

Agenda

Advisory Committee on Rules of Appellate Procedure

May 2, 2019

12:00 to 1:30 p.m.

Scott M. Matheson Courthouse

450 South State Street, Salt Lake City, UT

Executive Dining Room (1st floor inside Café)

ACTION: Welcome and approval of April 2019 minutes	Tab 1	Paul C. Burke, Chairman
DISCUSSION AND ACTION: Manner of service in the appellate courts under Rules 21 and 26 and adding language to Rule 26 regarding appellee <i>not</i> filing a brief	Tab 2	Mary Westby and Lisa Collins
DISCUSSION AND ACTION: Review updated language in intervention rules: URAP 25A, URCrP 12, and URCP 24	Tab 3	Nancy Sylvester
DISCUSSION AND ACTION: Continue discussion of Appellate Representation recommendation to amend URAP 1 to add parental termination to child welfare procedures	Tab 4	Nancy Sylvester and Margaret Lindsay
DISCUSSION AND ASSIGNMENTS: <ul style="list-style-type: none">• Advisory committee notes project• Unrepresented litigants and the appellate rules• Judicial efficiency		Paul C. Burke, Judge Gregory Orme
DISCUSSION: Other business		Paul C. Burke

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

Meeting schedule:

June 6, 2019

December 5, 2019

July 11, 2019

August 1, 2019

September 5, 2019

October 3, 2019

November 7, 2019

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, April 4, 2019
12:00 p.m. to 1:30 p.m.

PRESENT

Christopher Ballard
Troy Booher
Paul Burke- Chair
R. Shawn Gunnarson
Alan Mouritsen
Judge Gregory Orme
Adam Pace – Recording Secretary
Judge Jill Pohlman
Lori Seppi
Nancy Sylvester- Staff
Mary Westby

EXCUSED

Lisa Collins
Cathy Dupont- Staff
Rodney Parker
Bridget Romano
Clark Sabey
Ann Marie Taliaferro

1. Welcome and approval of March 2019 minutes

Paul Burke

Mr. Burke welcomed the committee to the meeting and invited a motion to approve the minutes from the last meeting. *Ms. Westby moved to approve the minutes from the March 2019 meeting. Ms. Seppi seconded the motion and it passed unanimously.* The committee also expressed congratulations to Ms. Collins on her recent marriage.

2. Discussion and Action: Manner of service in the appellate courts under Rules 21 and 26

Mary Westby
Lisa Collins

Ms. Westby introduced proposed amendments to appellate rules 21 and 26 to allow service by email. She explained that the changes to Rule 26 incorporate the court's standing order regarding service of briefs. Ms. Westby said that Ms. Collins has not had a chance to review these proposed amendments yet, and suggested that the committee should wait for her input because she will be the one that has to implement the changes.

Ms. Westby suggested amending lines 39-40 of rule 26 to read: "...paper copies must be ~~served-delivered~~ on counsel for each party separately represented unless ~~service~~ **delivery** of paper copies is waived." She said that service is accomplished by sending the email, so the paper copies are really just follow-up deliveries.

Mr. Ballard suggested amending line 5 of Rule 26 to read: "...will be considered timely if the email is ~~received~~ **sent** before midnight on the last day for..." He said that the party filing a brief by email has no control over when the email is received, and that this requirement seems inconsistent with the standard for briefs filed by mail, which are considered timely if they are mailed before midnight on the day they are due. Ms. Westby said that the standing order and case-law say "received," and that the risk that it is not timely received is on the filer. Mr. Ballard said that an email sent at 11:59 p.m. on the due date should be considered timely, even if the court's email server does not receive it until after 12:00 a.m. the next day. Judge Orme said that for non-jurisdictional issues, the court would overlook the fact that a brief was emailed late as long as it was there the next morning.

Mr. Burke seconded Mr. Ballard's motion to make the change to line 5 of Rule 26. Judge Pohlman said that it is difficult for the court to determine when an email is sent and that it is easier to see when an email is received. She doesn't want to be in a position of having to determine whether an email was timely sent. She also said that she wants to hear Ms. Collins' input on this issue before it is decided. Ms. Seppi asked if parties are going to have to litigate this issue every time an email is received after midnight on the due date. She also commented that Rule 21 says that service by email is complete on sending. Ms. Westby noted that when a party fails to file a brief on time the court's practice is to give that party an additional seven days to file it anyway. Mr. Burke said that Rules 21 and 26 need to be consistent on this issue.

Mr. Ballard also proposed amending lines 6-8 of Rule 26 to read: "Briefs ~~filed in~~ **emailed to** the Supreme Court ~~may~~ **must** be sent to: supremecourt@utcourts.gov. Briefs ~~filed in~~ **emailed to** the Court of Appeals ~~may~~ **must** be sent to: courtofappeals@utcourts.gov."

