

# Agenda

## Advisory Committee on Rules of Appellate Procedure

September 5, 2019

12:00 to 1:30 p.m.

Scott M. Matheson Courthouse

450 South State Street, Salt Lake City, UT

Executive Dining Room

<b>ACTION:</b> Welcome, introduction of new members, and approval of June 2019 minutes	Tab 1	Paul C. Burke, Chairman
<b>DISCUSSION AND ACTION:</b> Finalize URAP 45 and 49 (no comments received)	Tab 2	Nancy Sylvester
<b>DISCUSSION AND ACTION:</b> Continue discussion on incorporating <a href="#">Standing Order No. 11</a> in Rule 21(a) (removal of outdated language in (a)(3))	Tab 3	Mary Westby and Lisa Collins
<b>DISCUSSION AND ACTION:</b> Finalize URAP 25A-removing requirement of AG telling reasons for declining to file amicus brief (all Intervention Rules go to Supreme Court once finalized)	Tab 4	Christopher Ballard
<b>DISCUSSION:</b> <ul style="list-style-type: none"><li>• Advisory committee notes project</li><li>• Unrepresented litigants and the appellate rules</li><li>• Judicial efficiency</li></ul>		All
<b>DISCUSSION:</b> Other business		Paul C. Burke

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

**Meeting schedule:**

October 3, 2019

November 7, 2019

December 5, 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, June 6, 2019  
12:00 p.m. to 1:30 p.m.

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#### PRESENT

Christopher Ballard  
Troy Booher  
Paul Burke- Chair  
Lisa Collins  
Judge Gregory Orme  
R. Shawn Gunnarson  
Alan Mouritsen  
Adam Pace – Recording Secretary  
Rodney Parker  
Judge Jill Pohlman  
Bridget Romano  
Clark Sabey  
Lori Seppi  
Nancy Sylvester- Staff  
Mary Westby

#### EXCUSED

Cathy Dupont- Staff  
Ann Marie Taliaferro

#### 1. Welcome and approval of May 2019 minutes

**Paul Burke**

Mr. Burke welcomed the committee to the meeting and invited a motion to approve the minutes from the last meeting. *Mr. Gunnarson moved to approve the minutes from the May 2019 meeting. Ms. Seppi seconded the motion and it passed unanimously.*

#### 2. Discussion and Action: Incorporating Standing Order No. 11 in Rule 21(a)

**Mary Westby  
Lisa Collins**

The committee continued its discussion about whether to use the term “received” or “sent” in line 9 of Rule 21(a)(1), which says: “Documents filed by email will be considered timely if the email is received before midnight on the last day for filing.”

Ms. Collins said that she prefers the term “received,” because it is difficult for the court to verify when an email was sent, especially with pro se filers. The court has an automated response that gives notice when the court receives an email.

Mr. Gunnarson and Mr. Sabey explained reasons that were discussed in previous meetings for wanting to change the term to “sent,” which primarily focused on concern that it would be unfair to a party who files a document by email before midnight to have the filing deemed untimely if the court did not receive the email before midnight due to factors outside of the filer’s control.

Mr. Parker said he is comfortable using “received” if there is a safety valve that allows the court to address inequitable situations that may arise. Ms. Westby said that for jurisdictional deadlines, there are already safety valves in place. For non-jurisdictional filings (briefs, motions, etc.), the court’s practice is to accept the document if it is received the next day, even if it wasn’t received before midnight.

Mr. Burke asked if the rule could provide for an automatic stay if the court’s email server goes down, which extends the deadline until it is back up. Ms. Romano said that there is a local rule in federal court that extends filing deadlines to the next day if there is a system problem. Mr. Burke asked if the committee should follow this approach.

After further discussion of whether there is a real need to change the term to “sent,” and the difficulties that would arise from making that change, the committee reached a consensus that it should be left as “received.”

*Mr. Booher moved to use the term “received” in line 9 of Rule 21(a), and to adopt the rule as originally proposed in the meeting materials, with the term “may” changed to “must” in lines 4 and 5. Judge Pohlman seconded the motion and it passed unanimously.*

Ms. Collins asked the committee to consider striking paragraph (a)(3) from Rule 21 as unnecessary. Mr. Burke said he would add this proposal to the agenda for discussion at a future meeting.

### **3. Discussion and Action: Review updated language in intervention rules: URAP 25A, URCrP 12, and URCP 24** **Nancy Sylvester**

The committee continued its discussion of coordinating the intervention rules in appellate rule 25A, criminal rule 12, and civil rule 24.

