Agenda

Advisory Committee on Rules of Appellate Procedure

November 3, 2016

12:00 to 1:30 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes	Tab 1	Joan Watt
Rule 22. Computation and enlargement of time - Conforming amendment	Tab 2	Clark Sabey
Rule 37. Suggestion of mootness; voluntary dismissal	Tab 3	Judge Voros
Logue vs. Court of Appeals, 2016 UT 44 (October 20, 2016)	Tab 4	Joan Watt
Rule 40. Attorney's or party's certificate; sanctions and discipline	Tab 5	James Ishida

Committee Webpage: http://www.utcourts.gov/committees/appellate_procedure/

Meeting Schedule. All meetings are from 12:00 to 1:30 at the Administrative Office of the Courts in the Matheson Courthouse.

January 5, 2017
February 2, 2017
March 2, 2017
April 6, 2017
May 4, 2017
June 1, 2017
September 7, 2017
October 5, 2017
November 2, 2017
December 7, 2017

Tab 1

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON THE
UTAH RULES OF APPELLATE PROCEDURE

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Judicial Council Room
Tuesday, October 11, 2016
12:00 p.m. to 1:30 p.m.

PRESENT	**EXCUSED**
Joan Watt- Chair	Bridget Romano
Troy Booher	Clark Sabey
Paul Burke	Ann Marie Taliaferro
Marian Decker	
R. Shawn Gunnarson	
James Ishida-Staff	
Alan Mouritsen	
Judge Gregory Orme	
Adam Pace – Recording Secretary	
Rodney Parker	
Lori Seppi	
Judge Fred Voros	
Mary Westby	

1. Welcome and approval of minutes **Joan Watt**

Ms. Watt welcomed the committee to the meeting and invited a motion to approve the minutes from the September meeting.

Ms. Westby moved to approve the September minutes. Ms. Decker seconded the motion and it passed unanimously.

2. **Supreme Court action on proposed rules amendments**

Ms. Watt reported that the Utah Supreme Court has adopted the committee's proposed Rules 2, 14, 25A, and 52. Mr. Ishida pointed out a typographical error in the proposed Rule 2, where the article "the" just before the word "provisions" had been deleted. The committee agreed to restore the deleted article. Ms. Watt said her next meeting with the court will be to discuss the committee's proposed Rule 24, but that rule has not yet gone out for public comment.

3. Discussion of "e-filing" rules

The committee discussed whether it should send the packet of proposed e-filing rules to the Utah Supreme Court for review, due to the recent change in procedure where the court now reviews proposed amendments before sending them out for public comment. Ms. Watt recommended that the committee do this, and that it also send the court a summary explaining what the committee has done with the rules. Mr. Parker agreed, and suggested that the committee could use the memorandum that Tim Shea prepared as the summary. *Mr. Burke made a motion to instruct the e-filing subcommittee to do a final review of the e-filing rules, and then submit them back to the committee for further consideration before sending them on to the Utah Supreme Court for review. Mr. Gunnarson seconded the motion and it passed unanimously.*

4. Rule 22. Computation and enlargement of time- Conforming amendment **Clark Sabey**

Ms. Watt asked the committee to consider Mr. Sabey's proposal to amend Rule 22(b)(2) to clarify the circumstances under which the court can extend jurisdictional deadlines, similar to the recent change made to Rule 2. The committee decided to table the issue until the next meeting because Mr. Sabey was not present at the meeting to comment on it.

5. Rule 37. Suggestion of mootness; voluntary dismissal **Judge Voros**

Judge Voros introduced the proposed amendment to Rule 37. He explained that the change to 37(a) is intended as a language clean-up. Mr. Burke suggested deleting the word "likely" in the phrase "circumstances that likely render moot one or more of the issues…." He said this would maintain the current standard, and also avoid putting counsel in the awkward position of trying to determine when an appeal is "likely" moot. *Mr. Burke moved to adopt the proposed amendment to Rule 37(a) with this change. Mr. Gunnarson seconded the motion and it passed unanimously.*