Mr. Ballard also proposed updating the cross-references to Rule 26 that are contained in Rules 22(b)(1) and 25. Ms. Sylvester suggested changing the cross-references to something more generic that does not have to be updated every time a rule is amended.

Mr. Mouritsen suggested changing Rule 26(c) to require delivery of paper copies to counsel only if requested—rather than requiring delivery unless the requirement is waived.

Judge Orme suggested changing "must" in line 17 of Rule 26 to "may." He said that appellees are not required to file briefs.

At Mr. Burke's suggestion, the committee agreed to table this discussion until next month to give Ms. Collins a chance to comment on the proposed amendments.

3. Discussion and Action: Writ of Certiorari amendments Rules 45, 47, and 49

Christopher Ballard

Ms. Ballard introduced proposed amendments to clarify that appellate rules 45-51 also apply to cross-petitions for certiorari. Mr. Ballard proposed adding language to either rule 45 or 47 to address this. He thinks rule 45 is the best place for it. Ms. Westby agreed that the language fits better in rule 45. Mr. Gunnarson asked if it would be better to specifically reference cross-petitioners in each rule, rather than have a generic statement in Rule 45. Mr. Burke suggested using Mr. Ballard's proposed language in Rule 45, prefaced by the phrase "unless the rule otherwise requires."

Mr. Ballard moved to amend Rule 45 to create a subpart (b) that says: "Unless the rule requires otherwise, every reference in Rules 45 through 51 to a petition or petitioner includes a cross-petition or cross-petitioner, respectively." Mr. Mouritsen seconded the motion and it passed unanimously.

Mr. Ballard also moved to fix an incorrect cross-reference to Rule 47(c) in Rule 49(a)(6)(C). He said that the cross-reference should actually be to Rule 48(d)(1)(B). Judge Pohlman seconded the motion and it passed unanimously.

**4. Discussion and Action: Coordination of intervention rules: Nancy Sylvester
URAP 25A, URCP 12, and URCP 24**

Last year, a subcommittee consisting of representatives from the appellate, criminal, and civil rules committees studied how to better coordinate civil rule 24, appellate rule 25A, and criminal rule 12 regarding intervention when the constitutionality of a statute or ordinance is challenged. Ms. Sylvester asked the committee to review these three rules and discuss whether further changes should be made to appellate rule 25A.

Mr. Ballard pointed out that rule 25A does not specify how much time a governmental entity will be given at oral argument if it files an amicus brief. Mr. Booher said, and Judge Orme agreed, that this is something that needs to be decided on a case-by-case basis. Mr. Booher suggested amending Rule 25A(d) to require that a governmental entity who files an amicus brief provide notice that it wants to participate at oral argument, and then leave it up to the court to decide how much time the governmental entity will be given. Mr. Ballard said he agreed with that approach so long as it is clear that the governmental agency will be permitted to participate in oral argument if it wants to do so.

Mr. Ballard proposed amending Rule 25A(d) to say: "If the Attorney General or district, county, or municipal attorney files an amicus brief, the Attorney General or district, county, or municipal attorney will be permitted to participate at oral argument **by providing notice to the court at least 28 days before oral argument.**" Mr. Burke proposed that the committee adopt that amendment by consensus and continue its discussion.

Mr. Burke asked if the addition of the term "district" in Rule 25A(d) is confusing. There are many different types of districts (school districts, water districts, etc.) that may be outside the scope of the intended purpose of this rule. The committee discussed changing the references to governmental attorneys throughout Rule 25A to say "an attorney representing a governmental entity."

Mr. Burke suggested that the committee table this issue for now and review a clean draft of these proposed changes at the next meeting.

5. Discussion and Action: Discussion of Appellate Representation recommendations to amend URAP 1 and 58 and CJA 11-401, and repeal URAP 38B Nancy Sylvester

Ms. Sylvester summarized the committee's prior discussions about the proposal to amend Code of Judicial Administration Rule 11-401 and Appellate Rules 1 and 58, and repeal appellate rule 38B (see minutes from the March 2018 meeting). The committee discussed whether Rule 38B should be repealed in light of the fact that its contents have been moved to CJA Rule 11-401. Judge Orme said that he supports repealing Rule 38B now that CJA Rule 11-401 is in place, but rather than repealing it entirely, he suggested leaving something in its place that explains that the rule has been repealed and that the subject matter is now governed by CJA Rule 11-401. Mr. Gunnarson suggested that someone write an article in the bar journal about this change or take other steps to inform practitioners about it. Ms. Sylvester said that these changes will be sent out for public comment and the soonest they will likely be adopted is November 1, 2019.

