Agenda

Utah Supreme Court Advisory Committee
Utah Rules of Appellate Procedure

Christopher Ballard, Chair
Nathalie Skibine, Vice Chair

Location:	Meeting held through Webex and in person at: Matheson Courthouse, Café Meeting Room-W18A 450 S. State St. Salt Lake City, Utah 84111 https://utcourts.webex.com/utcourts/j.php?MTID=m538581f9082cdad50ff1e74adef124f9
Date:	October 5, 2023
Time:	12:00 to 1:30 p.m.

Action: Welcome and approval of September 7, 2023 Minutes	Tab 1	Chris Ballard, Chair
Action: Rule 52	Tab 2	Nathalie Skibine
Action: Vexatious Litigants	Tab 3	Lisa Collins, Judge Christiansen Forster
Action: *State v. Chadwick*/URE 506	Tab 4	Nathalie Skibine
Discussion: Old/new business		Chris Ballard, Chair

Committee Webpage: https://legacy.utcourts.gov/rules/urap.php

2023/2024 Meeting schedule:

November 2, 2023	February 1, 2024	May 2, 2024
December 7, 2023	March 7, 2024	June 6, 2024
January 4, 2024	April 4, 2024	

TAB 1

[Draft] 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

In Person and by WebEx Videoconference
Thursday, September 7, 2023
12:00 pm to 1:30 pm

PRESENT		EXCUSED
Emily Adams	Tera Peterson	Michael Judd—Recording Secretary
Christopher Ballard—Chair	Stanford Purser	Troy Booher—Emeritus Member
Judge Michele M. Christiansen Forster	Michelle Quist	
Lisa Collins	Clark Sabey	
Carol Funk	Nathalie Skibine—Vice Chair	
Amber Griffith—Staff	Scarlet Smith	
Debra Nelson	Nick Stiles—Staff	
Judge Gregory Orme	Eric Weeks—Guest	
	Mary Westby	

1. Action: Chris Ballard
Welcome and approval of June 2023 Minutes

Chris Ballard welcomed everyone to the meeting. The Committee welcomed two new members, Debra Nelson and Tera Peterson, and introduced themselves and provided their general area of practice.

The Committee then reviewed the June 1, 2023, minutes and no changes were suggested.

Mary Westby moved to approve the minutes. Nathalie Skibine seconded that motion, and the minutes were unanimously approved.

2. Action: Chris Ballard
Rules 5, 14, and 50 for final approval

Chris Ballard presented Rules 5, 14, and 50 for final Committee approval. One comment was received from Doug Thompson approving the changes to Rules 5 and 50.

- Stan Purser questioned if paragraph (a) of Rule 50 should specify which parts of Rule 49 must be complied with when responding to a petition for writ of certiorari. Chris Ballard agreed that it may be helpful but suggested making a new proposal for another meeting, so Rule 50 can move forward for final approval to the Supreme Court.

No further suggestions or comments were made. Lisa Collins moved to approve the rules be sent to the Supreme Court for final approval. Mary Westby seconded the motion and the motion unanimously passed.

3. Action: Chris Ballard
Rule 27

Chris Ballard reminded the Committee that this proposal was originally presented by Stan Purser and was approved by the Committee to be presented to the Supreme Court for public comment. The Supreme Court had several suggestions which Mr. Ballard incorporated into the rule. One suggestion was to make the requirements for the cover and the first page of a document mirror each other. Another suggestion was stylistic changes in accordance with the Supreme Court Style Guide. Mr. Ballard then asked the Committee for comment.

- Emily Adams noted that the word "and" was missing on line 32.
- The Committee had questions regarding paragraph (d) and the verbiage "first page," Mr. Ballard believed "first page" was the clearest reference to a cover page, which motions and documents do not have. Carol Funk expressed that "first page" seems confusing and suggested deleting the words "first page" from line 59. After discussion the Committee decided to remove the "first page" verbiage.
- Scarlet Smith questioned if the Committee needed to clarify paragraph (c)(2) as some people may believe based on the rule that all counsel should be listed in the caption. Judge Orme agreed that not all counsel is needed on the caption but believed that we should require a minimum amount of counsel be listed. The Committee also cleaned up language in paragraph (c)(2)(A) and the list that follows, then ensured those changes were mirrored in paragraph (d)(2)(A).

Following those changes Mary Westby moved to approve the rule as shown on the screen. Scarlet Smith seconded the motion, and the motion was unanimously passed.

4. Action: Mary Westby
Rule 4

Mary Westby explained the new proposed changes to Rule 4, specifically paragraph (b)(2)(A). The changes would enable the Court to dismiss, without prejudice, appeals that have not been submitted for decision in the trial court within 150 days after entry of judgment.

- Mr. Ballard questioned if there is any danger of a party losing their right to appeal since they originally had a timely filed appeal, would the party need to realize that they must file another notice of appeal? Ms. Westby verified that the parties would need to file a new notice of appeal, even though they had originally filed a premature notice due to the appeal being dismissed without prejudice.
- Carol Funk suggested adding additional language to clarify that parties will need to file a new notice if their appeal is dismissed under this provision. Emily Adams agreed and proposed moving a portion of the language in (b)(2)(A) to a new subparagraph (B) and explain in that subparagraph that parties will need to file a new notice.
- Ms. Funk expressed that the proposal seemed confusing and people who are not used to our rules may not understand what they are supposed to do. Ms. Adams questioned if this could be done internally by adding a failure to prosecute rule. Stan Purser asked if this could be included in Rule 10.

