



## Agenda

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

*Nathalie Skibine, Chair*  
*Stanford Purser, Vice Chair*

Location:	Meeting held through Webex and in person at: Matheson Courthouse, Council Room, N. 301 450 S. State St. Salt Lake City, Utah 84111 <a href="https://utcourts.webex.com/utcourts/j.php?MTID=md8c5d688a34bd3c7dff1f537f926045b">https://utcourts.webex.com/utcourts/j.php?MTID=md8c5d688a34bd3c7dff1f537f926045b</a>
Date:	June 5, 2025
Time:	12:00 to 1:30 p.m.

<b>Action:</b> Welcome and approval of May 1, 2025 Minutes	Tab 1	Nathalie Skibine, Chair
<b>Action:</b> Rule 11	Tab 2	Mary Westby
<b>Action:</b> Rules 9, 11, and 28A	Tab 3	Caroline Olsen
<b>Action:</b> Rule 23B	Tab 4	Nathalie Skibine
<b>Action:</b> Rule 38A	Tab 5	Mary Westby
<b>Discussion:</b> Old/new business		Nathalie Skibine, Chair

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

#### 2025 Meeting schedule:

July 3, 2025	October 2, 2025	February 5, 2026	May 7, 2026
August 7, 2025	November 6, 2025	March 5, 2026	June 4, 2026
September 4, 2025	December 4, 2025	April 2, 2026	July 2, 2026

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

In Person and by WebEx Videoconference  
Thursday, May 1, 2025  
12:00 pm to 1:30 pm

#### PRESENT

Dick Baldwin  
Nicole Gray  
Amber Griffith—Staff  
Michael Judd—Recording  
Secretary  
Debra Nelson  
Caroline Olsen  
Tera Peterson

Martha Pierce  
Michelle Quist  
Clark Sabey  
Nathalie Skibine—  
Chair  
Nick Stiles—Staff  
Mary Westby

#### EXCUSED

Judge Michele  
Christiansen Forster  
Judge Gregory Orme  
Stan Purser  
Scarlet Smith

#### GUEST

Alexandra Mareschal

#### 1. Action:

**Nathalie Skibine**

##### **Approval of March 2025 Minutes**

The committee reviewed the draft minutes from its March 2025 and noted no needed changes.

*Martha Pierce moved to approve the March 2025 minutes as they appeared in the committee's materials. Mary Westby seconded that motion, and it passed without objection by unanimous consent.*

**2. Action: Nathalie Skibine**  
**Final Approval of Rules 35 and 44**

Rules 35 and 44 were circulated for public comment and the committee received no responses.

*Ms. Westby moved for final approval of the rules as circulated. Ms. Pierce seconded that motion, and it passed without objection by unanimous consent.*

**3. Action: Mary Westby, Debra Nelson, Tera Peterson**  
**Rule 55A**

The committee discussed the proposed changes to Rule 55A at length. Ms. Westby began by noting that the version of the rule presented to the committee this month is very different from its previous version. The committee engaged with a question regarding the interplay between potential delays associated with the proposed process and the scope of briefing. The committee understands that the rule, as drafted, is intended to facilitate a balance and a trade-off by allowing a Rule 55A petition only upon receipt of a notice that the case will proceed to full briefing—that is, after a briefing order has been entered. The committee discussed and adopted a correction to include a needed word limit.

The committee continued with an extended discussion of the distinctions between factual findings and legal conclusions in this context, including reference to analogous Rule 23B procedures. A difference of opinion remains among committee members with respect to this question.

*Following that discussion, Ms. Westby moved to approve Rule 55A as modified, as it appeared on the screen at the committee’s meeting, with a plan to clear the rule with the board of juvenile judges before proceeding further. Mr. Sabey seconded that motion, and it passed without objection by unanimous consent.*

**4. Action: Nick Stiles**  
**Rule 29**

The committee understands that the Utah Supreme Court made additional changes to Rule 29 and then approved the rule with those changes, but that the Court requested a “good cause” standard be added. Nathalie Skibine drafted that standard for addition at line 54.

*Following that discussion, Ms. Westby moved to approve the most recent version of the rule conditionally, pending input from Judges Orme and Christiansen Forster. Dick Baldwin seconded, and it passed without objection by unanimous consent. Later in the meeting, the committee received approval from the two judges. The rule is ready to proceed forward accordingly.*

**5. Action:** Dick Baldwin

**Rule 3**

Dick Baldwin explained to the committee that the proposed changes to Rule 3 are meant as an incremental, moderate attempt to address “trap for the unwary” regarding identification of a single order for interlocutory review. Under certain circumstances, such an identification may inadvertently pin an appellant to the single identified order, and an appellate court may then refrain from touching any other issues, based on lack of jurisdiction. The committee discussed the proposed rule and its success in addressing that trap.