Judge Orme moved to repeal Rule 38B and replace it with language stating that the rule has been repealed and that its subject matter is now governed by CJA Rule 11-401. Mr. Mouritsen seconded the motion and it passed unanimously.

Ms. Sylvester introduced an issue dealing with tension between appellate Rule 55 and the child welfare appellate roster, which is outlined in more detail in her memorandum attached as Tab 5 to the meeting materials. She proposed amending Rule 58 to create a new subpart (b) that says:

(b) If the Court of Appeals sets the case for briefing under rule 24 and the petitioner has appointed counsel, the Court of Appeals will remand for the limited purpose of the juvenile court appointing appellate counsel pursuant to Rule 11-401 of the Utah Code of Judicial Administration. If the issue to be briefed is ineffective assistance of counsel, the Court of Appeals may order the juvenile court to appoint conflict counsel pursuant to Rule 11-401 of the Utah Code of Judicial Administration within 15 days for briefing and argument.

Ms. Westby said that the reference to ineffective assistance and conflict counsel is no longer necessary because with the new appellate roster, there is going to be appellate counsel handling the appeal, and not trial counsel. The committee agreed that the second sentence of the new proposed subpart (b) should be deleted.

Mr. Booher commented on the practical difficulty of raising an ineffective assistance of counsel claim under this framework. If appellate counsel is routinely appointed in these cases, how do they raise the IAC claim if trial counsel failed to identify it in the Rule 55 petition? Does the Rule 55 petition operate to narrow the issues that may be considered on appeal? If so that is a real problem, because there is no opportunity to raise the IAC claim through a later petition for relief under the PCRA in these types of cases. Ms. Westby said this is a good question that will

likely be litigated at some point. Perhaps the committee should consider these rules further to see if there is a better solution.

Mr. Burke invited a motion. Mr. Gunnarson moved to amend Rule 58 by adding a subpart (b) that states: “(b) If the Court of Appeals sets the case for briefing under rule 24 and the petitioner has appointed counsel, the Court of Appeals will remand to the juvenile court to appoint appellate counsel pursuant to Rule 11-401 of the Utah Code of Judicial Administration.” The motion was seconded and it passed unanimously.

Ms. Sylvester introduced a proposal to amend appellate Rule 1(f) to include a reference to district court orders related to the termination of parental rights. Mr. Burke suggested tabling this issue until next month’s meeting so that the committee can devote more time to discussing it.

**6. Discussion and Assignments: Advisory committee notes project; Paul Burke
Unrepresented litigants and the appellate rules; Judicial efficiency Judge Orme**

Mr. Burke asked for volunteers to serve on the three new subcommittees that are being formed to address: 1) making the rules more accessible to self-represented parties; 2) reviewing the advisory committee notes; and 3) considering ways to promote efficiency in the appellate process. Mr. Burke suggested that each sub-committee have four members, and meet a few times over the next few months before reporting to the full committee.

The committee discussed and agreed on the following subcommittee assignments:

Appellate efficiency: Ms. Seppi, Mr. Ballard, Ms. Westby, Judge Pohlman, Mr. Booher

Advisory committee note review: Judge Orme, Mr. Mouritsen, Mr. Parker

Self-representation: Ms. Collins, Ms. Westby

7. Other business

The committee did not discuss other business.

8. Adjourn

The meeting was adjourned. The next meeting will be held on May 2, 2019.

Tab 2

1 **Rule 21. Filing and service.**

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

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

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

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

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

26 (f) Filing by inmate.

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

29 (f)(2) Papers filed by an inmate are timely filed if they are deposited in the institution's
30 internal mail system on or before the last day for filing. Timely filing may be shown by a
31 contemporaneously filed notarized statement or written declaration setting forth the date of

32 deposit and stating that first-class postage has been, or is being, prepaid, or that the inmate has
33 complied with any applicable requirements for legal mail set by the institution. Response time
34 will be calculated from the date the papers are received by the court.

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

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1 **Rule 26. Filing and service of briefs.**

