Agenda

Advisory Committee on Rules of Appellate Procedure

April 4, 2019

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

ACTION: Welcome and approval of March 2019 minutes	Tab 1	Paul C. Burke, Chairman
DISCUSSION AND ACTION: Manner of service in the appellate courts under Rules 21 and 26	Tab 2	Mary Westby and Lisa Collins
DISCUSSION AND ACTION: Writ of Certiorari amendments: Rules 47, 45, and 49	Tab 3	Christopher Ballard
DISCUSSION AND ACTION: Coordination of intervention rules: URAP 25A, URCrP 12, and URCP 24	Tab 4	Nancy Sylvester
DISCUSSION AND ACTION: Discussion of Appellate Representation recommendations to amend URAP 1 and 58 and CJA 11-401, and repeal URAP 38B	Tab 5	Nancy Sylvester
DISCUSSION AND ASSIGNMENTS: • Advisory committee notes project • Unrepresented litigants and the appellate rules • Judicial efficiency	Tab 6	Paul C. Burke, Judge Gregory Orme
DISCUSSION: Other business		Paul C. Burke

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

Meeting schedule:

May 2, 2019

June 6, 2019

July 11, 2019

August 1, 2019

September 5, 2019

October 3, 2019

November 7, 2019

December 5, 2019

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

Executive Dining Room
Thursday, March 7, 2019
12:00 p.m. to 1:30 p.m.

PRESENT	**EXCUSED**
Christopher Ballard	Troy Booher
Paul Burke- Chair	Cathy Dupont- Staff
Lisa Collins	R. Shawn Gunnarson
Alan Mouritsen	Judge Jill Pohlman
Judge Gregory Orme	
Adam Pace – Recording Secretary	
Rodney Parker	
Bridget Romano	
Clark Sabey	
Lori Seppi	
Nancy Sylvester- Staff	
Ann Marie Taliaferro	
Mary Westby	

1. Welcome and approval of minutes; introductions **Paul Burke**

Mr. Burke welcomed the committee to the meeting and moved to approve the minutes from the November 2018 meeting. The motion was seconded and it passed unanimously.

2. **Discussion:** Word count analysis and Rules 24 and 24A **Lisa Collins**
Clark Sabey
Paul Burke

The committee received a request from the Court in January 2018 to consider amending Rules 24 and 24(A) in order to reduce the word limits for appellate briefs. After discussing the matter, the committee recommended that any changes in the word limits be deferred and taken up again after review and study over the next year of the length and subject matter of submitted briefs.

The Court accepted this suggestion and gathered the requested data over the past year. Ms. Collins and Mr. Sabey reported the results of this analysis to the committee.

Mr. Burke commented that the data shows a decline in the overall number of words and pages in appellate briefs on average, which the committee agreed shows the effectiveness of the recent changes to the rules. Based on this data, the Court withdrew its request for the committee to make further changes to Rules 24 and 24A.

3. Discussion: Manner of service in the appellate courts under Rule 21(c) **Mary Westby**

Ms. Westby proposed amending appellate Rule 21 to allow service by email. Mr. Ballard suggested that Rule 26 should be amended as well, because it addresses service of briefs. Mr. Burke asked Ms. Westby to prepare a proposed amendment to these rules for the committee to discuss at the next meeting.

4. Discussion: Discussion of future projects **Paul Burke**

Mr. Burke reported that the Court has asked the committee to review the appellate rules to accomplish three broad objectives: 1) make the rules more accessible to pro se parties; 2) review all advisory committee notes to ensure that they do not create substantive requirements that are not contained in the rules; and 3) consider ways to expedite the appellate process, such as creating a fast-track or multiple tracks for appeals.

Mr. Burke suggested that the committee form subcommittees to address each of these objectives. He asked the committee members to think about these issues and come prepared to discuss their ideas about them and subcommittee assignments at the next meeting.

Mr. Parker asked if there is a way to collect data about how much time is elapsing between each step in the appellate process. Ms. Collins said she could do that.

Ms. Seppi offered to research what other states have done to expedite appeals and report on her findings at the next meeting.

5. Other business

Mr. Ballard requested that the proposed changes to appellate Rule 47(a) that were summarized in the November 2018 meeting minutes be added to the agenda for discussion at the next meeting.

Mr. Parker asked if the committee is planning to meet over the summer in June, July, and August. Mr. Burke said he will consider whether one or more of these meetings can be cancelled, but he will keep them on the schedule for now.

6. Adjourn

The meeting was adjourned. The next meeting will be held on April 4, 2019.

Tab 2

WordPerfect Document Compare Summary

Original document: J:\Draftops\WorkInProgress_MW\Rule 21.wpd
Revised document: J:\Draftops\WorkInProgress_MW\Rule 21 amended.wpd
Deletions are shown with the following attributes and color:
~~Strikeout~~, Blue RGB(0,0,255).
Deleted text is shown as full text.
Insertions are shown with the following attributes and color:
Double Underline, Redline, Red RGB(255,0,0).

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Rule 21. Filing and service.

1. (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 or email address provided to the appellate court. 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, by mail, or by ~~mail~~email. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail or email is complete on ~~mailing~~sending.

(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.

(f)(1) For purposes of this paragraph (f), an inmate is a person confined to an institution or committed to a place of legal confinement.

(f)(2) Papers filed by an inmate 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 contemporaneously filed notarized statement or written declaration setting forth the date of deposit and stating that first-class postage has been, or is being, prepaid, or 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.

(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.

WordPerfect Document Compare Summary

Original document: J:\Draftops\WorkInProgress_MW\Rule 26.wpd
Revised document: J:\Draftops\WorkInProgress_MW\Rule 26 amended.wpd
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Deleted text is shown as full text.
Insertions are shown with the following attributes and color:
Double Underline, Redline, Red RGB(255,0,0).

