

## Agenda

### Utah Supreme Court Advisory Committee Utah Rules of Appellate Procedure

*Paul C. Burke, Chair*

Location: Webex (see calendar appointment for instructions)  
Date: June 3, 2021  
Time: 12:00 to 1:30 p.m.

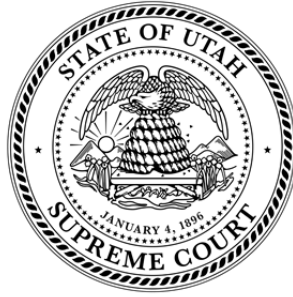
<b>Action:</b> Welcome and approval of May 6, 2021 minutes	Tab 1	Paul Burke, Chair
<b>Action:</b> Rules 54-58 (child welfare rules)	Tab 2	Adam Trupp, Carol Verdoia
<b>Action:</b> Rules 15, 25, 43, 50	Tab 3	Paul Burke, Sarah Roberts
<b>Action:</b> Rule 11	Tab 4	Paul Burke, Sarah Roberts
<b>Action:</b> Rule 12	Tab 5	Paul Burke, Sarah Roberts
<b>Discussion:</b> Old/new business		Paul Burke

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

#### **2021 Meeting schedule:**

July 1, 2021	October 7, 2021
August 5, 2021	November 4, 2021
September 2, 2021	December 2, 2021

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

Via WebEx Videoconference  
Thursday, May 6, 2021  
12:00 pm to 1:30 pm

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#### **PRESENT**

Christopher Ballard  
Troy Booher—  
Emeritus Member  
Paul C. Burke—Chair  
Patrick Burt  
Lisa Collins  
Tyler Green  
R. Shawn Gunnarson  
Michael Judd—  
Recording Secretary  
Margaret Lindsay—Guest  
Alan Mouritsen  
Debra Nelson—Guest

#### **EXCUSED**

Julie J. Nelson—Guest  
Judge Gregory Orme  
Rodney Parker  
Judge Jill Pohlman  
Sarah Roberts—Staff  
Adam Trupp—Guest  
Clark Sabey  
Nathalie Skibine  
Scarlet Smith  
Nick Stiles—Staff  
Christopher Williams  
Mary Westby

**1. Welcome, Approval of April 2021 Minutes**

**Paul C. Burke**

Paul Burke welcomed the committee and thanked its members for their attendance. The committee reviewed the April 2021 minutes, and it noted and corrected a stray period in Section 4 of those minutes.

*Christopher Ballard moved to approve the minutes from the April 2021 meeting, with that correction. Judge Jill Pohlman seconded that motion and it passed without objection by unanimous consent.*

**2. Action:  
Rules 59–62**

**Adam Trupp  
Margaret Lindsay**

Adam Trupp and Margaret Lindsay introduced the proposed changes to Rules 59 to 62. The proposed changes address several complicating aspects of the rules governing child-welfare appeals. Those appeals are quick-moving, yet the rights at issue on those appeals are incredibly important.

In turning to the proposed changes, Mary Westby proposed deleting language that placed trial counsel “on the hook” for appeals, given that the proposed amendments ensure access to a record that will act as a stand-in for trial counsel’s personal knowledge.

*Ms. Westby moved to amend accordingly, and Lisa Collins seconded that motion.*

Before that amendment proceeded to a vote, the committee discussed further coordination with Carol Verdoia at the Attorney General’s office, to ensure that the proposed changes do not conflict with existing law. Ms. Westby also made recommendations intended to simplify the record provisions, including by strike changes to Rule 54 regarding record-assembling procedures and making several other small, related changes. Ms. Westby then proposed several similar record-related changes to the proposed Rule 57.

*Ms. Westby moved to amend the proposed changes to Rule 54 and 57 to reflect the committee’s discussions. Ms. Collins seconded that motion, and it passed without objection by unanimous consent.*

The committee then turned to a discussion of the word-count requirement contained in the proposed amendment. Ms. Westby proposed that the word count be set at 5,000 words, rather than the 7,000 initially proposed. Margaret Lindsay noted that the petition at issue is a document that should and must contain argument, and therefore more space may be warranted. After

discussion, the committee agreed that a limit of 5,000 words is most appropriate.

Mr. Ballard also suggested a change in the language regarding “roster” attorneys, which the committee found acceptable.

*Following that discussion, and in light of the committee’s preference to seek further input before formally adopting the proposed changes, Judge Orme moved to approve amendments in the form developed at today’s meeting, but with the requirement that those amendments be shared with stakeholders at the Attorney General’s office within ten business days. Once the committee has received word back from the Attorney General’s office, the committee would then take whatever further action it finds appropriate, including possibly returning to this conversation next month if needed. That motion was seconded, and it passed without objection by unanimous consent.*

**3. Action: Lisa Collins**  
**Draft Letter re: Long-Standing Appellate Cases Sarah Roberts**

Sarah Roberts reported that she and Ms. Collins had worked together to draft the letter regarding long-standing appellate cases. The committee reviewed and discussed that draft letter. The committee endorsed the substance of the letter and offered minor changes to the letter’s language.

*Following that discussion, Ms. Westby moved to adopt the revised version. Shawn Gunnarson seconded that motion, and it passed without objection by unanimous consent.*

**4. Action: Sarah Roberts**  
**Rule 11**

Ms. Roberts introduced the action item, reminding the committee that some amendments to Rule 11 had been approved at the April 2021 meeting, but that any final decision on the proposed changes had been delayed to allow the committee to consider the amendments as a whole.

