

# MINUTES

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

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

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

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### PRESENT

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

### EXCUSED

Rodney Parker  
Anne Marie Taliaferro  
Judge Fred Voros

### 1. Welcome and Approval of Minutes

**Joan Watt**

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

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

### 2. Rules Without Comment

**Alison Adams-Perlac**

The committee amended Rule 5 to read as follows:

#### **Rule 5. Discretionary appeals from interlocutory orders.**

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

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

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

(c) Content of petition.

(c)(1) The petition shall contain:

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

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

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

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

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

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

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

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

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

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

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

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

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

The committee amended Rule 37 to read as follows:

**Rule 37. Suggestion of mootness; voluntary dismissal.**

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

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

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

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

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

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

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

### 3. Rule 9

Joan Watt

The committee amended Rule 9 to read as follows:

#### **Rule 9. Docketing statement.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **Advisory Committee Notes**

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

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

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

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

#### **4. Rule 23B**

**Joan Watt**

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

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

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

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

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

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

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

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

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

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

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

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

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

## 5. Rule 4(e) and 48

Paul Burke

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

### **Rule 4. Appeal as of right: when taken.**

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

(b) Time for appeal extended by certain motions.

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

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

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

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

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

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

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

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

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

(e) ~~Motion for Extension of time to appeal.~~

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

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

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

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

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

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

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

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

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

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

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

**Advisory Committee Note**

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

**Rule 48. Time for petitioning.**

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

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

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

(d) Time for cross-petition.

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

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

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

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

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

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

(e) Extension of time.

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

~~(e)(2) The Supreme Court, upon a showing of good cause or excusable neglect or good cause, may extend the time for filing a petition or a cross-petition for a writ of certiorari upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) or (c) of this rule, whichever is applicable. Any such motion which is filed before expiration of the prescribed time may be ex parte, unless the Supreme Court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties. No extension shall exceed 30 days past the prescribed time or 140 days from the date of entry of the order granting the motion, whichever occurs later, and no more than one extension will be granted.~~

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

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

## **6. Nonpublic Records—Rules 21, 21A, 55, and 56**

**Alison Adams-Perlac**

The committee proposed or amended Rules 21, 21A, 55, and 56 to read as follows:

### **Rule 21. Filing and service.**

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

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

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

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

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

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

(g) Representations to court. By filing papers in the appellate court, an attorney or unrepresented party is certifying that to the best of the person's knowledge formed after an inquiry reasonable under the circumstances:

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

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

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

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

#### **Advisory Committee Notes**

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

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

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

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

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

**Advisory Committee Notes**

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

Rule 11 defines “record on appeal.”

**Rule 55. Petition on appeal.**

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

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

(c) Format. All petitions on appeal shall substantially comply with the Petition on Appeal form that accompanies these rules. The petition shall not exceed 15 pages, excluding the attachments required by Rule 55(d)(6). The petition shall be typewritten, printed or prepared by photocopying or other duplicating or copying process that will produce clear, black and permanent copies equally legible to printing, on opaque, unglazed paper 8 ½ inches wide and 11 inches long. Paper may be recycled paper, with or without deinking. The printing must be double spaced, except for matter customarily single spaced and indented. Margins shall be at least one inch on the top, bottom and sides of each page. Page numbers may appear in the margins. Either a proportionally spaced or monospaced typeface in a plain, roman style may be used. A proportionally spaced typeface must be 13-point or larger for both text and footnotes. Examples are CG Times, Times New Roman, New Century, Bookman and Garamond. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes. Examples are Pica and Courier.

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

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

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

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

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

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

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

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

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

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

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

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

**Rule 56. Response to petition on appeal.**

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

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

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

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

**7. Rules 24 and 27**

**Troy Booher**

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

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

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

**Joan Watt**

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

## **9. Other Business**

There was no other business discussed at the meeting.

## **10. Adjourn**

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