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Rule 26. Filing and service of briefs.

~~1. (a) Time~~(a) Filing of briefs. Briefs may be filed in person, by mail, or by email if the electronic document is a searchable PDF file of no more than 25MB. Briefs will be deemed filed on the date of the postmark if first-class mail is used. Briefs filed by email will be considered timely if the email is received before midnight on the last day for filing. All risks associated with email are borne by the sender. Briefs filed in the Supreme Court may be sent to: supremecourt@utcourts.gov. Briefs filed in the Court of Appeals may be sent to: courtofappeals@utcourts.gov. The sending of an email constitutes an electronic signature and is within the scope of rule 40 of the Utah Rules of Appellate Procedure.

(b) Timing for service and filing ~~briefs. Briefs shall be deemed filed on the date of the postmark if first-class mail is utilized~~of briefs. The appellant ~~shall~~must serve and file a principal brief within 40 days after date of notice from the clerk of the appellate court pursuant to Rule 13. If a motion for summary disposition of the appeal or a motion to remand for determination of ineffective assistance of counsel is filed after the Rule 13 briefing notice is sent, service and filing of appellant's principal brief ~~shall~~must be within 30 days from the denial of such motion. The appellee, or in cases involving a cross-appeal, the cross-appellant, ~~shall~~must serve and file a principal brief within 30 days after service of the appellant's principal brief. In cases involving cross-appeals, the appellant ~~shall~~must serve and file the appellant's reply brief described in Rule 24A(d) within 30 days after service of the cross-appellant's principal brief. A reply brief may be served and filed by the appellant or the cross-appellant in cases involving cross-appeals. If a reply brief is filed, it ~~shall~~must be served and filed within 30 days after the filing and service of the appellee's principal brief or the appellant's reply brief in cases involving cross-appeals. If oral argument is scheduled fewer than 35 days after the filing of appellee's principal brief, the reply brief must be filed at least 5 days prior to oral

argument. By stipulation filed with the court in accordance with Rule 21(a), the parties may extend each of such periods for no more than 30 days. A motion for enlargement of time need not accompany the stipulation. No such stipulation ~~shall~~will be effective unless it is filed prior to the expiration of the period sought to be extended.

(~~b~~c) Number of copies to be filed and served. For matters pending in the Supreme Court, ~~ten~~eight (8) paper copies of each brief, one of which shall contain an original signature, ~~shall~~must be filed with the Clerk of the Supreme Court. For matters pending in the Court of Appeals, ~~eight~~six (6) paper copies of each brief, one of which shall contain an original signature, ~~shall~~must be filed with the Clerk of the Court of Appeals. ~~Two copies shall~~If a brief was filed by email, the required paper copies of the brief must be delivered no more than seven days after filing. If a brief is served by email, two paper copies must be served on counsel for each party separately represented unless service of paper copies is waived.

(~~c~~d) Consequence of failure to file principal briefs. If an appellant fails to file a principal brief within the time provided in this rule, or within the time as may be extended by order of the appellate court, an appellee may move for dismissal of the appeal. If an appellee fails to file a principal brief within the time provided by this rule, or within the time as may be extended by order of the appellate court, an appellant may move that the appellee not be heard at oral argument.

(~~d~~e) Return of record to the clerk. Each party, upon the filing of its brief, shall return the record to the clerk of the court having custody pursuant to these rules.

Tab 3

Rule 47. Transmission of record; joint and separate petitions; cross-petitions; parties.

(a) Joint and separate petitions; cross-petitions. Parties interested jointly, severally, or otherwise in a decision may join in a petition for a writ of certiorari; any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari and involve identical or closely related questions, it will suffice to file a single petition for a writ of certiorari covering all the cases. A cross-petition for writ of certiorari shall not be joined with any other filing. Unless the language or context of the rule requires otherwise, every reference in Rules 45 through 51 to a petition or petitioner includes a cross-petition or cross-petitioner, respectively.

(b) Parties. All parties to the proceeding in the Court of Appeals shall be deemed parties in the Supreme Court, unless the petitioner notifies the Clerk of the Supreme Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below, and a party noted as no longer interested may remain a party by notifying the clerk, with service on the other parties, that the party has an interest in the petition.

(c) Transmission of record. When a petition for writ of certiorari is granted, the Clerk of the Supreme Court shall notify the Clerk of the Court of Appeals to transmit the record on appeal to the Supreme Court.

Rationale for the proposed amendment: William Hains, Assistant Solicitor General in the Utah Attorney General's Office proposed this amendment in his public comments to the proposed amendments to Rules 46 and 49, that have been adopted and become effective 1 May 2019. The Committee deferred consideration of the proposed amendment because it went beyond the amendments that the Committee had proposed.

The amendment would be helpful because the rules governing cert petitions and cross-petitions (45 through 51) do not consistently state the procedures for handling cross-petitions. For example, Rule 48(f) requires a petitioner to file 7 copies of a cert petition, but does not specify how many copies of a cross-petition should be filed. Likewise, Rule 49 establishes the requirements for a cert petition, but does not explicitly state that the same requirements apply to a cross-petition. Similarly, Rule 50 allows for a response opposing a cert petition but does not explicitly authorize or address any response to a cross-petition. Rule 50 also allows a petitioner to reply to a response opposing a petition but contains no corresponding authorization for cross-petitioners. Rule 50(e)'s requirements

for amicus briefs and Rule 51, which establishes the procedure for disposing of a cert petition, refer only to petitions and say nothing about cross-petitions.

Granted, practitioners and the supreme court seem to read “petition(er)” as including “cross-petition(er)” in Rules 45 through 51. But the proposal supports the overarching purpose of the recently-adopted amendments to the rules governing cert petitions—to conform the rules to current practice. And I believe that we should make the requirements/procedures for cross-petitions explicit, rather that implicit.