Ms. Sylvester reported that the civil rules committee liked the term “governmental entity” that this committee proposed, but it proposed broadening the scope of review under these rules to include a “governmental entity’s ordinance, rule, or other administrative or legislative enactment.” Ms. Sylvester asked the committee to consider using the term “or other administrative or legislative enactment” in Rule 25A.

Ms. Romano said she liked this change, and suggested that it should be made in the title of Rule 25A as well.

Mr. Sabey suggested changing the language in 25A(a)(4) to clarify that the attorney general doesn't always need to be served in every case. Mr. Gunnarson proposed adding the language "when service on the Attorney General is necessary under these rules..."

Mr. Ballard repeated his proposed change to 25A(b)(1) that he raised in the previous meeting. His first proposal is to require that the Attorney General does not have to provide notice of its intent to file an amicus brief until it sees a responsive brief to the constitutional challenge. Mr. Ballard said this change will increase the overall efficiency of the briefing schedule; it's hard for the Attorney General to make an informed decision whether to file an amicus brief without seeing the responsive brief; and it will help the Attorney General's office conserve its resources.

Mr. Booher asked how an appellee responds to the amicus brief if it is filed after the appellee's brief. He said that the parties should have a chance to respond to the Attorney General's arguments. Mr. Ballard said that an appellee could file a petition for leave to file a sur-reply if necessary.

Mr. Burke asked what the best approach is to ensure that the parties have an opportunity to respond to an amicus brief filed under these rules. Judge Orme said that its logical to let the parties seek leave to file a sur-reply when needed.

Ms. Sylvester asked if Mr. Ballard's proposal required a change to be made to lines 52-54 about the briefing schedule being vacated upon filing of an amicus brief.

After further discussion, the committee reached a consensus that Rule 25A should provide for the following order of briefs: appellant, appellee, governmental entity's amicus brief (if any), appellee's response to amicus brief (if any), and finally, appellant's reply brief.

*Mr. Burke proposed tabling the discussion for now, and redrafting Rule 25A consistent with this approach for discussion at the next meeting.*

Mr. Burke said that he and Mr. Sabey still need to ask the court about Mr. Ballard's other proposal to eliminate the requirement in 25A(b)(1) for the Attorney General to explain its reasons for declining to file an amicus brief.

#### **4. Discussion and Action: Update on discussion of Appellate Representation recommendation to amend URAP 1 to add Parental termination to child welfare procedures**

**Nancy Sylvester**

Ms. Sylvester reported that the Appellate Representation committee has withdrawn its proposal to amend appellate rule 1 to bring termination of parental rights cases under the umbrella of child welfare cases, due to concerns this committee expressed at the last meeting. Instead, the Appellate Representation committee has decided to add statutory references to TPR cases in Rule 11-401. No further action from this committee is needed.

#### **5. Discussion and Assignments**

Mr. Burke asked for a subcommittee update.

#### Appellate Advisory Note Subcommittee

Mr. Sabey reported that he has found a lot of errors in the cross-references in the advisory notes, which are put there by LEXIS. He asked if the committee should do anything about this. Judge Orme suggested adding language in the introductory section of the rules stating that the Court does not take any responsibility for these cross-references and annotations to the rules. Judge Orme said he would work with Mr. Sabey to draft this language for discussion at a future meeting.

#### Self-Represented Litigant Subcommittee

Ms. Collins reported that she has updated the self-represented litigant guides online. They will be added to a tab on the court's website to make them easier to find.

### **6. Other business**

Mr. Burke noted that this is the last meeting for Mr. Booher, Ms. Seppi, Ms. Romano, and Ms. Taliaferro, who have each completed two full terms. The committee joined in thanking these members for their valued service over the past several years. Mr. Burke invited these departing members to approach him if they are interested in emeritus status (the committee is permitted two emeritus members by rule).

### **7. Adjourn**

The meeting was adjourned. The next meeting will be held on September 5, 2019.

# Tab 2

## UTAH COURT RULES – PUBLISHED FOR COMMENT

The Supreme Court and Judicial Council invite comments about amending these rules. To view the proposed amendment, click on the rule number.

To submit a comment or view the comments of others, click on “Continue Reading.” To submit a comment, scroll down to the “Leave a Reply” section, and type your comment in the “Comment” field. Type your name and email address in the designated fields and click “Post Comment.”

Comments cannot be acknowledged, but all will be considered. Comments are saved to a buffer for review before publication.

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Posted: May 7, 2019

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### Rules of Appellate Procedure – Comment Period Closed June 21, 2019

**URAP045. Review of judgments, orders, and decrees of court of appeals.** Amend. Conforms the rule to current practice in providing that 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.