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

11 (b) Timing for service and filing of briefs. The appellant must serve and file a principal brief
 12 within 40 days after date of notice from the clerk of the appellate court pursuant to Rule 13. If a
 13 motion for summary disposition of the appeal or a motion to remand for determination of
 14 ineffective assistance of counsel is filed after the Rule 13 briefing notice is sent, service and
 15 filing of appellant's principal brief ~~shall~~must be within 30 days from the denial of such motion.
 16 The appellee, or in cases involving a cross-appeal, the cross-appellant, ~~shall~~may serve and file a
 17 principal brief within 30 days after service of the appellant's principal brief. In cases involving
 18 cross-appeals, the appellant ~~shall~~may serve and file the appellant's reply brief described in Rule
 19 24A(d) within 30 days after service of the cross-appellant's principal brief. A reply brief may be
 20 served and filed by the appellant or the cross-appellant in cases involving cross-appeals. If a reply
 21 brief is filed, it ~~shall~~must be served and filed within 30 days after the filing and service of the
 22 appellee's principal brief or the appellant's reply brief in cases involving cross-appeals. If oral
 23 argument is scheduled fewer than 35 days after the filing of appellee's principal brief, the reply
 24 brief must be filed at least 5 days prior to oral argument. By stipulation filed with the court in
 25 accordance with Rule 21(a), the parties may extend each of such periods for no more than 30
 26 days. A motion for enlargement of time need not accompany the stipulation. No such stipulation
 27 ~~shall~~will be effective unless it is filed prior to the expiration of the period sought to be extended.

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

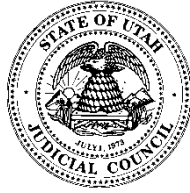
31 | ~~eight~~six (6) paper copies of each brief, one of which shall contain an original signature, ~~shall~~
32 | ~~must be filed-~~ with the Clerk of the Court of Appeals. ~~Two~~If a brief was filed by email, the
33 | required paper copies- ~~shall~~ of the brief must be delivered no more than seven days after filing. If
34 | a brief is served- ~~on~~ by email, upon request two paper copies must be delivered to counsel for
35 | each party separately ~~represented-~~ requesting paper copies.

36 | (d) ~~(e)~~ Consequence of failure to file principal briefs. If an appellant fails to file a principal
37 | brief within the time provided in this rule, or within the time as may be extended by order of the
38 | appellate court, an appellee may move for dismissal of the appeal. If an appellee fails to file a
39 | principal brief within the time provided by this rule, or within the time as may be extended by
40 | order of the appellate court, an appellant may move that the appellee not be heard at oral
41 | argument.

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

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Tab 3



Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

MEMORANDUM

Hon. Mary T. Noonan
Interim State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

To: Advisory Committee on the Utah Rules of Appellate Procedure
From: Nancy Sylvester *Nancy D. Sylvester*
Date: April 26, 2019
Re: Intervention rules

At your last meeting, this committee discussed changing the references to governmental attorneys throughout Rule 25A to say “an attorney representing a governmental entity.” I amended Rule 25A, Civil Rule 24, and Criminal Rule 12 along that line and presented all three rules to the Civil Rules Committee. The Civil Rules Committee declined to adopt this committee’s suggested terminology in Civil Rule 24 (d)(2). The Committee instead referred to the county or municipality, rather than the attorney of those entities, and referenced [Civil Rule 4\(d\)\(1\)](#) regarding whom to notify.

Ideally, these rules would coordinate as much as possible, but there may be a good reason for them to differ. I have included two Rule 25A options for this committee to review.

**The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.**

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

(a) **Notice to the Attorney General or ~~the county or municipal attorney~~ attorney representing the governmental entity; 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 a county or municipal 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 attorney representing the governmental entity ~~county or municipal attorney~~ on or before the date the brief is filed, and file proof of service with the court.

(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~~ the attorney representing the governmental entity 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, if circumstances prevent service by email, by mail at the addresses below, ~~or mail at the following address and must~~ file proof of service with the court.

Email:

notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

29 | ~~320 Utah State Capitol~~
30 | P.O. Box 142320
31 | Salt Lake City, Utah 84114-2320

32 | (a)(5) If a party does not serve a brief as required by this rule and supplemental
33 | briefing is ordered as a result of that failure, a court may order that party to pay the
34 | costs, expenses, and attorney fees of any other party resulting from that failure.

35 | (b) **Notice by the Attorney General or the attorney representing the**
36 | **governmental entity ~~county or municipal attorney~~; amicus brief.**

37 | (b)(1) Within 14 days after service of the brief that presents a constitutional
38 | challenge the Attorney General or ~~other government~~ attorney representing the
39 | governmental entity will notify the appellate court whether ~~it~~ the entity intends to file
40 | an amicus brief. The Attorney General or ~~other government~~ attorney representing the
41 | governmental entity may seek up to an additional 7 days' extension of time from the
42 | court. Should the Attorney General or ~~other government~~ attorney representing the
43 | governmental entity decline to file an amicus brief, that entity should plainly state the
44 | reasons therefor.

45 | (b)(2) If the Attorney General or ~~other government~~ attorney representing the
46 | governmental entity declines to file an amicus brief, the briefing schedule is not
47 | affected.