Judge Voros explained the change to 37(c) is intended to provide a way out for attorneys who are unable to contact their clients to obtain the necessary affidavit to support a motion for voluntary dismissal. Ms. Watt commented that this should only be allowed in circumstances where the client told the attorney to not pursue an appeal, and that the mere inability to contact the client should not be a basis for dismissing the appeal. Mr. Burke and Judge Orme both commented that a certification from the attorney should be sufficient, because it would be problematic to require the attorney to reveal communications with the client in an affidavit. Judge Voros proposed changing the last sentence of Rule 37(c) to read: "If the attorney is unable to obtain an affidavit or declaration from the appellant, the motion must be accompanied by the attorney's affidavit or declaration to that effect and certifying that based on communication with the appellant, the attorney reasonably believes the appellant no longer wishes to pursue the appeal." Judge Voros said that he would prepare a clean version of the proposed changes to Rule 37(c) for further discussion at the next meeting.

Judge Voros explained the history behind the proposed change to Rule 37(b). There was a situation years ago where the parties filed a voluntary dismissal of an appeal the morning that the

court was scheduled to issue its opinion, and the opinion went out anyways but then was withdrawn and vacated. The court then requested the committee consider an amendment to Rule 37(b) that allowed it to deny a stipulated motion to voluntarily dismiss. Several committee members were uncomfortable with that approach. Mr. Burke suggested at the time that he thought the change was unconstitutional, because there is no longer a justiciable case or controversy if the parties have settled. The committee recommended at the time that Rule 37(b) be left alone, but the Utah Supreme Court amended it anyways. Judge Voros and Mr. Burke filed a public comment at the time opposing the change. This was before Judge Voros was appointed to the Court of Appeals. Judge Voros explained that he believes the current composition of the Utah Supreme Court might be inclined to revisit this issue. The committee discussed changes to the proposed language, including whether the language referring to fees and costs should be deleted. Following this discussion Ms. Watt suggested that Judge Voros should prepare a clean version of the proposed change to Rule 37(b) for discussion at the next meeting.

6. Adjourn

The meeting was adjourned at 1:39 p.m.. The next meeting will be held on November 3, 2016.

Tab 2

Utah State Courts

James Ishida <jamesi@utcourts.gov>

Re: Updated Invitation: Rules of Appellate Procedure @ Tue Oct 11, 2016 12pm - 2pm (clarks@utcourts.gov)

Clark Sabey <clarks@utcourts.gov> Mon, Sep 12, 2016 at 12:40 PM
To: Joan Watt <JWATT@sllda.com>
Cc: Rodney Parker <rparker@scmlaw.com>, Marian Decker <mdecker@utah.gov>, Shawn Gunnarson <sgunnarson@kmclaw.com>, Ann Marie Taliaferro <ann@brownbradshaw.com>, "tbooher@zjbappeals.com" <tbooher@zjbappeals.com>, jplimpton@sllda.com, Mary Westby <maryw@utcourts.gov>, Paul Burke <pburke@rqn.com>, Lori Seppi <lseppi@sllda.com>, Bridget Romano <bromano@utah.gov>, "jfvoros@utcourts.gov" <jfvoros@email.utcourts.gov>, James Ishida <jamesi@utcourts.gov>, "jorme@utcourts.gov" <jorme@email.utcourts.gov>, Alan Mouritsen <amouritsen@parsonsbehle.com>, Jeni Wood <jeniw@utcourts.gov>

Joan, after we approved the amendment to Rule 2 at the last meeting, I remembered there was a pending proposal for another rule that functions (or at least should function) as a corollary to Rule 2 because a literal and isolated reading of Rule 22(b)(2) would simply circumvent Rule 2's strict limitation on the suspension of several rules. I think it would make sense to adopt both amendments at the same time.

I believe this proposal (or a similar form of it) has been pending for well over a year but was dropped from the queue because it got caught up in the e-filing amendments. The limited proposal for a change to 22(b)(2) is collateral to any concern directly relating to e-filing and likely can be adopted without causing any difficulty when grafting in the eventual additional changes for e-filing. I have attached a copy of the proposal that Tim had included in his e-filing amendments and a slightly different version that more specifically references Rule 2.

If it would be possible to place this on the next agenda, I would appreciate it.

Thanks,

Clark.

On Thu, Sep 8, 2016 at 7:15 AM, Jeni Wood <jeniw@utcourts.gov> wrote:

This event has been changed.