Following these discussions Ms. Westby withdrew the proposed amendment to Rule 4 and will work on a new proposal to Rule 10. Ms. Westby moved to approve Rule 4, the version that was approved at the June meeting and recommended the rule be submitted to the Supreme Court for public comment. Ms. Smith seconded the motion, and the motion was unanimously passed.

5. Action: Nathalie Skibine
Rule 52

Nathalie Skibine introduced the proposed changes to Rule 52 in response to the *A.S. v. State*, 2023 UT 11, opinion.

Ms. Skibine spoke with Alexa Mareschal and Martha Pierce prior to the meeting, and asked their input for what the deadlines should be within the Rule. Ms. Mareschal suggested beginning the timeline when the party learns of the right to appeal, and Ms. Pierce suggested a hard 30-day deadline. Ms. Westby agreed with a hard deadline because these are time sensitive cases and suggested limiting the reinstatement period to only determination orders.

The Committee decided to go with a hard deadline of 45 days for the motion to reinstate. Ms. Skibine will get feedback from the practitioners on both sides.

Due to time constraints Michelle Quist moved to table further discussion on the proposal for Rule 52 until October's meeting. Nathalie Skibine seconded the motion, and the meeting adjourned.

TAB 2

From: Nathalie Skibine
To: Appellate Rules Committee
Re: Memorandum on Utah Rule of Appellate Procedure 52(c)

Title change rule 52(c).

In *A.S. v. State*, 2023 UT 11, the Utah Supreme Court held that Utah Rule of Appellate Procedure 52(c) extended the time for any party to file a notice of appeal when a timely notice of appeal is filed by another party. The title of rule 52(c) is "Time for cross-appeal," but the opinion held that the appeal does not have to be a cross-appeal to get the benefit of the extension of time. The opinion noted that Utah Rule of Appellate Procedure 4(d) has nearly identical language to rule 52(c) but its title is clearer: Additional or cross-appeal.

The opinion included this footnote: "We encourage the Advisory Committee on the Utah Rules of Appellate Procedure to look at clarifying the title so it better reflects the rule's language and intent." *A.S. v. State*, 2023 UT 11, ¶ 36 n.13. The proposed change is to replace the title in rule 52(c) with the title from rule 4(d).

Adding a procedure to reinstate the period for filing an appeal in child welfare cases.

A.S. v. State also included this footnote:

> The guardian ad litem advocates that we task our rules committee with considering a new rule that would "reinstate the time for appeal in child welfare cases where a parent's right to effective counsel is implicated." We have previously recognized that a trial court may extend the time for appeal in a proceeding on termination of parental rights if a parent was denied effective assistance of counsel. *State ex rel. M.M.*, 2003 UT 54, ¶¶ 6, 9, 82 P.3d 1104. But this is not the same as a rule that says the court shall reinstate the time for appeal when a parent can show that they have been denied effective representation. We encourage the Advisory Committee on the Utah Rules of Appellate Procedure to explore such a rule, and we thank the guardian ad litem for the excellent suggestion.

A.S. v. State, 2023 UT 11, ¶ 43 n.15.

A memorandum from Martha Pierce is attached. My proposed changes attempt to mirror the rule for reinstating the right to appeal in criminal cases. The main difference is timing – I propose we agree on a bright line deadline from the date

of the challenged order after which even a parent who was deprived of the right to appeal cannot reinstate it.

Memo from Martha Pierce

ATTORNEY ERROR AND EXTENSION OF APPEAL PERIOD

Notice of right to appeal, and duty of parental engagement. Currently both the statute and the rule require the juvenile court to advise parties of the right to appeal. Utah Code Ann. § 78A-6-359; Utah R. Juv. P. 46(c).

Unfortunately, both of these provisions require the notice to be provided at disposition, which rarely results in a final appealable order. The two orders that are *always* final and appealable are the adjudication order and the termination order. Disposition is usually a months-long process that rarely involves a final order. The general rule of thumb is that is a disposition results in an ending of juvenile court jurisdiction, the order is likely final. Therefore, I urge the committee to move the notification provision in the rule (and to ask the legislature to move the notification provision in the statute) from disposition to adjudication (or either an initial child welfare petition or a termination petition).

In addition, the statutory notice provision includes the parent's statutory duty to "maintain regular contact with the party's counsel and to keep the party's counsel informed of the party's whereabouts." Utah Code Ann. § 78A-6-359(3)(d). And, a parent is required to sign the notice of appeal to demonstrate some level of commitment to the appellate process. Utah R. App. P. 53(b). These requirements are part of an ongoing requirement in juvenile court proceedings for a parent to stay engaged with counsel and with the court throughout the proceedings. *See, e.g., Id.* 80-3-307. Indeed, juvenile court orders routinely include notices that failure to attend proceedings may result in diminishment of rights.