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

54 | (c) **Call for the views of the Attorney General or attorney representing the**
55 | **governmental entity ~~county or municipal attorney~~.** Any time a party challenges the
56 | constitutionality of a statute or ordinance, the appellate court may call for the views of

Comment [NS1]: Isn't the court calling for the views of the entity? So for example, the municipality uses a contract attorney for its legal work, it wouldn't be that attorney's views the court wants. It's the entity's. The attorney is just representing that entity. It's a little different with the AG, which is an elected position and thus an entity itself. Sean Reyes is not personally responding but is instead using his staff to file a response. This has parallels to the municipality and contract attorney situation.

57 | the Attorney General or ~~of the county or municipal attorney~~ the attorney representing
58 | the governmental entity and set a schedule for filing an amicus brief and supplemental
59 | briefs by the parties, if any.

60 | (d) **Participation in oral argument.** If the Attorney General or other attorney
61 | representing the governmental entity ~~county or municipal attorney~~ files an amicus
62 | brief, the Attorney General or other attorney representing the governmental
63 | entity ~~county or municipal attorney~~ will be permitted to participate at oral argument by
64 | providing notice to the court at least 28 days before oral argument.

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

2 **(a) Notice to the Attorney General or the county or municipality; penalty for**
3 **failure to give notice.**

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

8 (a)(2) When a party challenges the constitutionality of a county or municipal
9 ordinance in an appeal or petition for review in which the ~~responsible~~ county or
10 municipality ~~attorney~~ has not appeared, every party must serve its principal brief and
11 any subsequent brief on the county or municipality ~~attorney~~ on or before the date the
12 brief is filed, and file proof of service with the court.

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

18 (a)(4) Every party must serve its brief on the Attorney General by email or, if
19 circumstances prevent service by email, by mail at the addresses below, ~~or mail at the~~
20 ~~following address and must~~ file proof of service with the court.

21 Email:

22 notices@agutah.gov

23 Mail:

24 Office of the Utah Attorney General

25 Attn: Utah Solicitor General

26 350 North State Street, Suite 230

27 ~~320 Utah State Capitol~~

28 P.O. Box 142320

29 Salt Lake City, Utah 84114-2320

30 (a)(5) If a party does not serve a brief as required by this rule and supplemental
31 briefing is ordered as a result of that failure, a court may order that party to pay the
32 costs, expenses, and attorney fees of any other party resulting from that failure.

33 (b) **Notice by the Attorney General or county or municipality attorney;**
34 **amicus brief.**

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

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

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

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

55 (d) **Participation in oral argument.** If the Attorney General or county or
56 municipality ~~attorney~~ files an amicus brief, the Attorney General or attorney

57 | representing the county or municipality attorney will be permitted to participate at oral
58 | argument by providing notice to the court at least 28 days before oral argument.

1 **Rule 24. Intervention.**

2 **(a) Intervention of right.** ~~Upon, On~~ timely application ~~motion~~, the court must permit anyone shall be
3 permitted to intervene in an action: ~~who:~~

4 (1) ~~when a statute confers~~ is given an unconditional right to intervene by a statute; or

5 (2) ~~when the applicant~~ claims an interest relating to the property or transaction ~~which~~ that is the
6 subject of the action, ~~and the applicant~~ is so situated that ~~the disposition~~ disposing of the action may
7 as a practical matter impair or impede the ~~applicant's~~ movant's ability to protect ~~that~~ its interest, unless
8 ~~the applicant's interest is adequately represented by existing parties~~ adequately represent that
9 interest.

10 **(b) Permissive intervention.** ~~Upon,~~

11 **(1) In General.** ~~On~~ timely application ~~motion~~, the court may permit anyone may be permitted to
12 intervene in an action: ~~(1) when a statute confers~~ who:

13 **(A)** is given a conditional right to intervene by a statute; or ~~(2) when an applicant's~~

14 **(B)** has a claim or defense ~~and~~ that shares with the main action ~~have a common~~ question of
15 law or fact ~~in common. When a party to an action bases.~~

16 **(2) By a Government Officer or Agency.** On timely motion, the court may permit a federal or
17 state governmental officer or agency to intervene if a party's claim or defense upon any is based on:

18 **(A)** a statute or executive order administered by ~~a governmental~~ the officer or agency; ~~or upon~~

19 **(B)** any regulation, order, requirement, or agreement issued or made ~~pursuant to~~ under the
20 statute or executive order, ~~the officer or agency upon timely application may be permitted to~~
21 intervene in the action.

22 **(3) Delay or Prejudice.** In exercising its discretion, the court ~~shall~~ must consider whether the
23 intervention will unduly delay or prejudice the adjudication of the ~~rights of the original parties~~ parties'
24 rights.