Rules of Appellate Procedure

more details »

When **Changed:** Tue Oct 11, 2016 12pm – 2pm Mountain Time

Where MATHESON - CouncilRoom, Master Event Calendar (map)

Calendar clarks@utcourts.gov

Who
- jeniw@utcourts.gov - organizer
- rparker@scmlaw.com
- mdecker@utah.gov
- sgunnarson@kmclaw.com
- ann@brownbradshaw.com
- tbooher@zjbappeals.com
- jplimpton@sllda.com
- maryw@utcourts.gov
- pburke@rqn.com
- lseppi@sllda.com
- bromano@utah.gov
- jfvoros@utcourts.gov
- jwatt@sllda.com
- clarks@utcourts.gov
- jamesi@utcourts.gov

- jorme@utcourts.gov
- amouritsen@parsonsbehle.com

Going? **Yes** - **Maybe** - **No** more options »

Invitation from Google Calendar

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To stop receiving these emails, please log in to https://www.google.com/calendar/ and change your notification settings for this calendar.

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2 attachments

Rule 22 - Tim's proposal for (b)(2) with modification.doc
27K

Rule 22 - Tim's proposal for (b)(2).doc
27K

PROPOSAL NO. 1

Rule 22. Computation and enlargement of time.

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

(b) Enlargement of time.

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

(b)(2) The court for good cause shown may upon motion ~~enlarge~~ extend the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of ~~such~~ time, but the court may not ~~enlarge~~ extend the time ~~for filing a notice of appeal or a petition for review from an order of an administrative agency~~ of a jurisdictional deadline, except as ~~specifically~~ expressly authorized by law. For the purpose of this rule, good cause includes, but is not limited to, the complexity of the case on appeal, engagement in other litigation, and extreme hardship to counsel.

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

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

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

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

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

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

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

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

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

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

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

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

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

(b)(5)(C) If the good cause relied upon is extreme hardship to counsel, the movant shall state in detail the nature of the hardship.

(b)(5)(D) All facts supporting good cause shall be stated with specificity. Generalities, such as "the motion is not for the purpose of delay" or "counsel is engaged in other litigation," are insufficient.

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

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

ADVISORY COMMITTEE NOTE

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

Counsel should note that there is no penalty for seeking an enlargement of time in filing briefs. However, both appellate courts place appeals in the oral argument queue in accordance with the priority of the case and the date of the completion of briefing. Delays in the completion of briefing will likely delay the date of oral argument.

PROPOSAL NO. 2

Rule 22. Computation and enlargement of time.

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

(b) Enlargement of time.

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

(b)(2) The court for good cause shown may upon motion ~~enlarge~~ extend the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of ~~such~~ time, but the court may not ~~enlarge~~ extend ~~the time for filing a notice of appeal or a petition for review from an order of an administrative agency~~ the jurisdictional deadlines specified by any of the Rules described in Rule 2, except as ~~specifically~~ expressly authorized by law. For the purpose of this rule, good cause includes, but is not limited to, the complexity of the case on appeal, engagement in other litigation, and extreme hardship to counsel.

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

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

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

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

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

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

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

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

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

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

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

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

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

(b)(5)(C) If the good cause relied upon is extreme hardship to counsel, the movant shall state in detail the nature of the hardship.

(b)(5)(D) All facts supporting good cause shall be stated with specificity. Generalities, such as "the motion is not for the purpose of delay" or "counsel is engaged in other litigation," are insufficient.

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

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

ADVISORY COMMITTEE NOTE

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

Counsel should note that there is no penalty for seeking an enlargement of time in filing briefs. However, both appellate courts place appeals in the oral argument queue in accordance with the priority of the case and the date of the completion of briefing. Delays in the completion of briefing will likely delay the date of oral argument.

Tab 3

Rule 37. Suggestion of mootness; voluntary dismissal.