*Following that discussion, Ms. Westby moved to approve Rule 3 as modified, as it appeared on the screen at the committee's meeting. Debra Nelson seconded that motion, and it passed without objection by unanimous consent. The rule will be sent to the Utah Supreme Court for approval.*

6. **Action:** Mary Westby  
**Rule 11**

The committee was left without time to discuss this action item, and it has therefore been reserved for the committee's next meeting.

7. **Discussion:** **Nathalie Skibine, Chair**  
**Old/New Business**

None.

**8. Adjourn**

**Nathalie Skibine**

*Following the business and discussions described above, Ms. Pierce moved to adjourn, and Mr. Baldwin seconded. The committee adjourned. The committee's next meeting will take place on June 5, 2025.*

TAB 2

**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;

(E) all exhibits; and

(F) 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](http://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.~~

**(d~~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.

**(eg) Accessing sealed records.** Any portion of the record properly designated as sealed in the trial court remains sealed on appeal. A party may file a motion or petition to access the sealed portion of the record in accordance with [Rule 4-202.04](#) of the Utah Code of Judicial Administration.

*Effective ~~January 22, 2025~~*

TAB 3

From: Caroline Olsen

To: Appellate Rules Committee

Re: Rules 9, 11, and 28A of the Utah Rules of Appellate Procedure

Given the frequent referral of appeals to mediation, the Committee should consider the interaction of Rules 9, 11, and 28A, and the requirement that appellants request (and pay for) transcripts before they know whether their case will be referred to mediation.

Many thanks and all the best,  
Caroline Olsen

**Rule 9. Docketing statement.**

(a) **Purpose.** A docketing statement has two principal purposes: (1) to demonstrate that the appellate court has jurisdiction over the appeal, and (2) to identify at least one substantial issue for review. The docketing statement is a document used for jurisdictional and screening purposes. It should not include argument.

(b) **Time for filing.** Within 21 days after a notice of appeal, cross-appeal, or a petition for review of an administrative order is filed, the appellant, cross-appellant, or petitioner must file the docketing statement with the appellate court clerk and serve the docketing statement with any required attachments on all parties. The Utah Attorney General must be served in any appeal arising from a crime charged as a felony or a juvenile court proceeding.

(c) **Content of docketing statement in a civil case.** The docketing statement in an appeal arising from a civil case must include:

(1) A concise statement of the nature of the proceeding and the effect of the order appealed, and the trial court case number, e.g., “This appeal is from a final judgment of the First District Court granting summary judgment in case number 001900055.”

(2) The following dates relevant to a determination of the appeal’s timeliness and the appellate court’s jurisdiction:

(A) The date the final judgment or order from which the appeal is taken is entered.

(B) The date the notice of appeal was filed in the trial court.

(C) If the notice of appeal was filed after receiving a time extension under [Rule 4\(e\)](#), the date the motion for an extension was granted.

(D) If any motions listed in [Rule 4\(b\)](#) were filed, the date such motion was filed in the trial court and the date any order disposing of such motion was entered.

(E) If the appellant is an inmate confined in an institution and is invoking [Rule 21\(f\)](#), the date the notice of appeal was deposited in the institution's internal mail system.

(F) If a motion to reinstate the time to appeal was filed under [Rule 4\(g\)](#), the date the order disposing of such motion was entered.

(3) If the appeal is taken from an order certified as final under [Rule 54\(b\)](#) of the Utah Rules of Civil Procedure, a statement of what claims and parties remain for adjudication before the trial court.

(4) A statement of at least one substantial issue appellant intends to assert on appeal. An issue not raised in the docketing statement may nevertheless be raised in appellant's brief; conversely, an issue raised in the docketing statement does not have to be included in the appellant's brief.

(5) A concise summary of the facts necessary to provide context for the issues presented.

(6) A reference to all related or prior appeals in the case, with case numbers and citations.

**(d) Content of docketing statement in a criminal case.** The docketing statement in an appeal arising from a criminal case must include:

(1) A concise statement of the nature of the proceeding, including the highest degree of any of the charges in the trial court, and the trial court case number, e.g., "This appeal is from a judgment of conviction and sentence of the Third District Court on a third degree felony charge in case number 001900055."

(2) The following dates relevant to a determination of the appeal's timeliness and the appellate court's jurisdiction:

(A) The date the final judgment or order from which the appeal is taken is entered.

(B) The date the notice of appeal was filed in the trial court.

(C) If the notice of appeal was filed after receiving a time extension under [Rule 4\(e\)](#), the date the motion for an extension was granted.

