AGENDA
APPELLATE RULES COMMITTEE

Thursday, May 4, 2017 12:00pm

1. **ACTION** - Approve minutes of April 6, 2017, meeting (Paul Burke, Chair) **(Tab 1)**

2. **ACTION** - Proposed amendment to Appellate Rule 21: Conforming amendment to Civil Rule 6, Prisoner Mailbox Rule (Civil Rules Committee) **(PUBLICATION) (Tab 2)**

3. **ACTION** - Proposed amendments to Appellate Rules 25 and 25A allowing State to participate in oral argument when it files an amicus brief on constitutionality of state statute (Utah Supreme Court/Clark Sabey) **(PUBLICATION) (Tab 3)**

4. **ACTION** - Proposed amendment to Appellate Rule 55 re dismissing an appeal in child welfare cases (Mary Westby) **(PUBLICATION) (Tab 4)**

5. **INFORMATION** - Report from *Logue* Subcommittee (Lori Seppi) **(Tab 5)**

6. Miscellaneous Matters

MEETING SCHEDULE:

June 1, 2017
September 7, 2017
October 5, 2017
November 2, 2017
December 7, 2017

GUESTS:

Hon. James Blanch, Member, Civil Rules Comm.
Nancy Sylvester, Staff, Civil Rules Comm.

Tab 1

DRAFT MINUTES OF THE APRIL 6, 2017,

APPELLATE RULES COMMITTEE MEETING

WILL BE DISTRIBUTED SEPARATELY

BEFORE THE MEETING

Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

TO: Appellate Rules Committee

FROM: James N. Ishida

DATE: April 19, 2017

RE: Proposed Amendment to Appellate Rule 21

This Committee has been asked to consider a conforming amendment to Appellate Rule 21, consistent with the proposed amendment to Civil Rule 6 regarding the "prisoner mailbox rule."

I. BACKGROUND

A. Preliminary Amendments to the Prisoner Mailbox Rule

On December 5, 2016, the Supreme Court approved for publication a proposal from the Civil Rules Committee, recommending that Civil Rule 5 be amended to include a new subdivision (g), which has been popularly described as the "prisoner mailbox rule." The proposal was intended to mirror its counterpart in Utah Rule of Appellate Procedure 21(f).

The Supreme Court, however, added one wrinkle to the Civil Rules proposal. The Court wanted to clarify when the clock starts to run on filing a responsive document. Therefore, the Court added the following language at the end of proposed new subdivision (g):

"*Response time will be calculated from the date the papers are received by the court.*"

This new language is not in Appellate Rule 21(f). The Court had asked that the Civil Rules proposal be submitted to this Committee for its consideration as to whether conforming changes should be made to Appellate Rule 21(f). At its meeting on February 2, 2017, this Committee had approved the conforming change to Rule 21(f).

450 South State Street / P.O. Box 140241 / Salt Lake City, UT 84114-0241 / 801-578-3800 / FAX: 801-578-3843

B. Subsequent Action by the Civil Rules Committee

Following public comment on its proposed amendment to Civil Rule 5, the Civil Rules Committee made several sound but significantly different changes to its proposed prisoner mailbox rule. The new proposed prisoner mailbox rule is now found in Civil Rule 6 (see attached). Because of the Civil Rules Committee's post-comment changes, we now have two different versions of the prisoner mailbox rule from the Civil and Appellate Rules Committees.

C. Appellate Rules Committee Proposal

At its last meeting on April 6, 2017, this Committee proposed a number of revisions to Appellate Rule 21, which incorporate elements of (1) the recent amendment to the federal prisoner mailbox rule in Federal Rule of Appellate Procedure 25(a)(2)(C), (2) local practice, and (3) the prisoner mailbox proposal by the Utah Civil Rules Committee. Highlights of the proposed changes to Appellate Rule 21 include:

1. Adopting the "contemporary declaration" language found in FRAP 25(a)(2)(C),[1]

2. Clarifying that a declaration, and not a notarized statement, is all that is required from the confined person,[2]

3. Broadening the rule to cover inmates and confined individuals,

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[1]The Advisory Committee on the Federal Rules of Appellate Procedure noted that there were several good reasons for requiring the contemporaneous filing of a declaration or notarized statement, including the observations that memories are fresh and it would streamline the process. However, the advisory committee also received several comments critical of this requirement when it published for comment FRAP 25(a)(2)(C). One such comment, from the Federal Courts Committee of the New York County Lawyers Association, was concerned that pro se litigants would have difficulty with complying with this new requirement because of other myriad requirements for appellate filings. The Association also pointed out that this new requirement differs from other rules – habeas and 28 USC 2255 rules – thus creating potential for confusion. The federal advisory committee acknowledged the validity of the Association's concerns, which prompted it to retain clarifying language in the rule.

