Agenda

Utah Supreme Court Advisory Committee
Utah Rules of Appellate Procedure

Chris Ballard, Chair
Nathalie Skibine, Vice Chair

Location:	Webex (see calendar appointment for instructions)
Date:	September 1, 2022
Time:	12:00 to 1:30 p.m.

Action: Welcome and approval of June 2, 2022 Minutes	Tab 1	Chris Ballard, Chair
Action: Rules 8, 17, 23B, 29, 37	Tab 2	Chris Ballard
Action: Rule 20	Tab 3	Chris Ballard
Action: Rule 19	Tab 4	Mary Westby
Action: Rule 22-Juneteenth Holiday	Tab 5	Chris Ballard
Action: Rule 50	Tab 6	Carol Funk and Clark Sabey
Action: Rule 57	Tab 7	Mary Westby
Action: Appellate Court Disqualification	Tab 8	Nick Stiles
Discussion: Old/new business		Chris Ballard, Chair

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

2022 Meeting schedule:
October 6, 2022
November 3, 2022
December 1, 2022

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, June 2, 2022
12:00 pm to 1:30 pm

PRESENT		**EXCUSED**
Emily Adams	Judge Gregory Orme	Patrick Burt
Christopher Ballard—Chair	Judge Jill Pohlman	
Troy Booher—Emeritus Member	Stanford Purser	
Jacqueline Carlton—Guest	Michelle Quist	
Lisa Collins	Clark Sabey	
Carol Funk	Nathalie Skibine—Vice Chair	
Tyler Green	Scarlet Smith	
Amber Griffith	Nick Stiles—Staff	
Michael Judd—Recording Secretary	Doug Thompson—Guest	
	Mary Westby	

1. Action: Chris Ballard
Approval of May 2022 Minutes

The committee reviewed the May 2022 minutes and did not note any needed changes or corrections.

Following that review, Judge Pohlman moved to approve the May 2022 minutes as circulated. Lisa Collins seconded that motion, and it passed without objection by unanimous consent.

2. Action: Chris Ballard
Rule 14

The committee has already voted to approve the proposed changes to Rule 14, which recognize the option to file a cross-petition in administrative matters. In March, the proposed changes were circulated for public comment, and no public comments were received.

In light of the absence of public comment, Mary Westby moved to recommend Rule 14 to the Utah Supreme Court for publication. Judge Orme seconded that motion, and it passed without objection by unanimous consent.

3. Action: Chris Ballard Judge Pohlman
Rule 4 Nathalie Skibine Mary Westby
Clark Sabey

The committee has organized a subcommittee to identify an appropriate deadline for a request to reinstate the time to appeal. Chris Ballard opened the committee's return to discussion of Rule 4 by noting that the subcommittee had reviewed past minutes to identify whether this issue was taken up following the Utah Supreme Court's request for consideration of this rule in *Ralphs v. McClellan*, 2014 UT 36, 337 P.3d 230. The committee did in fact take up this issue, in September 2014, but it opted not to recommend any deadline. As the subcommittee understands it, the consensus, at that time, was that motions to reinstate a period for appeal were being filed in a timely manner. This proposed change has now returned to the committee because that no longer appears to be the case. What's more, in its opinion, the *Ralphs* court suggested that without a deadline in the rule, a request to reinstate an appeal cannot be denied as untimely, no longer how late it arrives.

Several committee members and one guest expressed reservations with or opposition to the proposed changes. Nathalie Skibine, a subcommittee member, indicated that if the rule *were* to include a deadline, the deadline now being discussed has a major change that she favors: it adds a "reasonableness" backstop to the one-year limitation.

Doug Thompson expressed concern that the proposed rule is ambiguous about what triggers a defendant's knowledge, and he stated that he remains opposed to the proposed rule change. Even after reviewing the most recent revisions, his general view remains the same: the rule may, for some, constitute a deprivation of a constitutional right, and our rules should be very accommodating to defendants in such circumstances. Mr. Thompson added that he does not believe any benefits to the court system (by way of

efficiency, for example) will be sufficient to outweigh the danger of depriving a defendant of a right to appeal. Emily Adams added her voice to Mr. Thompson's and Ms. Skibine's, reiterating that she does not believe that the rule needs a deadline at all.

Mr. Ballard responded to Mr. Thompson's first concern by saying that, as he understands it, the discovery rule now contained in the rule is based on standard language. He added that the "backstop" for reasonableness, after the one-year deadline has passed, adequately addresses concerns about the application of the rule to *pro se*, incarcerated defendants.

Ms. Westby offered that, in her view, the proposed rule fairly addresses the real outliers, because it gives defendants a chance to make a showing of reasonableness. Clark Sabey stated that while risks of collateral litigation may cut slightly against the changes, he ultimately agrees with Ms. Westby's position.

Following that discussion, Ms. Westby moved to approve the rule as amended, as reflected on the screen at the committee's meeting. Mr. Sabey seconded that motion, and it passed by majority consent, with three objections noted. Ms. Adams, Ms. Skibine, and Ms. Quist object to the amendment, and they further object conditionally, believing that the rule, as now amended, should sent out again for comment.

The committee considered whether the proposed amendment will be recirculated for public comment. Nick Stiles stated that proposed rules that undergo this level of change are typically sent out again for public comment. Mr. Ballard asked whether the committee can recommend recirculation. Mr. Stiles said that it can, and the committee did so.

4. Action: Stan Purser
Rule 19

Mr. Purser reintroduced the committee to the proposed changes to Rule 19, beginning with proposed changes to certificate-of-compliance requirements, which largely track those found in Rule 24.

Ms. Westby led the committee in a discussion of the 30-day response timing contained in the proposed amendment, and Ms. Westby added that it may make sense to add language recognizing an appellate court's ability to transfer issues raised under Rule 19 to the district court, as that would allow the rule to reflect current practice.

The committee then considered whether a mandatory response to a petition filed under Rule 19 is necessary at all. Can, for example, an appellate court

dismiss such a petition without any response? Or could the rule be made more efficient if no response were needed unless and until the court calls for one? The committee spent a significant amount of time reworking the proposed amendment to incorporate a substantial conceptual change to the response and timing requirements, in accordance with those questions.

Following that discussion, Michelle Quist moved to accept the changes addressed in section (g), as shown on the screen at the committee's meeting. Carol Funk seconded that motion, and it passed without objection by unanimous consent.

The committee then discussed replacing references to "extraordinary writ" to "extraordinary relief." Mr. Sabey suggested that the rule clarify that an appellate court can deny petition without a response but cannot grant it without a response. The committee discussed additional possible changes to the rule, as well as page and word limitations.

After that discussion, the committee agreed that Ms. Westby would take a pass at revising the disposition section, while committee members and staff would work to perform other clean-up.

Judge Pohlman moved, accordingly, to table discussion of Rule 19 and to return to discussion of the rule at the committee's next meeting. Ms. Quist seconded that motion, and it passed without objection by unanimous consent.

5. Action: Carol Funk
Rule 50

Proposed amendments to Rule 50 would make a procedural change to the process for certiorari petitions. Carol Funk introduced those proposed amendments, and she encouraged the committee to consider the changes, which she believes will promote efficiency. Mr. Sabey noted that he had lodged previous concerns about delay associated with the rule change, but that he has come around to the proposal and believes it's a good idea. The ultimate question facing the committee, as Mr. Sabey sees it, is how many petitions the Court will feel comfortable denying without seeking a response. If there are a substantial number of petitions in that category, these changes will likely prove very useful.

The committee discussed how to best handle any potential delays associated with this new mechanism. Mr. Sabey offered to discuss with the Utah Supreme Court the timing associated with voting on cert petitions, which is driven by internal calendaring.

After discussion, the committee expressed a strong preference for the first of the two options identified by Ms. Funk. Tyler Green raised an issue that the committee discussed at some length: Should the rule *bar* parties from filing a

response before permission is granted by the court? Mr. Sabey noted that such a prohibition is built into our rules already, in other, potentially analogous rules. The committee will return to Rule 50 at its next meeting, and Mr. Sabey and Ms. Funk will discuss potential refinements in the meantime.

6. Action: Chris Ballard
Rule 22—Juneteenth Holiday

The committee opted to reserve discussion of Rule 22 until its next meeting.

7. Discussion: Chris Ballard
Old/New Business

Mr. Ballard proposed that the committee follow its historic practice of forgoing its July and August meetings. There were no objections. Mr. Ballard announced that the committee will plan on that approach, absent any need for an emergency meeting.

Mr. Ballard also announced that when the committee meets again in September, it plans to conduct that meeting under a hybrid approach, with an in-person meeting and the option for participants to join remotely.

8. Adjourn

Following that discussion, Ms. Funk moved to adjourn. Mr. Purser seconded, and there were no objections. The committee's next meeting will take place on September 1, 2022.

TAB 2

Rule 8. Stay or injunction pending appeal.

(a) **Motion for stay**.

(1) **Initial motion in the trial court**. A party must ordinarily move first in the trial court for the following relief:

(A) a stay of the judgment or order without security pending appeal or disposition of a petition under Rule 5;

(B) approval of a bond or other security provided to obtain a stay of the judgment or order; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending, unless the trial court has already rejected the basis for the requested relief.

(2) **Motion in the appellate court**.

