

Agenda

Advisory Committee on Rules of Appellate Procedure

June 2, 2016

12:00 to 1:30 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes.	Tab 1	Joan Watt
Priority of pending issues	Tab 2	Tim Shea
Rule 4(f) motion to reinstate the time to appeal.	Tab 3	Tim Shea
Criminal records in PCRA cases. URCP 65C.	Tab 4	Tim Shea
Rule 25A. Challenging the constitutionality of a statute or ordinance.	Tab 5	Bridget Romano Troy Booher Shawn Gunnarson Clark Sabey
Rule 37. Suggestion of mootness; voluntary dismissal.	Tab 6	Judge Voros
Rule 40. Attorney's or party's certificate; sanctions and discipline.	Tab 7	Tim Shea

Committee Webpage: http://www.utcourts.gov/committees/appellate_procedure/

Meeting Schedule. All meetings are from 12:00 to 1:30 at the Administrative Office of the Courts in the Matheson Courthouse.

September 1, 2016

October 6, 2016

November 3, 2016

December 1, 2016

January 5, 2017

February 2, 2017

March 2, 2017

April 6, 2017

May 4, 2017

June 1, 2017

September 7, 2017

October 5, 2017

November 2, 2017

December 7, 2017

Tab 1

MINUTES

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

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

Judicial Council Room
Thursday, May 5, 2016
12:00 p.m. to 1:30 p.m.

PRESENT

Joan Watt- Chair
Troy Booher
Marian Decker
R. Shawn Gunnarson
Judge Gregory Orme
Adam Pace – Recording Secretary
Rodney Parker
Bridget Romano
Clark Sabey
Lori Seppi
Tim Shea-Staff
Judge Fred Voros
Mary Westby

EXCUSED

Paul Burke
Alan Mouritsen
Ann Marie Taliaferro

1. Welcome and approval of minutes

Joan Watt

Ms. Watt welcomed the committee to the meeting and invited a motion to approve the minutes from the April meeting.

Ms. Romano moved to approve the April minutes. Ms. Seppi seconded the motion and it passed unanimously.

2. Further follow up to e-filing

Tim Shea

Mr. Shea introduced issues for further discussion based on public comments to the e-filing rules and the feedback that was received in the in e-filing CLE. Some comments addressed the need for sample forms and supporting information to be created and provided on the court’s e-filing website. Mr. Shea reported that the court can create this material without the need for any further rule amendments.

The comments raised several issues with respect to linking to the electronic record when there are multiple cases underlying the appeal. The committee identified and discussed different scenarios where this could happen, including PCRA (Post Conviction Remedy Act) proceedings, Rule 19 petitions for extraordinary writs, and possibly others. Mr. Shea proposed further revisions to Rule 21A to provide the citation formats needed for citing to records of multiple cases (D:1:#:#, D:2:#:#. etc.). Mr. Shea also suggested that there needs to be a mechanism in place to alert the court when there are multiple cases underlying the appeal, so the electronic records can be gathered and associated with the appeal in the e-filing system. Also, in some cases the record might not be available in electronic format, and might so voluminous that it would be unduly burdensome on the district court to require that it be scanned. There needs to be a mechanism in place to decide how these records are gathered and transferred to the appellate court.

The committee discussed and agreed that the appellate court should have discretion to decide on a case by case basis whether a voluminous paper record should be scanned. The committee discussed the best way to alert the court when there are multiple records that need to be linked from cases underlying the appeal. The options that were discussed included: 1) putting the information in the docketing statement; 2) making the parties file a motion; and 3) allowing the parties to identify associated cases in a drop-down menu in the e-filing system. Judge Voros commented, and others agreed, that the third option was preferable. Judge Voros also commented that only the record that was actually in front of the district court should be linked to on appeal. Otherwise, parties should have to make a motion to supplement the record. Mr. Sabey asked whether the district courts in PCRA proceedings could be required to make the records from any underlying cases part of the record before it is sent up on appeal. Judge Voros suggested that this may require an amendment to civil rule 65A, not the appellate rules. Ms. Watt asked Ms. Romano to gather feedback on this issue from her colleagues that also do PCRA work to discuss at the next meeting.