(a) Suggestion of mootness. ~~It is the duty of each party at all times during the course of an appeal or other proceeding to inform the court of any~~ Any party aware of circumstances ~~which have transpired subsequent to the filing of the appeal or other proceeding which~~ that render moot one or more of the issues ~~raised.~~ presented for review must promptly ~~If a party determines that one or more, but less than all, of the issues have been rendered moot, the party shall promptly advise the court by filing~~ file a "suggestion of mootness" in the form of a motion under Rule 23. ~~If all parties to an appeal or other proceeding agree as to the mootness of one or more, but less than all, of the issues raised, a stipulation to that effect shall be filed with the suggestion of mootness. If an appellant determines all issues raised in the appeal or other proceeding are moot, a motion for voluntary dismissal shall be filed pursuant to the provisions of paragraph (b) of this rule.~~

(b) Voluntary dismissal. At any time prior to the issuance of a decision an appellant may move to voluntarily dismiss an appeal or other proceeding. If all parties to an appeal or other proceeding agree that dismissal is appropriate~~, a stipulation to that effect shall be filed with the~~ and stipulate to a motion for voluntary dismissal, the appeal will be promptly dismissed. ~~Any such stipulation shall specify the terms as to payment of costs, if applicable, and provide for payment of whatever fees are due.~~

(c) Affidavits. If the appellant has the right to effective assistance of counsel, a motion to voluntarily dismiss the appeal for reasons other than mootness ~~shall~~ must be accompanied by appellant's personal affidavit or declaration under Section 78B-5-705 demonstrating that the appellant's decision to dismiss the appeal is voluntary and is made with knowledge of the right to an appeal and ~~an understanding of~~ the consequences of voluntary dismissal. If counsel for the

appellant is unable to obtain the required affidavit or declaration from the appellant, the motion must be accompanied by counsel's affidavit or declaration stating that, after reasonable efforts, counsel is unable to obtain the required affidavit and certifying that counsel has a reasonable factual basis to believe that the appellant no longer wishes to pursue the appeal.

~~(d) A suggestion of mootness or motion for voluntary dismissal shall be subject to the appellate court's approval.~~

Advisory Committee Note.

Criminal defendants have a constitutional right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Arguelles*, 921 P.2d 439, 441 (Utah 1996). Parties in juvenile court proceedings have a statutory right to effective assistance of counsel. *State ex rel. E.H. v. A.H.*, 880 P.2d 11, 13 (Utah App. 1994). ~~; see Utah Code Ann. § 78-3a-913(1)(a)(Supp. 1998). To protect these rights and the right to appeal, Utah Code Ann. § 77-18a-1(1)(Supp. 1998); id. § 78-3a-909(1)(1996), the last sentence was added to Rule 37(b) to assure that the decision to abandon an appeal is an informed choice made by the appellant, not unilaterally by appellant's attorney.~~

Tab 4

This opinion is subject to revision before publication in the Pacific Reporter

2016 UT 44

IN THE

SUPREME COURT OF THE STATE OF UTAH

DANNY LOGUE,
Petitioner,

v.

COURT OF APPEALS, STATE OF UTAH, and THIRD DISTRICT COURT,
Respondents.

No. 20160498
Filed October 20, 2016

Fourth District, Provo
The Honorable Derek P. Pullan
No. 111401543

On Petition for Extraordinary Writ

Attorneys:

Herschel Bullen, Salt Lake City, for petitioner

Sean D. Reyes, Att'y Gen., Tyler R. Green, Solic. Gen.,
Thomas B. Brunker, Deputy Solic. Gen., Mark C. Field, Asst. Solic. Gen.,
Salt Lake City, for respondents

Nancy J. Sylvester, Salt Lake City, for respondent
Administrative Office of the Courts

PER CURIAM:

¶ 1 In a petition for extraordinary relief, Danny Logue asks us to direct the district court to entertain a motion for a new trial based on newly discovered evidence, despite the fact that the time for filing such a motion has already expired. We deny Mr. Logue's petition for two reasons: (1) it fails to comply with the pleading requirements prescribed in rule 19(b) of the Utah Rules of Appellate Procedure, and (2) Mr. Logue has failed to carry his burden of showing that the newly

discovered impeachment evidence in this case justifies our granting extraordinary relief.

¶ 2 After a fourteen-day jury trial, Mr. Logue was convicted of aggravated murder, possession of a dangerous weapon by restricted person, and obstruction of justice. Brandon Wright was one of the State's witnesses at trial. He testified that Mr. Logue admitted to the aggravated murder in 2014 when they were both serving prison time on the same cell block. The jury also heard evidence of Mr. Wright's lengthy criminal record, including his prior gang affiliation.