**URAP049. Petition for writ of certiorari.** Amend. Corrects an erroneous reference in paragraph (a)(6)(C) from Rule 47(c) to Rule 48(d)(1)(B).

[EDIT PAGE](#)

This entry was posted in [URAP045](#), [URAP049](#).

[« Code of Judicial Administration – Comment](#)
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To view all comments submitted during a particular comment period, click on the comment deadline date. To view all comments to an amendment, click on the rule number.

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Period Closed July 6, 2019

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1       **Rule 45. Review of judgments, orders, and decrees of court of appeals.**

2       |       (a) Unless otherwise provided by law, the review of a judgment, an order, and a decree  
3       |       (herein referred to as "decisions") of the Court of Appeals shall be initiated by filing in the Utah  
4       |       Supreme Court a petition for a writ of certiorari to the Utah Court of Appeals.

5       |       (b) Unless the rule requires otherwise, every reference in Rules 45 through 51 to a petition or  
6       |       petitioner includes a cross-petition or cross-petitioner, respectively.  
7

**Rule 49. Petition for writ of certiorari.**

(a) **Contents.** The petition for a writ of certiorari shall contain, in the order indicated:

(a)(1) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in the Supreme Court contains the names of all parties.

(a)(2) A table of contents with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, agency rules, court rules, statutes, and authorities cited, with references to the pages of the petition where they are cited.

(a)(4) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. General conclusions, such as "the decision of the Court of Appeals is not supported by the law or facts," are not acceptable. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Supreme Court.

(a)(5) A reference to the official and unofficial reports of any opinions issued by the Court of Appeals.

(a)(6) A concise statement of the grounds on which the jurisdiction of the Supreme Court is invoked, showing:

(a)(6)(A) the date of the entry of the decision sought to be reviewed;

(a)(6)(B) the date of the entry of any order respecting a rehearing and the date of the entry and terms of any order granting an extension of time within which to petition for certiorari;

(a)(6)(C) reliance upon Rule ~~47(e)~~ 48(d)(1)(B), where a cross-petition for a writ of certiorari is filed, stating the filing date of the petition for a writ of certiorari in connection with which the cross-petition is filed; and

(a)(6)(D) the statutory provision believed to confer jurisdiction on the Supreme Court.

(a)(7) Controlling provisions of constitutions, statutes, ordinances, and regulations set forth verbatim with the appropriate citation. If the controlling provisions involved are

lengthy, their citation alone will suffice and their pertinent text shall be set forth in the appendix referred to in subparagraph (10) of this paragraph.

(a)(8) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the lower courts. There shall follow a statement of the facts relevant to the issues presented for review. All statements of fact and references to the proceedings below shall be supported by citations to the record on appeal or to the opinion of the Court of Appeals.

(a)(9) With respect to each question presented, a direct and concise argument explaining the special and important reasons as provided in Rule 46 for the issuance of the writ.

(a)(10) An appendix containing, in the following order:

(a)(10)(A) copies of all opinions, including concurring and dissenting opinions, and all orders, including any order on rehearing, delivered by the Court of Appeals in rendering the decision sought to be reviewed;

(a)(10)(B) copies of any other opinions, findings of fact, conclusions of law, orders, judgments, or decrees that were rendered in the case or in companion cases by the Court of Appeals and by other courts or by administrative agencies and that are relevant to the questions presented. Each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of its entry; and

(a)(10)(C) any other judicial or administrative opinions or orders that are relevant to the questions presented but were not entered in the case that is the subject of the petition.

If the material that is required by subparagraphs (7) and (10) of this paragraph is voluminous, they may be separately presented.

(b) **Form of petition.** The petition for a writ of certiorari shall comply with the form of a brief as specified in Rule 27.

(c) **No separate brief.** All contentions in support of a petition for a writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (a)(9) of this rule. The petitioner shall not file a separate brief in support of a petition for a writ of certiorari. If the petition is granted, the petitioner will be notified of the date on which the brief in support of the merits of the case is due.

60 (d) **Page limitation.** The petition for a writ of certiorari shall be as short as possible, but may  
61 not exceed 20 pages, excluding the subject index, the table of authorities, any verbatim  
62 quotations required by subparagraph (a)(7) of this rule, and the appendix.

63 (e) **Absence of accuracy, brevity, and clarity.** The failure of a petitioner to present with  
64 accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the  
65 points requiring consideration will be a sufficient reason for denying the petition.