[2]The federal Appellate Rules Committee chose to retain both declarations and notarized statements in amended FRAP 25(a)(2)(C). During preliminary discussions, it was suggested that notarized statements be deleted because declarations would be easier for inmates to prepare and because institutions lack notaries public. However, the advisory committee elected to retain both declarations and notarized statements for several reasons: (1) there had been no public comments suggesting the deletion of notarized statements; (2) research showed that notaries are available in some institutions; and (3) rules pertaining to habeas and section 28 USC 2255 proceedings all refer to declarations and notarized statements.

4. Omitting reference to first-class postage, which may not be applicable in all cases, and including a requirement that the confined person must conform to the mailing practices of the institution,

5. Adopting the initial clause of FRAP 25(a)(2)(C), requiring a confined person to conform to the institution's mailing practices in order to receive the benefit of the rule, and

6. Electing not to include FRAP 25(a)(2)(C)(ii) in the proposed amendment, which would give the appellate court discretion to permit a later filing of the declaration.[3]

D. Differences Between Civil and Appellate Proposals

Stylistic differences aside, there are several material differences between the Appellate proposal and the Civil proposal:

1. The Civil Rule addresses both "filing" and "service" by an inmate, whereas the Appellate Rule addresses only "filing" by a confined person,

2. The Appellate Rule requires the confined person to present his or her papers to the prison mail system, along with a declaration stating the date the papers were deposited and that the confined person complied with all applicable mail requirements as established by the institution. The Civil Rule does not include this "contemporary declaration" requirement, and

3. The Civil Rule expressly provides that the response time is calculated from the date the papers are received by the court or the parties served or the date of the postmark. The Appellate Rules is silent on the calculation of the response time.[4]

E. Illustrative Appellate Declaration Form

This Committee may also wish to consider adopting a new illustrative declaration form to assist confined persons comply with the new proposed prisoner mailbox rule. The federal rules committees had approved in 2016 a new Form 7, appended to the Federal Rules of Appellate Procedure, which serves this purpose. FRAP Form 7 is attached.

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[3]If this safety valve provision is deleted, then what happens if a confined person submits his or her papers without a declaration?

[4]This Committee may wish to consider adding language to its proposal regarding the calculation of the response time because the Supreme Court specifically added that language to the Civil Rules Committee's initial proposal. This Committee had also adopted similar language in February 2017 when it approved its first proposed amendment to Appellate Rule 21(f).

II. CONCLUSION

This Committee is now being asked to consider whether to make conforming changes to Appellate Rule 21 in light of the prisoner mailbox rule as proposed by the Civil Rules Committee in Rule 6. If this Committee approves the conforming amendment, then it is anticipated that both committees will ask the Supreme Court for approval to publish for public comment its respective prisoner mailbox rule.

Attachments: Proposed amendment to Appellate Rule 21
Proposed amendment to Civil Rule 5
Proposed amendment to Civil Rule 6
Public comments on proposed prisoner mailbox rule
Form 7 (Declaration of Inmate Filing) - FRAP Appendix of Forms

Rule 21. Filing and service.

(a) Filing. Papers required or permitted to be filed by these rules shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk. Except as provided in subpart (f), filing is not considered timely unless the papers are received by the clerk within the time fixed for filing, except that briefs shall be deemed filed on the date of the postmark if first class mail is utilized. If a motion requests relief which may be granted by a single justice or judge, the justice or judge may accept the motion, note the date of filing, and transmit it to the clerk.

(b) Service of all papers required. Copies of all papers filed with the appellate court shall, at or before the time of filing, be served on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel of record, or, if the party is not represented by counsel, upon the party at the last known address. A copy of any paper required by these rules to be served on a party shall be filed with the court and accompanied by proof of service.

(c) Manner of service. Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing.

(d) Proof of service. Papers presented for filing shall contain an acknowledgment of service by the person served or a certificate of service in the form of a statement of the date and manner of service, the names of the persons served, and the addresses at which they were served. The certificate of service may appear on or be affixed to the papers filed. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

(e) Signature. All papers filed in the appellate court shall be signed by counsel of record or by a party who is not represented by counsel.

(f) Filing by ~~inmate~~a confined person. If an institution has a system for legal mail, a confined person must use that system to receive the benefit of this Rule 21(f). Papers filed by ~~an inmate~~a person confined in an institution are timely filed if they are deposited in the institution's internal mail system on or before the last day for filing, and if they are accompanied by a written declaration setting forth the date of deposit and that the confined person has complied with any applicable requirements for legal mail set by the institution. ~~Timely filing may be shown by a~~

~~notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid.~~

(g) Filings containing other than public information and records. If a filing, including an addendum, contains non-public information, the filer must also file a version with all such information removed. Non-public information means information classified as private, controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law.