(A) The motion for a stay must include:

(i) the reasons the trial court denied the request;

(ii) the reasons for granting the relief requested and the facts relied on;

(iii) copies of affidavits or declarations, ~~or other sworn statements~~ supporting facts subject to dispute; and

(iv) relevant parts of the record, including a copy of the trial court's order.

(B) Any motion must comply with Rule 23.

(C) Except in extraordinary circumstances, an appellate court will not act on a motion to stay a judgment or order or to suspend, modify, restore, or grant an injunction, unless the movant first requested a stay or opposed the injunction in the trial court.

(3) **Stays in criminal cases**. Stays pending appeal in criminal cases in which the defendant has been sentenced are governed by Utah Code section 77-20-10 and Rule 27 of the Utah Rules of Criminal Procedure. Stays in other criminal cases are governed by this rule.

(b) **Bond requirement.**

(1) **Stay ordinarily conditioned upon giving a bond**. For requests for relief to which Rule 62(d) of the Utah Rules of Civil Procedure applied in the trial court, relief available pending appeal will be conditioned upon giving a bond or other appropriate security in the trial court, unless there is no reasonable means of quantifying the security in monetary or other terms and the conditions of paragraph (b)(2) are met.

(2) **Stay in cases not conditioned on giving a bond**. Ordinarily a stay without a bond or other security will not be granted unless the movant demonstrates a likelihood of success on the merits or the case presents serious issues on the merits warranting appellate review and the appellant demonstrates:

(A) a likelihood of irreparable harm to the movant outweighing the harm to any other party and the stay would not be adverse to the public interest; or

(B) an extraordinary circumstance that justifies issuing a stay.

(c) **Injunctions**. For requests for relief to which Rules 65A or 62(c) of the Utah Rules of Civil Procedure applied in the trial court, any relief available pending appeal is governed by those rules.

Advisory Committee Note

"Declaration" refers to an unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act.

Rule 17. Stay pending review.

Application for a stay of a decision or order of an agency pending direct review in the appellate court shall ordinarily be made in the first instance to the agency if the agency is authorized by law to grant a stay. If a motion for such relief is made to the appellate court, the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or declarations~~or other sworn statements or copies thereof~~. With the motion shall be filed those parts of the record relevant to the relief sought. Reasonable notice of the filing of the motion and any hearing shall be given to all parties to the proceeding in the appellate court. The appellate court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be considered by a single justice or judge of the court.

Advisory Committee Note

"Declaration" refers to an unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act.

Rule 23B. Motion to remand for findings necessary to determination of ineffective assistance of counsel claim.

(a) Grounds for motion; time. A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel. The motion will be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.

The motion must be filed before or at the time of the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. After the appeal is taken under advisement, a remand pursuant to this rule is available only on the court's own motion and only if the claim has been raised and the motion would have been available to a party.

(b) Content of motion. The content of the motion must conform to the requirements of Rule 23. The motion must include or be accompanied by affidavits or declarations alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits or declarations must also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. The motion must also be accompanied by a proposed order of remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed on remand.

(c) Orders of the court; response; reply. If a motion under this rule is filed at the same time as appellant's principal brief, any response and reply must be filed within the time for the filing of the parties' respective briefs on the merits, unless otherwise specified by the court. If a motion is filed before appellant's brief, the court may elect to defer ruling on the motion or decide the motion prior to briefing.

(1) If the court defers the motion, the time for filing any response or reply will be the same as for a motion filed at the same time as appellant's brief, unless otherwise specified by the court.

(2) If the court elects to decide the motion prior to briefing, it will issue a notice that any response must be filed within 30 days of the notice or within such other time as the court may specify. Any reply in support of the motion must be filed within 20 days after the response is served or within such other time as the court may specify.

(3) If the requirements of parts (a) and (b) of this rule have been met, the court may order that the case be temporarily remanded to the trial court to enter findings of fact relevant to a claim of ineffective assistance of counsel. The order of remand will identify the ineffectiveness claims and specify the factual issues relevant to each such claim to be addressed by the trial court. The order will also direct the trial court to complete the proceedings on remand within 90 days of issuance of the order of remand, absent a finding by the trial court of good cause for a delay of reasonable length.

(4) If it appears to the appellate court that the appellant's attorney of record on the appeal faces a conflict of interest upon remand, the court will direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

(d) Effect on appeal. If a motion is filed at the same time as appellant's brief, the briefing schedule will not be stayed unless ordered by the court. If a motion is filed before appellant's brief, the briefing schedule will be automatically stayed until the court issues notice of whether it will defer the motion or decide the motion before briefing.

(e) Proceedings before the trial court. Upon remand the trial court will promptly conduct hearings and take evidence as necessary to enter the findings of fact necessary to determine the claim of ineffective assistance of counsel. Any claims of ineffectiveness

not identified in the order of remand will not be considered by the trial court on remand, unless the trial court determines that the interests of justice or judicial efficiency require consideration of issues not specifically identified in the order of remand. Evidentiary hearings will be conducted without a jury and as soon as practicable after remand. The burden of proving a fact will be upon the proponent of the fact. The standard of proof will be a preponderance of the evidence. The trial court will enter written findings of fact concerning the claimed deficient performance by counsel and the claimed prejudice suffered by appellant as a result, in accordance with the order of remand. Proceedings on remand must be completed within 90 days of entry of the order of remand, unless the trial court finds good cause for a delay of reasonable length.

(f) Preparation and transmittal of the record. At the conclusion of all proceedings before the trial court, the clerk of the trial court will immediately prepare the record of the supplemental proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court will immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court will transmit the record of the supplemental proceedings upon the preparation of the entire record.

(g) Appellate court determination. Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals.

Effective December 1, 2018

Advisory Committee Note

"Declaration" refers to an unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act.

Rule 29. Oral argument.

(a) **Holding oral argument.**

(1) **Supreme Court**. Oral argument will be held in cases before the Supreme Court unless the court determines that oral argument will not aid the decisional process.

(2) **Court of Appeals**. Oral argument will be allowed in all cases in which the Court of Appeals determines that oral argument will significantly aid the decisional process.

(3) **Alternative means**. The court may hold oral argument in person, by phone, or by videoconference.

(b) **Notice; waiver; cancellation; continuance.**

(1) **Supreme Court.** Not later than 28 days before the date on which a case is calendared, the clerk will give notice of the time and place of oral argument, and the time to be allowed each side. If all parties to a case believe oral argument will not benefit the court, they may file a joint motion to cancel oral argument not later than 14 days from the date of the clerk's notice. The court will grant the motion only if it determines that oral argument will not aid the decisional process. A motion to continue oral argument must be supported by (1) a stipulation of all parties or a statement that the movant was unable to obtain such a stipulation, and (2) an affidavit or declaration of counsel specifying the grounds for the motion. A motion to continue filed not later than 14 days from the date of the clerk's notice may be granted on a showing of good cause. A motion to continue filed thereafter will be granted only on a showing of exceptional circumstances.

(2) **Court of Appeals**. Not later than 28 days before the date on which a case is calendared, the clerk shall give notice to all parties that oral argument is to be permitted, the time and place of oral argument, and the time to be allowed each

side. Any party may waive oral argument by filing a written waiver with the clerk not later than 14 days from the date of the clerk's notice. If one party waives oral argument and any other party does not, the party waiving oral argument may nevertheless present oral argument. A request to continue oral argument or for additional argument time must be made by motion. A motion to continue oral argument must be supported by (1) a stipulation of all parties or a statement that the movant was unable to obtain such a stipulation, and (2) an affidavit or declaration of counsel specifying the grounds for the motion. A motion to continue filed not later than 14 days from the date of the clerk's notice may be granted on a showing of good cause. A motion to continue filed thereafter will be granted only on a showing of exceptional circumstances.

(c) **Argument order**. The appellant argues first and the appellee responds. The appellant may reply to the appellee's argument if appellant reserved part of appellant's time for this purpose. Such argument in reply is limited to responding to points made by appellee in appellee's oral argument and answering any questions from the court.

(d) **Cross and separate appeals.** A cross or separate appeal is argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a separate appeal, the plaintiff in the action below is deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care must be taken to avoid duplicative arguments. Unless otherwise agreed by the parties, in cases involving a cross-appeal the appellant, as determined pursuant to Rule 24A, opens the argument and presents only the issues raised in the appellant's opening brief. The cross-appellant then presents an argument that answers the appellant's issues and addresses original issues raised by the cross-appeal. The appellant then presents an argument that replies to the cross-appellant's answer to the appellant's issues and answers the issues raised on the cross-appeal. The cross-appellant may then present an argument that is confined to a reply to

the appellant's answer to the issues raised by the cross-appeal. The court will grant reasonable requests, for good cause shown, for extended argument time.

(e) **Nonappearance of parties**. If the appellee fails to appear to present argument, the court will hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present. If neither party appears, the case may be decided on the briefs, or the court may direct that the case be rescheduled for argument.

(f) **Submission on the briefs**. By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) **Use of physical exhibits at argument; removal**. If physical exhibits other than documents are to be used at the argument, counsel must arrange to have them placed in the courtroom before the court convenes on the date of the argument. After the argument, counsel must remove the exhibits from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they will be destroyed or otherwise disposed of.