25 **(c) Procedure. Notice and Pleading Required.** ~~A person desiring~~ motion to intervene shall ~~serve a~~
26 motion to intervene upon ~~must be served on~~ the parties as provided in ~~Rule~~ Rule 5. The ~~motions~~
27 motion ~~must~~ state the grounds ~~therefor~~ for intervention and ~~shall be accompanied by a pleading~~
28 setting forth that sets out the claim or defense for which intervention is sought.

29 **(d) Constitutionality of Utah statutes and ordinances.**

30 (d)(1) **Challenges to a statute.** If a party challenges the constitutionality of a Utah statute in an action
31 in which the Attorney General has not appeared, the party raising the question of constitutionality shall
32 must notify the Attorney General of such fact as described in paragraphs (d)(1)(A), (d)(1)(B), and
33 (d)(1)(C). ~~The court shall permit the state to be heard upon timely application.~~

34 (d)(1)(A) **Form and Content.** The notice must (i) be in writing, (ii) be titled "Notice of
35 Constitutional Challenge Under URCP 24(d)," (iii) concisely describe the nature of the challenge, and
36 (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of
37 the statute.

38 (d)(1)(B) **Timing.** The party must serve the notice on the Attorney General on or before the date
39 the party files the paper challenging the constitutionality of the statute.

40 (d)(1)(C) **Service.** The party must serve the notice on the Attorney General by email or, if
41 circumstances prevent service by email, by mail at the address below, and file proof of service with
42 the court.

43 Email: notices@agutah.gov

44 Mail:

45 Office of the Utah Attorney General

46 Attn: Utah Solicitor General

47 350 North State Street, Suite 230

48 P.O. Box 142320

49 Salt Lake City, Utah 84114-2320

50 (d)(1)(D) **Attorney General's response to notice.**

51 (d)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers in response to
52 the constitutional challenge, the Attorney General must file a notice of intent to respond unless
53 the Attorney General determines that a response is unnecessary. The Attorney General may
54 seek up to an additional 7 days' extension of time to file a notice of intent to respond.

55 (d)(1)(D)(ii) If the Attorney General files a notice of intent to respond within the time permitted
56 by this rule, the court will allow the Attorney General to file a response to the constitutional
57 challenge and participate at oral argument when it is heard.

58 (d)(1)(D)(iii) Unless the parties stipulate to or the court grants additional time, the Attorney
59 General's response to the constitutional challenge must be filed within 14 days after filing the
60 notice of intent to respond.

61 (d)(1)(D)(iv) The Attorney General's right to respond to a constitutional challenge under Rule
62 25A of the Utah Rules of Appellate Procedure is unaffected by the Attorney General's decision
63 not to respond under this rule.

64 (d)(2) **Challenges to an ordinance.** If a party challenges the constitutionality of a county or municipal
65 ordinance in an action in which the county or municipality ~~attorney~~ has not appeared, the party raising the
66 question of constitutionality ~~shall~~ must notify the county or municipality by providing notice to the person
67 identified in Rule 4(d)(1). ~~attorney of such fact.~~ The procedures for the party challenging the
68 constitutionality of a county or municipal ordinance will be consistent with paragraphs (d)(1)(A), (d)(1)(B),
69 and (d)(1)(C), except that service must be on the individual governmental entity. ~~The court shall permit~~
70 the county or municipality to be heard upon timely application. ~~The procedures for the response by the~~
71 county or municipality must be consistent with paragraph (d)(1)(D).

72 (d)(3) **Failure to provide notice.** Failure of a party to provide notice as required by this rule is not a
73 waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as

74 | required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the
75 | notice.
76

1 **Rule 12. Motions.**

2 (a) **Motions.** An application to the court for an order shall be by motion, which,
3 unless made during a trial or hearing, shall be in writing and in accordance with this
4 rule. A motion shall state succinctly and with particularity the grounds upon which it
5 is made and the relief sought. A motion need not be accompanied by a memorandum
6 unless required by the court.

7 (b) **Request to Submit for Decision.** If neither party has advised the court of the
8 filing nor requested a hearing, when the time for filing a response to a motion and the
9 reply has passed, either party may file a request to submit the motion for decision. If a
10 written Request to Submit is filed it shall be a separate pleading so captioned. The
11 Request to Submit for Decision shall state the date on which the motion was served,
12 the date the opposing memorandum, if any, was served, the date the reply
13 memorandum, if any, was served, and whether a hearing has been requested. The
14 notification shall contain a certificate of mailing to all parties. If no party files a
15 written Request to Submit, or the motion has not otherwise been brought to the
16 attention of the court, the motion will not be considered submitted for decision.

17 (c) **Time for filing specified motions.** Any defense, objection or request,
18 including request for rulings on the admissibility of evidence, which is capable of
19 determination without the trial of the general issue may be raised prior to trial by
20 written motion.