***Manning*.** The task is to create a rule respecting a constitutional right to appeal, Utah Const. art. viii, § 5; a parent's statutory right to effective counsel, Utah Code Ann. § 80-3-104(2)(a); and the Child's right to swift permanency, as reflected in our statutes, court rules, and appellate rules. *See, e.g., In re M.H.,* 2014 UT 26, ¶ 44, 347 P.3d 368 (Nehring, J., concurring) (policy of swift permanency ensures that Children do not languish in legal limbo); *In re K.C.,* 2015 UT 92, ¶ 23, 362 P.3d 1248, (reasonableness of accommodation must take into account core principles and policies of CWRA, including paramount concern of BIOC).

Utah R. App. P. 4(f), formalized the holding in *Manning v. State,* 2006 UT 61, 122 P.3d 628 and to "provide criminal defendants who have been deprived an appeal through no fault of their own with an avenue for relief. *State v. Brown,* 2021 UT 11, ¶ 15, 489 P.3d 152. *Manning* required that, to have the time for appeal reinstated, a defendant must show loss of appellate rights because

> (1) counsel failed to file an appeal after agreeing to do so;
> (2) despite diligently attempting to file a timely appeal, the defendant was unable to do so through no fault of their own; or
> (3) the court or the defendant's counsel "failed to properly advise [them] of the right to appeal."

Id. ¶ 16.

First, I recommend moving the notification language in the rule and the statute from disposition to adjudication and to include a duty to keep counsel and the court updated on contact information.

Second, I recommend that the burden be on the proponent to show by a preponderance of evidence the three *Manning* requirements as well as the juvenile court requirement of parental engagement:

> (1) counsel failed to file an appeal after agreeing to do so;
> (2) despite diligently attempting to file a timely appeal, the defendant was unable to do so through no fault of their own; or
> (3) the court or the defendant's counsel "failed to properly advise [them] of the right to appeal." *Notwithstanding the party's compliance with the duty to maintain regular contact with the party's counsel and to keep the party's counsel informed of the party's whereabouts."*

Rule 52. Child welfare appeals.

(a) **Time for appeal**. A notice of appeal from an order in a child welfare proceeding, as defined in Rule 1(f), must be filed within 15 days of the entry of the order appealed from. If the juvenile court enters an order on a Saturday, Sunday, or legal holiday, the date of entry will be deemed to be the first day following the juvenile court's entry that is not a Saturday, Sunday, or legal holiday.

(b) **Time for appeal extended by certain motions.**

(1) If a party timely files in the trial court any of the following, the time for all parties to appeal from the judgment runs from the entry of the dispositive order:

(A) A motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(B) A motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(C) A motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure; or

(D) A motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure.

(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in paragraph (b), will be treated as filed after entry of the order and on the day thereof, except that the notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in paragraph (b)(1), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) ~~**Time for**~~**Additional or cross-appeal**. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 5 days after the first notice of appeal

was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(d) Motion to reinstate period for filing a direct appeal in child welfare appeals.

(1) The juvenile court ~~must~~will reinstate the 15-day period for filing a direct appeal in a child welfare case if a parent with a right to effective assistance of counsel demonstrates by a preponderance of evidence that the parent was deprived of the right to appeal through no fault of the parent.

(2) The motion must be filed within ~~XX~~45 of the entry of the order appealed from.

(3) If the parent is not represented by counsel and has the right to effective assistance of counsel, the juvenile court will appoint counsel.

(4) The motion must be served on the attorney general and the guardian ad litem. The attorney general, the guardian ad litem, or both may file a response to the motion within 14~~28~~ days after being served.

(5) If the motion to reinstate the time to appeal is opposed, the juvenile court will set a hearing at which the parties may present evidence.

(6) If the juvenile court enters an order reinstating the time for filing a direct appeal, the parent's notice of appeal must be filed with the clerk of the juvenile court within 15 days after the date the order is entered.

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(e~~d~~) **Appeals of interlocutory orders**. Appeals from interlocutory orders are governed by Rule 5.

Effective May 1, 2023

TAB 3

To: Judge Harris
From: Heather Robison
Re: Research on Vexatious Litigants at the Appellate Level

States generally address vexatious litigants at the appellate level in three ways. First, states create appellate rules that directly apply to the problem of vexatious litigants in their appellate courts, *see section I*. Second, states craft general rules of civil procedure or pass statutes that are interpreted to include appellate courts, *see section II*. And third, states rely on the "inherent power" of appellate courts to manage their dockets and create case law applying that power to vexatious appellate litigants, *see section III*.

According to the National Center for State Courts, 12 states have rules or statutes that specifically deal with vexatious litigants. Bill Raftery, *Vexatious Litigants*, National Center for State Courts (Jan. 25, 2023), https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/vexatious-litigants [https://perma.cc/ZH27-A435]. Of those 12, the following include appellate courts in one of the three aforementioned ways.

I: Appellate Rules

Michigan:
Mich. R. of App. P. 7.216(C): Miscellaneous Relief (for its Court of Appeals)

> (C) Vexatious Proceedings; Vexatious Litigator.
>
> (1) The Court of Appeals may, on its own initiative or on the motion of any party filed under MCR 7.211(C)(8), assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
>
> (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
>
> (b) a pleading, motion, argument, brief, document, record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.
>
> (2) Damages may not exceed actual damages and expenses incurred by the opposing party because of the vexatious appeal or proceeding, including

reasonable attorney fees, and punitive damages in an added amount not exceeding the actual damages. The court may remand the case to the trial court or tribunal for a determination of actual damages.