(D) If a motion under [Rule 24](#) of the Utah Rules of Criminal Procedure was filed, the date such motion was filed in the trial court and the date any order disposing of such motion was entered.

(E) If a motion to reinstate the time to appeal was filed under [Rule 4\(f\)](#), the date the order disposing of such motion was entered.

(F) If the appellant is an inmate confined to an institution and is invoking [Rule 21\(f\)](#), the date the notice of appeal was deposited in the institution's internal mail system.

(3) The charges of which the defendant was convicted, and any sentence imposed; or, if the defendant was not convicted, the dismissed or pending charges.

(4) A statement of at least one substantial issue appellant intends to assert on appeal. An issue not raised in the docketing statement may nevertheless be raised in appellant's brief; conversely, an issue raised in the docketing statement does not have to be included in appellant's brief.

(5) A concise summary of the facts necessary to provide context for the issues presented. If the conviction was pursuant to a plea, the statement of facts should include whether a motion to withdraw the plea was made before sentencing, and whether the plea was conditional.

(6) A reference to all related or prior appeals in the case, with case numbers and citations.

**(e) Content of docketing statement in a review of an administrative order.** The docketing statement in a case arising from an administrative proceeding must include:



(1) A concise statement of the nature of the proceedings and the effect of the order appealed, e.g., “This petition is from an order of the Workforce Appeals Board denying reconsideration of the denial of benefits.”

(2) The statutory provision that confers jurisdiction on the appellate court.

(3) The following dates relevant to a determination of the timeliness of the petition for review:

(A) The date the final order from which the petition for review is filed.

(B) The date the petition for review was filed.

(4) A statement of at least one substantial issue petitioner intends to assert on review. An issue not raised in the docketing statement may nevertheless be raised in petitioner’s brief; conversely, an issue raised in the docketing statement does not have to be included in petitioner’s brief.

(5) A concise summary of the facts necessary to provide context for the issues presented.

(6) If applicable, a reference to all related or prior petitions for review in the same case.

(7) The following documents must be attached to the docketing statement:

(A) The final order from which the petition for review is filed.

(B) In appeals arising from an order of the Public Service Commission, any application for rehearing filed pursuant to [Utah Code section 54-7-15](#).

**(f) Consequences of failure to comply.** In a civil appeal, failure to file a docketing statement within the time period provided in paragraph (b) may result in dismissal of a civil appeal or a petition for review. In a criminal case, failure to file a docketing statement within the time period provided in paragraph (b) may result in a finding of contempt or other sanction.

99 (g) **Appeals from interlocutory orders.** When a petition for permission to appeal from an  
100 interlocutory order is granted under [Rule 5](#), a docketing statement may not be filed unless  
101 otherwise ordered.

102 *Effective January 22, 2025*

**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:

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

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

(E) all exhibits; and

(F) 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.**

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

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

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

46       **(d) Agreed statement as the record on appeal.** In lieu of the record on appeal as defined  
47       in paragraph (a) of this rule, the parties may prepare and sign a statement of the case,  
48       showing how the issues presented by the appeal arose and were decided in the trial court  
49       and setting forth only so many of the facts averred and proved or sought to be proved as  
50       are essential to a decision of the issues presented. If the court deems the statement  
51       accurate, it, together with such additions as the trial court may consider necessary fully  
52       to present the issues raised by the appeal, will be approved by the trial court. The trial  
53       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.

(g) **Accessing sealed records.** Any portion of the record properly designated as sealed in the trial court remains sealed on appeal. A party may file a motion or petition to access the sealed portion of the record in accordance with [Rule 4-202.04](#) of the Utah Code of Judicial Administration.

*Effective January 22, 2025*

**Rule 28A. Appellate Mediation Office.**

**(a) Appellate Mediation Office; purpose of mediation conference.** The court may order the attorneys for the parties and the parties to appear before a mediator appointed by the court for a mediation conference to explore the possibility of settlement and any other matters that may aid in the efficient management and disposition of the case. The court will advise the parties by order that the case has been referred to the Appellate Mediation Office. All decisions regarding conduct of the mediation conference are within the sole discretion of the mediator.

**(b) Confidentiality.** Unless contained in a written settlement agreement under paragraph (f), statements and comments made during mediation conferences and in related discussions, and any record of those statements, are confidential and may not be disclosed by anyone (including the appellate mediation office, counsel, or the parties; and their agents or employees) to anyone not participating in the mediation process. Proceedings under this rule may not be recorded by counsel or the parties. Mediators may not be called as witnesses, and the information and records of the Appellate Mediation Office may not be disclosed to judges, staff, or employees of any court.

**(c) Continuances.** Mediation conferences will not be rescheduled or continued absent good cause as determined by the mediator.