The committee agreed that the e-filing system should be designed to provide the ability for the district and appellate courts to link to records from other cases, and to identify them with the proper labels so they are easily citable on appeal. Mr. Parker commented this proposal might be too ambitious, and suggested revising Rule 21A to require linking to the electronic record “when possible” in order to account for scenarios that are likely to arise when linking to the electronic record is not possible, or does not function properly. The committee agreed with this suggestion.

Mr. Shea said that he would incorporate these suggestions into a new revision of Rule 21A to be presented and discussed at the next meeting. He reported that the court is preparing a standing order that it will issue to allow filing of documents by email in the interim until the e-filing system is ready. Finally, Mr. Shea pointed out that the e-filing system has been delayed, and asked the committee to consider whether it should move forward with a modified version of the proposed e-filing rules in the interim. Ms. Watt invited the committee members to review the e-filing rules and to identify what portions could be adopted before the e-filing system is complete—to be discussed in a future meeting.

3. Rule 52. Child Welfare Appeals

Mary Westby

Ms. Westby proposed, and the committee agreed, that Rule 52 should be amended to make it consistent with the recent changes that were approved to Rule 4(b). Mr. Booher questioned whether the language in Rule 52(c) regarding the timing for filing a cross appeal should be left as “after a notice of appeal is filed,” and not changed to “after the date on which the first notice of appeal is docketed.” He commented that there might be confusion between the date that an appeal is docketed and the date it is filed. The committee agreed with this suggestion. Mr. Sabey asked if the same change should be made to Rule 4(b). The committee agreed that change should be made as well. Ms. Watt invited a motion to approve these proposed changes.

Mr. Booher moved to approve the proposed change to Rule 52. Ms. Romano seconded the motion and it passed unanimously.

Mr. Gunnarson moved to approve proposed change to Rule 4(b). Ms. Romano seconded the motion and it passed unanimously.

Judge Voros suggested the committee should consider inviting feedback from practitioners on the changes that are being made to rules governing child welfare appeals.

4. Rule 37. Suggestion of mootness; voluntary dismissal

Judge Voros

Discussion of this issue was tabled until the next meeting.

5. Rule 23D. Challenging the constitutionality of a statute or ordinance Tim Shea

Mr. Shea reported that the Supreme Court requested he draft a rule requiring the parties to serve their briefs on the Attorney General (or the county or municipal attorney, as the case may be) if a party challenges the constitutionality of a statute or ordinance. He asked the committee to discuss a new proposed Rule 23D.

Ms. Romano commented that she is in favor of the concept of the rule, but that the proposed time frames in the rule do not work because they are too short. She also raised several other concerns with the way the rule is drafted. The committee discussed various other questions raised by this rule. Ms. Watt suggested, and the committee agreed, that a subcommittee should be formed to examine the proposed rule and make further recommendations. Ms. Romano agreed to chair the subcommittee comprised of herself, Mr. Gunnarson, Mr. Booher, and Mr. Sabey.

6. Rule 40. Attorney's or party's certificate; sanctions and discipline **Tim Shea**

Discussion of this issue was tabled until the next meeting.

7. Adjourn

The meeting was adjourned at 1:29 p.m. The next meeting will be held on Thursday June 2, 2016.

Tab 2

PENDING

Rule	Topic	Raised by	Pending since	Status	Priority
01	Incorrect reference to 78-3a-320.	Tim Shea	2016/05		3
02	Adds Rule 14(a) to the list of rules that the court cannot suspend.	Clark Sabey		Comment period expires July 1.	2
03	Order of parties in the case title.	Supreme Court	2016/04		3
03, 24	When should party file a co-notice of appeal and when a cross-appeal?	Rod Parker	2015/12	E-filing amendments pending.	3
04(f)	Ralphs v. Mc Clellan 2014 U T 36, ¶25 “our inclination to amend the rule prospectively to add a time limitation going forward.” Proposed amendment of URCrP 38 would impose 6 month deadline for a motion to reinstate the time to appeal from justice court to district court.	Supreme Court	2014/08	Get data about filings from Kim	1
14	Restates first sentence in the active voice.	Judge Voros	2016/04	Drafted. E-filing amendments pending.	3
23	Consolidate all motion provisions in Rule 23.	Troy Booher	2016/02	E-filing amendments pending.	3