¶ 3 Mr. Logue was sentenced on May 14, 2015. He filed a motion for a new trial, which was denied on December 9, 2015. On December 28, 2015, he filed his notice of appeal. Approximately three months later, while Mr. Logue's appeal was pending, Mr. Wright walked into a police station and confessed to an unrelated twenty-year-old murder.

¶ 4 Mr. Logue now petitions for extraordinary relief based on Mr. Wright's confession. Mr. Logue argues that unless we exercise our authority to issue an extraordinary writ, he will be unable to seek a new trial based on this newly discovered evidence until after he has exhausted his direct appeal—a process that could take months or years.

¶ 5 We broadly take Mr. Logue's point. Rule 24(c) of the Utah Rules of Criminal Procedure generally requires that a motion for new trial be made "not later than 14 days after entry of the sentence." The Utah Rules of Civil Procedure likewise require litigants to seek relief from judgment based on new evidence no later than ninety days from the entry of judgment against them. *See* UTAH R. CIV. P. 60(b)(2), (c).[1] Moreover, it appears that Mr. Logue may not petition for postconviction relief until he exhausts his direct appeal. *See* UTAH CODE §§ 78B-9-102(1), 78B-9-107(1)–(2).[2] Thus, it appears that criminal defendants, like Mr. Logue, who discover new evidence more than ninety days after sentencing must await the conclusion of their appeal

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[1] The Utah Rules of Civil Procedure may apply in criminal proceedings when "there is no other applicable statute or rule." UTAH R. CIV. P. 81(e).

[2] Because Mr. Logue does not seek to raise a claim of factual innocence, we do not reach whether factual innocence claims may be exempt from this limitation. *See* UTAH CODE § 78B-9-402.

before attempting to seek relief based on this evidence, even if it would likely entitle them to a new trial.

¶ 6 We share Mr. Logue's concerns that there may be a period of time during which defendants in Mr. Logue's shoes are procedurally unable to press potentially meritorious claims. We nevertheless deny Mr. Logue's petition because we conclude that Mr. Logue failed to carry his burden of showing that the newly discovered impeachment evidence in this case justifies our issuing an extraordinary writ. *See Kettner v. Snow*, 375 P.2d 28, 30 (Utah 1962) ("[T]he burden of showing facts to justify [granting extraordinary relief] is upon him who seeks such relief."). Mr. Logue contends that Mr. Wright's posttrial confession to an unrelated murder shows that he "seriously perjured himself by the material omission of the fact that he had committed a murder in Washington State for which he had not been brought to justice." But Mr. Logue has not explained how Mr. Wright's omission of this fact amounts to perjury. Moreover, the jury knew that Mr. Wright had a lengthy criminal record, including prior affiliation with a prison gang. Mr. Logue has not persuaded us that the jury's assessment of Mr. Wright's credibility would have been significantly affected by the additional information that he had committed an unsolved serious crime. *See State v. Pinder*, 2005 UT 15, ¶ 66, 114 P.3d 551 (newly discovered evidence does not warrant a new trial if it is merely cumulative); *see also State v. Boyd*, 2001 UT 30, ¶ 28, 25 P.3d 985 ("As a general rule, newly discovered evidence does not warrant a new trial where its only use is impeachment."); *State v. Worthen*, 765 P.2d 839, 851 (Utah 1988) (denying motion for new trial when newly discovered evidence had only "minor impeachment value").[3]

¶ 7 We accordingly decline to exercise our discretion to grant Mr. Logue's petition for extraordinary relief. But we will direct the appropriate standing committee on the rules of procedure to consider

[3] We also note that Mr. Logue did not comply with rule 19(b) of the Utah Rules of Appellate Procedure. This rule requires a petition for an extraordinary writ to contain, among other things, "[a] statement of the reasons why no other plain, speedy, or adequate remedy exists and why the writ should issue." UTAH R. APP. P. 19(b)(4). Mr. Logue's petition does not even attempt to explain why his inability to pursue a new trial until after he has exhausted his appeal deprived him of a "plain, speedy, or adequate remedy." Indeed, nowhere in Mr. Logue's petition does the phrase "plain, speedy, or adequate remedy" even appear.

revising them so that they do not act as a categorical bar to motions for new trials in cases like these.