(3) Vexatious Litigator. If a party habitually, persistently, and without reasonable cause engages in vexatious conduct under subrule (C)(1), the Court may, on its own initiative or on motion of another party, find the party to be a vexatious litigator and impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Court without first obtaining leave, prohibiting the filing of actions in the Court without the filing fee or security for costs required by MCR 7.209 or MCR 7.219, or other restriction the Court deems just.

Mich. R. of App. P. 7.316(C): Miscellaneous Relief (for its Supreme Court)

(C) Vexatious Proceedings; Vexatious Litigator.

(1) The Court may, on its own initiative or the motion of any party filed before a case is placed on a session calendar, dismiss an appeal, assess actual and punitive damages, or take other disciplinary action when it determines that an appeal or original proceeding was vexatious because

(a) the matter was filed for purposes of hindrance or delay or is not reasonably well-grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; or

(b) a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the Court.

(2) Damages may not exceed actual damages and expenses incurred by the opposing party because of the vexatious appeal or proceeding, including reasonable attorney fees, and punitive damages in an added amount not exceeding the actual damages. The Court may remand the case to the trial court or tribunal for a determination of actual damages.

(3) Vexatious Litigator. If a party habitually, persistently, and without reasonable cause engages in vexatious conduct under subrule (C)(1), the Court may, on its own initiative or on motion of another party, find the party to be a vexatious litigator and impose filing restrictions on the party. The

restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Court without first obtaining leave, prohibiting the filing of actions in the Court without the filing fee or security for costs required by MCR 7.209 or MCR 7.319, or other restriction the Court deems just.

North Dakota
Among its administrative rules regarding vexatious litigants, North Dakota has a section designated for its supreme court.

ND R. Admin. AR 58, § 7. Supreme Court Order.
The Supreme Court may, on the Court's own motion or the motion of any party to an appeal, enter a pre-filing order prohibiting a vexatious litigant from filing any new litigation in the courts of this state as a self-represented party without first obtaining leave of a judge of the court where the litigation is proposed to be filed. If the Supreme Court finds that there is a basis to conclude that a person is a vexatious litigant and that a pre-filing order should be issued, the Court must issue a proposed pre-filing order along with the proposed findings supporting the issuance of the pre-filing order. The person who would be designated as a vexatious litigant in the proposed order will have 14 days to file a written response to the proposed order and findings. If no response is filed within 14 days, or if the Supreme Court concludes following a response and any subsequent hearing that there is a basis for issuing the order, the pre-filing order may be issued.

Nevada:
Supreme Court Rule 9.5 List of Vexatious Litigants:
1. Purpose and procedure**.** The administrative office of the courts shall maintain for use by the judicial council and the courts of the state a list of litigants that have been declared as vexatious by any court, at any level of jurisdiction, throughout the state:
(a) Each court shall, upon entering an order declaring a litigant to be vexatious, submit a copy of the order to the director of the administrative office of courts or his or her designee.
(b) The director or designee shall enter the name of the litigant identified in the aforementioned order on a list of vexatious litigants and post the list in such a place so that it will be readily accessible to the various courts. The director or designee shall maintain the list in good order.
(c) If a court takes any action that affects the status of a litigant declared vexatious, the court shall forward record of that action to the director or designee forthwith for amendment of the list.

II: General Rules that Incorporate Appellate Courts

Idaho:
Idaho Admin. Code r.59 (2011): Entitled "Vexatious Litigation," this rule sets forth how to "address this impediment to the proper functioning of the courts while protecting the constitutional right of all individuals to access to the courts. Subsection (b) states, "'Litigation,' as used in this rule, means any civil action or proceeding, and includes any appeal from an administrative agency, any appeal from the small claims department of the magistrate division, any appeal from the magistrate division to the district court, and *any appeal to the Supreme Court*." (Emphasis added.)

California:
Cal. Civ. Proc. Code § 391.7 (2012)
"In addition to other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge or presiding judge of the court where the litigation is proposed to be filed." *See also John v. Superior Ct.*, 369 P.3d 238, 239 (Cal. 2016) (explaining that "the vexatious litigant statutory scheme . . . authorizes a trial *or appellate court* to enter, on its own motion or the motion of any party, a prefiling order that prohibits a self-represented vexatious litigant from filing any new litigation in the courts of this state" (emphasis added)).

Texas:
The Texas Vexatious Litigant Statute (Tex. Civ. Prac. & Rem. § 11.001 et. seq.) defines "litigation" as "a civil action commenced, maintained, or pending in *any state or federal court*." (Emphasis added.) One Texas court has interpreted this phrase as "plainly encompass[ing] appeals." *See Retzlaff v. GoAmerica Commc'ns. Corp.*, 356 S.W.3d 689, 699 (Tex. App. 2011).

Ohio:
Their vexatious litigant statute applies to both pro se and represented persons, and applies to any court, including their court of appeals:

Ohio Rev. Code Ann. § 2323.52 (2016)
"'Vexatious litigator' means any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims *or in a court of appeals*, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions,

and whether the vexatious conduct was against the same party or against different parties in the civil action or actions." (Emphasis added.) *See also RRL Holding Co. of Ohio, LLC v. Stewart*, 2021 Ohio 3989, ¶ 11, 180 N.E. 3d 699 (stating that the "plain language of [the vexatious litigators statute] makes clear that a vexatious litigator must first seek leave of the court before bringing a new legal proceeding").