Rule	Topic	Raised by	Pending since	Status	Priority
23B	Rewrite.	Subcommittee: Lori Seppi, Judge Voros, Clark Sabey, Marian Decker, Tom Bruner, Mary Westby, Joan Watt	2014/12	Draft circulated to subcommittee. E-filing amendments pending.	1
24	New organization and content of brief. New rule 24A for cross-appeals. Amendments to Rule 26 and Rule 27.	Subcommittee: Judge Voros, Judge Orme, Justice Lee; Troy Booher, Paul Burke, Rod Parker, Lori Seppi	2014/05	Subcommittee working on amendments. E-filing amendments pending.	1
25	Consolidate all amicus provisions into Rule 25. Rules 5, 25, 35, 41, 50,	Tim Shea	2016/01	E-filing amendments pending.	3
25A	Challenging the constitutionality of a statute or ordinance.	Supreme Court	2015/10	Amendment drafted. Subcommittee: Bridget Romano, Shawn Gunnarson, Clark Sabey, Troy Booher.	1

Rule	Topic	Raised by	Pending since	Status	Priority
29	Oral argument in private cases.	AG; Court of Appeals	2015/06	Amendment drafted. E-filing amendments pending.	3
30	Refers to dismissals in its title, but not its text.	Judge Voros	2016/05		3
35	Alternatives to petitions for rehearing for minor modifications to opinions. Motion. Model after URCP 60(a). Integrate SO 2. Delete amicus brief?	Supreme Court E-filing subcommittee	2014/10	E-filing amendments pending.	3
36	Simplify remittitur language.	Tim Shea	2015/05	Amendment drafted. E-filing amendments pending.	3
37	Allows a lawyer to attach his or her own affidavit instead of the appellant's when the lawyer has lost communication with the appellant and an affidavit from appellant is required to dismiss an appeal.	Judge Voros	2014/10	Amendment drafted. Ready for committee.	2
40	Sanctioning lawyers or parties.	Supreme Court	2015/10	Amendment drafted. Ready for committee.	1
47(b)	Are we comfortable with how respondents on cert are determined? Compare to SCOTUS rule 12(6). Seems to allow a party on the same side as a cert petitioner in the court of appeals to ride the coattails of a cert petitioner (and become a party to a cert proceeding) without filing either a cert petition or joining in a cert petition. Compare SCOTUS rule 12(6).	Judge Voros	2015/12	E-filing amendments pending.	3

Rule	Topic	Raised by	Pending since	Status	Priority
50	Proposed as part of “global” changes. No record that the committee ever reached this rule. Most amendments could be integrated with the e-filing amendments.	Troy Booher	2013/08	E-filing amendments pending.	3
52	Effect of post-trial motions should be consistent with Rule 4.	Mary Westby	2016/01	Comment period expires June 25.	2
52-59	Is there a way to expedite adoption appeals similar to child welfare appeals? Work with civil and juvenile rules committees to expedite trial court proceedings.	Supreme Court	2015/05		1
55	Child welfare appeals. Is there a mechanism for a party to raise an ineffective assistance of counsel claim when trial court counsel is required to file the petition to appeal? How can a party have appellate counsel independent of trial counsel? Should there be a process like Rule 23B to supplement the records? How does the policy of an expedited appeal for the benefit of the child weigh against these other policies.	Supreme Court	2016/05		1
60(e)	Should 2 days be changed to 3? Other, more substantive issues.	E-filing subcommittee Paul Burke	2015/11	E-filing amendments pending.	3
Multiple	Incorporate SO2 into Rule 35, SO4 into Rule 24, and SO9 into Rule 23 or 29. Standing Orders 5 & 6 are special procedures for judicial discipline. Would have to be new rules. How much do they differ from regular procedures?			Add express prohibitions from SO 2 to R35 and repeal.	3
Multiple	E-filing	E-filing subcommittee	2016/01	Amendments drafted. Comments closed 4/1/2016	1

Rule	Topic	Raised by	Pending since	Status	Priority
None	Integrate the forms at end of URAP, with http://www.utcourts.gov/howto/appeals/				
None	Add brief template to webpage.			Develop i/a/w new Rule 24.	