Tab 5

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210
Appellate Clerks' Office
Telephone 801-578-3900

May 31, 2016

To: Appellate Rules Committee
From: Tim Shea
Re: Rule 40

The Supreme Court asked me to draft amendments to Rule 40 to better describe the grounds for sanctions imposed by the court, the process, and what those sanctions might be. I've been through the rules of a few other jurisdictions to develop the attached proposal.

Rule 40. Attorney's or party's signature; representations to the court; sanctions and discipline.

(a) Attorney's or party's signature. Every motion, brief, and other document must be signed by at least one attorney of record who is an active member in good standing of the Bar of this state or by a party who is self-represented. A person may sign a document using any form of signature recognized by law as binding.

(b) Representations to court. The signature of an attorney or self-represented party certifies that to the best of the person's knowledge formed after an inquiry reasonable under the circumstances:

(b)(1) the filing is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the factual contentions are supported by the record on appeal; and

(b)(4)(A) the filing contains no information or records classified as private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social or any other information or records to which the right of public access is restricted by statute, rule, order, or caselaw; or

(b)(4)(B) a filing required by Rule 21(g) that does not contain information or records classified as private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social or any other information or records to which the right of public access is restricted by statute, rule, order, or caselaw is being filed simultaneously.

(c) Sanctions and discipline of attorneys and parties.

(c)(1) The court may~~, after reasonable notice and an opportunity to show cause to the contrary, and upon hearing, if requested, take appropriate action~~ enter a disciplinary order against ~~any~~ an attorney or ~~person~~ a self-represented party who ~~practices~~ appears before it for ~~inadequate representation of a client,~~ conduct unbecoming ~~a member of the Bar or a person allowed to appear before the court,~~ an attorney or a self-represented party or for failure to comply with these rules or a court order ~~of the court~~. In addition the court may enter a disciplinary order against an attorney for inadequate representation of a client.

(c)(2) When alleged conduct constituting grounds for discipline comes to the attention of the court, the court may enter an order to show cause why a disciplinary order should not be entered. The order to show cause will describe the alleged conduct, and the clerk of the court will send the order to the attorney or self-represented party.

(c)(3) No later than 14 days after receiving the order the self-represented party or attorney may file a memorandum showing cause why a disciplinary order should not be entered and may request a hearing.

(c)(4) If the self-represented party or attorney fails to show cause why a disciplinary order should not be entered, the court may enter the order, which may include suspension from practice before the

court for a definite or indefinite term; reprimand; financial penalty; or any other appropriate sanction other than disbarment or suspension from the practice of law.

(c)(5) A financial penalty is the personal responsibility of the person disciplined, and may not be reimbursed by a client. A person suspended from practice before the court for a definite term is automatically reinstated at the end of the term. A person suspended from practice before the court for an indefinite term may be reinstated only by order of the court. A person suspended from practice before the court who represents clients before the court must promptly notify the clients of the term of the suspension.

(c)(6) ~~Any action to suspend or disbar a member of the Utah State Bar shall be referred~~ If the person disciplined is an attorney, the clerk of the court will promptly send the disciplinary order to the Office of Professional Conduct of the Utah State Bar.

(d) Rule does not affect contempt power. This rule does not limit or impair the court's inherent and statutory contempt powers.

(e) Appearance of counsel pro hac vice. An attorney who is licensed to practice before the bar of another state or a foreign country but who is not a member of the Bar of this state, may appear, pro hac vice upon motion, filed pursuant to Rule 14-806 of the Rules Governing the Utah State Bar. A separate motion is not required in the appellate court if the attorney has previously been admitted pro hac vice in the trial court or agency, but the attorney shall file in the appellate court a notice of appearance pro hac vice to that effect.

Advisory Committee Notes

Records are classified as public, private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social by Code of Judicial Administration Rule 4-202.02. The right of public access might also be restricted by Title 63G, Chapter 2, Government Records Access and Management Act, by other statutes, rules, or caselaw, or by court order. If a filing contains information or records that are not public, Rule 21(g) requires the filer to file an unredacted version for the court and a version for the public that does not contain the confidential information.