*After brief discussion regarding the amendments, Ms. Westby moved to strike the final sentence of the first paragraph regarding the record (which appeared as ll. 9-11). Ms. Collins seconded that motion, and it passed without objection by unanimous consent.*

*Ms. Collins then moved to strike subsection (c) of the proposed amendment. Rod Parker seconded that motion, and it passed without objection by unanimous consent.*

The committee discussed a further rule change to provide additional flexibility about numbering the pages of the record.

*After that additional discussion, Judge Pohlman moved to again table the proposed changes to Rule 11, to allow for additional discussion at a future meeting. Judge Orme seconded that motion, and it passed without objection by unanimous consent.*

**5. Action:**  
**Rule 12**

## Sarah Roberts

Given time constraints, discussion of Rule 12 was postponed until a future meeting.

## 6. Discussion: Old / New Business

**Paul C. Burke**

None.

## 7. Adjourn

*Rod Parker moved to adjourn, and that motion was seconded. The committee adjourned its May 2021 meeting and will meet again on June 3, 2021.*

Tab 2

1 **Rule 54. Transcripts~~s~~ of ~~proceedings~~.**

2 (a) **Duty of appellant to request transcript.** Within ~~four~~<sup>4</sup> days after filing the notice of  
3 appeal, the appellant ~~shall~~<sup>must</sup> order the transcripts online at [www.utcourts.gov](http://www.utcourts.gov), ~~file~~  
4 ~~with the clerk of the appellate court a written request for transcript,~~ specifying the  
5 entire proceeding or parts of the proceeding to be transcribed that are not already on  
6 file. ~~Within the same period, the appellant shall file a copy with the clerk of the juvenile~~  
7 ~~court and serve the parties.~~

8 (b) If appellant intends to urge on appeal that a finding or conclusion is unsupported by  
9 or is contrary to the evidence, the appellant must include in the record a transcript of all  
10 evidence relevant to such finding or conclusion. Neither the court nor the appellee is  
11 obligated to correct appellant's deficiencies in providing the relevant portions of the  
12 transcript.

13 (c) **Notice that no transcript needed.** If no parts of the proceeding need to be  
14 transcribed, within four days after filing the notice of appeal, the appellant ~~must~~<sup>shall</sup>  
15 file a notice to that effect with the ~~clerk of the~~ Court of Appeals [clerk](#) and a copy with  
16 the ~~clerk of the~~ juvenile court [clerk](#).



**Rule 55. Petition on appeal.**

(a) **Filing; dismissal for failure to timely file.** The appellant must file with ~~the clerk of~~ the Court of Appeals clerk a petition on appeal within 15 days from ~~the filing of the notice of appeal or the amended notice of appeal~~ transmission of the record on appeal by the Court of Appeals to each party. ~~The petition will be deemed filed on the date of the postmark if first class mail is used.~~ Filing of the petition must be in accordance with Rule 21(a). If the petition on appeal is not timely filed, the court may dismiss the appeal or take other appropriate action. The petition must be accompanied by proof of service. The appellant must serve a copy on counsel of record of each party, including the Guardian ad Litem, or, if the party is not represented by counsel, then on the party at the party's last known address, in the manner prescribed in Rule 21(c).

(b) **Preparation by ~~trial~~ counsel.** If the petitioner has appointed counsel in the juvenile court, or has been found to be indigent, then the petition on appeal must be prepared by appellate counsel appointed pursuant to the requirements of Rule 11-401 of the Utah Code of Judicial Administration.

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

(c) **Format.** All petitions on appeal must substantially comply with the Petition on Appeal form that accompanies these rules. The petition must not exceed ~~15 pages~~ 5,000 words, excluding the attachments required by Rule 55(d)(7). The petition ~~must be typewritten, printed or prepared by photocopying or other duplicating or copying process that will produce clear, black and permanent copies equally legible to printing, on opaque, unglazed paper 8 inches wide and 11 inches long. Paper may be recycled paper, with or without deinking. The printing must be double spaced, except for matter customarily single spaced and indented. Margins must be at least one inch on the top, bottom and sides of each page. Page numbers may appear in the margins. Either a~~

~~proportionally spaced or monospaced typeface in a plain, roman style may be used. A proportionally spaced typeface must be 13 point or larger for both text and footnotes. Examples are CG Times, Times New Roman, New Century, Bookman and Garamond. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes. Examples are Pica and Courier~~ must comply with Rule 27(a) and (b), except that it may be printed or duplicated on one side of the sheet.

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

- ~~(d)~~(1) A statement of the nature of the case and the relief sought.
- ~~(d)~~(2) The entry date of the judgment or order on appeal.
- ~~(d)~~(3) The date and disposition of any post-judgment motions.
- ~~(d)~~(4) A concise statement of the material adjudicated facts as they relate to the issues presented in the petition on appeal.
- ~~(d)~~(5) A statement of the legal issues presented for appeal, how they were preserved for appeal, and the applicable standard of review. The issue statements should be concise in nature, setting forth specific legal questions. General, conclusory statements such as "the juvenile court's ruling is not supported by law or the facts" are not acceptable.
- ~~(d)~~(6) The petition should include supporting statutes, case law, and other legal authority and argument for each issue raised, including authority contrary to appellant's case, if known.
- ~~(d)~~(7) The petition on appeal must have attached to it:
  - ~~(d)~~(7)(A) a copy of the order, judgment, or decree on appeal;
  - ~~(d)~~(7)(B) a copy of any rulings on post-judgment motions.