Standing Order 2. Petitions for Rehearing will be accepted pursuant to Rule 35 of the Utah Rules of Appellate Procedure in cases which have received plenary review by the Court and a full opinion has been published, either as a signed opinion or per curiam. [Rule 35 adds memorandum decision.]

No petition for rehearing in interlocutory appeals which have been denied (Rule 5), motions for summary disposition which have been granted or denied (Rule 10), petitions for writs of certiorari which have been denied (Rule 49), and motions to remand for findings under Rule 23B when granted or denied.

Standing Order 4. describes the citation format.

Standing Orders 5 & 6. Special procedures for judicial discipline. Would have to be new rules. How much do they differ from regular procedures?

Standing Order 9. Absent extraordinary circumstances, the Supreme Court will not rule on a motion prior to oral argument if the motion is filed less than thirty days before the date scheduled for oral argument. If it appears the moving party had an opportunity to file the motion more than thirty days before oral argument, the failure to file it in a more timely manner may be deemed to constitute an independent justification for its denial.

Tab 3

Extension of Time to File an Appeal Since 2010

case_num	filing_date	locn_descr	title	appeal date	Sentence Date	Days Between
131701195	Jul 26, 2013	Farmington District	Motion to Reinstate Period for Filing a Direct Appeal Utah R App P Rule 4 (F)	Feb 2, 2016	Jan 8, 2014	755
131701202	Jul 29, 2013	Farmington District	Motion to Reinstate Period for Filing a Direct Appeal Utah R App P Rule 4 (F)	Feb 2, 2016	Jan 8, 2014	755
111901766	Aug 9, 2011	Ogden District	Motion: U.R. App. Proc. Rule 4 (f) Appeal as of Right	Apr 24, 2013	Nov 19, 2012	156
131500007	Jan 10, 2013	Silver Summit District	Motion to Reinstate Period for Filing a Direct Appeal (Utah Rules of Appellate Procedure 4(f))	Aug 21, 2015	Apr 22, 2013	851
131901775	Sep 5, 2013	Ogden District	Motion to Reinstate Appeal Rights Pursuant to U.R.A.P Rule 4 (F)	Jan 21, 2016	Nov 6, 2013	806

Tab 4



Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210
Appellate Clerks' Office
Telephone 801-578-3900

May 31, 2016

Matthew B. Durrant
Chief Justice
Thomas R. Lee
Associate Chief Justice
Christine M. Durham
Justice
Deno G. Himonas
Justice
John A. Pearce
Justice

To: Appellate Rules Committee
From: Tim Shea *T. Shea*
Re: PCRA appeals

I believe the most effective way of including all of the records from a criminal conviction as part of the record in a PCRA appeal is to expressly make them part of the record in the district court PCRA proceedings. I recommend amending Rule of Civil Procedure 65C.

The PCRA statutes—Section 78B-9-104(2) and Section 78B-9-105(1)—clearly intend that the district court judge consider the entire record of the criminal prosecution, but the experience of practitioners is that the criminal record is not always included in its entirety as part of the PCRA appeal. The proposed amendment makes the criminal record part of the civil proceedings by operation of law, so it would be available to the appellate court in its entirety, even if the district court judge failed to consider some part of it.

Our current appellate Rule 11 is sufficient to direct the district court clerk to include the criminal record in the PCRA appeal if it is not included originally. And our proposed amendment to Rule 11 is sufficient to require that the criminal record be scanned if it exists only in paper.

If the committee agrees, we would work with the civil rules committee to make the change.

This issue came to light during the discussion about appellate electronic access to trial court records in a case that is not on appeal. Are there any other circumstances in which the records of a case not on appeal would not have been made part of the trial court proceedings in a case that is on appeal?

1 **Rule 65C. Post-conviction relief.**

2 **(a) Scope.** This rule governs proceedings in all petitions for post-conviction relief filed under the Post-
3 Conviction Remedies Act, Utah Code [Title 78B, Chapter 9](#). The Act sets forth the manner and extent to
4 which a person may challenge the legality of a criminal conviction and sentence after the conviction and
5 sentence have been affirmed in a direct appeal under [Article I, Section 12](#) of the Utah Constitution, or the
6 time to file such an appeal has expired.