It occurs to me though that Rule 47(a) may not be the best place for this amendment. Putting it there seems to bury it under unrelated language. Although Rule 47(a) has a single sentence referring to cross-petitions, that sentence seems misplaced and redundant given Rule 48(d)(4), which says that “A cross-petition for a writ of certiorari may not be joined with any other filing. The clerk of the court shall refuse any filing so joined.”

Maybe the best place for this proposed amendment is to put it as a second paragraph under Rule 45. That would look like this:

Rule 45. Review of judgments, orders, and decrees of court of appeals.

(a) Unless otherwise provided by law, the review of a judgment, an order, and a decree (herein referred to as "decisions") of the Court of Appeals shall be initiated by filing in the Utah Supreme Court a petition for a writ of certiorari to the Utah Court of Appeals.

(b) Unless the language or context of the rule requires otherwise, every reference in Rules 45 through 51 to a petition or petitioner includes a cross-petition or cross-petitioner, respectively.

In reviewing the rules governing cert petitions, I think I discovered an error in Rule 49(a)(6)(C). That larger subsection requires a petitioner to the justify the timeliness of the petition and 49(a)(6)(C) refers specifically to the timeliness of a cross-petition. Rule 49(a)(6)(C) refers to “reliance upon Rule 47(c),” but that rule says nothing about the timeliness of a cross-petition. Instead, it talks about “Transmission of record.” I think what 49(a)(6)(C) is meaning to refer to is Rule 48(d)(1)(B), which makes a cross-petition timely if it is filed within 30 days of a petition for writ of certiorari. I propose correcting that reference.

Rule 49. Petition for writ of certiorari.

(a) Contents. The petition for a writ of certiorari shall contain, in the order indicated:

(a)(1) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in the Supreme Court contains the names of all parties.

(a)(2) A table of contents with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, agency rules, court rules, statutes, and authorities cited, with references to the pages of the petition where they are cited.

(a)(4) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. General conclusions, such as "the decision of the Court of Appeals is not supported by the law or facts," are not acceptable. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Supreme Court.

(a)(5) A reference to the official and unofficial reports of any opinions issued by the Court of Appeals.

(a)(6) A concise statement of the grounds on which the jurisdiction of the Supreme Court is invoked, showing:

(a)(6)(A) the date of the entry of the decision sought to be reviewed;

(a)(6)(B) the date of the entry of any order respecting a rehearing and the date of the entry and terms of any order granting an extension of time within which to petition for certiorari;

(a)(6)(C) reliance upon Rule ~~47(c)~~48(d)(1)(B), where a cross-petition for a writ of certiorari is filed, stating the filing date of the petition for a writ of certiorari in connection with which the cross-petition is filed; and

(a)(6)(D) the statutory provision believed to confer jurisdiction on the Supreme Court.

(a)(7) Controlling provisions of constitutions, statutes, ordinances, and regulations set forth verbatim with the appropriate citation. If the controlling provisions involved are lengthy, their citation alone will suffice and their pertinent text shall be set forth in the appendix referred to in subparagraph (10) of this paragraph.

(a)(8) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the lower courts. There shall follow a statement of the facts relevant to the issues presented for review. All statements of fact and references to the proceedings below shall be supported by citations to the record on appeal or to the opinion of the Court of Appeals.

(a)(9) With respect to each question presented, a direct and concise argument explaining the special and important reasons as provided in Rule 46 for the issuance of the writ.

(a)(10) An appendix containing, in the following order:

(a)(10)(A) copies of all opinions, including concurring and dissenting opinions, and all orders, including any order on rehearing, delivered by the Court of Appeals in rendering the decision sought to be reviewed;

(a)(10)(B) copies of any other opinions, findings of fact, conclusions of law, orders, judgments, or decrees that were rendered in the case or in companion cases by the Court of Appeals and by other courts or by administrative agencies and that are relevant to the questions presented. Each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of its entry; and

(a)(10)(C) any other judicial or administrative opinions or orders that are relevant to the questions presented but were not entered in the case that is the subject of the petition.

If the material that is required by subparagraphs (7) and (10) of this paragraph is voluminous, they may be separately presented.

(b) Form of petition. The petition for a writ of certiorari shall comply with the form of a brief as specified in Rule 27.

(c) No separate brief. All contentions in support of a petition for a writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (a)(9) of this rule. The petitioner shall not file a separate brief in support of a petition for a writ of certiorari. If the petition is granted, the petitioner will be notified of the date on which the brief in support of the merits of the case is due.

(d) Page limitation. The petition for a writ of certiorari shall be as short as possible, but may not exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations required by subparagraph (a)(7) of this rule, and the appendix.

(e) Absence of accuracy, brevity, and clarity. The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

Tab 4

Administrative Office of the Courts

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

Hon. Mary T. Noonan
Interim State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Advisory Committee on the Utah Rules of Appellate Procedure
From: Nancy Sylvester
Date: March 28, 2019
Re: Intervention rules

Last year, a subcommittee consisting of representatives from the Appellate, Criminal, and Civil Procedures Committees studied how to better coordinate Civil Rule 24, Appellate Rule 25A, and Criminal Rule 12 regarding intervention when the constitutionality of a statute or ordinance is challenged. While the Civil Rules Committee approved the subcommittee's proposed amendments, it made a few more amendments to Rule 24, such as incorporating the federal language into the rule and addressing what it means for the Attorney General's office to "timely" respond. The latter amendments have also been incorporated into Criminal Rule 12. I don't believe there is a need for further changes to Appellate Rule 25A, but the committee should review the three rules and discuss that.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

Rule 24. Intervention.