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

- 2 (a) **Filing.** Any appellee, including the Guardian ad Litem, may file a response to the  
3 petition on appeal with the appellate clerk. ~~An original and four copies of the response~~  
4 ~~must be filed with the clerk of the Court of Appeals~~ within ~~14~~<sup>5</sup> days after service of the  
5 appellant's petition on appeal. Filing of the petition must be in accordance with Rule  
6 21(a). ~~It~~ The response must ~~shall~~ be accompanied by proof of service to. ~~The response~~  
7 ~~shall be deemed filed on the date of the postmark if first-class mail is utilized. The~~  
8 ~~appellee shall serve a copy on~~ counsel of record of each party, including the Guardian  
9 ad Litem, or, on the party if the party is not represented by counsel, ~~then on the party~~  
10 ~~at the party's last known address, in the manner prescribed in Rule 21(e).~~
- 11 (b) **Format.** A response must ~~shall~~ substantially comply with the Response to Petition  
12 on Appeal form that accompanies these rules. The response ~~shall~~ may not exceed ~~15~~  
13 ~~pages~~ 5,000 words, excluding any attachments, and must ~~shall~~ comply with Rule 27. ~~(a)~~  
14 ~~and (b), except that it may be printed or duplicated on one side of the sheet.~~

1 **Rule 57. Record on appeal; transmission of record.**

2 (a) The record on appeal must ~~shall~~ include the legal file, any exhibits admitted as  
3 evidence, and any transcripts.

4 (b) The record will ~~shall~~ be transmitted by the juvenile court clerk to the ~~clerk of the~~  
5 Court of Appeals clerk upon the request of an appellate court. ~~completion of the~~  
6 ~~transcript or, if there is no transcript, within 20 days after the filing of the notice of~~  
7 ~~appeal.~~

8

1   **Rule 58. Ruling.**

2   (a) After reviewing the petition on appeal, any response, and the record, the Court of  
3   Appeals may rule by opinion, memorandum decision, or order. The Court of Appeals  
4   may issue a decision or may set the case for full briefing under Rule 24. The Court of  
5   Appeals may order an expedited briefing schedule and specify which issues must ~~shall~~  
6   be briefed.

7   ~~(b) If the Court of Appeals sets the case for briefing under Rule 24 and the petitioner has~~  
8   ~~appointed counsel, the Court of Appeals will remand to the juvenile court to appoint~~  
9   ~~appellate counsel pursuant to Rule 11-401 of the Utah Code of Judicial Administration.~~

10   **(be)** If the Court of Appeals affirms, reverses, or remands the juvenile court order,  
11   judgment, or decree, further review pursuant to Rule 35 may be sought, but refusal to  
12   grant full briefing will ~~shall~~ not be a ground for such further review.

Tab 3

**Rule 15. Petitions for review in tax cases.**

(a) If ~~a petition for judicial~~one party seeks review of a State Tax Commission decision ~~is filed pursuant to Utah Code Ann. §59-1-602~~ by filing a petition for judicial review ~~one party~~ in the district court, ~~and by~~ while another party seeks review in the ~~S~~supreme Court through a direct appeal, the direct appeal ~~shall~~will be, absent compelling circumstances~~;~~:

(1) stayed pending resolution of the district court proceeding ~~resolution of the proceeding before the district court;~~ and

(2) dismissed after the district court issues~~upon the issuance of~~ a final appealable order and upon notice to the Appellate Court by the prevailing party ~~by the district court.~~

(b) Assuming an absence of compelling circumstances under ~~subsection~~paragraph (a), all issues ~~appealed~~ raised in the direct appeal may be raised by any party in the district court proceeding~~;~~ ~~and if~~ not raised in the district court proceeding, the direct appeal issues will be waived and subject to dismissal with the direct appeal when the district court issues~~upon the issuance of~~ a final appealable order ~~by the district court.~~

(c) A party may not ~~appeal pursuant to Utah Code Ann. §59-1-602 to~~ seek review simultaneously in both the district court and ~~to~~ the Supreme Court ~~through appeal.~~

However, a party ~~that~~who has ~~appealed to~~ sought review in either the district court or the Supreme Court may join ~~an appeal~~ the proceeding filed by another party in the separate court ~~through~~ by filing a cross-appeal ~~at the Supreme Court~~ or by intervening in the district court ~~appeal.~~

**Rule 25. Amicus curiae briefs**~~Brief of an amicus curiae or guardian ad litem.~~

(a) Notice. An amicus curiae in the Supreme Court or Court of Appeals must provide notice to counsel of record for all parties to the appeal of its intent to file its brief at least 14 days before the brief's due date as provided in paragraph (d).

(1) Only one signatory to any amicus curiae brief filed jointly must notify the parties of its intent to file that brief.

(2) An amicus curiae whose brief is requested by an appellate court need not comply with this notice requirement.

(b) When permitted. ~~A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only by leave of court granted on motion or at the request of the court.~~

(1) The following entities may file an amicus curiae brief without consent of the parties or leave of court:

(A) a guardian ad litem;

(B) the State of Utah or any agency of the State of Utah by the Office of the Utah Attorney General;

(C) any other State, Commonwealth, or Territory when submitted by its Attorney General; or

(D) the United States of America when submitted by the United States Department of Justice.