Effective September 23, 2020

Advisory Committee Note

"Declaration" refers to an unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act.

Rule 37. Suggestion of mootness; voluntary dismissal.

(a) **Suggestion of mootness.** Any party aware of circumstances that render moot one or more of the issues presented for review must promptly file a "suggestion of mootness" in the form of a motion under Rule 23.

(b) **Voluntary dismissal.** At any time prior to the issuance of a decision an appellant may move to voluntarily dismiss an appeal or other proceeding. If all parties to an appeal or other proceeding agree that dismissal is appropriate and stipulate to a motion for voluntary dismissal, the appeal will be promptly dismissed. The stipulation must specify the terms as to payment of costs and fees, if any.

~~(c)~~ **Affidavit or declaration.** If the appellant has the right to effective assistance of counsel, a motion to voluntarily dismiss the appeal for reasons other than mootness must be accompanied by appellant's personal affidavit or ~~unsworn~~ declaration ~~as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act,~~ demonstrating that the appellant's decision to dismiss the appeal is voluntary and is made with knowledge of the right to an appeal and the consequences of voluntary dismissal. If counsel for the appellant is unable to obtain the required affidavit or declaration from the appellant, the motion must be accompanied by counsel's affidavit or declaration stating that, after reasonable efforts, counsel is unable to obtain the required affidavit or declaration and certifying that counsel has a reasonable factual basis to believe that the appellant no longer wishes to pursue the appeal.

Effective June 9, 2020 under Rule 11-105

Advisory Committee Note

"Declaration" refers to an unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act.

TAB 3

Rule 20 Memo

The Rule 20 subcommittee (Clark Sabey, Mary Westby, and Christopher Ballard) recommends deleting the rule because its existence is superfluous and confusing and could prejudice a criminal defendant's opportunity to seek relief under the Post-Conviction Remedies Act (PCRA). The recent opinion in *Patterson v. State*, 2021 UT 52, does not change the subcommittee's conclusion.

Rule 20 provides a procedure for filing a petition for writ of habeas corpus directly in an appellate court to challenge an allegedly unlawful detention. *See* Rule 20(a). But Rules 65B and 65C of the civil rules, together with the PCRA, Utah Code § 78B-9-101 to -110, already provide mechanisms to challenge the lawfulness of any official detention.

Rule 65C and the PCRA govern all challenges to a detention resulting from a criminal conviction and sentence that has been affirmed on appeal or that was not challenged in a timely appeal. *See* Utah R. Civ. P. 65C(a). The rule recognizes the PCRA as establishing "the manner and extent to which a person may challenge the legality of a criminal conviction and sentence" after direct appeal. *Id.*

Rule 65B governs extraordinary relief generally. Subsection (b) of that rule governs challenges to official detention based on anything other than a criminal conviction or sentence. "Except for instances governed by Rule 65C, this paragraph shall govern all petitions claiming that a person has been wrongfully restrained of personal liberty." Utah R. Civ. P. 65B(b)(1). Subsection (d) of Rule 65B governs claims that the Board of Pardons has exceeded its jurisdiction or violated a person's constitutional rights.

The subcommittee could not think of any official detention that could not be challenged under these two rules. Appellate Rule 20 is therefore superfluous.

Moreover, Rule 20's existence can cause confusion that could prejudice a criminal defendant's opportunity to seek post-conviction relief. The PCRA has a one-year statute of limitations. *See* Utah Code § 78B-9-107. Filing a petition for writ of habeas corpus under appellate Rule 20 does not toll the statute. *See id.*

The PCRA also bars subsequent petitions that raise claims that could have been raised in a prior petition. *See* Utah Code § 78B-9-106(d). Thus, a criminal defendant who files a petition under appellate rule 20 could be procedurally barred from filing additional claims in a PCRA petition.

The Utah Supreme Court's recent decision in *Patterson v. State*, 2021 UT 52, does not change the subcommittee's conclusion. The *Patterson* court held that the Utah Constitution delegates to the judicial branch the power to grant extraordinary relief in the form of a writ of habeas corpus. *See id.* ¶¶85, 143-44. The court further held that this writ power is not limited to examining only detentions other than those that are based on a criminal conviction, but includes the power to examine challenges to criminal

convictions after direct appeal (post-conviction challenges). *See id.* ¶¶129, 135, 143-44. But the court also clarified that it has chosen to exercise its constitutional writ authority to consider post-conviction challenges "in total harmony" with the PCRA's provisions, and consequently adopted civil rule 65C to incorporate the PCRA. *See id.* ¶¶174, 218.

In short, *Patterson* clarifies that the court has chosen to exercise through the PCRA and rule 65C its constitutional authority to issue a writ of habeas corpus in response to a post-conviction challenge. Rule 65B governs all other circumstances in which habeas relief might be appropriate. Therefore, *Patterson* does not require maintaining a separate procedure for seeking habeas relief outside of rules 65B and 65C.

Comment received on Rule 20 (highlighted portion of the comment)

David Ferguson
April 24, 2022 at 3:06 pm

The Utah Association of Criminal Defense Lawyers opposes the proposed changes to Utah Rules of Appellate Procedure 4 and 20. These rule changes run the risk of keeping our appellate courts from hearing unique but deserving cases that have no other means to be heard. Closing off access to the appellate courts through procedural mechanisms does not advance the fundamental judicial functions of guaranteeing the right to an appeal, and exercising the constitutional authority only vested in the courts for this purpose. These changes instead hamper the ability of people to seek meaningful review. Further, the people most likely to be harmed by these changes are the most vulnerable individuals in society. For these reasons, explained in more detail below, the proposed changes should be rejected.

Beginning with the amendments to Rule 004, Doug Thompson's assessment is correct. The proposed changes limit the possibility of appeals in the most deserving of cases. These cases are often brought by prisoners who, due to their incarceration, face enormous obstacles in getting their appellate rights reinstated.

Prison rules prohibit keeping a law library, leaving inmates among the least likely individuals to be aware of procedural barriers to exercising rights, such as the right of appeal. Because of the lack of legal resources in prisons, inmates typically learn about their rights by word of mouth from other inmates. What they typically do not learn are procedural bars, including time limits for filing. Indigent inmates also have severely limited (if any) access to counsel. Thus, pro se prisoners are surrounded by misinformation and no meaningful ability to check what they are told against the rules and case law. The critical information about filing deadlines is least likely to reach the mentally ill, disabled, or individuals for whom English is not their first language. That means that the most disadvantaged individuals are most likely to be prejudiced by the rule change. The constraints of this rule allow courts to deny reinstatement motions more easily at the expense of limiting deserving appeals.

Additionally, the proposed changes to subsection 5 of Rule 4 is also unnecessarily constrictive. As Doug Thompson noted, the proposal takes a non-exhaustive list of three reasons to reinstate an appeal in _Manning_ and caps it at those three. There is real harm in this. District courts should continue to have the discretion to consider unusual circumstances resulting in a denial of a defendant's right to an appeal by a failure to file timely notice of appeal. The right to an appeal is constitutional and fundamental, and our rules of procedure should seek to protect this right, not substantively curtail it. What's more, our appellate system is designed to correct errors; our judicial system interferes with its own mission when it limits the avenues to hear the errors that need correcting.

Comment received on Rule 20 (highlighted portion of the comment)

As an association of lawyers committed to improving the outcomes for criminal defendants through education and support of their attorneys, we are acutely aware of the consequences when the legal system gets it wrong. Rule 4 is one of a series of mechanisms that correct for legal error in trial courts but more than that, it is necessary to guarantee the constitutional right to an appeal. If a defendant is unaware or unable to file for a timely appeal, whether through trial court, counsel error, or some unusual circumstance outside of the situations discussed in _Manning_, the constitutional right to an appeal includes a means for these individuals to seek a jurisdictional reprieve and have their cases reviewed on direct appeal. The proposed changes to Rule 4 unconstitutionally limit the right to an appeal.

Turning to the proposal for Rule 20, UACDL emphatically opposes this change as well. There are three issues:

1) The committee misunderstands the constitutional basis for the Supreme Court's writ power. The elimination of Rule 20 limits a person's power to petition a wrongful detention by forcing them to start their claim at the trial court. But the Supreme Court has original jurisdiction over writs as a matter of constitutional authority. _See_ Utah Const. Art. VII, § 3. Even if Rule 20 were to be eliminated, that original jurisdiction would continue to exist. All this rule change would do is eliminate the mechanism by which that writ may be exercised. _See Patterson v. State_, 2021 UT 52, ¶ 77. Eliminating procedural guidance just makes it less clear to Utah courts how such writs should be handled. It would not eliminate the Supreme Court's original jurisdiction; it would merely eliminate any direction on original writs.

2) By eliminating Rule 20, the Supreme Court would be abdicating its responsibility to exercise and explain its writ power. While Rule 65C cites the Post-Conviction Relief Act as the sole avenue for a defendant to challenge their conviction in many circumstances, we know this legislative enactment cannot obviate the Supreme Court's constitutional writ authority. Furthermore, habeas writs are based on principles of equity. Equity is, by its nature, designed to be flexible so that injustices unaddressed by law can nevertheless be addressed by courts. By eliminating Rule 20 the Supreme Court would cede its constitutional authority to the legislature, something the Court simply cannot do. The Committee, in its notes accompanying the amendment, suggests that _Patterson_ has ended the discussion on this topic. UACDL does not share that interpretation. _Patterson_ is still under ongoing litigation. It would be premature to draw conclusions from _Patterson_ as-it-is to eliminate Rule 20 when there are still important issues for the Court to consider.