Rule 5. Service and filing of pleadings and ~~other~~ papers.

(a) When service is required.

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(a)(1)(A) a judgment;

(a)(1)(B) an order that states it must be served;

(a)(1)(C) a pleading after the original complaint;

(a)(1)(D) a paper relating to disclosure or discovery;

(a)(1)(E) a paper filed with the court other than a motion that may be heard ex parte; and

(a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

(a)(2) Serving parties in default. No service is required on a party who is in default except that:

(a)(2)(A) a party in default must be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(a)(2)(C) a party in default for any reason must be served with notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason must be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) a party in default for any reason must be served under Rule 4 with pleadings asserting new or additional claims for relief against the party.

(a)(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b) How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if

(b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

(b)(2) When to serve. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.

(b)(3) Methods of service. A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing if the person being served has an electronic filing account;

(b)(3)(B) emailing it to the email address provided by the person or to the email address on file with the Utah State Bar, if the person has agreed to accept service by email or has an electronic filing account;

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

(b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

(b)(4) When service is effective. Service by mail or electronic means is complete upon sending.

(b)(5) Who serves. Unless otherwise directed by the court:

(b)(5)(A) every paper required to be served must be served by the party preparing it; and

(b)(5)(B) an order or judgment prepared by the court will be served by the court.

(c) Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(c)(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(c)(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(c)(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(c)(4) a copy of the order must be served upon the parties.

(d) Certificate of service. A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served.

(e) Filing. Except as provided in Rule 7(j) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

(g) Filing by inmate. Papers filed by an inmate confined in an institution are timely filed if they are deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been prepaid. Response time will be calculated from the date the papers are received by the court.

Advisory Committee Notes

Rule 6. Time.

(a) Computing time. The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(a)(1) When the period is stated in days or a longer unit of time:

(a)(1)(A) exclude the day of the event that triggers the period;

(a)(1)(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(a)(1)(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(a)(2) When the period is stated in hours:

(a)(2)(A) begin counting immediately on the occurrence of the event that triggers the period;

(a)(2)(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(a)(2)(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(a)(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

(a)(3)(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(a)(3)(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(a)(4) Unless a different time is set by a statute or court order, filing on the last day means:

(a)(4)(A) for electronic filing, before midnight; and

(a)(4)(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

(a)(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(a)(6) "Legal holiday" means the day for observing:

(a)(6)(A) New Year's Day;

(a)(6)(B) Dr. Martin Luther King, Jr. Day;

(a)(6)(C) Washington and Lincoln Day;

(a)(6)(D) Memorial Day;

(a)(6)(E) Independence Day;

(a)(6)(F) Pioneer Day;

(a)(6)(G) Labor Day;

(a)(6)(H) Columbus Day;

(a)(6)(I) Veterans' Day;

(a)(6)(J) Thanksgiving Day;

(a)(6)(K) Christmas; and

(a)(6)(L) any day designated by the Governor or Legislature as a state holiday.

(b) Extending time.

(b)(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(b)(1)(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b)(1)(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(b)(2) A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d) and (e), and 60(c).

(c) Additional time after service by mail. When a party may or must act within a specified time after service and service is made by mail under Rule 5(b)(3)(C), 3 days are added after the period would otherwise expire under paragraph (a).

(d) Filing or service by inmate.

(d)(1) Papers filed or served by an inmate confined in an institution are timely filed or served if they are deposited in the institution's internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, and that the inmate has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court, or for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail, plus any time added under paragraph (b).

(d)(2) The provisions of paragraph (d)(1) do not apply to service of process, which is governed by Rule 4.

URCP 5

Posted by Nathan Phelps

Regarding the suggested amendment to URCP 5:

I have no problem with the substance of the amendment, but I believe logically it fits better under URCP 6. The whole of Rule 6, like the amendment, deals with how to measure time and timeliness, and URCP 6(c), like the amendment, explains that service in certain form extends to act.

> *Nancy's comment:*
>
> *Mr. Phelps raises a good point and it's one that's worth exploring in conjunction with Mr. Kaiser's comment below.*

Posted by Kyle Kaiser

Dear Members of the Rules Committee and the Honorable Justices of the Supreme Court:

I write to comment regarding the proposed amendment to Rule 5. I am the Section Director of the Civil Rights Section of the Litigation Division of the Utah Attorney General's Office. I defend government agents and agencies against claims of civil rights violations, which often includes claims brought by incarcerated persons. I have experience with the issues created when inmates are required to serve and file documents with the court and with opposing parties within a certain period of time. I write to support the suggested rule change, but to also suggest a few changes to make the rule clearer, more manageable, and fairer for all parties involved. Though I have consulted with other Assistant Utah Attorneys General in the preparation of these comments, please note my comments are made from me, have not been approved by the Office of the Attorney General, and may not be the opinion of the Office, the Division, or other employees.