(2) Any other amicus curiae brief may be filed only if all parties have consented to its filing, at the court's request, or by leave of court granted on motion.

(c) Motion for leave to file. ~~The motion for leave may be accompanied by a proposed amicus brief, provided it complies with applicable rules and the number of copies specified by Rule 26(b) are submitted to the court. If all parties do not consent to the brief's filing, A~~ an amicus curiae may file a motion for leave to file the brief.



(1) The motion must ~~shall~~ identify the party or parties who have withheld consent, identify the movant's interest, ~~of the movant and shall~~ and state the reasons why ~~a brief of~~ an amicus curiae ~~or the guardian ad litem~~ brief is desirable and why the matters asserted are relevant to the disposition of the case.

(2) The motion must not exceed 1,500 words. It must be submitted as one document with the brief sought to be filed.

~~Except for a motion for leave to participate in support of, or in opposition to, a petition for writ of certiorari filed pursuant to Rule 50(e), the motion for leave shall be filed at least 21 days prior to the date on which the brief of the party whose position as to affirmance or reversal the amicus curiae or guardian ad litem will support is due, unless the court for cause shown otherwise orders.~~

(3) A ~~p~~Party ~~ies~~ to the appeal ~~proceeding~~ may ~~indicate their support for, or opposition to,~~ the motion. ~~Any responses of a party to a motion for leave shall be by~~ filing an objection within ~~7~~14 days ~~after the motion is~~ served that concisely states its reasons for withholding consent~~ice of the motion~~.  
Withholding consent is disfavored.

**(d) Time for filing.** An amicus curiae brief, together with a motion under paragraph (c) when a party has withheld consent, must be filed:

(1) in a case before the Supreme Court when a petition for a writ of certiorari is pending, 14 days after the petition is filed; or

(2) in a case before the Supreme Court for merits review, or before the Court of Appeals, 14 days after the principal brief of the party being supported is filed. ~~If leave is granted, an amicus curiae or guardian ad litem shall file its brief within 7 days of the time allowed the party whose position the amicus curiae or guardian ad litem will support, unless the order granting leave otherwise indicates.~~

(3) An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed.

(e) **Length.** An amicus curiae brief filed regarding a petition for writ of certiorari may not exceed 4,000 words. Any other amicus curiae brief may not exceed 7,000 words. Those limits will not be extended. Both limits exclude the table of contents, the table of authorities, any appendix, and required certificates of counsel.

(f) **Contents and form.** An amicus curiae brief must comply with Rule 27. In addition, the cover must identify the party or parties supported and must indicate whether the brief supports affirmance or reversal. The brief must include:

(1) a table of contents;

(2) a table of authorities;

(3) unless included as part of a motion under paragraph (c)(1), a concise statement of the identity of the amicus curiae and its interest in the case;

(4) a statement indicating whether counsel for the parties received timely notice under paragraph (a);

(5) unless the amicus curiae is one listed in paragraph (b)(1), a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief, and if so, identifies each such person; and

(6) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review.

(g) **Responsive briefs.** The time for responsive briefs under Rule 26(a) ~~shall~~ runs from the timely service of the amicus ~~curiae or guardian ad litem~~ brief or from the timely

service of the brief of the party whose position the amicus curiae ~~or guardian ad litem~~ supports, whichever is later.

(h) Oral argument. ~~A motion of a~~ While such motions are not favored, an amicus curiae ~~or guardian ad litem~~ may file a motion to participate in the oral argument. ~~will be granted when circumstances warrant in the court's discretion.~~

(i) An amicus curiae brief may not be filed in support of a petition for rehearing under Rule 35.

## Public Comment re: Rule 25

Publius

May 22, 2021 at 3:30 pm

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The inclusion of “a guardian ad litem” among the list of entities that may file an amicus curiae brief without consent of the parties or leave of court is both vague and over-inclusive.

The proposed rule is vague because it does not specify whether a private guardian ad litem is also included in this rule.

The proposed rule is over-inclusive by permitting a guardian ad litem to file an amicus curiae brief without consent of the parties or leave of court in an appeal that does not involve a child welfare proceeding.

At present, neither Rule 29 of the Federal Rules of Appellate Procedure nor Rule 37.4 of the U.S. Supreme Court Rules permits a guardian ad litem to file an amicus curiae brief without consent of the parties or leave of court in any appeal.

The U.S. Supreme Court recently took to task a Ninth Circuit Court of Appeals panel that “named three amici and invited them to brief and argue issues framed by the panel” sua sponte. According to Justice Ginsburg writing for a unanimous Court, such a “takeover of the appeal” departs from the “party presentation principle”. U.S. v. Sineneng-Smith, 140 S.Ct. 1575 (2020).

It’s bad enough that indigent and pro se respondents to state petitions usually lack resource parity on appeal. The inclusion of a guardian ad litem — usually an attorney functionally unaccountable to the executive or legislative branches of government — among the list of parties permitted to file an amicus curiae brief without consent of the parties or leave of court will lead to further piling on by “passive instruments of government[.]” Sineneng-Smith at 1579 (quoting U.S. v. Samuels, 808 F.2d 1298, 1301 (CA8 1987), especially in cases having no meaningful nexus with a child welfare proceeding.

Please narrow the proposed rule by adding after “a guardian ad litem” “, if a guardian ad litem participated as trial counsel,” or making a functionally-equivalent change.