III: "Inherent Power"

Massachusetts:
"In some appeals involving vexatious litigants, the Supreme Judicial Court has instructed the appellate court clerk not to accept new petitions or appeals from a frequent, frivolous litigant unless they were accompanied by a motion for leave to file and first approved by a single justice." § 71:4. Vexatious litigants and orders not to accept repetitive filing of vexatious self-represented litigant, 41A Mass. Prac., Appellate Procedure § 71:4 (4th ed. 2022). *See Cooper v. CVS Pharmacy*, 482 Mass. 1019, 1020, 121 N.E.3d 1287 (2019); *Murray v. Massachusetts Parole Board*, 481 Mass. 1019, 1020-1021, 113 N.E.3d 327 (2018); *Watson v. Justice of Boston Div. of Housing Court Dept.*, 458 Mass. 1025, 1027, 941 N.E.2d 593 (2011); *Devon Services, Inc. v. Wellman*, 432 Mass. 1013, 731 N.E.2d 1089 (2000); *Russell v. Nichols*, 434 Mass. 1015, 750 N.E.2d 1008 (2001); *Camoscio v. Board of Registration in Podiatry*, 408 Mass. 1001, 561 N.E.2d 516 (1990); *Gorod v. Tabachnick*, 428 Mass. 1001, 696 N.E.2d 547 (1998).

Illinois:
"In extreme cases, where an appellant has been found to be a vexatious litigant, the court may direct the clerk of the court to refuse to file any further appeals." Timothy J. Storm, "Sanctions for Frivolous Appeals or Improper Conduct—Vexatious Litigant," *Ill. App. Practice Manual* § 38-9 (Mar. 2022); *see People v. Austin*, 387 Ill. Dec. 923, 23 N.E.3d 615 (App. Ct. 4th Dist. 2014); *Williams v. Commissary Dept. of Illinois Dept. of Corrections*, 407 Ill. App. 3d 1135, 1138, 350 Ill. Dec. 554, 948 N.E.2d 1061 (4th Dist. 2011).

Florida:
"Appellate courts likewise possess inherent power to prevent frivolous and repetitious filings by pro se litigants." Jani Maurer, "Increase Your Toolbox: Lesser-Known Sanctions in Probate and Trust Litigation," 35 *Quinnipiac Probate Law Journal*, 116, 147 (2022). *See Cafaro v. Estate of Wyllins,* 164 So.2d 146 (Fla. 2d Dist. Ct. App. 2015).
This inherent-power theory is important in Florida because its vexatious litigant statute does not specifically incorporate appellate courts.

TAB 4

To: Advisory Committee on the Rules of Appellate Procedure
From: Nathalie Skibine
Re: *State v. Chadwick* and Utah Rule of Evidence 506

State v. Chadwick, 2023 UT 12, is a sexual abuse of a child case where the issue on appeal was the district court's decision, after in camera review of the victim's mental health records, to release only a portion of the records. Appellate counsel sought to review the sealed records in full to argue that the district court erred when it did not release them to trial counsel.

The Utah Supreme Court held that, under rule 4-202.04 of the Utah Code of Judicial Administration, the balance of interests weighed in favor of keeping the records sealed and not allowing appellate counsel access to them. In that case, the parties agreed to seal all nonrelevant records in district court, the defendant's constitutional rights were not violated by his inability to access the records, and the patient and the State had an interest in protecting the therapist-patient privilege.

A couple years ago, the Utah Supreme Court asked the Advisory Committee on the Utah Rules of Evidence to consider amendments to rule 506 addressing the physician and mental health therapist-patient privilege. The public comment period recently closed on rule 506. It amends the rule to add an exception to the physician and mental health therapist-patient privilege for communications necessary to a fair determination of guilt or innocence in a criminal case. If a party shows by preponderance of the evidence that the communication is necessary, the court is to conduct an in-camera review and release communications to which the exception applies, subject to protective orders. The rule also states, "Any communications submitted to the court for in-camera review and that are not otherwise released under an exception shall be sealed and made part of the record."

A previous draft of rule 506 included the following language, no longer in the proposed rule: "If an appeal is taken, the sealed records will be transmitted to the appellate court as part of the record on appeal. However, the sealed records will be made available to the parties on appeal only upon a motion showing that the sealed records are necessary to the appeal."

The Advisory Committee on the Rules of Evidence thought the procedure for what to do with the sealed records on appeal was a question for this Committee instead. Some options: (1) Add language like the deleted language in the previous draft of rule 506 to rule 11. (2) Draft a new rule. (3) Direct parties to file a motion under rule 4-202.04 of the Utah Code of Judicial Administration, as the defendant did in *Chadwick*, or let *Chadwick* be the guidance and do nothing.

Rule 506. Physician and Mental Health Therapist-Patient.

(a) Definitions.

(1) "Patient" means a person who consults or is examined or interviewed by a physician or mental health therapist.

(2) "Physician" means a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state.