7 **(b) Procedural defenses and merits review.** Except as provided in paragraph (h), if the court
8 comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether
9 that claim is independently precluded under Section [78B-9-106](#).

10 **(c) Commencement and venue.** The proceeding shall be commenced by filing a petition with the
11 clerk of the district court in the county in which the judgment of conviction was entered. The petition
12 should be filed on forms provided by the court. The court may order a change of venue on its own motion
13 if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for
14 the convenience of the parties or witnesses.

15 **(d) Contents of the petition.** The petition shall set forth all claims that the petitioner has in relation to
16 the legality of the conviction or sentence. The petition shall state:

17 (d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

18 (d)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of
19 proceedings in which the conviction was entered, together with the court's case number for those
20 proceedings, if known by the petitioner;

21 (d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to
22 relief;

23 (d)(4) whether the judgment of conviction, the sentence, or the commitment for violation of
24 probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding,
25 the issues raised on appeal, and the results of the appeal;

26 (d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-
27 conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the
28 issues raised in the petition, and the results of the prior proceeding; and

29 (d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons
30 why the evidence could not have been discovered in time for the claim to be addressed in the trial,
31 the appeal, or any previous post-conviction petition.

32 **(e) Attachments to the petition.** If available to the petitioner, the petitioner shall attach to the
33 petition:

34 (e)(1) affidavits, copies of records and other evidence in support of the allegations;

35 (e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct
36 appeal of the petitioner's case;

37 (e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil
38 proceeding that adjudicated the legality of the conviction or sentence; and

39 (e)(4) a copy of all relevant orders and memoranda of the court.

40 **(f) Memorandum of authorities.** The petitioner shall not set forth argument or citations or discuss
41 authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall
42 be filed with the petition.

43 **(g) Assignment.** On the filing of the petition, the clerk shall promptly assign and deliver it to the judge
44 who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall
45 assign the case in the normal course.

46 **(h)(1) Summary dismissal of claims.** The assigned judge shall review the petition, and, if it is
47 apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the
48 petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating
49 either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent
50 by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal.
51 The order of dismissal need not recite findings of fact or conclusions of law.

52 (h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the
53 pleadings and attachments, it appears that:

54 (h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

55 (h)(2)(B) the claim has no arguable basis in fact; or

56 (h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the
57 filing of the petition.

58 (h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to
59 comply with the requirements of this rule, the court shall return a copy of the petition with leave to
60 amend within 21 days. The court may grant one additional 21-day period to amend for good cause
61 shown.

62 (h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a
63 case where the petitioner is sentenced to death.

64 **(i) Service of petitions.** If, on review of the petition, the court concludes that all or part of the petition
65 should not be summarily dismissed, the court shall designate the portions of the petition that are not
66 dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail
67 upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is
68 the state of Utah represented by the Attorney General. In all other cases, the respondent is the
69 governmental entity that prosecuted the petitioner.

70 **(j) Appointment of pro bono counsel.** If any portion of the petition is not summarily dismissed, the
71 court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent
72 the petitioner in the post-conviction court or on post-conviction appeal. In determining whether to appoint
73 counsel the court shall consider whether the petition or the appeal contains factual allegations that will

74 require an evidentiary hearing and whether the petition involves complicated issues of law or fact that
75 require the assistance of counsel for proper adjudication.

76 **(k) Answer or other response.** Within 30 days after service of a copy of the petition upon the
77 respondent, or within such other period of time as the court may allow, the respondent shall answer or
78 otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer
79 or other response upon the petitioner in accordance with Rule [5\(b\)](#). Within 30 days (plus time allowed for
80 service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may
81 respond by memorandum to the motion. No further pleadings or amendments will be permitted unless
82 ordered by the court.

83 **(l) Hearings.** After pleadings are closed, the court shall promptly set the proceeding for a hearing or
84 otherwise dispose of the case. The court may also order a prehearing conference, but the conference
85 shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing
86 conference, the court may:

87 (l)(1) consider the formation and simplification of issues;

88 (l)(2) require the parties to identify witnesses and documents; and

89 (l)(3) require the parties to establish the admissibility of evidence expected to be presented at the
90 evidentiary hearing.