I generally support the codification of the "prison mailbox" rule into the Rules of Civil Procedure. In my experience defending the Utah Department of Corrections and its employees, a prisoner's mail may be delayed as much as five days from the time it is received by the mailroom of the Utah State Prison or the Central Utah Correctional Facility to reach the prisoner for incoming mail, or placed in outgoing mail by the prisoner to reach the Postal Service. This is because the mailroom must review and X-ray all incoming and outgoing mail. And even though the mailroom does not read items marked "Legal Mail," the sheer volume of mail processed by these institutions daily slows the process for all pieces of mail. The process may be delayed even further if the prisoner is indigent and needs to follow required processes for free postage for legal

mail. As a result, prisoners at the Prison may only have a few days to respond to dispositive motions, discovery, or other time-sensitive, litigation-related documents.

Accordingly, the attorneys in the Civil Rights Section generally apply a "de facto" prison mailbox rule. We generally do not seek to strike pleadings for timeliness unless they were not deposited in the prison's internal mail system until well after the due date. We also generally calculate our response times from the U.S. mail postmark date, or on the date docketed by the court. We have not had any serious challenges or issues with such a practice. However, our informal practice does result in ambiguity regarding when documents are actually due, and whether the court has or will properly process them.

Codifying a prison mailbox rule would be beneficial to all parties. It would give both the inmate and those litigating against the inmate the confidence that pleadings and other papers would be timely filed and served and would reduce ambiguity regarding every party's responsibility.

However, a number of changes to the proposed rule should be made in order to meet those goals. First, the rule should be modified to include documents that are served and not filed, and to take into account response times for such documents. Second, the rule should be modified to recognize the legal mail procedures at institutions and the necessity of indigent postage filings.

SUGGESTED CHANGES TO PROPOSED RULE:

(1) The rule should be modified to include documents that are only served and need not be filed.

The current rule mentions only papers "filed" by an inmate confined in an institution. This language comes largely from the pre-December 2016 version of Federal Rule of Appellate Procedure 25(a)(2)(C), the only federal rule that creates any sort of prison mailbox rule.

In the appellate courts, where virtually all documents are filed, this language would be sufficient. However, at the trial level, there are a number of documents that do not need to be filed with the Court that are regularly served upon opposing parties. The most common types of these documents are requests for discovery and responses thereto.

This issue is further exacerbated by the fact that the Committee has suggested that districts, by local rule, may prohibit the filing of discovery with the court, and may even prohibit the filing of certificates of service related to the discovery. If such rules were enacted, either the proposed prison mailbox rule would be ineffective, or calculating deadlines to respond would be virtually impossible. I therefore suggest that the proposed rule be amended to include options for calculating response dates to documents that are served but not filed. My proposal starts the time from when the document is placed in U.S. Mail (the postmark date) rather than the date the inmate places the document in the prison's internal mail system. This provides the most

certainty as postmarks are not manipulable by inmates and avoids the mailroom delay discussed above.

However, by adding a discussion of documents "served," unrepresented inmates may believe that service of process may be effected by mail. Such service on governmental entities is generally not allowed under the Utah Rules of Civil Procedure. E.g., Utah R. Civ. P. 4(d)(1)(J). Accordingly, language should be added to distinguish service of papers from service of process.

(2) The rule should be modified to recognize legal mail requirements at correctional institutions and to adapt to the necessity of indigent postage.

The rule, as currently written, requires an inmate to certify that at the time of deposit in the prison mail system "first-class postage has been prepaid." Additionally, the rule eschews former Federal Rule of Appellate Procedure 25(a)'s requirement that the inmate has used any available internal prison mail systems. The result of this is that the current rule requires inmates to prepay postage. Many, if not most, inmates are indigent, and do not have the means to prepay postage. Following the U.S. Supreme Court's requirement that inmates be provided "at state expense with paper and pen to draft legal documents ... and with stamps to mail them," Bounds v. Smith, 430 U.S. 817, 825 (1977), the Utah Department of Corrections has implemented policies to provide postage to inmates for purposes of legal mail. See, e.g. Utah Department of Corrections, Insitutional Operations Division Manual, FD03 Inmate Mail, available at https://webapps.corrections.utah.gov/webdav_pub/F%20-%20Institutional%20Operations%20Public%20Policy/FD03%20-%20Inmate%20Mail.pdf; Utah Department of Corrections, Institutional Operations Division Manual, FD15/2.02 Indigent Mail, available at https://webapps.corrections.utah.gov/webdav_pub/F%20-%20Institutional%20Operations%20Public%20Policy/FD15%20-%20Indigent%20Status.pdf. However, to qualify, inmates must properly comply with Department of Corrections procedures, including properly requesting indigent postage for legal mail and verifying their indigent status. Id.