(3) "Mental health therapist" means a person who

(A) is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor; and

(B) is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction.

(b) Statement of the Privilege. A patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing information that is communicated in confidence to a physician or mental health therapist for the purpose of diagnosing or treating the patient. The privilege applies to:

(1) diagnoses made, treatment provided, or advice given by a physician or mental health therapist;

(2) information obtained by examination of the patient; and

(3) information transmitted among a patient, a physician or mental health therapist, and other persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist. Such other persons include guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communication~~s~~, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician or mental

health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.

(d) Exceptions. No privilege exists under paragraph (b) in the following circumstances:

(1) Condition as Element of Claim or Defense. For a communication~~s~~ relevant to an issue of the physical, mental, or emotional condition of the patient:

(A) in any proceeding in which that condition is an element of any claim or defense, or

(B) after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense;

(2) **Necessary to a Criminal Case.** If a party in a criminal case shows by the preponderance of the evidence that the communication is necessary to a fair determination of guilt or innocence and the communication:

(A) contains a recantation or material inconsistency;

(B) shows that ~~the~~an accusation was the product of suggestion or undue influence;

(C) relates to the reliability of the method or means by which the communication was disclosed; or

(D) is necessary to protect a criminal defendant's constitutional rights.

~~(2)~~(3) **Hospitalization for Mental Illness.** For a communication~~s~~ relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization; and

~~(3)~~(4) **Court Ordered Examination.** For a communication~~s~~ made in the course of, and pertinent to the purpose of, a court-ordered examination of the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise.

(e) Effect of Claiming any Exception in a Criminal ~~Proceeding~~Case. The following provisions apply only in criminal cases and only if a party is claiming an exception under paragraphs (d)(1) or (d)(2).

(1) If the party claiming any exception makes the required showing, the court shall conduct an in-camera review of the communications and shall release to the parties any communication to which the exception applies, subject to any protective orders entered by the court~~,~~.

(2) If the party claiming the exception makes the required showing and the court has not released all communications that were subject to the in-camera review, upon motion of a party based on changed circumstances, the court shall conduct further in-camera review of the communications to re-examine the applicability of an exception and to release any additional communication to which the exception applies.

(3) ~~All~~Any communications submitted to the court for in-camera review and that are not otherwise released under an exception shall be sealed and made part of the record.

(f) Reasonable Protective Orders and Procedures. The court may make reasonable orders regarding ~~the~~ confidentiality protections and the procedure to be followed when a party claims an exception.

2021 Advisory Committee Note. The language of this rule has been amended in light of the Utah Supreme Court's decision in *State v. Bell*, 2020 UT 38, 469 P.3d 929. There, the Court noted "that Mr. Bell raise[d] important constitutional and policy concerns regarding a criminal defendant's access to records that may contain exculpatory evidence[,]" and referred the rule to its advisory committee for review. *Id.* ¶ 1. Specifically, the court directed the committee "to consider the importance of": (1) "maintaining a strong privilege rule"; (2) "more clearly defining what is required to qualify for exceptions to the privilege"; and (3) "respecting a criminal defendant's constitutional rights." *Id.* The amendments contained in subsections (d)(2) and (e) are intended to address the court's directive. Further, the amendment in subsection (d)(2) is not intended to change the longstanding requirement that "some type of extrinsic indication" is necessary to show the exception applies. *See State v. Worthen*, 2009 UT 79, ¶ 38. The amendments do not limit the availability of this rule's other exceptions in criminal proceedings. Communications released to the parties may qualify as private

records and be subject to Rules 4-202.02 and 4-202.03 of the Utah Rules of Judicial Administration.

2011 Advisory Committee Note. The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make class and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Original Advisory Committee Note. Rule 506 is modeled after Rule 503 of the Uniform Rules of Evidence, and is intended to supersede Utah Code §§ 78-24-8(4) and 58-25a-8. There is no corresponding federal rule. By virtue of Rule 501, marriage and family therapists are not covered by this Rule.

The differences between existing Utah Code § 78-24-8 and Rule 506 are as follows:

(1) Rule 506 specifically applies to psychotherapists and licensed psychologists, it being the opinion of the Committee that full disclosure of information by a patient in those settings is as critical as and as much to be encouraged as in the "physician" patient setting. The Utah Supreme Court requested that Rule 506 further apply to licensed clinical social workers. To meet this request, the Committee included such individuals within the definition of psychotherapists. Under Utah Code § 58-35-2(5), the practice of clinical social work "means the application of an established body of knowledge and professional skills in the practice of psychotherapy. . . ." Section 58-35-6 provides that "[n]o person may engage in the practice of clinical social work unless that person: (1) is licensed under this chapter as a certified social worker," has the requisite experience, and has passed an examination. Section 58-35-8(4) refers to licenses and certificates for "clinical social worker[s]." As a result of including clinical social workers, Rule 506 is intended to supplant Utah Code § 58-35-10 in total for all social workers.

(2) Rule 506 applies to both civil and criminal cases, whereas Utah Code § 78-24-8 applies only to civil cases. The Committee was of the opinion that the considerations supporting the privilege apply in both.