91 **(m) Presence of the petitioner at hearings.** The petitioner shall be present at the prehearing
92 conference if the petitioner is not represented by counsel. The prehearing conference may be conducted
93 by means of telephone or video conferencing. The petitioner shall be present before the court at hearings
94 on dispositive issues but need not otherwise be present in court during the proceeding. The court may
95 conduct any hearing at the correctional facility where the petitioner is confined.

96 **(n) Discovery; records.**

97 (n)(1) Discovery under Rules [26](#) through [37](#) shall be allowed by the court upon motion of a party
98 and a determination that there is good cause to believe that discovery is necessary to provide a party
99 with evidence that is likely to be admissible at an evidentiary hearing.

100 (n)(2) The court may order either the petitioner or the respondent to obtain any relevant transcript
101 or court records.

102 (n)(3) All records from the criminal case under review, including the records in an appeal of that
103 conviction, are deemed part of the trial court record in the petition for post-conviction relief.

104 **(o) Orders; stay.**

105 (o)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and
106 conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony
107 conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give
108 written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new
109 sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these
110 rules and by the [Rules of Appellate Procedure](#).

111 (o)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay
112 shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release
113 the petitioner.

114 (o)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial
115 court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail,
116 discharge, or other matters that may be necessary and proper.

117 **(p) Costs.** The court may assign the costs of the proceeding, as allowed under Rule [54\(d\)](#), to any
118 party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the
119 governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of
120 Corrections, Utah Code [Title 78A, Chapter 2, Part 3](#) governs the manner and procedure by which the trial
121 court shall determine the amount, if any, to charge for fees and costs.

122 **(q) Appeal.** Any final judgment or order entered upon the petition may be appealed to and reviewed
123 by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to
124 those courts.

125 [Advisory Committee Notes](#)

126

Tab 5

Rule 25A. Challenging the constitutionality of a statute or ordinance.

(a) Notice to the Attorney General or the county or municipal attorney; penalty for failure to give notice.

(a)(1) When a party challenges the constitutionality of a statute in an appeal or petition for review in which the Attorney General has not appeared, every party must serve its principal brief and any subsequent brief on the Attorney General on or before the date the brief is filed.

(a)(2) When a party challenges the constitutionality of an ordinance in an appeal or petition for review in which the responsible county or municipal attorney has not appeared, every party must serve its principal brief and any subsequent brief on the county or municipal attorney on or before the date the brief is filed.

(a)(3) If an appellee or cross-appellant is the first party to challenge the constitutionality of a statute or ordinance, the appellant must serve its principal brief on the Attorney General or the county or municipal attorney no more than 7 days after receiving the appellee’s or the cross-appellant’s brief and must serve its reply brief on or before the date it is filed.

(a)(4) Every party must serve its brief on the Attorney General by email or mail at the address specified by it and must file proof of service with the court.

(a)(5) If a party does not serve a brief as required by this rule, a court may order that party to pay the costs, expenses, and attorney fees of any party affected by that failure.

(b) Notice by the Attorney General or county or municipal attorney; amicus brief.

(b)(1) Within 14 days after service of the brief that presents a constitutional challenge the Attorney General or other government attorney will notify the appellate court whether it intends to file an amicus brief. The Attorney General or other government attorney may seek up to an additional 7 days’ extension of time from the court. Should the Attorney General or other government attorney decline to file an amicus brief, that entity should plainly state the reasons therefor.

(b)(2) If the Attorney General or other government attorney declines to file an amicus brief, the briefing schedule is not affected.

(b)(3) If the Attorney General or other government attorney intends to file an amicus brief, that brief will come due 30 days after the notice of intent is filed. Each governmental entity may file a motion to extend that time as provided under Rule 22. On a governmental entity filing a notice of a intent, the briefing schedule established under Rule 13 is vacated, and the next brief of a party will come due 30 days after the amicus brief is filed.

(c) Call for the views of the Attorney General or county or municipal attorney. Any time a party challenges the constitutionality of a statute or ordinance, the appellate court may call for the views of the Attorney General or of the county or municipal attorney and set a schedule for filing an amicus brief and supplemental briefs by the parties, if any.