(a) Intervention of right. ~~Upon.~~ On timely ~~application~~ motion, the court must permit anyone ~~shall be permitted~~ to intervene ~~in an action:~~ who:

(1) ~~when a statute confers~~ is given an unconditional right to intervene by a statute; or

(2) ~~when the applicant~~ claims an interest relating to the property or transaction ~~which~~that is the subject of the action, and ~~the applicant~~ is so situated that ~~the disposition~~disposing of the action may as a practical matter impair or impede the ~~applicant's~~movant's ability to protect ~~that~~its interest, unless ~~the applicant's interest is adequately represented by~~ existing parties adequately represent that interest.

(b) Permissive intervention. ~~Upon.~~

(1) In General. On timely ~~application~~ motion, the court may permit anyone ~~may be permitted~~ to intervene ~~in an action: (1) when a statute confers~~who:

(A) is given a conditional right to intervene by a statute; or ~~(2) when an applicant's~~

(B) has a claim or defense ~~and~~that shares with the main action ~~have~~ a common question of law or fact ~~in common. When a party to an action bases~~.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense ~~upon any~~is based on:

(A) a statute or executive order administered by ~~a governmental~~the officer or agency; or ~~upon~~

(B) any regulation, order, requirement, or agreement issued or made ~~pursuant to~~under the statute or executive order~~, the officer or agency upon timely application may be permitted to intervene in the action.~~.

(3) Delay or Prejudice. In exercising its discretion, the court ~~shall~~must consider whether the intervention will unduly delay or prejudice the adjudication of the ~~rights of the~~ original ~~parties~~parties' rights.

(c) ~~Procedure.~~ Notice and Pleading Required. A ~~person desiring~~motion to intervene ~~shall serve a motion to intervene upon~~ must be served on the parties as provided in ~~Rule~~ Rule 5. The ~~motions shall~~motion must state the grounds ~~therefor~~ for intervention and ~~shall be accompanied by a pleading setting forth~~that ~~set~~s out the claim or defense for which intervention is sought.

(d) Constitutionality of Utah statutes and ordinances.

(d)(1) **Challenges to a statute.** If a party challenges the constitutionality of a Utah statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality ~~shall~~ must notify the Attorney General of such fact as described in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C). ~~The court shall permit the state to be heard upon timely application.~~

(d)(1)(A) **Form and Content**. The notice must (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCP 24(d)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute.

(d)(1)(B) **Timing**. The party must serve the notice on the Attorney General on or before the date the party files the paper challenging the constitutionality of the statute.

(d)(1)(C) **Service**. The party must serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the address below, and file proof of service with the court.

Email: notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(d)(1)(D) **Attorney General's response to notice.**

(d)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers in response to the constitutional challenge, the Attorney General must file a notice of intent to respond unless the Attorney General determines that a response is unnecessary. The Attorney General may seek up to an additional 7 days' extension of time to file a notice of intent to respond.

(d)(1)(D)(ii) If the Attorney General files a notice of intent to respond within the time permitted by this rule, the court will allow the Attorney General to file a response to the constitutional challenge and participate at oral argument when it is heard.

(d)(1)(D)(iii) Unless the parties stipulate to or the court grants additional time, the Attorney General's response to the constitutional challenge will be filed within 14 days after filing the notice of intent to respond.

(d)(1)(D)(iv) The Attorney General's right to respond to a constitutional challenge under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the Attorney General's decision not to respond under this rule.

(d)(2) **Challenges to an ordinance**. If a party challenges the constitutionality of a county or municipal ordinance in an action in which the district attorney, county attorney, or municipal attorney has not appeared, the party raising the question of constitutionality ~~shall~~ must notify the district attorney, county attorney, or municipal attorney of such fact. The procedures for the party challenging the constitutionality of a county or municipal ordinance will be consistent with paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C), except that service must be on the individual county or municipality. ~~The court shall permit the county or municipality to be heard upon timely application.~~The procedures for the district attorney's, county attorney's, or municipal attorney's response will be consistent with paragraph (d)(1)(D). It is the party's responsibility to find and use the correct email address for the relevant district attorney, county attorney, or municipal attorney, or if circumstances prevent service by email, it is the party's responsibility to find and use the correct mailing address.

(d)(3) **Failure to provide notice.** Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the notice.

Rule 12. Motions.

(a) **Motions**. An application to the court for an order shall be by motion, which, unless made during a trial or hearing, shall be in writing and in accordance with this rule. A motion shall state succinctly and with particularity the grounds upon which it is made and the relief sought. A motion need not be accompanied by a memorandum unless required by the court.

(b) **Request to Submit for Decision**. If neither party has advised the court of the filing nor requested a hearing, when the time for filing a response to a motion and the reply has passed, either party may file a request to submit the motion for decision. If a written Request to Submit is filed it shall be a separate pleading so captioned. The Request to Submit for Decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If no party files a written Request to Submit, or the motion has not otherwise been brought to the attention of the court, the motion will not be considered submitted for decision.

(c) **Time for filing specified motions**. Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion.

(c)(1) The following shall be raised at least 7 days prior to the trial:

(c)(1)(A) defenses and objections based on defects in the indictment or information ;

(c)(1)(B) motions to suppress evidence;

(c)(1)(C) requests for discovery where allowed;

(c)(1)(D) requests for severance of charges or defendants;

(c)(1)(E) motions to dismiss on the ground of double jeopardy ; or

(c)(1)(F) motions challenging jurisdiction, unless good cause is shown why the issue could not have been raised at least 7 days prior to trial.

(c)(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah Code Section 76-3-402(1) shall be in writing and filed at least 14 days prior to the date of sentencing unless the court sets the date for sentencing within ten days of the entry of conviction. Motions for a reduction of criminal offense pursuant to Utah Code Section 76-3-402(2) may be raised at any time after sentencing upon proper service of the motion on the appropriate prosecuting entity.

(d) **Motions to Suppress**. A motion to suppress evidence shall:

(d)(1) describe the evidence sought to be suppressed;

(d)(2) set forth the standing of the movant to make the application; and

(d)(3) specify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them.