21 (c)(1) The following shall be raised at least 7 days prior to the trial:

22 (c)(1)(A) defenses and objections based on defects in the indictment or
23 information ;

24 (c)(1)(B) motions to suppress evidence;

25 (c)(1)(C) requests for discovery where allowed;

26 (c)(1)(D) requests for severance of charges or defendants;

27 (c)(1)(E) motions to dismiss on the ground of double jeopardy ; or

28 (c)(1)(F) motions challenging jurisdiction, unless good cause is shown why the
29 issue could not have been raised at least 7 days prior to trial.

30 (c)(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah
31 Code Section 76-3-402(1) shall be in writing and filed at least 14 days prior to the
32 date of sentencing unless the court sets the date for sentencing within ten days of the
33 entry of conviction. Motions for a reduction of criminal offense pursuant to Utah
34 Code Section 76-3-402(2) may be raised at any time after sentencing upon proper
35 service of the motion on the appropriate prosecuting entity.

36 (d) **Motions to Suppress.** A motion to suppress evidence shall:

37 (d)(1) describe the evidence sought to be suppressed;

38 (d)(2) set forth the standing of the movant to make the application; and

39 (d)(3) specify sufficient legal and factual grounds for the motion to give the
40 opposing party reasonable notice of the issues and to enable the court to determine
41 what proceedings are appropriate to address them.

42 If an evidentiary hearing is requested, no written response to the motion by the
43 non-moving party is required, unless the court orders otherwise. At the conclusion of
44 the evidentiary hearing, the court may provide a reasonable time for all parties to
45 respond to the issues of fact and law raised in the motion and at the hearing.

46 (e) **Motions made before trial.** A motion made before trial shall be determined
47 before trial unless the court for good cause orders that the ruling be deferred for later
48 determination. Where factual issues are involved in determining a motion, the court
49 shall state its findings on the record.

50 (f) **Failure to timely raise defenses or objections.** Failure of the defendant to
51 timely raise defenses or objections or to make requests which must be made prior to
52 trial or at the time set by the court shall constitute waiver thereof, but the court for
53 cause shown may grant relief from such waiver.

54 (g) A verbatim record shall be made of all proceedings at the hearing on motions,
55 including such findings of fact and conclusions of law as are made orally.

56 | (h) **Defects in the institution of the prosecution or indictment or information.**

57 | If the court grants a motion based on a defect in the institution of the prosecution or in
58 | the indictment or information, it may also order that bail be continued for a reasonable
59 | and specified time pending the filing of a new indictment or information. Nothing in
60 | this rule shall be deemed to affect provisions of law relating to a statute of limitations.

61 | (i) **Motions challenging the constitutionality of Utah statutes and ordinances.**

62 | (i)(1) **Challenges to a statute.** If a party in a court of record challenges the
63 | constitutionality of a statute in an action in which the Attorney General has not
64 | appeared, the party raising the question of constitutionality shall notify the Attorney
65 | General of such fact as described in paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C). The
66 | court shall permit the state to be heard upon timely application.

67 | (i)(1)(A) **Form and Content.** The notice shall (i) be in writing, (ii) be titled
68 | “Notice of Constitutional Challenge Under URCrP 12(i),” (iii) concisely describe
69 | the nature of the challenge, and (iv) include, as an attachment, the pleading,
70 | motion, or other paper challenging the constitutionality of the statute.

71 | (i)(1)(B) **Timing.** The party shall serve the notice on the Attorney General on
72 | or before the date the party files the paper challenging the constitutionality of the
73 | statute.

74 | (i)(1)(C) **Service.** The party shall serve the notice on the Attorney General by
75 | email or, if circumstances prevent service by email, by mail at the address below,
76 | and file proof of service with the court.

77 | Email: notices@agutah.gov

78 | Mail:

79 | Office of the Utah Attorney General

80 | Attn: Utah Solicitor General

81 | 350 North State Street, Suite 230

82 | P.O. Box 142320

83 | Salt Lake City, Utah 84114-2320

84 (i)(1)(D) Attorney General's response to notice.

85 (i)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers
86 in response to the constitutional challenge, the Attorney General must file a
87 notice of intent to respond unless the Attorney General determines that a
88 response is unnecessary. The Attorney General may seek up to an additional 7
89 days' extension of time to file a notice of intent to respond.

90 (i)(1)(D)(ii) If the Attorney General files a notice of intent to respond within
91 the time permitted by this rule, the court will allow the Attorney General to file
92 a response to the constitutional challenge and participate at oral argument when
93 it is heard.

94 (i)(1)(D)(iii) Unless the parties stipulate to or the court grants additional
95 time, the Attorney General's response to the constitutional challenge will be
96 filed within 14 days after filing the notice of intent to respond.