Advisory Committee Notes

Service on the Attorney General must be sent to:

<u>Email</u>	<u>Mail</u>
<u>TBD</u>	<u>TBD</u>

38

Tab 6

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~~ Any party aware of circumstances which have transpired subsequent to the filing of the appeal or other proceeding ~~which that likely~~ render moot one or more of the issues ~~raised presented for review must.~~ ~~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~~ file 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~~ before 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~~ must be filed with the motion ~~for voluntary dismissal. Any such~~ The stipulation shall specify the terms as to payment of costs and attorney fees, if applicable, and provide for payment of whatever fees are due. If all parties stipulate in writing that a case be dismissed, specifying the terms for payment of applicable costs and attorney fees, and pay any fees then due the court, the clerk of the court will enter an order dismissing the appeal or other proceeding.

(c) When affidavit or declaration is required. ~~If the appellant has the right to effective assistance of counsel, a motion to voluntarily dismiss for voluntary dismissal for reasons other than mootness shall~~ 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 made with knowledge of the right to an appeal and ~~an understanding of the consequences of voluntary dismissal.~~ If an attorney representing the appellant has lost communication with the appellant, the motion must be accompanied by the attorney's affidavit or declaration to that effect and stating the basis of the motion.

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

Advisory Committee Notes

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 Paragraph (c) assures that the decision to abandon an appeal is an informed choice made by the appellant, not ~~unilaterally by~~ the appellant's attorney.

Tab 7



Timothy M. Shea
Appellate Court Administrator

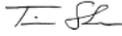
Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210
Appellate Clerks' Office
Telephone 801-578-3900

May 31, 2016

Matthew B. Durrant
Chief Justice
Thomas R. Lee
Associate Chief Justice
Christine M. Durham
Justice
Deno G. Himonas
Justice
John A. Pearce
Justice

To: Appellate Rules Committee
From: Tim Shea 
Re: Rule 40

The Supreme Court asked me to draft amendments to Rule 40 to better describe the grounds for sanctions imposed by the court, the process, and what those sanctions might be. I've been through the rules of a few other jurisdictions to develop the attached proposal.

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

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

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

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

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

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

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

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

20 **(c) Sanctions and discipline of attorneys and parties.**

21 ~~(c)(1) The court may, after reasonable notice and an opportunity to show cause to the contrary,~~
22 ~~and upon hearing, if requested, take appropriate action~~ enter a discipline order against any an
23 attorney or person a self-represented party who practices appears before it for inadequate
24 representation of a client, conduct unbecoming a member of the Bar or a person allowed to appear
25 before the court, an attorney or a self-represented party or for failure to comply with these rules or a
26 court order of the court. In addition the court may enter a discipline order against an attorney for
27 inadequate representation of a client.

28 (c)(2) When alleged conduct constituting grounds for discipline comes to the attention of the
29 court, the court may enter an order to show cause why a discipline order should not be entered. The
30 order to show cause will describe the alleged conduct, and the clerk of the court will send the order to
31 the attorney or self-represented party.

32 (c)(3) No later than 14 days after receiving the order the self-represented party or attorney may
33 file a memorandum showing cause why a discipline order should not be entered and may request a
34 hearing.

35 (c)(4) If the self-represented party or attorney fails to show cause why a discipline order should
36 not be entered, the court may enter the order, which may include suspension from practice before the

37 court for a definite or indefinite term; reprimand; financial penalty; or any other appropriate sanction
38 other than disbarment or suspension from the practice of law.

39 (c)(5) A financial penalty is the personal responsibility of the person disciplined, and may not be
40 reimbursed by a client. A person suspended from practice before the court for a definite term is
41 automatically reinstated at the end of the term. A person suspended from practice before the court for
42 an indefinite term may be reinstated only by order of the court. A person suspended from practice
43 before the court who represents clients before the court must promptly notify the clients of the term of
44 the suspension.

45 ~~(c)(6) Any action to suspend or disbar a member of the Utah State Bar shall be referred~~ If the
46 person disciplined is an attorney, the clerk of the court will promptly send the discipline order to the
47 Office of Professional Conduct of the Utah State Bar.

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

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

56 **Advisory Committee Notes**

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

63