**Rule 50. Response; reply; ~~brief of amicus curiae.~~**

(a) **Response.** Within 30 days after ~~service of~~ a petition for a writ of certiorari is served, any other party may file a response ~~to the petition. If the satisfaction of a~~ petitioner's ~~obligation to~~ pay at the required filing fee or ~~to obtain~~ a waiver of that fee ~~is accomplished~~ after service, then the time for response ~~shall~~ will run from the date that obligation is satisfied ~~of satisfaction of that obligation~~. The response ~~shall~~ must comply with Rule 27 and, as applicable, Rule 49. ~~Seven copies of the response, one of which shall contain an original signature, shall be filed with the Clerk of the Supreme Court.~~ A party opposing a petition may so indicate by letter in lieu of a formal response, but the letter ~~shall~~ may not include any argument or analysis.

(b) **Page limitation.** A response ~~shall~~ must be as short as possible and may not, ~~in any single case,~~ exceed 20 pages, excluding the table of contents ~~subject index~~, the table of authorities, and the appendix.

(c) **Objections to jurisdiction.** The court will not accept a ~~No~~ motion ~~by a respondent~~ to dismiss a petition for a writ of certiorari ~~will be received~~. Objections to the Supreme Court's ~~jurisdiction of the Supreme Court~~ to grant the petition may be included in the response.

(d) **Reply.** A petitioner may file a reply addressed to arguments first raised in the response ~~may be filed by any petitioner~~ within ~~fourteen~~ 7 days after ~~service of~~ the response is served, but distribution of the petition and response to the court ordinarily will not be delayed pending the filing of any such reply unless the response includes a new request for relief, such as an award of attorney fees for the response. The reply ~~shall~~ must be as short as possible, ~~but~~ may not exceed five pages, and ~~shall~~ must comply with Rule 27. ~~The number of copies to be filed shall be as described in Rule 50(a).~~

~~(e) Brief of amicus curiae. A brief of an amicus curiae concerning a petition for certiorari may be filed only by leave of the Supreme Court granted on motion or at the~~

~~request of the Supreme Court. The motion for leave shall be accompanied by a proposed amicus brief, not to exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations required by Rule 49(a)(7), and the appendix. The proposed amicus brief shall comply with Rule 27, and, as applicable, Rule 49. The number of copies of the proposed amicus brief submitted to the Supreme Court shall be the same as dictated by Rule 48(f). A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. The motion for leave shall be filed on or before the date of the filing of the timely petition or response of the party whose position the amicus curiae will support, unless the Supreme Court for cause shown otherwise orders. Parties to the proceeding in the Court of Appeals may indicate their support for, or opposition to, the motion. Any response of a party to a motion for leave shall be filed within seven days of service of the motion. If leave is granted, the proposed amicus brief will be accepted as filed and, unless the order granting leave otherwise indicates, amicus curiae also will be permitted to submit a brief on the merits, provided it is submitted in compliance with the briefing schedule of the party the amicus curiae supports. Denial of a motion for leave to file brief of an amicus curiae concerning a petition for certiorari shall not preclude a subsequent amicus motion relating to the merits after a grant of certiorari. All motions for leave to file brief of an amicus curiae on the merits after a grant of certiorari are governed by Rule 25.~~

**Rule 43. Certification by the Court of Appeals to the Supreme Court.**

(a) **Transfer.** In any case over which the Court of Appeals has original appellate jurisdiction, the court may, upon the affirmative vote of at least four judges of the court, certify a case for immediate transfer to the Supreme Court for determination.

(b) **Procedure for transfer.**

(1) The Court of Appeals may, on its own motion, decide whether a case should be certified. Any party to a case may, however, file ~~and serve an original and eight copies of~~ a suggestion for certification not exceeding five pages, ~~setting forth the reasons~~ explaining why the party believes that the case should be certified. The suggestion may not be filed ~~prior to the filing of~~ before a docketing statement is filed. Within ~~ten~~ 14 days of service, an adverse party may file and serve ~~an original and eight copies of a~~ statement not ~~in excess of~~ exceeding five pages either supporting or opposing the suggestion for certification.

(2) Upon ~~entry of~~ entering the certification order ~~of certification~~, the Court of Appeals Clerk ~~of the Court of Appeals shall~~ must immediately transfer the case, including the record and file of the case from the trial court, all papers filed in the Court of Appeals, and a written statement of all docket entries in the case up to and including the certification order, to the Supreme Court Clerk ~~of the Supreme Court~~. The Court of Appeals Clerk ~~of the Court of Appeals shall~~ must promptly notify all parties and the trial court clerk ~~of the trial court~~ that the case has been transferred.

(3) Upon ~~receipt of~~ receiving the certification order ~~of certification~~, the Supreme Court Clerk ~~of the Supreme Court shall~~ must enter the appeal ~~up~~ on the Supreme Court's docket ~~of the Supreme Court~~. The ~~clerk of the~~ Supreme Court Clerk ~~shall~~ must immediately send notices to all parties and to the trial court clerk ~~of the trial court~~ that the case has been docketed and that all further filings will be made with the Supreme Court Clerk ~~of the Supreme Court~~. The notice ~~shall~~ must state the docket number assigned to the case in the Supreme Court. The case



29 ~~shall~~will proceed before the Supreme Court to final decision and disposition as  
30 in other appellate cases ~~pursuant to~~under these rules.