**(d) Extensions/tolling.** The time for filing briefs or motions for summary disposition and for other appellate proceedings is not automatically tolled pending a mediation conference. The parties may seek an extension by motion or stipulation as provided in [Rule 22](#).

**(e) Request for mediation conference by a party.**

(1) For cases pending in the Supreme Court, the parties may request a mediation conference by stipulated motion filed with the Court. The Court will determine whether the case will be referred to mediation. If a mediation conference is ordered, the mediation will be conducted in accordance with this rule.

28 (2) For cases pending in the Court of Appeals, the parties may request a mediation  
29 conference by motion, letter, or confidential request. The Chief Appellate Mediator  
30 will determine whether a mediation conference will be conducted. The decision of  
31 the Chief Appellate Mediator is final and not subject to review. If a mediation  
32 conference is ordered, the mediation will be conducted in accordance with this rule.

33 (3) The denial of a mediation request will not prevent the parties from engaging in  
34 private settlement negotiations or private mediation.

35 (f) **Settlement/termination.** In appeals settled in whole or in part pursuant to this rule,  
36 the court will enter an appropriate order upon written stipulation of all parties, or in the  
37 case of voluntary dismissal by the appellant pursuant to these rules, and send the order  
38 to the parties. In appeals not settled and terminated from mediation, the court will enter  
39 an appropriate order and send the order to the parties. A motion to enforce a settlement  
40 agreement will be considered only if the alleged agreement is in writing. The motion  
41 and related documents will be filed under seal.

42 (g) **Sanctions.** The court may impose sanctions, including costs, fees or dismissal, for  
43 the failure of counsel or a party to comply with the provisions of this rule or with orders  
44 entered pursuant to this rule.

45



TAB 4

**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 210 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 clerk 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 clerk 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 clerk 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 November 1, 2022~~

**Advisory Committee Note**

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

83 Note ~~Ad~~*opted* 2022

TAB 5

**1 Rule 38A Withdrawal of counsel.****2 (a) ~~(1)~~ Withdrawal in criminal cases and certain civil cases.**

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3 (1) An attorney may not withdraw from a criminal case or from a civil case in which  
4 that attorney's client has the right to effective assistance of counsel except upon  
5 motion and ~~order of the~~ court order. Absent good cause shown, leave to withdraw  
6 will not be granted unless the motion to withdraw is accompanied by an entry of  
7 proposed appearance by new counsel or a representation by the withdrawing  
8 attorney that the client is entitled to the appointment of new counsel.

9 ~~(a)~~ (2) Duration of representation by court-appointed counsel. Absent good cause  
10 shown for withdrawal, if a party has a right to effective assistance of counsel through  
11 the first appeal as of right, an attorney appointed to represent that party on appeal  
12 shall represent that party throughout the first appeal as of right, respond to a petition  
13 for writ of certiorari, file a petition for writ of certiorari if appointed counsel  
14 determines that such a petition is warranted, and brief and argue the merits if the  
15 Supreme Court grants certiorari review.

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**16 (b) Withdrawal in other civil cases.**

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17 ~~(b)~~ (1) **When oral argument not scheduled.** An attorney may withdraw without leave  
18 of court in any other civil case that has not been scheduled for oral argument; ~~unless~~  
19 a motion is pending in the appellate court. If a motion is pending, an attorney may  
20 not withdraw except upon motion and ~~order of the~~ court order. The motion to  
21 withdraw shall describe the nature of any pending motion. The withdrawing attorney  
22 ~~shall~~ must serve notice of the withdrawal with the court and upon all parties,  
23 including his or her client.

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24 ~~(b)~~ (2) **When oral argument scheduled.** An attorney may not withdraw from any other  
25 civil case that has been scheduled for oral argument except upon motion and ~~order of~~  
26 ~~the~~ court order. Absent good cause shown, leave to withdraw will not be granted  
27 unless the motion to withdraw is accompanied by an entry of proposed appearance

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28 of new counsel and new counsel's representation that oral argument may proceed as  
29 scheduled.

30 ~~(b)~~(3) **Notice to appoint or appear in person.** If an attorney withdraws under  
31 ~~subdivision~~paragraph (b)(1), dies, is suspended from the practice of law, is disbarred,  
32 or is removed from the case by the court, the opposing party must~~shall~~, and the court  
33 may, serve a notice on the unrepresented party, informing the party of the  
34 responsibility to appoint new counsel or, if the unrepresented party is a natural  
35 person, the responsibility to appear personally or appoint new counsel. A copy of the  
36 notice served by the opposing party must~~shall~~ be filed with the court. No further  
37 proceedings will~~shall~~ be held in the case until 20 days after such a notice is served,  
38 unless the unrepresented party waives the time requirement or unless the court  
39 otherwise orders.

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