If an evidentiary hearing is requested, no written response to the motion by the non-moving party is required, unless the court orders otherwise. At the conclusion of the evidentiary hearing, the court may provide a reasonable time for all parties to respond to the issues of fact and law raised in the motion and at the hearing.

(e) **Motions made before trial.** A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(f) **Failure to timely raise defenses or objections.** Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(g) A verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(h) **Defects in the institution of the prosecution or indictment or information.** If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

(i) **Motions challenging the constitutionality of Utah statutes and ordinances**.

(i)(1) **Challenges to a statute.** If a party in a court of record challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact as described in paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C). The court shall permit the state to be heard upon timely application.

(i)(1)(A) **Form and Content**. The notice shall (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCrP 12(i)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute.

(i)(1)(B) **Timing**. The party shall serve the notice on the Attorney General on or before the date the party files the paper challenging the constitutionality of the statute.

(i)(1)(C) **Service**. The party shall serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the address below, and file proof of service with the court.

Email: notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(i)(1)(D) **Attorney General's response to notice.**

(i)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers in response to the constitutional challenge, the Attorney General must file a notice of intent to respond unless the Attorney General determines that a response is unnecessary. The Attorney General may seek up to an additional 7 days' extension of time to file a notice of intent to respond.

(i)(1)(D)(ii) If the Attorney General files a notice of intent to respond within the time permitted by this rule, the court will allow the Attorney General to file a response to the constitutional challenge and participate at oral argument when it is heard.

(i)(1)(D)(iii) Unless the parties stipulate to or the court grants additional time, the Attorney General's response to the constitutional challenge will be filed within 14 days after filing the notice of intent to respond.

(i)(1)(D)(iv) The Attorney General's right to respond to a constitutional challenge under Rule 25A of the Utah Rules of Appellate Procedure is unaffected by the Attorney General's decision not to respond under this rule.

(i)(2) **Challenges to an ordinance.** If a party challenges the constitutionality of a county or municipal ordinance in an action in which the district attorney, county attorney, or municipal attorney has not appeared, the party raising the question of constitutionality shall notify the district attorney, county attorney, or municipal attorney of such fact. The procedures shall be as provided in paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C) except that service will be on the individual county or municipality. The procedures for the district attorney's, county attorney's, or municipal attorney's response will be consistent with paragraph (i)(1)(D). It is the party's responsibility to find and use the correct email address for the relevant district attorney, county attorney, or municipal attorney, or if circumstances prevent service by email, it is the party's responsibility to find and use the correct mailing address.

(i)(3) **Failure to provide notice.** Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required under paragraphs (i)(1) or (i)(2), the court may postpone the hearing until the party serves the notice.

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

(a) **Notice to the Attorney General or the district, 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 district, county, or municipal attorney on or before the date the brief is filed ,and file proof of service with the court.

(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 district, 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, if circumstances prevent service by email, by mail at the addresses below, ~~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

350 North State Street, Suite 230

~~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 district, 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 district, 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 district, county, or municipal attorney and set a schedule for filing an amicus brief and supplemental briefs by the parties, if any.

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

Tab 5

Administrative Office of the Courts

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

Hon. Mary T. Noonan
Interim State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Advisory Committee on the Utah Rules of Appellate Procedure
From: Nancy Sylvester on behalf of the Appellate Representation Committee
Date: March 28, 2019
Re: Amendments to CJA11-401, URAP001, URAP058 and Repeal of URAP038B

The Appellate Representation Committee proposes amending Code of Judicial Administration Rule 11-401 and Appellate Rules 1 and 58, and repealing Appellate Rule 38B. The committee determined the following:

- The provisions of Appellate Rule 38B should be merged into CJA Rule 11-401 to reduce the redundancies and confusion from having two rules addressing indigent appellate representation;
- Rule 11-401 should address mentoring for roster appointees;
- Rule 11-401 should addressing rolling admissions;
- The tension between Rule 55 and the child welfare appellate roster should be addressed (for example, trial counsel is the same as appellate counsel for purposes of the Rule 55 petition but there are lingering concerns regarding trial counsel's inability to raise ineffective assistance of counsel claims); and
- The roster should also include appeals of private parental termination cases from the district court.

Merging the provisions of Appellate Rule 38B into CJA Rule 11-401

The committee merged Rule 38B's provisions into Rule 11-401 in the following ways:

- New paragraph (2)(C)(i) (eligibility criteria) now captures 38B(c)(1) and (c)(2). New paragraph (2)(E) (mentoring) also captures 38B(c)(2).
- Rule 38B(e) is now addressed in the eligibility and removal sections of 11-401.

There were several Rule 38B provisions that the committee did not bring over. For example, paragraphs (a) and (b) of Rule 38B are redundant to 11-401 as currently written. The committee also elected not to bring over paragraph 38B(d) (appointing

irrespective of requirements) because Criminal Rule 8(f) now addresses appointments. Regarding Rule 38B(f) (ineffective assistance of counsel), the committee thought this provision was irrelevant. The paragraph is more of a truism and will depend on the facts of any individual case. Finally, the committee did not bring over paragraph (c)(3) from Rule 38B,[1] but the language is a part of the Appellate Roster application.

Mentoring when required for maintaining roster eligibility

Some of the first round roster appointees are required to be both mentored by an attorney who qualifies for appointment under Rule 38B *and* certify that they were mentored by a qualifying attorney. Since the committee's recommendation is that Rule 38B be repealed, the committee added the following to CJA Rule 11-401:

- (2)(E) **Mentoring**. If an attorney is selected for the roster on the condition that they have a mentor, then they must select a mentor who meets the qualifications set forth in this rule at paragraphs (2)(C)(i)-(v). A mentor must have briefed the merits in at least three appeals within the past three years or in 12 appeals total. The attorney subject to the mentoring requirement shall certify in each brief filed on behalf of an indigent party that the attorney was directly supervised in drafting the brief by a mentor qualified under paragraphs (2)(C)(i)-(v). The attorney is not required to name the mentor in their certification.