Accordingly, the rule, as drafted, is insufficient to describe the process or availability of inmate mail. Inmates will not be able to certify that postage has been prepaid, as currently required by the proposed rule, when indigent. However, inmates should also not have the benefit of the prison mailbox rule if they flout the institution's rules (for example, by not providing an affidavit of indigency in their request for legal mail franking) in an attempt to get free postage. The rule should be modified to both provide inmates the flexibility to receive the benefit of the rule even if they cannot prepay postage, while respecting correctional institution's requirements for free mail. The language provided incorporates some of the new Appellate Rule 25(a)'s requirements, while maintaining a simpler format.

SUGGESTED, AMENDED RULE:

Papers filed or served by an inmate confined in an institution are timely filed or served if they are deposited in the institution's internal mail system on or before the last day for filing or service. Timely filing or service may be shown by a notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, and that the inmate has complied with any applicable requirements for legal mail set by the institution. Response time will be calculated from the date the papers are received by the court, or, for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail, plus any time added by Utah Rule of Civil Procedure 6.

The provisions in this subsection do not apply to service of process, governed by Utah Rule of Civil Procedure 4.

Thank you for your consideration, and feel free to contact me with any questions.

Kyle Kaiser
Section Director, Civil Rights Section
Litigation Division
Utah Attorney General's Office

Nancy's comment:
I wish more comments looked like this one. It is well thought out and offers a suggested amendment, which saves time. That said, I wonder if the "filed or served" language in the first part of Mr. Kaiser's suggestion is confusing. He does clarify it later in the sentence beginning with "Response time will be calculated...." so perhaps this is a non-issue, but it's one we are grappling with right now in Rules 7 and 101. Having both terms can be confusing to pro se litigants and can lead to uncertainty. His explanation above addresses why both are needed, but this is something the committee should discuss.

URCP 45

None.

URCP 84

None.

United States Code Annotated
Federal Rules of Appellate Procedure (Refs & Annos)
Appendix of Forms

Federal Rules of Appellate Procedure Form 7, 28 U.S.C.A.

Form 7. Declaration of Inmate Filing

Currentness

_____

[insert name of court; for example,

United States District Court for the District of Minnesota]

A.B., Plaintiff	)	
	)	
v.	)	*Case No.*
	)	
C.D., Defendant	)	

I am an inmate confined in an institution. Today, _____ [*insert date*], I am depositing the _____ [*insert title of document; for example, "notice of appeal"*] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here _____

Signed on _____ [*insert date*]

*[**Note to inmate filers:** If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(C).]*

CREDIT(S)
(Added Apr. 28, 2016, eff. Dec. 1, 2016.)

F. R. A. P. Form 7, 28 U.S.C.A., FRAP Form 7
Including Amendments Received Through 3-1-17

End of Document

Tab 3

Utah State Courts

James Ishida <jamesi@utcourts.gov>

Proposed Amendments to Rules 25A and 25

Clark Sabey <clarks@utcourts.gov> Wed, Apr 19, 2017 at 10:45 AM
To: James Ishida <jamesi@utcourts.gov>, Paul Burke <pburke@rqn.com>

The Court has asked me to forward to the Committee a proposed amendment to Rule 25A that grants the Attorney General (or local attorney in cases involving ordinances) the right to appear at oral argument whenever an amicus brief has been filed pursuant to the Rule. The proposed amendment to Rule 25 simply cross-references the Rule 25A change.

Paul and James, I am assuming you are the right individuals to send this to. I can send it to the full Committee prior to the next meeting if you think it would be helpful, but I am guessing it will be fairly non-controversial as to the substance and (hopefully) will only need minor tinkering with respect to form. Let me know if I should send it to anyone else.

Thanks,

Clark

2 attachments

Proposed Rule 25 Amendment 2017-05.doc
15K

Proposed Rule 25A Amendment 2017-05.doc
18K

Rule 25A. Challenging the constitutionality of a statute or ordinance.

(a) Notice to the Attorney General or the county or municipal attorney; penalty for failure to give notice.

(a)(1) When a party challenges the constitutionality of a statute in an appeal or petition for review in which the Attorney General has not appeared, every party must serve its principal brief and any subsequent brief on the Attorney General on or before the date the brief is filed.
(a)(2) When a party challenges the constitutionality of a county or municipal ordinance in an appeal or petition for review in which the responsible county or municipal attorney has not appeared, every party must serve its principal brief and any subsequent brief on the county or municipal attorney on or before the date the brief is filed.
(a)(3) If an appellee or cross-appellant is the first party to challenge the constitutionality of a statute or ordinance, the appellant must serve its principal brief on the Attorney General or the county or municipal attorney no more than 7 days after receiving the appellee's or the cross-appellant's brief and must serve its reply brief on or before the date it is filed.

