for rehearing or motion to amend.

(a) **Petition for rehearing** ~~for rehearing permitted. A rehearing will not be granted in the absence of a petition for rehearing~~.

(a)(1) **Petition.** A petition for rehearing requesting to alter a decision in a manner 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~~ issue~~d~~s an opinion, memorandum decision, ~~or~~ per curiam decision, or order resolving the appeal on the merits. ~~No other petitions for rehearing will be considered.~~

(a~~b~~)(2) **Time for filing**. A petition for rehearing may be filed with the clerk within 14 days after the court issu~~ance of~~es ~~the opinion, memorandum decision, or per curiam decision of the court~~ an opinion, memorandum decision, per curiam decision, or order resolving the appeal on the merits, unless the time is shortened or enlarged by order.

(a~~c~~)(3) **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~~a)(4) **Response**. No response to a petition for rehearing will be received unless requested by the court. Any response ~~shall~~ must 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~~a)(5) **Form of petition**. The petition ~~shall~~must be in ~~a~~the form prescribed by Rule 27(a), (b), and (d) with respect to contents of the cover and ~~shall~~ must include a copy of the decision to which it is directed.

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

(~~h~~a)(6) **Length**. Except by ~~order of the~~ court order, a petition for rehearing and any response requested by the court ~~shall~~may 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 curie, 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~~a)(7) **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~~a)(8) **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~~a)(9) **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~~a)(4) ~~of this rule~~.

(b) **Stipulated or unopposed motion to amend decision**.

(b)(1) **Motion**. A party seeking to amend a decision in a manner not affecting the substantive rights of the parties or any mandate or rule of law established by the decision may file a stipulated or unopposed motion to amend decision.

(b)(2) **Time for filing**. A motion to amend decision may be filed with the clerk within 14 days after the appellate court issues any decision that includes an explanation of the reasoning for the decision.

(b)(3) **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 moving party must state the position of all other parties as to the relief requested and certify that the motion is presented in good faith and not for delay.

(b)(4) **Length**. A motion to amend decision, and any response, may not exceed 10 pages.

(b)(5) **Authority to correct**. This paragraph 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.

(c) **Reclassifying**. If the court determines a petition for rehearing should have been filed as a stipulated or unopposed motion to amend or vice versa, it may treat the

petition or motion as appropriate, provided it affords all other parties an adequate opportunity to respond under the appropriate provisions of paragraphs (a) or (b). Such a determination will not be a ground for sanctions unless the court also determines the requirements of Rule 33 have been met.

Rule 36. Issuance of remittitur.

(a) **Date of issuance**.

(1) ~~In t~~The Supreme Court will issue a~~the~~ remittitur ~~of the court shall issue~~ 15 days after ~~the entry of~~ the judgment is entered. If a petition for rehearing under Rule 35A or a motion to modify under Rule 35B is timely filed, the remittitur ~~of the court shall~~will issue five days after ~~the entry of~~ the order disposing of the petition is entered.

(2) ~~In t~~The Court of Appeals will issue a~~the~~ remittitur ~~of the court shall issue~~ immediately after ~~the expiration of~~ the time for filing a petition for writ of certiorari expires. If a petition for writ of certiorari is timely filed, ~~issuance of the remittitur by~~ the Court of Appeals will automatically ~~be~~ stay~~ed~~ issuing the remittitur until the Supreme Court's disposition on the petition for writ of certiorari. If the Supreme Court denies the petition, the Court of Appeals ~~shall~~will issue its remittitur five days after ~~entry of~~ the order denying the petition is entered. If the Supreme Court grants the petition, jurisdiction of the appeal ~~shall~~will ~~be transferred~~transfer to the Supreme Court, and the Court of Appeals ~~shall~~will close its file and transfer the record on appeal, if any, to the Supreme Court.

(3) The time ~~for issuance of~~to issue the remittitur may be otherwise stayed, enlarged, or shortened by ~~order of the~~ court order. ~~A certified copy of t~~The court's opinion ~~of the court~~, any direction as to costs, and the record of the proceedings ~~shall~~will constitute the remittitur.

(b) **Stay, supersedeas, or injunction pending application for review to the Supreme Court of the United States**. A stay or supersedeas of the remittitur or an injunction pending application for review to the United States Supreme Court may be granted on motion and for good cause. Any motion for a stay of the remittitur or for approval of a supersedeas bond or for an order suspending, modifying, restoring, or granting an injunction during ~~the pendency of~~ the appeal ~~shall~~must be filed in the Utah Supreme Court. Reasonable notice of the motion ~~shall~~must be given to all parties. The period of the stay, supersedeas, or injunction ~~shall~~will be for such time as the court order~~ed~~s, ~~by the~~

~~court~~ up to and including the final disposition of the application for review. A bond or other security on such terms as the court deems appropriate may be required as a condition to the grant or continuance of relief under this paragraph. If the stay, supersedeas, or injunction is granted until the final disposition of the application for review, the party seeking the review ~~shall~~must, within the time permitted for seeking the review, file with the clerk of the court ~~which~~ that entered the decision sought to be reviewed, ~~a certified copy of~~ the notice of appeal, petition for writ of certiorari, or other application for review, or ~~shall~~must file a certificate that such application for review has been filed. ~~Upo~~On ~~the~~ filing ~~of a copy of~~ an order of the United States Supreme Court dismissing the appeal or denying the petition for a writ of certiorari, the remittitur ~~shall~~will issue immediately.

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 clerk within 30 days after ~~the entry of the final decision by~~ the Court of Appeals' final decision is entered. The docket fee ~~shall~~must be paid when ~~at the time of filing~~ the petition is filed.

(b) **Refusal of petition**. The clerk will refuse ~~to receive~~ any petition for a writ of certiorari not timely filed or~~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 or motion to modify**. The time for filing a petition for a writ of certiorari runs from the date ~~the decision is entered by~~ the Court of Appeals' final decision is entered, not from the date ~~of the issuance of the~~ remittitur is issued. If a petition for rehearing that complies with Rule 35A(a) or a motion to modify that complies with Rule 35B(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 motion to modify is denied or ~~of the entry of~~ a subsequent decision on~~entered upon~~ the rehearing or motion is entered.

(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 that is timely only ~~pursuant to~~under 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~~must be paid when ~~at the time of filing~~ the cross-petition is filed. The clerk ~~shall~~will 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~~ will refuse any filing so joined.

(e) **Time ~~E~~extensions ~~of time~~**.

(e)(1) ~~The Supreme Court, upon a showing of good cause,~~ A party may file a motion to~~may~~ extend the time for filing a petition or a cross-petition for a writ of certiorari ~~upon motion filed not later~~within ~~than~~ 30 days after ~~the expiration of~~ the time prescribed by paragraph (a) or (c) ~~of this rule~~expires. The Supreme Court will grant the motion only for good cause or excusable neglect. Responses to such motions are disfavored and the court may rule at any time after the ~~filing of the~~ motion is filed. No extension ~~shall~~will exceed 30 days past the prescribed time or 14 days from the date ~~of entry of~~ the order granting the motion is entered, 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, 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. 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.~~

~~(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.~~