Notably, a mentoring attorney does not have to be a roster appointee. An attorney who could otherwise qualify for the roster in the mentee's practice area is qualified to be a mentor for that attorney. The reasoning for this is that a well-qualified attorney may be simply uninterested in providing indigent representation.

Rolling admissions

The committee examined Rule 11-401 with an eye toward allowing rolling admissions. The committee determined that although the rule did not explicitly state that it was permitted, the language, "The Committee shall meet at least annually and shall submit its recommendations to the Board of Appellate Court

[1](c)(3) Counsel has completed the equivalent of 12 months of full time employment, either as an attorney or as a law student, in an appellate practice setting, which may include but is not limited to appellate judicial clerkships, appellate clerkships with the Utah Attorney General's Office, or appellate clerkships with a legal services agency that represents indigent parties on appeal; and during that employment counsel had significant personal involvement in researching legal issues, preparing appellate briefs or appellate opinions, and experience with the Utah Rules of Appellate Procedure.

Judges by December 31[2] of each year," provided discretion to the committee for rolling admissions. Nonetheless, the committee also added the following clarifying language:

- "If the Committee determines that additional recommendations should be submitted to the Board of Appellate Court Judges, the Committee may call for additional applications at any time."

Addressing the tension between Rule 55 and the child welfare appellate roster

Rule 55 of the Rules of Appellate Procedure provides that trial counsel will prepare the appellate petition in child welfare proceedings. This requirement has created at least two issues or questions: 1) when will appellate counsel from the child welfare roster be appointed, as the appellate courts would like; and 2) when would ineffective assistance of counsel arguments be raised? Appellate Rule 58 already addresses the latter issue in part, but the question of roster counsel was not addressed. The committee came up with the following solution:

- Amend Appellate Rule 58 by creating a new paragraph (b) as follows: "(b) If the Court of Appeals sets the case for briefing under rule 24 and the petitioner has appointed counsel, the Court of Appeals will remand for the limited purpose of the juvenile court appointing appellate counsel pursuant to Rule 11-401 of the Utah Code of Judicial Administration. If the issue to be briefed is ineffective assistance of counsel, the Court of Appeals may order the juvenile court to appoint conflict counsel pursuant to Rule 11-401 of the Utah Code of Judicial Administration within 15 days for briefing and argument."
- The second sentence of new (b) was carried down from paragraph (a). Former paragraph (b) is now renumbered as (c).

Addressing appeals of private parental termination cases from the district court

Parental termination cases are technically addressed under the umbrella of "child welfare proceedings" in Appellate Rule 1(f). But Appellate Rule 1(f) currently addresses only termination cases appealed from the juvenile court. The committee thought that private parental termination cases that proceed through the district court should be treated the same as termination cases from the juvenile court. So it recommends the following amendments to Rule 1(f):

[2] The committee also updated the date by which it submits its recommendations to the Board. December 31 gives the committee the entire year to submit recommendations; February 1 only gave it two months.

- (f) Rules for appeals in child welfare proceedings. Appeals taken from juvenile court orders related to abuse, neglect, dependency, termination of parental rights, ~~and~~ adoption proceedings, and district court orders related to termination of parental rights, are governed by Rules 52 through 59, except for orders related to substantiation proceedings under Section 78-3a-320. Rules 9 and 23B do not apply. Due to the summary nature of child welfare appeals, Rule 10(a)(2)(A) does not apply. Other appellate rules apply if not inconsistent with Rules 52 through 59.

Rule 11-401. Standing Committee on Appellate Representation

Intent:

To establish a standing ~~Committee~~ committee to assist the Board of Appellate Court Judges ~~to~~ in determining ~~e~~ a roster of attorneys eligible for appointment to represent indigent parties on appeal to the Utah Supreme Court and the Utah Court of Appeals.

To establish uniform terms and a ~~uniform~~ method for appointing committee members.

To establish a schedule for recommending the appointment of attorneys to, or the removal of attorneys from, the appellate roster.

Applicability:

This rule shall apply to the internal operation of the Board of Appellate Court Judges and the Committee on Appellate Representation and to ~~district and appellate~~ courts of record in indigent criminal cases, juvenile delinquency, and child welfare proceedings as those proceedings are defined in Rule 1(f) of the Utah Rules of Appellate Procedure.

Statement of the Rule:

(1) **Establishment**. The Standing Committee on Appellate Representation is hereby established as a committee of the Board of Appellate Court Judges.

(1)(A) **Composition**. The Committee shall consist of one ~~member~~ attorney from~~of~~ the Office of General Counsel of the Administrative Office of the Courts; one ~~member~~ attorney from the Criminal Appeals Division of the Utah Attorney General's Office; one active or retired trial court judge from either a District or Juvenile court in the state; one active or retired appellate court judge; one private civil appellate attorney; two criminal defense appellate attorneys: at least one of whom is currently practicing in the area of indigent criminal appeals in a legal defender's office, under Utah Code § 77-32-302(2)(a) or (2)(b); one attorney practicing in the area of juvenile delinquency defense appeals; and one attorney practicing in the area of child welfare proceedings as defined by Rule 1(f) of the Utah Rules of Appellate Procedure~~child welfare defense appeals~~. The Director or designee of the Indigent Defense Commission shall be an ex-officio, non-voting member.

(1)(B) **Appointment**. Committee members shall be appointed by the Supreme Court and shall serve staggered four-year terms. The Supreme Court shall select a chair from among the Committee's members. Judges who serve as members of the Committee generally shall not be selected as chair. Committee members shall serve as officers of the court and not as representatives of any client, employer, or other organization or interest group. At the first meeting of the Committee in any calendar year, and at every meeting at which a new member of the Committee first attends, each Committee member shall briefly disclose the general nature of his or her legal practice.