31 (4) If the record on appeal has not been filed with the Court of Appeals Clerk ~~of~~  
32 ~~the Court of Appeals~~ as of the date of the certification order ~~of transfer~~, the Court  
33 of Appeals Clerk ~~of the Court of Appeals shall~~must notify the trial court clerk ~~of~~  
34 ~~the trial court~~ that upon ~~completion of~~completing the conditions for filing the  
35 record by that court, the clerk ~~shall~~must transmit the record on appeal to the  
36 Supreme Court Clerk ~~of the Supreme Court~~. If, however, the record on appeal  
37 has already been transmitted to and filed with the Court of Appeals Clerk ~~of the~~  
38 ~~Court of Appeals~~ as of the date the certification order is entered ~~of the entry of the~~  
39 ~~order of transfer~~, the Court of Appeals Clerk ~~of the Court of Appeals shall~~must  
40 transmit the record on appeal to the Supreme Court Clerk ~~of the Supreme Court~~  
41 within five days ~~of the date of the entry of the order of transfer~~ after the  
42 certification order is entered.

43 (c) **Criteria for transfer.** The Court of Appeals ~~shall~~must consider certification only in  
44 the following cases:

45 (1) Cases ~~which are of such a nature that~~ where it is apparent that the case should  
46 be decided by the Supreme Court and that the Supreme Court would ~~probably~~  
47 likely grant a petition for a writ of certiorari in the case if decided by the Court of  
48 Appeals, irrespective of how the Court of Appeals might rule; ~~and~~

49 (2) Cases ~~which~~ that will govern a number of other cases involving the same  
50 legal issue or issues pending in the district courts, juvenile courts, ~~or~~ the Court of  
51 Appeals, ~~or~~ ~~which are~~ cases of first impression under state or federal law ~~which~~  
52 that will have wide applicability.



Tab 4

**Rule 11. The record on appeal.**

(a) **Composition of the record on appeal.** The record on appeal consists of the ~~original papers~~ documents and exhibits filed in or considered by ~~in~~ the trial court, including the presentence report in criminal matters, the transcript of proceedings, if any, and the record index. ~~prepared by the clerk of the trial court, and the docket sheet, shall constitutes the record on appeal in all cases. A copy of the record certified by the clerk of the trial court to conform to the original may be substituted for the original as the record on appeal. Only those papers prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.~~

(b) Preparing, pagination ~~ong~~, and indexing ~~of the~~ record.

(1) Preparing the record. ~~Immediately upon filing of the notice of appeal~~ On the appellate court's request, ~~the clerk of the trial court clerk shall will securely fasten the record in a trial court case file, with collation~~ prepare the record in the following order:

(A) the record index ~~prepared by the clerk;~~

~~(B) the docket sheet;~~

~~(C)~~ all original ~~papers~~ documents in chronological order;

~~(D)~~ all published depositions in chronological order;

~~(E)~~ all transcripts prepared for appeal in chronological order;

~~(F)~~ a list of all exhibits offered in the proceeding; and

~~(G)~~ in criminal cases, the presentence investigation report.

(2) Pagination.

(A) ~~The clerk shall mark the bottom right corner of every page of the collated index, docket sheet, and all original papers as well as~~ Using bates numbering, the entire record must be paginated. ~~the cover page only of all published depositions and the cover page only of each volume of~~

transcripts constituting the record with a sequential number using one series of numerals for the entire record.

(B) If the appellate court requests a supplemental record ~~is forwarded to the appellate court~~, the ~~clerk shall collate~~ same procedures as in (b)(2)(A) apply, continuing bates numbering from the last page number of the original record. ~~the papers, depositions, and transcripts of the supplemental record in the same order as the original record and mark the bottom right corner of each page of the collated original papers as well as the cover page only of all published depositions and the cover page only of each volume of transcripts constituting the supplemental record with a sequential number beginning with the number next following the number of the last page of the original record.~~

(3) Index. ~~The clerk shall prepare a~~ A chronological index of the record must accompany the record on appeal. For each document, deposition, or transcript, ~~T~~he index shall ~~must~~ contain ~~a reference to~~ the date of filing and starting page of the record ~~on which the paper, deposition or transcript was filed in the trial court and the starting page of the record on which the paper, deposition or transcript will be found.~~

(4) Examining the record. ~~Clerks of the trial and a~~ Appellate courts clerks ~~shall~~ will establish rules and procedures for parties to check~~ing~~ out the record after pagination. ~~for use by the parties in preparing briefs for an appeal or in preparing or briefing a petition for writ of certiorari.~~

~~(c) Duty of appellant.~~ After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this rule and shall take any other action necessary to enable the clerk of the trial court to assemble and transmit the record. A single record shall be transmitted.