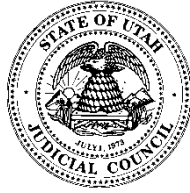
97 (i)(1)(D)(iv) The Attorney General's right to respond to a constitutional
98 challenge under Rule 25A of the Utah Rules of Appellate Procedure is
99 unaffected by the Attorney General's decision not to respond under this rule.

100 (i)(2) Challenges to an ordinance. If a party challenges the constitutionality of a
101 county or municipal ordinance in an action in which the attorney representing the
102 governmental entity has not appeared, the party raising the question of
103 constitutionality shall notify the attorney representing the governmental entity of such
104 fact. The procedures shall be as provided in paragraphs (i)(1)(A), (i)(1)(B), and
105 (i)(1)(C) except that service will be on the individual governmental entity. The
106 procedures for the response by the attorney representing the governmental entity will
107 be consistent with paragraph (i)(1)(D). It is the party's responsibility to find and use
108 the correct email address for the relevant attorney representing the governmental
109 entity, or if circumstances prevent service by email, it is the party's responsibility to
110 find and use the correct mailing address.

111 | (i)(3) **Failure to provide notice.** Failure of a party to provide notice as required by
112 | this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a
113 | party does not serve a notice as required under paragraphs (i)(1) or (i)(2), the court
114 | may postpone the hearing until the party serves the notice.

115

Tab 4



Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

MEMORANDUM

Hon. Mary T. Noonan
Interim State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

To: Advisory Committee on the Utah Rules of Appellate Procedure
From: Nancy Sylvester *Nancy D. Sylvester*
Date: April 26, 2019
Re: Appellate Representation Rules

At the last meeting, this committee took up several amendments suggested by the Appellate Representation Committee. This committee took the following actions:

- Regarding the repeal of Rule 38B, the committee asked that the following language be added to the website: "This rule has been repealed. The subject matter is now governed by CJA 11-401." The committee approved repealing the rule.
- The committee took out this sentence from Rule 58 because it was redundant: "If the issue to be briefed is ineffective assistance of counsel, the Court of Appeals may order the juvenile court to appoint conflict counsel pursuant to Rule 11-401 of the Utah Code of Judicial administration within 15 days for briefing and argument."
- The committee approved taking out the limiting language of Rule 58 regarding remand.
- And the committee asked that we revisit Rule 1 this month. Concerns were expressed about adding parental termination cases to the child welfare definition of Rule 1 without knowing their full ramifications. The committee also discussed that if parental termination is part of a divorce case, it was preferable not to impose Rule 59's procedures.

I have redrafted Rule 1 to add a limiting statutory reference. I look forward to the discussion of this rule.

**The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.**

1 **Rule 1. Scope of rules.**

2 **(a) Applicability of rules.** These rules govern the procedure before the Supreme Court and the
3 Court of Appeals of Utah in all cases. Applicability of these rules to the review of decisions or orders of
4 administrative agencies is governed by Rule 18. When these rules provide for a motion or application to
5 be made in a trial court or an administrative agency, commission, or board, the procedure for making
6 such motion or application shall be governed by the Utah Rules of Civil Procedure, Utah Rules of Criminal
7 Procedure, and the rules of practice of the trial court, administrative agency, commission, or board.

8 **(b) Reference to "court."** Except as provided in Rule 43, when these rules refer to a decision or
9 action by the court, the reference shall include a panel of the court. The term "trial court" means the court
10 or administrative agency, commission, or board from which the appeal is taken or whose ruling is under
11 review. The term "appellate court" means the court to which the appeal is taken.

12 **(c) Procedure established by statute.** If a procedure is provided by state statute as to the appeal or
13 review of an order of an administrative agency, commission, board, or officer of the state which is
14 inconsistent with one or more of these rules, the statute shall govern. In other respects, these rules shall
15 apply to such appeals or reviews.

16 **(d) Rules not to affect jurisdiction.** These rules shall not be construed to extend or limit the
17 jurisdiction of the Supreme Court or Court of Appeals as established by law.

18 **(e) Title.** These rules shall be known as the Utah Rules of Appellate Procedure and abbreviated Utah
19 R. App. P.

20 **(f) Rules for appeals in child welfare proceedings.** Appeals taken from juvenile court orders
21 related to abuse, neglect, dependency, termination of parental rights, ~~and~~-adoption proceedings, and
22 district court orders related to termination of parental rights under Section 78B-6-112, are governed by
23 Rules 52 through 59, except for orders related to substantiation proceedings under Section 78-3a-320.
24 Rules 9 and 23B do not apply. Due to the summary nature of child welfare appeals, Rule 10(a)(2)(A) does
25 not apply. Other appellate rules apply if not inconsistent with Rules 52 through 59.

26

Tab 5