(a)(4) Every party must serve its brief on the Attorney General by email or mail at the following address and must file proof of service with the court.
Email
notices@agutah.gov
Mail
Office of the Utah Attorney General
Attn: Utah Solicitor General
320 Utah State Capitol
P.O. Box 142320
Salt Lake City, Utah 84114-2320
(a)(5) If a party does not serve a brief as required by this rule and supplemental briefing is ordered as a result of that failure, a court may order that party to pay the costs, expenses, and attorney fees of any other party resulting from that failure.

(b) Notice by the Attorney General or county or municipal attorney; amicus brief.
(b)(1) Within 14 days after service of the brief that presents a constitutional challenge the Attorney General or other government attorney will notify the appellate court whether it intends to file an amicus brief. The Attorney General

or other government attorney may seek up to an additional 7 days' extension of time from the court. Should the Attorney General or other government attorney decline to file an amicus brief, that entity should plainly state the reasons therefor.

(b)(2) If the Attorney General or other government attorney declines to file an amicus brief, the briefing schedule is not affected.

(b)(3) If the Attorney General or other government attorney intends to file an amicus brief, that brief will come due 30 days after the notice of intent is filed. Each governmental entity may file a motion to extend that time as provided under Rule 22. On a governmental entity filing a notice of intent, the briefing schedule established under Rule 13 is vacated, and the next brief of a party will come due 30 days after the amicus brief is filed.

(c) Call for the views of the Attorney General or county or municipal attorney. Any time a party challenges the constitutionality of a statute or ordinance, the appellate court may call for the views of the Attorney General or of the county or municipal attorney and set a schedule for filing an amicus brief and supplemental briefs by the parties, if any.

(d) If the Attorney General or county or municipal attorney files an amicus brief, the Attorney General or county or municipal attorney will be permitted to participate at oral argument.

Effective November 1, 2016

Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only by leave of court granted on motion or at the request of the court. The motion for leave may be accompanied by a proposed amicus brief, provided it complies with applicable rules and the number of copies specified by Rule 26(b) are submitted to the court. A motion for leave shall identify the interest of the movant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except for a motion for leave to participate in support of, or in opposition to, a petition for writ of certiorari filed pursuant to Rule 50(f),the motion for leave shall be filed at least 21 days prior to the date on which the brief of the party whose position as to affirmance or reversal the amicus curiae or guardian ad litem will support is due, unless the court for cause shown otherwise orders. Parties to the proceeding may indicate their support for, or opposition to, the motion. Any response of a party to a motion for leave shall be filed within 7 days of service of the motion. If leave is granted, an amicus curiae or guardian ad litem shall file its brief within 7 days of the time allowed the party whose position the amicus curiae or guardian ad litem will support, unless the order granting leave otherwise indicates. The time for responsive briefs under Rule 26(a) shall run from the timely service of the amicus or guardian ad litem brief or from the timely service of the brief of the party whose position the amicus curiae or guardian ad litem supports, whichever is later. Except as provided by Rule 25A, a motion of an amicus curiae or guardian ad litem to participate in the oral argument will be granted when circumstances warrant in the court's discretion.

Tab 4

Utah State Courts

James Ishida <jamesi@utcourts.gov>

Brief description regarding rule 55 issue

Mary Westby <maryw@utcourts.gov> Wed, Apr 19, 2017 at 2:37 PM
To: James Ishida <jamesi@utcourts.gov>

James,

Let me know if this gets you what you need. thanks

Rule 55 of the Utah Rules of Appellate Procedure sets out the process and requirements for filing a petition on appeal in child welfare cases. It provides that if a petition is untimely filed, the appeal must be dismissed. Although these rules were designed with a goal of expediting permanency for the children involved, this firm dismissal requirement may lead to disservice to clients when an attorney fails to file the petition. There is no way of knowing whether the failure to file a petition is because of a choice or conduct of an appellant or merely an attorney not following through.

Amending rule 55 to provide the court of appeals with discretion to dismiss rather than requiring dismissal, or requiring a declaration indicating a reason why a petition will not be filed would help assure that clients do not bear the consequences for an attorney's failure to file a petition without justification.

ALTERNATIVE 1

Rule 55. Petition on appeal.