54 ~~(d) Papers on appeal.~~

55 ~~(1) Criminal cases. All of the papers in a criminal case shall be included by the~~  
56 ~~clerk of the trial court as part of the record on appeal.~~

57 ~~(2) Civil cases. Unless otherwise directed by the appellate court upon sua sponte~~  
58 ~~motion or motion of a party, the clerk of the trial court shall include all of the~~  
59 ~~papers in a civil case as part of the record on appeal.~~

60 ~~(3) Agency cases. Unless otherwise directed by the appellate court upon sua~~  
61 ~~sponte motion or motion of a party, the agency shall include all papers in the~~  
62 ~~agency file as part of the record.~~

63 **(e) The transcript of proceedings; duty of appellant to order; notice to appellee if**  
64 **partial transcript is ordered.**

65 (1) Request for transcript; time for filing. Within ~~10~~4 days after filing the notice of  
66 appeal, or within 30 days of the notice of appeal where an indigent appellant has  
67 a statutory or constitutional right to counsel, the appellant ~~shall~~ must order the  
68 transcript(s) online at [www.utcourts.gov](http://www.utcourts.gov), specifying the entire proceeding or  
69 parts of the proceeding to be transcribed that are not already on file. The  
70 appellant ~~shall~~ must serve on the appellee a designation of those parts of the  
71 proceeding to be transcribed. ~~If the appellant desires a transcript in a compressed~~  
72 ~~format, appellant shall include the request for a compressed format within the~~  
73 ~~request for transcript.~~ If no such parts of the proceedings are to be requested,  
74 within the same period the appellant ~~shall~~ must file a certificate to that effect  
75 with the ~~clerk of the~~ appellate court clerk and serve a copy ~~of that certificate~~ on  
76 the appellee.

77 (2) Transcript required of all evidence regarding challenged finding or  
78 conclusion. If the appellant intends to ~~urge~~argue on appeal that a finding or  
79 conclusion is unsupported by or is contrary to the evidence, the appellant ~~shall~~  
80 must include in the record a transcript of all evidence relevant to such finding or

81 conclusion. Neither the court nor the appellee is obligated to correct appellant's  
82 deficiencies in providing the relevant portions of the transcript.

83 (3) Statement of issues; ~~C~~cross-designation by appellee. If the appellant does not  
84 order the entire transcript, the appellee may, within ~~10~~4 days after the appellant  
85 ~~services of~~ the designation or certificate described in paragraph (e)(1)-~~of this~~  
86 ~~rule,~~ order the transcript(s) in accordance with (e)(1), and file and serve on the  
87 appellant a designation of additional parts to be included.

88 (~~f~~d) **Agreed statement as the record on appeal.** In lieu of the record on appeal as  
89 defined in paragraph (a) of this rule, the parties may prepare and sign a statement of  
90 the case, showing how the issues presented by the appeal arose and were decided in the  
91 trial court and setting forth only so many of the facts averred and proved or sought to  
92 be proved as are essential to a decision of the issues presented. If the court deems - the  
93 statement complete and accurate ~~conforms to the truth,~~ it, together with such additions  
94 as the trial court may consider necessary fully to present the issues raised by the appeal,  
95 ~~shall~~ will be approved by the trial court. The ~~clerk of the~~ trial court clerk shall will  
96 transmit the statement to the ~~clerk of the~~ appellate court clerk within the time  
97 prescribed by Rule 12(b)(2). The ~~clerk of the~~ trial court clerk shall will transmit the  
98 record index-~~of the record~~ to the ~~clerk of the~~ appellate court clerk ~~up~~ upon the trial court's  
99 approval of the statement ~~by the trial court.~~

100 (~~g~~e) **Statement of evidence or proceedings when no report was made or when**  
101 **transcript is unavailable.** If no report of the evidence or proceedings at a hearing or  
102 trial was made, or if a transcript is unavailable, or if the appellant is impecunious and  
103 unable to afford a transcript in a civil case, the appellant may prepare a statement of the  
104 evidence or proceedings from the best available means, including recollection. The  
105 statement ~~shall~~ must be served on the appellee, who may serve objections or propose  
106 amendments within ~~10~~4 days after service. The statement and any objections or  
107 proposed amendments ~~shall~~ must be submitted to the trial court for resolution, and the  
108 trial court clerk will conform the record to such resolution. ~~-for settlement and approval~~

~~and, as settled and approved, shall be included by the clerk of the trial court in the record on appeal.~~

~~(hfg)~~ Supplementing or ~~Correction or modification~~ ing of the record.

(1) If any ~~difference-dispute~~ arises as to whether the record ~~truly discloses what occurred in the trial court~~ is complete and accurate, the ~~difference-dispute shall~~ may be submitted to and ~~resolved~~ settled by the ~~at~~ trial court. The trial court will ensure that ~~and~~ the record ~~made to conform to the truth~~ accurately reflects the proceedings before the trial court, including by entering any necessary findings to resolve the dispute.

(2) If anything material to either party is ~~omitted from or~~ misstated ~~or is omitted from in~~ the record by error of the trial court or court personnel, by accident, or because the appellant did not order a transcript of proceedings that the appellee needs to respond to issues raised in appellant's brief ~~the Brief of Appellant, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that~~ the omission or misstatement may be corrected and, ~~if necessary, that~~ a supplemental record may be ~~certified~~ created and forwarded ~~and transmitted~~:

(A) on stipulation of the parties;

(B) by the trial court before or after the record has been forwarded; or

(C) by the appellate court on a motion from a party.

(3) The moving party, or the court if it is acting on its own initiative, ~~shall~~ must serve on the parties a statement of the proposed changes. Within ~~10~~ 4 days after service, any party may serve objections to the proposed changes. ~~All other questions as to the form and content of the record shall be presented to the appellate court.~~

Tab 5

1 **Rule 12. Transmission of the record.**

2 (a) Duty to prepare and file transcript; request for enlargement of time; notice to  
3 appellate court.