(3) In the Committee's original recommendation to the Utah Supreme Court, the proposed Rule 506 granted protection only to confidential communications, but did not extend the privilege to observations made, diagnosis or treatment by the physician/psychotherapist. The Committee was of the opinion that while the traditional protection of the privilege should extend to confidential communications, as is the case in other traditional privileges, the interests of society in discovering the truth during the trial process outweigh any countervailing interests in extending the protection to observations made, diagnosis or treatment. However, the Supreme Court requested that the scope of the privilege be broadened to include information obtained by the physician or psychotherapist in the course of diagnosis or treatment, whether obtained verbally from the patient or through the physician's or psychotherapist's observation or examination of the patient. The Court further requested that the privilege extend to diagnosis, treatment, and advice. To meet these requests, the Committee relied in part on language from the California evidentiary privileges involving physicians and psychotherapists. See Cal. Evid. Code §§ 992 and 1012. These features of the rule appear in subparagraphs (a)(4) and (b). The Committee also relied on language from Uniform Rule of Evidence 503.

Upon the death of the patient, the privilege ceases to exist.

The privilege extends to communications to the physician or psychotherapist from other persons who are acting in the interest of the patient, such as family members or others who may be consulted for information needed to help the patient.

The privilege includes those who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist. For example, a certified social worker practicing under the supervision of a clinical social worker would be included. See Utah Code § 58-35-6.

The patient is entitled not only to refuse to disclose the confidential communication, but also to prevent disclosure by the physician or psychotherapist or others who were properly involved or others who overheard, without the knowledge of the patient, the confidential communication. Problems of waiver are dealt with by Rule 507.

The Committee felt that exceptions to the privilege should be specifically enumerated, and further endorsed the concept that in the area of exceptions, the rule should simply state that no privilege existed, rather than expressing the exception in terms of a "waiver" of the privilege. The Committee wanted to avoid any possible clashes with the common law concepts of "waiver."

The Committee did not intend this rule to limit or conflict with the health care data statutes listed in the Committee Note to Rule 501.

Rule 506 is not intended to override the child abuse reporting requirements contained in Utah Code § 62A-4-501 et seq.

The 1994 amendment to Rule 506 was primarily in response to legislation enacted during the 1994 Legislative General Session that changed the licensure requirements for certain mental health professionals. The rule now covers communications with additional licensed professionals who are engaged in treatment and diagnosis of mental or emotional conditions, specifically certified social workers, marriage and family therapists, specially designated advanced practice registered nurses and professional counselors.

Some mental health therapists use the term "client" rather than "patient," but for simplicity this rule uses only "patient."

The committee also combined the definition of confidential communication and the general rule section, but no particular substantive change was intended by the reorganization.

UCJA Rule 4-202.04 (Code of Judicial Administration)

Rule 4-202.04. Request to access a record associated with a case; request to classify a record associated with a case.

Effective: 5/1/2023

Rule printed on September 21, 2023 at 12:35 pm. Go to https://www.utcourts.gov/rules *for current rules.*

Intent:

To establish the process for accessing a court record associated with a case.

Applicability:

This rule applies to court records associated with a case.

Statement of the Rule:

(1) **Written request.** A request to access a public court record shall be presented in writing to the clerk of the court unless the clerk waives the requirement. A request to access a non-public court record to which a person is authorized access pursuant to 4-202.03 shall be presented in writing to the clerk of the court. A written request shall contain the requester's name, mailing address, daytime telephone number and a description of the record requested. If the record is a non-public record, the person making the request shall present identification.

(2) **Motion or petition to access record.**

(2)(A) If a written request to access a court record is denied by the clerk of court, the person making the request may file a motion or petition to access the record.

(2)(B) A person not authorized to access a non-public court record pursuant to rule 4-202.03 must file a motion or petition to access the record. If the court allows access, the court may impose any reasonable conditions to protect the interests favoring closure.

(2)(C) A motion should be filed when the court record is associated with a case over which the court has continuing jurisdiction. A petition should be filed to access the record if the court record is associated with a case over which the court no longer has jurisdiction.

(3) **Motion or petition to reclassify record.**

(3)(A) If the court record is associated with a case over which the court has continuing jurisdiction, a person with an interest in a court record may file a motion to classify the record as private, protected, sealed, safeguarded, juvenile court legal, or juvenile court social; or to have information redacted from the record. The court shall deny access to the record until the court enters an order.

(3)(B) If the court record is associated with a case over which the court no longer has jurisdiction, a person with an interest in the record may file a petition to classify the record as private, protected, sealed, safeguarded, juvenile court legal, or juvenile court social; or to have information redacted from the record. The court shall deny access to the record until the court enters an order.

(4) **Rules of Procedure Applicable to Motions and Petitions.** As appropriate for the nature of the case with which the record is associated, the motion or petition shall be filed and proceedings shall be conducted under the rules of civil procedure, criminal procedure, juvenile procedure, or appellate procedure. The person filing the motion or petition shall serve any representative of the press who has requested notice in the case. The court shall conduct a closure hearing when a motion or petition to close a record is contested, when the press has requested notice of closure motions or petitions in the particular case, or when the court decides public interest in the record warrants a hearing.