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

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

(c) Format. All petitions on appeal shall substantially comply with the Petition on Appeal form that accompanies these rules. The petition shall not exceed 15 pages, excluding the attachments required by Rule 55(d)(~~6~~7). The petition shall be typewritten, printed or prepared by photocopying or other duplicating or copying process that will produce clear, black and permanent copies equally legible to printing, on opaque, unglazed paper 8 ½ inches wide and 11 inches long. Paper may be recycled paper, with or without deinking. The printing must be double spaced, except for matter customarily single spaced and indented. Margins shall be at least one inch on the top, bottom and sides of each page. Page numbers may appear in the margins. Either a proportionally spaced or monospaced typeface in a plain, roman style may be used. A proportionally spaced typeface must be 13-point or larger for both text and footnotes. Examples are CG Times, Times New Roman, New Century, Bookman and Garamond. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes. Examples are Pica and Courier.

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

(d)(1) A statement of the nature of the case and the relief sought.

(d)(2) The entry date of the judgment or order on appeal.

(d)(3) The date and disposition of any post-judgment motions.

(d)(4) A concise statement of the material adjudicated facts as they relate to the issues presented in the petition on appeal.

(d)(5) A statement of the legal issues presented for appeal, how they were preserved for appeal, and the applicable standard of review. The issue statements should be concise in nature, setting forth specific legal questions. General, conclusory statements such as "the juvenile court's ruling is not supported by law or the facts" are not acceptable.

(d)(6) The petition should include supporting statutes, case law, and other legal authority for each issue raised, including authority contrary to appellant's case, if known.

(d)(7) The petition on appeal shall have attached to it:

(d)(7)(A) a copy of the order, judgment, or decree on appeal;

(d)(7)(B) a copy of any rulings on post-judgment motions.

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ALTERNATIVE 2

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

(b)(1) If an appellant cannot be located to pursue the appeal, or the appellant wants to voluntarily dismiss the appeal, trial counsel may file a declaration to that effect instead of filing a petition on appeal. The declaration must be filed within the time period for filing the petition on appeal.

(c) Format. All petitions on appeal shall substantially comply with the Petition on Appeal form that accompanies these rules. The petition shall not exceed 15 pages, excluding the attachments required by Rule 55(d)(~~6~~7). The petition shall be typewritten, printed or prepared by photocopying or other duplicating or copying process that will produce clear, black and permanent copies equally legible to printing, on opaque, unglazed paper 8 ½ inches wide and 11 inches long. Paper may be recycled paper, with or without deinking. The printing must be double spaced, except for matter customarily single spaced and indented. Margins shall be at least one inch on the top, bottom and sides of each page. Page numbers may appear in the margins. Either a proportionally spaced or monospaced typeface in a plain, roman style may be used. A proportionally spaced typeface must be 13-point or larger for both text and footnotes. Examples are CG Times, Times New Roman, New Century, Bookman and Garamond. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes. Examples are Pica and Courier.

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Tab 5

Logue Subcommittee Meeting Notes

April 21, 2017

Present:

Nancy Sylvester (staff-URCP), Mark Field (URAP), Jensie Anderson (URCrP), Lori Seppi (URAP)

Logue v. Court of Appeals, 2016 UT 44:

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

"We will direct the appropriate [advisory] committee on the rules of procedure to consider revising them so that they do not act as a categorical bar to motions for new trials in cases like this."

Discussion:

Jensie:

Utah is unique from federal system and other states. In other states, newly discovered evidence does not go into post-conviction. But in Utah it does. I.e. Wyoming: 2 year statute of limitations to bring; NV: tiered system of bringing it (1 year, 5 years—interest of justice, 10 years—rebuttable presumption of prejudice to state). But we have set up a system where newly discovered evidence is part of post-conviction. Logue discussed 90 days then there is a gap.

Last meeting we discussed whether appellate attorneys are able to properly investigate.

Lori:

Judge Voros said he is meeting with the Council on Monday r.e. post-conviction. Going to be requesting counsel in post-conviction; statutory change.

Mark:

Federal rules on indicative rulings talk about motions over which the district court no longer has jurisdiction. But we don't have the same jurisdiction issue in Utah.

In federal rules, court would only be making a decision on the merits after remand, whereas in our situation, the court can make a decision on the merits without a remand.

So the jurisdiction issue isn't necessarily there. If evidence is discovered and the attorney doesn't bring a new trial motion, could be problematic, although could raise as IAC claim in post-conviction. Let's say discover 6 months after appeal, but could have discovered with reasonable diligence, that's a bar.

Lori:

What is reasonable diligence? Appellate attorney probably won't be looking outside the lower court record.

Mark:

Appellate attorneys do Rule 23B motions to remand for findings necessary to determination of ineffective assistance of counsel claim. Would ask for money to do investigation from district court.