4 (a)(1) ~~Upon receipt of a request for a transcript~~ On receiving a transcript request,  
5 the ~~clerk of the~~ appellate court clerk shall will assign ~~the preparation of the~~  
6 transcript preparation to the court reporter who reported the proceedings or, if  
7 recorded on video or audio equipment, to an official court transcriber and notify  
8 the requesting party of the assignment. With appellate court approval, ~~By~~  
9 ~~stipulation of the parties approved by the appellate court~~, the parties may  
10 stipulate that a person other than an official court transcriber may transcribe a  
11 recorded hearing.

12 (a)(2) A party requesting a transcript ~~shall~~ must make satisfactory arrangements  
13 for paying the fee to the reporter or transcriber ~~and notify the clerk of the~~  
14 ~~appellate court of the date on which satisfactory arrangements were made~~. The  
15 transcript ~~shall~~ must be completed and filed within 30 days after that date.

16 (a)(3) The reporter or transcriber may request through the Transcript  
17 Management System ~~from the clerk of the appellate court~~ an enlargement of time  
18 in which to file the transcript. The request for enlargement of time ~~shall be in~~  
19 ~~writing and shall~~ must contain the elements stated in CJA 5-201(1). If filed ~~prior~~  
20 ~~to the expiration of~~ before the transcript preparation period expires, the request  
21 ~~shall~~ must make a showing of good cause. If filed after the period ~~expiration of~~  
22 ~~the period~~, the request ~~shall~~ must make a showing of extraordinary circumstances  
23 beyond the control of the reporter or transcriber. ~~The reporter or transcriber shall~~  
24 ~~provide a copy of the request to the parties. The clerk of the appellate court shall~~  
25 ~~provide written notice of the disposition of the request for enlargement of time to~~  
26 ~~the reporter or transcriber and the parties.~~



(a)(4) ~~Upon completion of~~On completing the transcript, the reporter and, if applicable, the transcriber ~~shall~~must certify that the transcript is a true and correct record of the court hearing or of the file provided by the ~~clerk of the~~ appellate court clerk. The reporter or transcriber ~~shall~~must prepare an index of its contents and file the electronic file through the transcript management program. ~~The original hard copy of the transcript and index shall must be filed with the clerk of the trial court.~~ At the request of the person ordering the transcript or at the request of the appellate court, the reporter or transcriber ~~shall~~must file the transcript in a compressed format that places multiple complete pages of the original transcript upon each page of compressed transcript. The compressed transcript ~~shall~~must retain the page and line numbers of the original transcript. ~~A compressed transcript may be certified as a correct copy of the original.~~

(b) ~~Transmittal of~~ing the record on appeal to the appellate court.

(b)(1) ~~Transmittal of~~ing an index. Within 20 days from the date of the appellate court's request ~~from the appellate court,~~ the trial court, ~~juvenile court, or~~ government agency ~~shall~~must transmit ~~a certified copy of~~ the index prepared ~~pursuant to~~under Rule 11(b) to the ~~clerk of the~~ appellate court clerk.

~~(b)(2) Transmittal of non-paginated record. Within 7 days from the date of request from the appellate court, the trial court, juvenile court, or government agency shall transmit the papers and any transcripts on file to the clerk of the appellate court. These papers may be sent "as is," without pagination, and will be used by the appellate court for purposes of preliminary review. If the appeal is not summarily dismissed, the record will be returned for indexing and pagination.~~

(b)(~~3~~2) ~~Transmittal of~~ing a paginated record. Within 20 days from the date of the appellate court's request ~~from the appellate court,~~ the trial court, ~~juvenile court,~~

54 ~~or government agency shall~~must transmit the ~~papers~~documents, transcripts, and  
55 exhibits in the appeal to the appellate court.

56 (b)(~~43~~) ~~Transmission of~~fitting exhibits. Documents of unusual bulk or weight, and  
57 physical exhibits other than documents, photographs, or binders, ~~shall~~must not  
58 be transmitted by the trial court, ~~juvenile court, or government agency~~ unless  
59 directed to do so by a party or by the ~~clerk of the~~ appellate court clerk. A party  
60 must make advance arrangements with the clerks for ~~the transportation and~~  
61 ~~receipt of~~transporting and receiving exhibits of unusual bulk or weight.

62 (b)(~~54~~) Examining the record. During the briefing period, the parties may obtain  
63 a copy of the record on appeal from the appellate courts. If a digital record is  
64 available, it may be shared with the parties electronically.

65 (b)(~~65~~) Checking out the record on appeal. If a physical record on appeal exists,  
66 dDuring the briefing period, counsel for the parties who are members of the  
67 Utah State Bar in good standing may, as officers of the court, check out the  
68 record upon written request to the clerk of court of the court in possession of the  
69 record on appeal. The record may be mailed by registered mail or other  
70 reputable overnight carrier, return receipt requested, provided that counsel  
71 requesting mailing makes advance arrangements with the clerk and pays the cost  
72 of shipping. The record may be picked up in person by counsel, or his or her  
73 authorized agent. Counsel ~~shall~~must be responsible for promptly returning the  
74 record to the court not later than when the party's brief is filed.

75 (c) ~~Expedited~~editing the transmittal of parts of the record. If ~~prior to the appellate court~~  
76 requires the record before the time the record is transmitted ~~the record is required in the~~  
77 ~~appellate court~~, the ~~clerk of the~~ trial court clerk at the request of any party or of the  
78 appellate court ~~shall~~must transmit to the appellate court such parts of the original  
79 record as designated.