# Tab 3

**Rule 21. Filing and service.**

(a) **Filing.** Papers required or permitted to be filed by these rules ~~shall~~must be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk, or by email sent to the appropriate court. Documents filed by email in the Supreme Court must be sent to [supremecourt@utcourts.gov](mailto:supremecourt@utcourts.gov). Documents filed by email in the Court of Appeals must be sent to [courtofappeals@utcourts.gov](mailto:courtofappeals@utcourts.gov).

~~(a)(1) Except as provided in subpart-paragraph (f), filing is not considered timely unless the papers are received by the clerk within the time fixed for filing. Documents filed by email will be considered timely if the email is received before midnight on the last day for filing.;~~

~~(a)(2) except that b~~Briefs ~~shall~~will be deemed filed on the date of the postmark if first class mail is ~~utilized~~used, or the date of sending by email.

~~If a motion requests relief which may be granted by a single justice or judge, the justice or judge may accept the motion, note the date of filing, and transmit it to the clerk.~~

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

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

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

(e) **Signature.** All papers filed in the appellate court ~~shall~~must be signed by counsel of record or by a party who is not represented by counsel. For documents filed by email, the sending of the email is an electronic signature.

32        **(f) Filing by inmate.**

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

35            (f)(2) Papers filed by an inmate are timely filed if they are deposited in the institution's  
36 internal mail system on or before the last day for filing. Timely filing may be shown by a  
37 contemporaneously filed notarized statement or written declaration setting forth the date of  
38 deposit and stating that first-class postage has been, or is being, prepaid, or that the inmate  
39 has complied with any applicable requirements for legal mail set by the institution. Response  
40 time will be calculated from the date the papers are received by the court.

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

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# Tab 4

**Rule 25A. Challenging the constitutionality of a statute, ~~or ordinance~~, rule, or other administrative or legislative enactment.**

**(a) Notice to the Attorney General or ~~the county or municipal attorney~~ other 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 governmental entity's ordinance, rule, or other administrative or legislative enactment ~~a county or municipal ordinance~~ in an appeal or petition for review in which the responsible ~~county or municipal~~ governmental entity attorney has not appeared, every party must serve its principal brief and any subsequent brief on 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~~, rule, or other administrative or legislative enactment, the appellant must serve its principal brief on the Attorney General or ~~the county or municipal~~ other 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) When service on the Attorney General is necessary under these rules, ~~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

~~320 Utah State Capitol~~

P.O. Box 142320

Salt Lake City, Utah 84114-2320

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

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

(b)(1) ~~Within 14 days after service of the a brief that presents a constitutional challenge, and all responsive briefs.~~ When a party raises a constitutional challenge in an appeal in which the Attorney General or responsible governmental entity has not appeared, the Attorney General or other governmental attorney entity will must notify the appellate court ~~whether it intends to~~ that it will or will not file an amicus brief. When the appellant's principal brief raises the constitutional challenge, the Attorney General or other governmental entity must file its notice within 14 days after service of the appellee's principal brief. When the appellee's or cross-appellant's principal brief raises the constitutional challenge, the Attorney General or other governmental entity must file its notice within 14 days after service of the appellant's or cross-appellant's reply brief. The Attorney General or other governmental attorney entity may seek up to an additional 7 days' extension of time from the court to file its notice. 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 governmental ~~attorney~~entity declines to file an amicus brief, the briefing schedule is not affected.

(b)(3) If the Attorney General or other governmental ~~attorney~~entity intends to file an amicus brief, that brief ~~will come~~is due 30 days after the notice of intent is filed. ~~Each~~The Attorney General or other governmental entity may ~~file a motion~~move to extend that time as provided under Rule 22. ~~On a governmental entity~~The filing of a notice of intent to file an amicus brief, vacates the briefing schedule established under Rule 13 ~~is vacated~~, and the next brief of a party, if the rules allow for a next brief, will comeis due 30 days after the amicus brief is ~~filed~~served. If the rules do not allow the party that raised the constitutional challenge to file an additional brief without leave of the court after that party receives the amicus brief, that party may move for permission to file a supplemental brief. If leave is granted, the court will state the length of, and due date for, the supplemental brief. The supplemental brief must be limited to responding to the arguments raised in the amicus brief and comply with all other requirements of rule 24(b). On its own motion, the court may order additional supplemental briefing.

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

(d) **Participation in oral argument.** If the Attorney General or other governmental entity~~county or municipal attorney~~ files an amicus brief, the Attorney General or other governmental entity~~county or municipal attorney~~ will be permitted to participate at oral argument by timely declaring an intent to participate on the court's oral argument acknowledgment form. -