Lori:

But Rule 23B is different from newly discovered evidence. Let's say you have a case on appeal and you visit your client who says my attorney didn't talk to my cousin. Cousin had great evidence. This triggers the need to do investigation because 23B exists. There is now a standing order that says you can file a 23B motion with your opening appellate brief (says "can," but really have to). So client comes to attorney says need to investigate and you do. But you're relying on the client to bring up that something is important, unless something in the record tells you. This could happen with expert testimony. For example, ballistics evidence is discussed by state expert but no defense expert is called. That would trigger 23B, but that's not necessarily new evidence.

Mark:

So if a client after conviction tells appellate attorney about cousin needing to be interviewed, for 23B purposes, talk to cousin, get affidavit, file 23B motion.

Lori:

At LDA, have investigation division, but it's dedicated to trial attorneys. Appellate attorney doesn't necessarily have that benefit. Hire expert, have them investigate, and produce report. Newly discovered evidence probably isn't this: something that should have discovered at trial and didn't. Newly discovered evidence is more like cousin coming forward and saying I did it or overheard someone in a bar saying they did. Would have to come to appellate attorney and say it.

Jensie:

I would consider shortening the time in Rule 24. Pull it back and make 14 days longer, but not turn appellate attorney into investigator. Maybe 90 days from date of sentencing and have an interest of justice exception for really good piece of evidence. So if evidence doesn't come up in time, don't turn appellate attorney into investigator. Concern of procedural bar or ruining it for post-conviction. If no way to bring it after certain time, no obligation to look for evidence?

Mark:

Why even have this rule at all?

Jensie:

Concern is procedural bar. AG's will argue that the evidence should have been discovered during trial, not appeal. Are we creating a new procedural bar if say you can bring a new trial motion up to the point of appeal finality? That creates kind of a scary obligation on appellate attorneys to do investigations.

Lori:

The 23B subcommittee discussed making 23B motions a motion for new trial. Someone still has to do an investigation. New counsel appointed to investigate motion for new trial? Appellate attorney comes in when?

Jensie:

What about a legislative fix: pull newly discovered evidence out of PCRA? Feds allow anytime within 3 years to bring newly discovered evidence. Anytime newly discovered evidence is part of PCRA, you're looking at procedural bar.

Nevada: within 1 year, interests of justice within 5, rebuttable presumption of prejudice against state after 5 years .Finality important, but if good enough, can bring it in. It stays as new trial motion. Not PCRA claim. New evidence is always a new trial motion in other states. If discover 10 years after trial (NV), must get over rebuttable claim. WY: 2 years bar on newly discovered evidence. Working on factual innocence evidence to expand WY's 2 years.

Mark:

Dilemma: addressing concerns of Supreme Court—no procedural mechanism for Logue. Must wait for end of appeal until post-conviction and bring claim like that.

A rule change is going to be worse than better for defendants? There is a categorical bar for people like Logue, but Sup Ct directed the appropriate rules committees "to consider revising the rules so they do not act as a categorical bar to motions for new trials in cases like these." We may determine we shouldn't revise the rules.

78B-9-104(1)(e)

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or

78B-9-107. Statute of limitations for postconviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based;

Under Criminal Rule 24, if the defendant discovers evidence within 14 days, must bring new trial motion but then barred. Go through appeal, at end argue ineffective assistance in post-conviction because counsel could have discovered evidence within 14 days of sentence and didn't'.

Substantive claim of newly discovered evidence is barred post-conviction, but the IAC claim is not.

Jensie:

Case law says if same counsel in trial and appeal, wouldn't expect attorney to raise IAC claim until new counsel appointed.

Mark:

If evidence would show factual innocence, can bring that at any point. If evidence raises reasonable doubt, goes to post-conviction.

Logue--Evidence: key state witness admitted to 20 year old murder. Already knew he was a bad guy, though. Herschel Bullen wanted to use this for impeachment evidence.

Jensie:

Don't want evidence ruined for post-conviction and also don't want to make Rule 24 turn appellate attorneys into investigators. Is it better to put onus on appellate attorney or say, sorry Logue, you're out of luck?

Mark:

May be better to wait for legislative fix to provide PCRA attorneys than do this rule change. PCRA attorney can do investigation.

Lori:

We should take time to talk to appellate attorneys about how they would deal with newly discovered evidence.

Mark:

Has heard from appellate attorneys that if they don't do investigation now, and get it in front of appellate courts, barred in PCRA. Don't think this is app counsel's job though. Appellate attorneys should only go outside record if information comes to them.

Nancy will circulate results of Judicial Council presentation on PCRA counsel Monday. She will circulate Council agenda so that Mark, Jensi, and Lori can attend if they are able.

<u>Next meeting</u>

June 2, 2017 at 9 a.m. Judicial Council Room

Please come with what you think the best answer is on this issue (rule change, statutory fix, no change) after talking to your contacts and after hearing what the Council does with the PCRA presentation on counsel appointment (April 24).