3) The Advisory Committee's notes also indicate that they cannot think of a single circumstance in which a petitioner would raise a habeas petition under Rule 20 instead of Utah Rules of Civil Procedure 65B and 65C. In _ACLU of Utah v. State_, the ACLU filed suit because the state prison and county jails throughout the state were failing to

Comment received on Rule 20 (highlighted portion of the comment)

provide appropriate Covid-19 safeguards for inmates. 2020 UT 31, 467 P.3d 832. The case was dismissed for lack of standing, but one of the main topics of the briefing was the mechanism for bringing the case to the Supreme Court. The ACLU filed the case under 65B directly to the Supreme Court. They noted that there was a need for emergency relief that would address a statewide problem and provide clear guidance and binding precedent on all jail and prison facilities. Respondents pointed out that 65B requires that the petition be first brought to the District Court. In their reply, the ACLU argued that writs are flexible in nature and that the Supreme Court can (and in that case should) take the writ immediately given the nature of the situation. Both the ACLU and the State were probably somewhat wrong on the issue. While the ACLU was right in that there are rare and extraordinary situations in which the Supreme Court should have immediate review, they were wrong to bring their writ under 65B since that rule (as the State correctly pointed out) requires the case to go to a district court first. The petition should have been filed under Rule 20. Rule 20 explicitly provides for how a party may petition the Supreme Court to exercise its original jurisdiction to grant habeas petitions. The rule should remain to ensure that parties have guidance on how to bring unique situations directly to the Supreme Court.

As a final point, and to underscore a previous one, writs are meant to be flexible in nature. Their genesis is constitutional and grounded in equity. They are designed to solve the injustices that are not contemplated by the legislature in crafting law but nevertheless merit review. We request that the amendments be rejected and suggest instead that a task force be created to develop a more clear and effective writ system to encompass Rule 20, and potentially, a review of Utah Rules of Civil Procedure 65B and 65C.

Utah Association of Criminal Defense Lawyers

David Ferguson
Executive Director

Staci Visser
Amicus Committee Chair; Board Member

Ann Marie Taliaferro
Board Member

Rule 20. Habeas corpus proceedings.

(a) Application for an original writ; when appropriate. If a petition for a writ of habeas corpus is filed in the appellate court or submitted to a justice or judge thereof, it will be referred to the appropriate district court unless it is shown on the face of the petition to the satisfaction of the appellate court that the district court is unavailable or other exigent circumstances exist. If a petition is initially filed in a district court or is referred to a district court by the appellate court and the district court denies or dismisses the petition, a refiling of the petition with the appellate court is inappropriate; the proper procedure in such an instance is an appeal from the order of the district court.

(b) Procedure on original petition.

(1) A habeas corpus proceeding may be commenced by filing a petition with the clerk of the appellate court or, in emergency situations, with a justice or judge of the court. For matters pending in the Supreme court, an original petition and seven copies shall be filed in the Supreme Court. For matters pending in the Court of Appeals, an original petition and four copies shall be filed in the Court of Appeals. The petitioner shall serve a copy of the petition on the respondent pursuant to any of the methods provided for service of process in Rule 4 of the Utah Rules of Civil Procedure but, if imprisoned, the petitioner may mail by United States mail, postage prepaid, a copy of the petition to the Attorney General of Utah or the county attorney of the county if imprisoned in a county jail. Such service is in lieu of service upon the named respondent, and a certificate of mailing under oath that a copy was mailed to the Attorney General or county attorney must be filed with the clerk of the appellate court. In emergency situations, an order to show cause may be issued by the court, or a single justice or judge if the court is not available, and a stay or injunction may be issued to preserve the court's jurisdiction until such time as the court can hear argument on whether a writ should issue.

(2) If the petition is not referred to the district court, the attorney general or the county attorney, as the case may be, shall answer the petition or otherwise plead within ten days after service of a copy of the petition. When a responsive pleading or motion is filed or an order to show cause is issued, the court shall set the case for hearing and the clerk shall give notice to the parties.

(3) The clerk of the appellate court shall, if the petitioner is imprisoned or is a person otherwise in the custody of the state or any political subdivision thereof, give notice of the time for the filing of memoranda and for oral argument, to the attorney general, the county attorney, or the city attorney, depending on where the petitioner is held and whether the petitioner is detained pursuant to state, county or city law. Similar notice shall be given to any other person or an association detaining the petitioner not in custody of the state.

(c) Contents of petition and attachments. The petition shall include the following:

(1) A statement of where the petitioner is detained, by whom the petitioner is detained, and the reason, if known, why the respondent has detained the petitioner.

(2) A brief statement of the reasons why the detention is deemed unlawful. The petition shall state in plain and concise language:

(A) the facts giving rise to each claim that the confinement or detention is in violation of a state order or judgment or a constitutional right established by the United States Constitution or the Constitution of the State of Utah or is otherwise illegal;

(B) whether an appeal was taken from the judgment or conviction pursuant to which a petitioner is incarcerated; and

(C) whether the allegations of illegality were raised in the appeal and decided by the appellate court.

(3) A statement indicating whether any other petition for a writ of habeas corpus based on the same or similar grounds has been filed and the reason why relief was denied.

(4) Copies of the court order or legal process, court opinions and findings pursuant to which the petitioner is detained or confined, affidavits, copies of orders, and other supporting written documents shall be attached to the petition or it shall be stated by petitioner why the same are not attached.

(d) Contents of answer. The answer shall concisely set forth specific admissions, denials, or affirmative defenses to the allegations of the petition and must state plainly and unequivocally whether the respondent has, or at any time has had, the person designated in the petition under control and restraint and, if so, the cause for the restraint. The answer shall not contain citations of legal authority or legal argument.

(e) Other provisions.

(1) If the respondent cannot be found or if the respondent does not have the person in custody, the writ and any other process issued may be served upon anyone having the petitioner in custody, in the manner and with the same effect as if that person had been made respondent in the action.

(2) If the respondent refuses or avoids service, or attempts wrongfully to carry the person imprisoned or restrained out of the county or state after service of the writ, the person serving the writ shall immediately arrest the respondent or other person so

resisting, for presentation, together with the person designated in the writ, forthwith before the court.

(3) At the time of the issuance of the writ, the court may, if it appears that the person detained will be carried out of the jurisdiction of the court or will suffer some irreparable injury before compliance with the writ can be enforced, cause a warrant to issue, reciting the facts and directing the sheriff to bring the detained person before the court to be dealt with according to law.

(4) The respondent shall appear at the proper time and place with the person designated or show good cause for not doing so. If the person designated has been transferred, the respondent must state when and to whom the transfer was made, and the reason and authority for the transfer. The writ shall not be disobeyed for any defect of form or misdescription of the person restrained or of the respondent, if enough is stated to show the meaning and intent.

(5) The person restrained may waive any rights to be present at the hearing, in which case the writ shall be modified accordingly. Pending a determination of the matter, the court may place such person in the custody of an individual or association as may be deemed proper.

TAB 4

Rule 19. Extraordinary ~~writs~~relief.

(a) **Petition for extraordinary relief~~writ to a judge or agency; petition; service and filing~~.** When no other plain, speedy, or adequate remedy is available, a person may petition an appellate court for ~~An application for an~~ extraordinary relief~~writ~~ referred to in ~~Rule 65B, U~~Utah Rule~~s~~ of Civil Procedure 65B.~~, directed to a judge, agency, person, or entity must be made by filing a petition with the appellate court clerk.~~

(b) **Respondents.** The person or entity against whom relief is sought and all parties in any related district court or agency action other than the petitioner are deemed respondents for all purposes.

(c) **Filing and service.** The petition must be filed with the appellate clerk and ~~be~~ served on the respondent(s) ~~judge, agency, person, or entity and on all parties to the action or case in the trial court~~. In the event of an original petition in the appellate court where no action is pending in the district~~trial~~ court or agency, the petition also must be served ~~personally on the respondent judge, agency, person, or entity and service must be made by the most direct means available~~ on all persons or ~~associations~~entities whose interests might be substantially affected.

(d) **Filing fee.** The petitioner must pay the prescribed filing fee at the time of filing, unless waived by the court.

(~~b~~e) **Contents of petition ~~and filing fee~~**. A petition for ~~an~~ extraordinary ~~writ~~relief must contain the following:

(1) ~~A~~a list~~statement~~ of all respondents against whom relief is sought, and all others persons or ~~associations~~entities, by name or by class, whose interests might be substantially affected;

(2) ~~A~~a statement of the issues presented and of the relief sought;

(3) ~~A~~a statement of the facts necessary to ~~an understanding of~~understand the issues presented by the petition;

(4) Aa statement of the reasons why no other plain, speedy, or adequate remedy exists and why the writ relief should issuebe granted;

(5) (10) Wwhenre the subject of the petition is an interlocutory order, the petitioner must statea statement explaining whether a petition for interlocutory appeal has been filed and, if so, summarize its status or, if not, state why interlocutory appeal is not a plain, speedy, or adequate remedy.;

(56) Eexcept in cases where the writ relief is directed to a district court, a statement explaining why it is impractical or inappropriate to file the petition for a writ in the district court;

(67) a discussion of points and authorities in support of the petition; andCopies of any order or opinion or parts of the record that may be essential to an understanding of the matters set forth in the petition;

(8)(7) A memorandum of points and authorities in support of the petition; copies of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition.and

(8) The prescribed filing fee, unless waived by the court.