(5) **Classify – Redact.** The court may classify the record as private, protected, sealed, safeguarded, juvenile court legal, or juvenile court social, or redact information from the record if the record or information:

(5)(A) is classified as private, protected, sealed, safeguarded, juvenile court legal, or juvenile court social under Rule 4-202.02;

(5)(B) is classified as private, controlled, or protected by a governmental entity and shared with the court under the Government Records Access and Management Act;

(5)(C) is a record regarding the character or competence of an individual; or

(5)(D) is a record containing information the disclosure of which constitutes an unwarranted invasion of personal privacy.

(6) **Factors and findings.** In deciding whether to allow access to a court record or whether to classify a court record as private, protected, or sealed, safeguarded, juvenile court legal, or juvenile court social, or to redact information from the record, the court may consider any relevant factor, interest, or policy, including but not limited to the interests described in Rule 4-202. In ruling on a motion or petition under this rule the court shall:

(6)(A) make findings and conclusions about specific records;

(6)(B) identify and balance the interests favoring opening and closing the record; and

(6)(C) if the record is ordered closed, determine there are no reasonable alternatives to closure sufficient to protect the interests favoring closure.

(7) **Appellate briefs.** If an appellate brief is sealed, the clerk of the court shall seal the brief under Rule 4-205. If an appellate brief is classified as private, protected, safeguarded, juvenile court legal, or juvenile court social, the clerk of the court shall allow access only to persons authorized by Rule 4-202.03. If the court orders information redacted from the brief, the clerk of the court shall remove the information and allow public access to the edited brief.

(8) **State Law Library.** If the petitioner serves the order on the director of the State Law Library, the director shall comply with the order in the same manner as the clerk of the court under paragraph (7).

(9) **Compliance.** Unless otherwise ordered by the court, the order is binding only on the court, the parties to the motion or petition, and the state law library. Compliance with the order by any other person is voluntary.

(10) **Governing rules.** A request under this rule to access a public court record is also governed by Rule 4-202.06. A motion or petition under this rule is not governed by Rule 4-202.06 or Rule 4-202.07.

Rule 11. The record on appeal.

(a) **Composition of the record on appeal**. The record on appeal consists of the documents and exhibits filed in or considered by the trial court, including the presentence report in criminal matters, and the transcript of proceedings, if any.

(b) **Preparing, paginating, and indexing the record**.

(1) Preparing the record. On the appellate court's request, the trial court clerk will prepare the record in the following order:

(A) all original documents in chronological order;

(B) all published depositions in chronological order;

(C) all transcripts prepared for appeal in chronological order;

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

(E) in criminal cases, the presentence investigation report.

(2) Pagination.

(A) Using Bates numbering, the entire record must be paginated.

(B) If the appellate court requests a supplemental record, the same procedures as in (b)(2)(A) apply, continuing Bates numbering from the last page number of the original record.

(3) Index. A chronological index of the record must accompany the record on appeal. The index must identify the date of filing and starting page of the document, deposition, or transcript.

(4) Examining the record. Appellate court clerks will establish rules and procedures for parties to check out the record after pagination.

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

(1) Request for transcript; time for filing. Within 14 days after filing the notice of appeal, or within 30 days of the notice of appeal where an indigent appellant has a statutory or constitutional right to counsel, the appellant must order the transcript(s) online at www.utcourts.gov, specifying the entire proceeding or parts of the proceeding to be transcribed that are not already on file. The appellant must serve on the appellee a designation of those parts of the proceeding to be transcribed. If no such parts of the proceedings are to be requested, within the same period the appellant must file a certificate to that effect with the appellate court clerk and serve a copy on the appellee.

(2) Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to argue on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

(3) Statement of issues; cross-designation by appellee. If the appellant does not order the entire transcript, the appellee may, within 14 days after the appellant serves the designation or certificate described in paragraph (c)(1), order the transcript(s) in accordance with (c)(1), and serve on the appellant a designation of additional parts to be included.

(d) **Agreed statement as the record on appeal**. In lieu of the record on appeal as defined in paragraph (a) of this rule, the parties may prepare and sign a statement of the case, showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the court deems the statement accurate, it, together with such additions as the trial court may consider necessary fully to present the issues raised by the appeal, will be approved by the trial court. The trial court clerk will transmit the statement to the appellate court clerk within

the time prescribed by Rule 12(b)(2). The trial court clerk will transmit the record to the appellate court clerk on the trial court's approval of the statement.

(e) **Statement of evidence or proceedings when no report was made or when transcript is unavailable**. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, or if the appellant is impecunious and unable to afford a transcript in a civil case, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement must be served on the appellee, who may serve objections or propose amendments within 14 days after service. The statement and any objections or proposed amendments must be submitted to the trial court for resolution, and the trial court clerk will conform the record to the trial court's resolution.

(f) **Supplementing or modifying the record.**

(1) If any dispute arises as to whether the record is complete and accurate, the dispute may be submitted to and resolved by the trial court. The trial court will ensure that the record accurately reflects the proceedings before the trial court, including by entering any necessary findings to resolve the dispute.

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

(A) on stipulation of the parties;

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

(C) by the appellate court on a motion from a party. The motion must state the position of every other party on the requested supplement or modification or why the movant was unable to learn a party's position.

(3) The moving party, or the court if it is acting on its own initiative, must serve on the parties a statement of the proposed changes. Within 14 days after service, any party may serve objections to the proposed changes.

Effective May 1, 2023