(9f) **Emergency relief.** Whenre emergency relief is sought, the petitioner and respondent(s) must also comply with Rule 23C. file a separate petition and comply with the additional requirements set forth in Rule 23C(b).

(10) Where the subject of the petition is an interlocutory order, the petitioner must state whether a petition for interlocutory appeal has been filed and, if so, summarize its status or, if not, state why interlocutory appeal is not a plain, speedy, or adequate remedy.

(gc) **Response.** No petition will be granted in the absence of a request by the court for a response. No response to a petition will be received unless requested by the court. to

~~**petition**. The judge, agency, person, or entity and all parties in the action other than the petitioner will be deemed respondents for all purposes.~~

(1) ~~(1)~~ **Timing.** If requested,~~Any~~ a respondent may file a response within 30 days of the court's request or within such other time as the court orders. ~~after the later of the date the petition is served or the filing fee is paid or waived.~~

(2) **Joint Response.** Two or more respondents may respond jointly.

(~~2~~3) **Contents.** The response must include, or respond to, as appropriate, the items in paragraph (e).

(~~3~~4) **Notice of non-participation.** If any respondent does not desire to appear in the proceedings or file a response, that respondent may advise the appellate court clerk and all parties by letter, but the allegations of the petition will not thereby be deemed admitted. ~~Where emergency relief is sought, Rule 23C(d) applies. Otherwise, within seven days after the petition is served, any respondent or any other party may file a response in opposition or concurrence, which includes supporting authority.~~

(h) **Reply.** The petitioner may file a reply within 14 days after service of the response. A reply must be limited to responding to the facts and arguments raised in the response.

(i) **Page and word limits.** A petition or response may not exceed 20 pages or 7,000 words. A reply may not exceed 10 pages or 3,500 words. Headings, footnotes, and quotations count toward the page or word limit, but the cover page or caption, any tables of content or authorities, signature block, certificates, and any attachments do not.

(j) **Certificate of compliance.** A petition, response, and reply must include the filer's certification that the document complies with:

(1) paragraph (i), governing the number of pages or words (the filer may rely on the word count of the word processing system used to prepare the brief); and

~~(2) Rule 27(a), governing format, typeface, and typesize; and~~

(~~3~~2) Rule 21(h), governing filings containing non-public information.

(k~~d~~) **Review and disposition of petition**.

(1) The court may deny a~~will render a decision based on the~~ petition without a ~~and any timely~~ response. Where a response has been called for, the court will render a decision based on the petition and any timely response and reply, or it may require briefing or request further information, and may hold oral argument at its discretion. ~~If additional briefing is required, the briefs must comply with Rules 24 and 27. Rule 23C(f) applies to requests for hearings in emergency matters.~~

(2) If the court determines that the petition was not appropriately filed in the appellate court, the court will refer the petition to the appropriate district court. Any review of the district court's decision on the petition must be pursued by appeal rather than a refiling of the petition.

(3) With regard to emergency petitions submitted under Rule 23C, and where consultation with other members of the court cannot be timely obtained, a single judge or justice may grant or deny the emergency relief~~petition~~, subject to the court's review at the earliest possible time.

(4~~3~~) With regard to all petitions, a single judge or justice may deny the petition if it is frivolous on its face or fails to materially comply with the requirements of this rule or Rule 65B, Utah Rules of Civil Procedure. A petition's denial by a single judge or justice may be reviewed by the appellate court upon specific request filed within seven days of notice of disposition, but such request may not include any additional argument or briefing.

(~~e~~l) **Transmission of record**. In reviewing a petition for extraordinary ~~-~~relief~~writ~~, the appellate court may order transmission of the record, or any relevant portion thereof.

(m~~f~~) **Issuing ~~an~~ extraordinary ~~writ~~ relief on the court's motion**.

(1) The appellate court, in aid of its own jurisdiction in extraordinary cases, may on its own motion issue a writ of certiorari directed to a judge, agency, person, or entity.

(2) A copy of the writ will be served on the named respondents in the manner and by an individual authorized to accomplish personal service under ~~Rule 4,~~ Utah Rule~~s~~ of Civil Procedure 4. In addition, copies of the writ must be transmitted by the appellate court clerk, by the most direct means available, to all persons or associations whose interests might be substantially affected by the writ.

(3) The respondent and the persons or ~~associations~~entities whose interests are substantially affected may, within four days of the writ's issuance, petition the court to dissolve or amend the writ. The petition must be accompanied by a concise statement of the reasons for dissolving or amending the writ.

TAB 5

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part III. Employees (Refs & Annos)
Subpart E. Attendance and Leave
Chapter 61. Hours of Work (Refs & Annos)
Subchapter I. General Provisions (Refs & Annos)

5 U.S.C.A. § 6103

§ 6103. Holidays

Effective: June 17, 2021
Currentness

(a) The following are legal public holidays:

New Year's Day, January 1.

Birthday of Martin Luther King, Jr., the third Monday in January.

Washington's Birthday, the third Monday in February.

Memorial Day, the last Monday in May.

Juneteenth National Independence Day, June 19.

Independence Day, July 4.

Labor Day, the first Monday in September.

Columbus Day, the second Monday in October.

Veterans Day, November 11.

Thanksgiving Day, the fourth Thursday in November.

Christmas Day, December 25.

(b) For the purpose of statutes relating to pay and leave of employees, with respect to a legal public holiday and any other day declared to be a holiday by Federal statute or Executive order, the following rules apply:

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

(1) Instead of a holiday that occurs on a Saturday, the Friday immediately before is a legal public holiday for--

(A) employees whose basic workweek is Monday through Friday; and

(B) the purpose of section 6309 of this title.

(2) Instead of a holiday that occurs on a regular weekly non-workday of an employee whose basic workweek is other than Monday through Friday, except the regular weekly non-workday administratively scheduled for the employee instead of Sunday, the workday immediately before that regular weekly nonworkday is a legal public holiday for the employee.

(3) Instead of a holiday that is designated under subsection (a) to occur on a Monday, for an employee at a duty post outside the United States whose basic workweek is other than Monday through Friday, and for whom Monday is a regularly scheduled workday, the legal public holiday is the first workday of the workweek in which the Monday designated for the observance of such holiday under subsection (a) occurs.

This subsection, except subparagraph (B) of paragraph (1), does not apply to an employee whose basic workweek is Monday through Saturday.

(c) January 20 of each fourth year after 1965, Inauguration Day, is a legal public holiday for the purpose of statutes relating to pay and leave of employees as defined by section 2105 of this title and individuals employed by the government of the District of Columbia employed in the District of Columbia, Montgomery and Prince Georges Counties in Maryland, Arlington and Fairfax Counties in Virginia, and the cities of Alexandria and Falls Church in Virginia. When January 20 of any fourth year after 1965 falls on Sunday, the next succeeding day selected for the public observance of the inauguration of the President is a legal public holiday for the purpose of this subsection.

(d)(1) For purposes of this subsection--

(A) the term “compressed schedule” has the meaning given such term by section 6121(5); and

(B) the term “adverse agency impact” has the meaning given such term by section 6131(b).

(2) An agency may prescribe rules under which employees on a compressed schedule may, in the case of a holiday that occurs on a regularly scheduled non-workday for such employees, and notwithstanding any other provision of law or the terms of any collective bargaining agreement, be required to observe such holiday on a workday other than as provided by subsection (b), if the agency head determines that it is necessary to do so in order to prevent an adverse agency impact.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 515; Pub.L. 90-363, § 1(a), June 28, 1968, 82 Stat. 250; Pub.L. 94-97, Sept. 18, 1975, 89 Stat. 479; Pub.L. 98-144, § 1, Nov. 2, 1983, 97 Stat. 917; Pub.L. 104-201, Div. A, Title XVI, § 1613, Sept. 23, 1996, 110 Stat. 2739; Pub.L. 105-261, Div. A, Title XI, § 1107, Oct. 17, 1998, 112 Stat. 2142; Pub.L. 117-17, § 2, June 17, 2021, 135 Stat. 287.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 10358

Ex. Ord. No. 10358, June 9, 1952, 17 F.R. 1529, as amended by Ex. Ord. No. 11226, May 27, 1965, 30 F.R. 7213; Ex. Ord. No. 11272, Feb. 23, 1966, 31 F.R. 3111, formerly set out as a note under this section, which related to the observance of holidays, was revoked by Ex. Ord. No. 11582, Feb. 11, 1971, 36 F.R. 2957, set out under this section.

EXECUTIVE ORDER NO. 11582

<Feb. 11, 1971, 36 F.R. 2957>

Observance of Holidays

By virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

Section 1. Except as provided in section 7, this order shall apply to all executive departments, independent agencies, and Government corporations, including their field services.

Sec. 2. As used in this order:

(a) Holiday means the first day of January, the third Monday of February, the last Monday of May, the fourth day of July, the first Monday of September, the second Monday of October, the fourth Monday of October, the fourth Thursday of November, the twenty-fifth day of December, or any other calendar day designated as a holiday by Federal statute or Executive order.

(b) Workday means those hours which comprise in sequence the employee's regular daily tour of duty within any 24-hour period, whether falling entirely within one calendar day or not.

Sec. 3. (a) Any employee whose basic workweek does not include Sunday and who would ordinarily be excused from work on a holiday falling within his basic workweek shall be excused from work on the next workday of his basic workweek whenever a holiday falls on Sunday.

(b) Any employee whose basic workweek includes Sunday and who would ordinarily be excused from work on a holiday falling within his basic workweek shall be excused from work on the next workday of his basic workweek whenever a holiday falls on a day that has been administratively scheduled as his regular weekly nonworkday in lieu of Sunday.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Sec. 4. The holiday for a full-time employee for whom the head of a department has established the first 40 hours of duty performed within a period of not more than six days of the administrative workweek as his basic workweek because of the impracticability of prescribing a regular schedule of definite hours of duty for each workday, shall be determined as follows:

(a) If a holiday occurs on Sunday, the head of the department shall designate in advance either Sunday or Monday as the employee's holiday and the employee's basic 40-hour tour of duty shall be deemed to include eight hours on the day designated as the employee's holiday.

(b) If a holiday occurs on Saturday, the head of the department shall designate in advance either the Saturday or the preceding Friday as the employee's holiday and the employee's basic 40-hour tour of duty shall be deemed to include eight hours on the day designated as the employee's holiday.

(c) If a holiday occurs on any other day of the week, that day shall be the employee's holiday, and the employee's basic 40-hour tour of duty shall be deemed to include eight hours on that day.

(d) When a holiday is less than a full day, proportionate credit will be given under paragraph (a), (b), or (c) of this section.

Sec. 5. Any employee whose workday covers portions of two calendar days and who would, except for this section, ordinarily be excused from work scheduled for the hours of any calendar day on which a holiday falls, shall instead be excused from work on his entire workday which commences on any such calendar day.

Sec. 6. In administering the provisions of law relating to pay and leave of absence, the workdays referred to in sections 3, 4, and 5 shall be treated as holidays in lieu of the corresponding calendar holidays.

Sec. 7. The provisions of this order shall apply to officers and employees of the Post Office Department and the United States Postal Service (except that sections 3, 4, 5, and 6 shall not apply to the Postal Field Service) until changed by the Postal Service in accordance with the Postal Reorganization Act [see Short Title note under 39 U.S.C.A. § 101].

Sec. 8. Executive Order No. 10358 of June 9, 1952, entitled **Observance of Holidays by Government Agencies**, and amendatory Executive Orders No. 11226 of May 27, 1965, and No. 11272 of February 23, 1966, are revoked.

Sec. 9. This order is effective as of January 1, 1971.

Richard Nixon

Notes of Decisions (13)

5 U.S.C.A. § 6103, 5 USCA § 6103
Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

2022 Utah Laws H.B. 238 (West's No. 328)

UTAH 2022 SESSION LAWS

64th LEGISLATURE, 2022 GENERAL SESSION

Additions are indicated by **Text**; deletions by ~~Text~~.
Vetoes are indicated by ~~Text~~;
stricken material by ~~**Text**~~.

HB 238

West's No. 328
STATE HOLIDAY MODIFICATIONS

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Sandra Hollins

Senate Sponsor: Jacob L. Anderegg

LONG TITLE

General Description:

This bill amends provisions related to state holidays.

Highlighted Provisions:

This bill:

. provides for the observation of Juneteenth National Freedom Day each year as a holiday throughout the State.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Utah Code Sections Affected:

AMENDS:

63G–1–301, as last amended by Laws of Utah 2021, Chapters 335 and 344

Be It enacted by the Legislature of the state of Utah:

Section 1. Section 63G–1–301 is amended to read:

<< UT ST § 63G–1–301 >>

§ 63G–1–301. Legal holidays—Personal preference day—Governor authorized to declare additional days

(1)(a) The following-named days are legal holidays in this state:

(i) every Sunday, except as provided in Subsection (1)(e);

(ii) January 1, called New Year's Day;

(iii) the third Monday of January, called Dr. Martin Luther King, Jr. Day;

(iv) the third Monday of February, called Washington and Lincoln Day;

(v) the last Monday of May, called Memorial Day;

(vi) on the day described in Subsection (1)(f), Juneteenth National Freedom Day;

~~(vi)~~**(vii)** July 4, called Independence Day;

~~(vii)~~**(viii)** July 24, called Pioneer Day;

~~(viii)~~**(ix)** the first Monday of September, called Labor Day;

~~(ix)~~**(x)** the second Monday of October, called Columbus Day;

~~(x)~~**(xi)** November 11, called Veterans Day;

~~(xi)~~**(xii)** the fourth Thursday of November, called Thanksgiving Day;

~~(xii)~~**(xiii)** December 25, called Christmas; and

~~(xiii)~~**(xiv)** all days which may be set apart by the President of the United States, or the governor of this state by proclamation as days of fast or thanksgiving.

(b) If any of the holidays under Subsections (1)(a)(ii) through ~~(xiii)~~ **(v) or Subsections (1)(a)(vii) through (xiv)**, falls on Sunday, then the following Monday shall be the holiday.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

(c) If any of the holidays under Subsections (1)(a)(ii) through ~~(xiii)~~ **(v) or Subsections (1)(a)(vii) through (xiv)** falls on Saturday, then the preceding Friday shall be the holiday.

(d) Each employee may select one additional day, called Personal Preference Day, to be scheduled pursuant to rules adopted by the Division of Human Resource Management.

(e) For purposes of Utah Constitution Article VI, Section 16, Subsection (1), regarding the exclusion of state holidays from the 45–day legislative general session, Sunday is not considered a state holiday.

(f)(i) The Juneteenth National Freedom Day holiday is on June 19, if that day is on a Monday.

(ii) If June 19 is on a Tuesday, Wednesday, Thursday, or Friday, the Juneteenth National Freedom Day holiday is on the immediately preceding Monday.

(iii) If June 19 is on a Saturday or Sunday, the Juneteenth National Freedom Day holiday is on the immediately following Monday.

(2)(a) Whenever in the governor's opinion extraordinary conditions exist justifying the action, the governor may:

(i) declare, by proclamation, legal holidays in addition to those holidays under Subsection (1); and

(ii) limit the holidays to certain classes of business and activities to be designated by the governor.

(b) A holiday may not extend for a longer period than 60 consecutive days.

(c) Any holiday may be renewed for one or more periods not exceeding 30 days each as the governor may consider necessary, and any holiday may, by like proclamation, be terminated before the expiration of the period for which it was declared.

Effective May 4, 2022.

Approved March 24, 2022

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

Note: Highlighted sections are amendments previously approved by the Committee.

Rule 22. Computation and enlargement of time.

(a) **Computation of time**. In computing any period of time prescribed by these rules, by a~~n order of the~~ court's order, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run ~~shall~~may not be included. If the designated period of time begins to run from the date of entry of an order or judgment and the order or judgment is entered on a Saturday, Sunday, or legal holiday, the date of entry will be deemed to be the first day following the entry that is not a Saturday, Sunday, or legal holiday. The last day of the period ~~shall~~must be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time under ~~subsection~~ paragraph (d), is less than 11 days, intermediate Saturdays, Sundays, and legal holidays ~~shall~~must be excluded in the computation. As used in this rule, "legal holiday" includes days designated as holidays by the state or federal governments.

(b) **Enlargement of time**.

~~(b)~~(1) Motions for an enlargement of time for filing briefs beyond the time permitted by stipulation of the parties under Rule 26(a) are not favored.

~~(b)~~(2) The court for good cause shown may upon motion extend the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of time. This rule does not authorize the court to extend the jurisdictional deadlines specified by any of the rules listed in Rule 2. For the purpose of this rule, good cause includes, but is not limited to, the complexity of the case on appeal, engagement in other litigation, and extreme hardship to counsel.

~~(b)~~(3) A motion for an enlargement of time shall be filed prior to the expiration of the time for which the enlargement is sought.

~~(b)~~(4) A motion for enlargement of time shall state:

~~(b)(4)~~(A) with particularity the good cause for granting the motion;

~~(b)(4)~~(B) whether the movant has previously been granted an enlargement of time and, if so, the number and duration of such enlargements;

~~(b)(4)~~(C) when the time will expire for doing the act for which the enlargement of time is sought; ~~and~~

~~(b)(4)~~(D) the date on which the act for which the enlargement of time is sought will be completed~~.~~; and

(E) the position of every other party on the requested extension or why the movant was unable to learn a party's position.

~~(b)~~(5)~~(A)~~ If the good cause relied upon is engagement in other litigation, the motion ~~shall~~must:

~~(b)(5)~~(A)~~(i)~~ identify such litigation by caption, number and court;

~~(b)(5)~~(B~~A~~)~~(ii)~~ describe the action of the court in the other litigation on a motion for continuance;

~~(b)(5)~~(C~~A~~)~~(iii)~~ state the reasons why the other litigation should take precedence over the subject appeal;

~~(b)(5)~~(D~~A~~)~~(iv)~~ state the reasons why associated counsel cannot prepare the brief for timely filing or relieve the movant in the other litigation; and

~~(b)(5)~~(E~~A~~)~~(v)~~ identify any other relevant circumstances.

~~(b)~~(6~~5~~)~~(B)~~ If the good cause relied upon is the complexity of the appeal, the movant ~~shall~~ must state the reasons why the appeal is so complex that an adequate brief cannot reasonably be prepared by the due date.

~~(b)~~(75)~~(C)~~ If the good cause relied upon is extreme hardship to counsel, the movant ~~shall~~ must state in detail the nature of the hardship.

~~(b)~~(85)~~(D)~~ All facts supporting good cause ~~shall~~ msut be stated with specificity. Generalities, such as "the motion is not for the purpose of delay" or "counsel is engaged in other litigation," are insufficient.

(c) **Ex parte motion**. Except as to enlargements of time for filing and service of briefs under Rule 26(a), a party may file one ex parte motion for enlargement of time not to exceed 14 days if no enlargement of time has been previously granted, if the time has not already expired for doing the act for which the enlargement is sought, and if the motion otherwise complies with the requirements and limitations of paragraph (b) of this rule.

(d) **Additional time after service by mail.** Whenever a party is required or permitted to do an act within a prescribed period after service of a ~~paper~~ document and the ~~paper~~ document is served by mail, 3 days shall be added to the prescribed period.

Effective November 14, 2016

Advisory Committee Note

A motion to enlarge time must be filed prior to the expiration of the time sought to be enlarged. A specific date on which the act will be completed must be provided. The court may grant an extension of time after the original deadline has expired, but the motion to enlarge the time must be filed prior to the deadline.

Both appellate courts place appeals in the oral argument queue in accordance with the priority of the case and after principal briefs have been filed. Delays in the completion of briefing will likely delay the date of oral argument.

Adopted 2020

TAB 6

Rule 50. Response; reply.

Option 1:

(a) **Response**. No petition for writ of certiorari will be granted absent a request by the court for a response, and no response will be received unless requested by the court. Within 30 days after an order requesting a response ~~petition for a writ of certiorari is served~~, any other party may file a response. If the petitioner pays the required filing fee or obtains a waiver of that fee after service, then the time for response will run from the date that obligation is satisfied. The response must comply with Rule 27 and, as applicable, Rule 49. A party opposing a petition may so indicate by letter in lieu of a formal response, but the letter may not include any argument or analysis.

Option 2:

(a) **Response**. Within 30 days after a petition for a writ of certiorari is served, any other party may file a response. If no response is submitted within the allotted time, the court may request a response. No petition for writ of certiorari will be granted unless a response is submitted within the allotted time or subsequently requested by the court. If the petitioner pays the required filing fee or obtains a waiver of that fee after service, then the time for response will run from the date that obligation is satisfied. The response must comply with Rule 27 and, as applicable, Rule 49. A party opposing a petition may so indicate by letter in lieu of a formal response, but the letter may not include any argument or analysis.

Rule 50. Response; reply.

(a) **Response**. Within 30 days after a petition for a writ of certiorari is served, any other party may file a response. If the petitioner pays the required filing fee or obtains a waiver of that fee after service, then the time for response will run from the date that obligation is satisfied. The response must comply with Rule 27 and, as applicable, Rule 49. A party opposing a petition may so indicate by letter in lieu of a formal response, but the letter may not include any argument or analysis.

(b) **Page limitation**. A response must be as short as possible and may not exceed 20 pages, excluding the table of contents, the table of authorities, and the appendix.

(c) **Objections to jurisdiction**. The court will not accept a motion to dismiss a petition for a writ of certiorari. Objections to the Supreme Court's jurisdiction 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 within 7 days after 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 must be as short as possible, may not exceed five pages, and must comply with Rule 27.

Effective May 1, 2022

TAB 7

Rule 57. Record on appeal; transmission of record.

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

(b) The record will be transmitted by the juvenile court clerk to the Court of Appeals clerk upon the request of an appellate court.

TAB 8

UTAH SUPREME COURT

Matthew B. Durrant
Chief Justice
John A. Pearce
Associate Chief Justice
Paige Petersen
Justice
Diana Hagen
Justice
Jill M. Pohlman
Justice

Nicole I. Gray
Clerk of Court

Appellate Court Board

Nicholas Stiles
Appellate Court Administrator

450 South State Street
Salt Lake City, Utah 84114-0230
Telephone: (801) 578-3834
Email: nicks@utcourts.gov

UTAH COURT OF APPEALS

Michele M. Christiansen Forster
Presiding Judge
Gregory K. Orme
Judge
David N. Mortensen
Judge
Ryan M. Harris
Judge
Ryan D. Tenney
Judge

Lisa A. Collins
Clerk of Court

To: Chris Ballard, Chair, Advisory Committee on the Rules of Appellate Procedure
From: Nick Stiles, Appellate Court Administrator
Re: Disqualification of Appellate Judges

Chris –

A member of the Court of Appeals recently brought this issue before all of our appellate judges. We do not currently have a rule regarding how a party may move for an appellate judge to be disqualified, recused, or be determined to be constitutionally or statutorily incompetent.

I have provided a draft version of a Utah rule. I have also provided three examples of other jurisdictions' relevant rules. One question in addition to the drafting considerations, is where within our appellate rules would be most appropriate for this new rule to be located.

Thanks!

Respectfully,

Nick Stiles

Attached:
Tab 1 Draft Utah Rule
Tab 2 Example Nevada Rule
Tab 3 Example California Rule
Tab 4 Example Tennessee Rule

TAB 1

Potential Utah Rule

Rule XX - Disqualification of a Justice or Judge

(a) **Motion for Disqualification.** A request that a justice or judge of the Supreme Court or Court of Appeals be disqualified from sitting in a particular case shall be made by motion. Unless the court permits otherwise, the motion shall be in writing and shall be in the form required by Rule 23.

(1) Time to File. A motion to disqualify a justice or judge shall be filed with the clerk of the appropriate court within 60 days after filing of the notice of appeal under Rule 4, together with proof of service on all other parties. Except for good cause shown, the failure to file a timely motion to disqualify shall be deemed a waiver of the moving party's right to object to a justice's or judge's participation in a case.

(2) Contents of a Motion.

(A) Grounds, Supporting Facts, and Legal Authorities. A motion shall state clearly and concisely in separately numbered paragraphs each ground relied upon as a basis for disqualification with the specific facts alleged in support thereof and the legal argument, including citations to relevant cases, statutes or rules, necessary to support it.

(B) Verification. All assertions of fact in a motion must be supported by proper sworn averments in an affidavit or by citations to the specific page and line where support appears in the record of the case.

(i) A verification by affidavit shall be served and filed with the motion.

(ii) The affidavit shall be made upon personal knowledge by a person or persons affirmatively shown competent to testify and shall set forth only those facts that would be admissible in evidence.

(iii) The affidavit shall set forth the date or dates when the moving party first became aware of the facts set forth in the motion.

(C) Attorney's Certificate. A motion under this Rule filed by a party represented by counsel shall contain a certificate signed by at least 1 attorney of record who is an active member of the bar of this state. The certificate must contain the following information:

(i) A representation that the signing attorney has read the motion and supporting documents;

(ii) A representation that the motion and supporting documents are in the form required by this Rule; and

(iii) A representation that, based on personal investigation, the signing attorney believes all grounds asserted to be legally valid and all supporting factual allegations to be true, and that the motion is made in good faith and not for purposes of delay or for other improper motive.

(D) Striking a Motion Without an Attorney's Certificate. If a motion does not contain the certification required by Rule XX(a)(2)(C) it shall be stricken unless such a certification is provided within 14 days after the omission is called to the attorney's attention.

(b) Response.

(1) By a Party. Any party may file a response to a motion to disqualify a justice or judge. The response shall be filed within 14 days after service of the motion unless the court shortens or extends the time.

(2) By the Justice or Judge. The challenged justice or judge may submit a response to the motion in writing or orally at any hearing that may be ordered by the court.

(c) Reply. A reply may not be filed unless permission is first obtained from the court.

(d) Order. The judge in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion. If the judge denies the motion, the movant, within 21 days of entry of the order, may file a motion for court review to be determined promptly by three other judges of the intermediate court upon a de novo standard of review.

(e) Motion concerning more than one judge. If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of more than one judge of the intermediate appellate court ("recusal motion"), and if the recusal motion is denied by the judges in question, the movant, within twenty-one days of entry of the order, may file a motion for court review to be determined promptly by three other judges of the intermediate appellate court who were not subjects of the recusal motion, upon a de novo standard of review. If there are not three judges of the intermediate appellate court who were not subjects of the recusal motion, then a motion for court review is not available; under such circumstances, the order denying the recusal motion may be appealed pursuant to Rule XX(f).

(f) Review unavailable or denied. If the motion for court review is denied, or if a motion for court review is not available pursuant to the third sentence of Rule XX(e), an accelerated appeal as of right lies to the Utah Supreme Court, which shall expeditiously decide the appeal based upon the petition and other papers filed in the intermediate appellate court. The appeal to the Supreme Court shall be titled "recusal appeal from the Court of Appeals" and shall be filed within 21 days of the intermediate appellate court's order denying the motion for court review or, if a motion for court review was not available pursuant to the third sentence of Rule XX(e), within 21 days of the order denying the motion seeking disqualification or recusal of the appellate judges in question.

(g) Supreme Court justices. If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of a Supreme Court justice, the justice in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the justice shall state in writing the grounds upon which he or she denies the motion. If the justice denies the motion, the movant, within 21 days of entry of the order, may file a motion for court review, which shall be determined promptly by the remaining justices upon a de novo standard of review.

Potential Utah Rule

(h) If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of all of the justices of the Supreme Court, and if the motion is denied by the justices, no motion for further review is available.

TAB 2

Nevada Example

Rule 35 - Disqualification of a Justice or Judge

(a) Motion for Disqualification. A request that a justice or judge of the Supreme Court or Court of Appeals be disqualified from sitting in a particular case shall be made by motion. Unless the court permits otherwise, the motion shall be in writing and shall be in the form required by Rule 27.

(1) Time to File. A motion to disqualify a justice or judge shall be filed with the clerk of the Supreme Court within 60 days after docketing of the appeal under Rule 12, together with proof of service on all other parties. Except for good cause shown, the failure to file a timely motion to disqualify shall be deemed a waiver of the moving party's right to object to a justice's or judge's participation in a case.

(2) Contents of a Motion.

(A) Grounds, Supporting Facts, and Legal Authorities. A motion shall state clearly and concisely in separately numbered paragraphs each ground relied upon as a basis for disqualification with the specific facts alleged in support thereof and the legal argument, including citations to relevant cases, statutes or rules, necessary to support it.

(B) Verification. All assertions of fact in a motion must be supported by proper sworn averments in an affidavit or by citations to the specific page and line where support appears in the record of the case.

(i) A verification by affidavit shall be served and filed with the motion.

(ii) The affidavit shall be made upon personal knowledge by a person or persons affirmatively shown competent to testify and shall set forth only those facts that would be admissible in evidence.

(iii) The affidavit shall set forth the date or dates when the moving party first became aware of the facts set forth in the motion.

(C) Attorney's Certificate. A motion under this Rule filed by a party represented by counsel shall contain a certificate signed by at least 1 attorney of record who is an active member of the bar of this state. The certificate must contain the following information:

(i) A representation that the signing attorney has read the motion and supporting documents;

(ii) A representation that the motion and supporting documents are in the form required by this Rule; and

(iii) A representation that, based on personal investigation, the signing attorney believes all grounds asserted to be legally valid and all supporting factual allegations to be true, and that the motion is made in good faith and not for purposes of delay or for other improper motive.

(D) Striking a Motion Without an Attorney's Certificate. If a motion does not contain the certification required by Rule 35(a)(2)(C). it shall be stricken unless such a certification is provided within 14 days after the omission is called to the attorney's attention.

(b) Response.

Nevada Example

(1) By a Party. Any party may file a response to a motion to disqualify a justice or judge. The response shall be filed within 14 days after service of the motion unless the court shortens or extends the time.

(2) By the Justice or Judge. The challenged justice or judge may submit a response to the motion in writing or orally at any hearing that may be ordered by the court.

(c) Reply. A reply may not be filed unless permission is first obtained from the court.

Nev. R. App. P. 35

TAB 3

California Example

CODE OF CIVIL PROCEDURE - CCP

PART 1. OF COURTS OF JUSTICE [35 - 286] (Part 1 repealed and added by Code Amendments 1880, Ch. 35.)

TITLE 2. JUDICIAL OFFICERS [165 - 187] (Title 2 repealed and added by Code Amendments 1880, Ch. 35.)

CHAPTER 3. Disqualifications of Judges [170 - 170.9] (Chapter 3 added by Code Amendments 1880, Ch. 35.)

170.6.

(a) (1) A judge, court commissioner, or referee of a superior court of the State of California shall not try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it is established as provided in this section that the judge or court commissioner is prejudiced against a party or attorney or the interest of a party or attorney appearing in the action or proceeding.

(2) A party to, or an attorney appearing in, an action or proceeding may establish this prejudice by an oral or written motion without prior notice supported by affidavit or declaration under penalty of perjury, or an oral statement under oath, that the judge, court commissioner, or referee before whom the action or proceeding is pending, or to whom it is assigned, is prejudiced against a party or attorney, or the interest of the party or attorney, so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing before the judge, court commissioner, or referee. If the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to, or who is scheduled to try, the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date. If directed to the trial of a cause with a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. If directed to the trial of a criminal cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance. If directed to the trial of a civil cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance. If the court in which the action is pending is authorized to have no more than one judge, and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion shall be made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion. In no event shall a judge, court commissioner, or referee entertain the motion if it is made after the drawing of the name of the first juror, or if there is no jury, after the making of an opening statement by counsel for plaintiff, or if there is no opening statement by counsel for plaintiff, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing, other than the trial of a cause, the motion shall be made not later than the commencement of the hearing. In the case of trials or hearings not specifically provided for in this

paragraph, the procedure specified herein shall be followed as nearly as possible. The fact that a judge, court commissioner, or referee has presided at, or acted in connection with, a pretrial conference or other hearing, proceeding, or motion prior to trial, and not involving a determination of contested fact issues relating to the merits, shall not preclude the later making of the motion provided for in this paragraph at the time and in the manner herein provided.

A motion under this paragraph may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. Notwithstanding paragraph (4), the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under this section regardless of whether that party or side has previously done so. The motion shall be made within 60 days after the party or the party's attorney has been notified of the assignment.

(3) A party to a civil action making that motion under this section shall serve notice on all parties no later than five days after making the motion.

(4) If the motion is duly presented, and the affidavit or declaration under penalty of perjury is duly filed or an oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge, court commissioner, or referee to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending or, if there is no other judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chair of the Judicial Council shall assign some other judge, court commissioner, or referee to try the cause or hear the matter as promptly as possible. Except as provided in this section, no party or attorney shall be permitted to make more than one such motion in any one action or special proceeding pursuant to this section. In actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

(5) Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing shall not be granted by reason of the making of a motion under this section. If a continuance is granted, the cause or matter shall be continued from day to day or for other limited periods upon the trial or other calendar and shall be reassigned or transferred for trial or hearing as promptly as possible.

(6) Any affidavit filed pursuant to this section shall be in substantially the following form:

TAB 4

Tennessee Example – Not in their Rules of App Procedure, but in their Supreme Court Rules

Section 3 - Motion Seeking Disqualification or Recusal of Appellate Judge or Justice

3.01. Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge or justice of an appellate court shall do so by a timely filed written motion. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials; the motion shall state, with specificity, all factual and legal grounds supporting disqualification of the judge or justice and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party who is represented by counsel is not permitted to file a pro se motion under this rule.

3.02.(a) Upon the filing of a motion seeking disqualification, recusal, or determination of constitutional or statutory incompetence of an intermediate appellate judge, the judge in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion. If the judge denies the motion, the movant, within twenty-one days of entry of the order, may file a motion for court review to be determined promptly by three other judges of the intermediate court upon a de novo standard of review.
(b) If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of more than one judge of the intermediate appellate court ("recusal motion"), and if the recusal motion is denied by the judges in question, the movant, within twenty-one days of entry of the order, may file a motion for court review to be determined promptly by three other judges of the intermediate appellate court who were not subjects of the recusal motion, upon a de novo standard of review. If there are not three judges of the intermediate appellate court who were not subjects of the recusal motion, then a motion for court review pursuant to this section 3.02(b) is not available; under such circumstances, the order denying the recusal motion may be appealed pursuant to section 3.02(c).**(c)** If the motion for court review is denied, or if a motion for court review is not available pursuant to the second sentence of section 3.02(b), an accelerated appeal as of right lies to the Tennessee Supreme Court, which shall expeditiously decide the appeal based upon the petition and other papers filed in the intermediate appellate court. The appeal to the Supreme Court shall be titled "recusal appeal from the [Court of Appeals or Court of Criminal Appeals]" and shall be filed within twenty-one days of the intermediate appellate court's order denying the motion for court review or, if a motion for court review was not available pursuant to the second sentence of section 3.02(b), within twenty-one days of the order denying the motion seeking disqualification or recusal of the appellate judges in question.

3.03.(a) If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of a Supreme Court justice, the justice in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the justice shall state in writing the grounds upon which he or she denies the motion. If the justice denies the motion, the movant, within twenty-one days of entry of the order, may file a motion for court review, which shall be determined promptly by the remaining justices upon a de novo standard of review.
(b) If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of all of the justices of the Supreme Court, and if the motion is denied by the justices, no motion for court review shall be available pursuant to section 3.03(a).

Tennessee Example – Not in their Rules of App Procedure, but in their Supreme Court Rules

3.04. The time periods for filing a motion for court review pursuant to sections 3.02(a), 3.02(b), or 3.03(a) and for filing a "recusal appeal from the [Court of Appeals or Court of Criminal Appeals]" pursuant to section 3.02(c) are jurisdictional and cannot be extended by the court. The computation of time for filing the foregoing matters under section 3 shall be governed by Tenn. R. App. P. 21(a).