(1)(C) **Vacancies**. In the event of a vacancy on the Committee ~~due to death, incapacity, resignation or removal~~, the Supreme Court, after consultation with the Committee chair, shall appoint a new Committee member from the same category as the prior Committee member to serve for the remainder of the unexpired term.

(1)(D) **Absences**. In the event that a Committee member fails to attend two consecutive Committee meetings, the chair may notify the Supreme Court of those absences and may request that the Supreme Court replace that Committee member.

(1)(E) **Administrative assistance**. The Administrative Office of the Courts shall coordinate staff support to the Committee, including the assistance of the Office of General Counsel in research and drafting ~~and the coordination of secretarial support~~.

(2) **Appellate Roster**. The Board of Appellate Judges shall create and maintain an appellate roster of attorneys skilled in handling criminal, juvenile delinquency, and child welfare proceedings as defined in Rule 1(f) of the Utah Rules of Appellate Procedure. ~~abuse, neglect and dependency appeals~~.

(2)(A) **Purpose of the Committee**. The purpose of the Committee shall be to recommend to the Board of Appellate Court Judges attorneys for inclusion on an appellate roster of attorneys eligible for appointment by the courts of this state to represent indigent parties on appeal before the Utah Supreme Court or the Utah Court of Appeals ~~pursuant to Rule 38B of the Utah Rules of Appellate Procedure~~. Except as specified in paragraphs (2)(G) of this rule, only attorneys on the roster shall be eligible for such court appointments.

(2)(B) **Committee recommendations**. The Committee shall consider and recommend attorneys for inclusion on the appellate roster based on the eligibility criteria listed in subsection (2)(C) together with any other factor bearing on an applicant's ethics, diligence, competency, and willingness to fairly, efficiently, and effectively provide appellate representation to indigent parties on appeal. The Committee may also recommend the removal of an attorney from the roster.

(2)(C) **Eligibility criteria**. To be considered for inclusion on the roster, an applicant must complete an application in a form provided by the Committee and must:

(2)(C)(i) demonstrate that the applicant has briefed the merits in at least three appeals within the past three years or in 12 appeals total, or is directly supervised by an attorney with that experience;

~~(i) comply with the requirements of rule 38B of the Utah Rules of Appellate Procedure, sections (b) through (e);~~

(2)(C)(ii) be a member of the Utah Bar in good standing;

~~(2)(C)(iii) submit at least two appellate briefs to the Committee with a certification that the applicant was substantially responsible for drafting the briefs;~~(2)(C)(iii~~v~~) demonstrate knowledge of appellate practice as shown by experience, training, or legal education;

(2)(C)(iv) certify that the attorney has not, within the preceding three years, been the subject of an order issued by any appellate court imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before an appellate court;

(2)(C)(v) not have been removed from the appellate roster within the past year;

(2)(C)(~~ii~~vi) submit at least two appellate briefs to the Committee with a certification that the applicant was substantially responsible for drafting the briefs;

(2)(C)(vii) submit an Appellate Rule 55 petition if the person is applying to be on the roster for appeals from child welfare proceedings;

~~(2)(C)(iv) demonstrate knowledge of appellate practice as shown by experience, training, or legal education;~~

(2)(C)(v~~ii~~ix) provide citations for all appellate decisions in which the applicant was counsel of record; and

~~(2)(C)~~(2)(C)(~~vi~~x) certify that the applicant has sufficient time and administrative support to accept an appointment to represent indigent parties on appeal and to provide the effective assistance of counsel in every case and a willingness to commit those resources to that representation.

(2)(D) **Roster Selection**. The Board of Appellate Court Judges shall approve or disapprove the recommendations of the Committee with respect to attorneys to be included on the appellate roster. The Board may not add to the roster an attorney who was not recommended by the Committee.

(2)(E) **Mentoring**. If an attorney is selected for the roster on the condition that they have a mentor, then they must select a mentor who meets the qualifications set forth in this rule at paragraphs (2)(C)(i)-(v). A mentor must have briefed the merits in at least three appeals within the past three years or in 12 appeals total. The attorney subject to the mentoring requirement shall certify in each brief filed on behalf of an indigent party that the attorney was directly supervised in drafting the brief by a mentor qualified under paragraphs (2)(C)(i)-(v). The attorney is not required to name the mentor in their certification.

(2)(F~~E~~) **Removal**. The Board may ~~also~~ at any time remove an attorney from the appellate roster based on an attorney's qualifications, skills, experience, ~~and~~ or prior performance in ~~the~~ any ~~Utah~~ appellate court~~s~~, or an attorney's failure to maintain eligibility under paragraph (2)(C). ~~The Board may not add to the roster an attorney who was not recommended by the Committee.~~

(2)(~~E~~G~~F~~) **Reconsideration**. An attorney who submitted an application to the Committee but was not chosen by the Board for inclusion on the appellate roster, or who was removed from the roster~~,~~ may ~~file a~~ petition for reconsideration in the form of a letter submitted to the Board of Appellate Court Judges. The letter must be submitted within 30 days from the date of the removal notice. ~~The petitioner shall submit an original letter and twelve copies.~~

(2)(~~F~~H~~G~~) **Retention**. To maintain eligibility, an attorney must be recommended by the Committee and reappointed by the Board of Appellate Court Judges every ~~two~~ three years by submitting a ~~. An attorney desiring to maintain eligibility shall submit a~~ renewal request to the Committee by ~~January~~ September 1 of the attorney's third year on the roster. ~~in which the attorney reports his or her MCLE compliance to the Utah State Bar; provided, however, that the first such request shall not be due~~

~~earlier than the first January 1 at least two years after the date on which the attorney originally qualified to be on the roster.~~ The renewal request shall include the following:

(2)(~~F~~H~~G~~)(i) a certification that the attorney is a member of the Utah Bar in good standing;

(2)(~~F~~H~~G~~)(ii) a certification that the attorney has not, within the preceding three years, been the subject of an order issued by ~~either~~ any appellate court imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before ~~either~~ an appellate court;

(2)(~~F~~H~~G~~)(iii) a showing that the attorney has maintained competence in appellate practice, which showing may be achieved by:

(2)(~~F~~H~~G~~)(iii)(a) submitting two appellate briefs filed with appellate courts during the previous two years, together with a certification that the attorney was substantially responsible for drafting the briefs;

(2)(~~F~~H~~G~~)(iii)(b) certification that the attorney has attended at least six hours of CLE dealing with the area of appellate practice in which the attorney has accepted court-appointments on appeal in the previous two years; or

(2)(~~F~~H~~G~~)(iii)(c) an equivalent demonstration of continued competence.

(2)(~~G~~I~~H~~) **Exemption**. Notwithstanding any other provision of this rule, any attorney currently employed in a county or other regional legal defender's office, under Utah Code § 77-32-302(2)(a) or (2)(b), to provide court-appointed representation and defense resources on appeal, shall be independently eligible for appointment to represent indigent parties on appeal. ~~.~~ This paragraph does not apply to an attorney who has contracted with a county in the attorney's individual capacity to provide court-appointed representation and defense resources on appeal.

~~(2)(H) **Disqualification**. Nothing in this rule is intended to supplant or create an exception to the disqualification provisions of Rule 38B of the Utah Rules of Appellate Procedure.~~

(3) **Annual Schedule**. The Committee shall meet at least annually and shall submit its recommendations to the Board of Appellate Court Judges by ~~February~~ December 31~~1~~ ~~of~~ each year. If the Committee determines that additional recommendations should be submitted to the Board of Appellate Court Judges, the Committee may call for additional applications at any time. The Board of Appellate Court Judges shall at its next meeting thereafter approve or disapprove the recommendations of the Committee with respect to attorneys to be included on the appellate roster.

Rule 38B. Qualifications for Appointed Appellate Counsel.

~~(a) In all appeals where a party is entitled to appointed counsel, only an attorney proficient in appellate practice may be appointed to represent such a party before either the Utah Supreme Court or the Utah Court of Appeals.~~

~~(b) The burden of establishing proficiency shall be on counsel. Acceptance of the appointment constitutes certification by counsel that counsel is eligible for appointment in accordance with this rule.~~

~~(c) Counsel is presumed proficient in appellate practice if any of the following conditions are satisfied:~~

~~(c)(1) Counsel has briefed the merits in at least three appeals within the past three years or in 12 appeals total; or~~

~~(c)(2) Counsel is directly supervised by an attorney qualified under subsection (c)(1); or~~

~~(c)(3) Counsel has completed the equivalent of 12 months of full time employment, either as an attorney or as a law student, in an appellate practice setting, which may include but is not limited to appellate judicial clerkships, appellate clerkships with the Utah Attorney General's Office, or appellate clerkships with a legal services agency that represents indigent parties on appeal; and during that employment counsel had significant personal involvement in researching legal issues, preparing appellate briefs or appellate opinions, and experience with the Utah Rules of Appellate Procedure.~~

~~(d) Counsel who do not qualify for appointment under the presumptions described above in subsection (c) may nonetheless be appointed to represent a party on appeal if the appointing court concludes there is a compelling reason to appoint counsel to represent the party and further concludes that counsel is capable of litigating the appeal. The appointing court shall make findings on the record in support of its determination to appoint counsel under this subsection.~~

~~(e) Notwithstanding counsel's apparent eligibility for appointment under subsection (c) or (d) above, counsel may not be appointed to represent a party before the Utah Supreme Court or the Utah Court of Appeals if, during the three-year period immediately preceding counsel's proposed appointment, counsel was the subject of an order issued by either appellate court imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before either appellate court.~~

~~(f) The fact that appointed counsel does not meet the requirements of this rule shall not establish a claim of ineffective assistance of counsel.~~

Advisory Committee Note - This rule does not alter the general method by which counsel is selected for indigent persons entitled to appointed counsel on appeal. In particular, it does not change the expectation that such appointed counsel will ordinarily be appointed by the trial court rather than the appellate court. The rule only addresses the qualifications of counsel eligible for such appointment. See generally State v. Hawke, 2003 UT App 448 (2003).

Comment [NS1]: You have to have been substantially responsible for at least 2 appellate briefs. Do we even need this in 11-401? The committee determined no. (2)(C) covers some of this already and this language is also in the application.

Comment [NS2]: This is dealt with in new paragraph (f) of Criminal Rule 8.

Comment [NS3]: This is now in 11-401 in eligibility and removal.

Comment [NS4]: The committee thinks this is irrelevant. This is more of a truism and will depend on the facts of any individual case.

Rule 58. Ruling.

(a) After reviewing the petition on appeal, any response, and the record, the Court of Appeals may rule by opinion, ~~or~~ memorandum decision, or order. The Court of Appeals may issue a decision or may set the case for full briefing under rule 24. The Court of Appeals may order an expedited briefing schedule and specify which issues shall be briefed. ~~If the issue to be briefed is ineffective assistance of counsel, the Court of Appeals may order the juvenile court to appoint conflict counsel within 15 days for briefing and argument.~~

(b) If the Court of Appeals sets the case for briefing under rule 24 and the petitioner has appointed counsel, the Court of Appeals will remand for the limited purpose of the juvenile court appointing appellate counsel pursuant to Rule 11-401 of the Utah Code of Judicial Administration. If the issue to be briefed is ineffective assistance of counsel, the Court of Appeals may order the juvenile court to appoint conflict counsel pursuant to Rule 11-401 of the Utah Code of Judicial Administration within 15 days for briefing and argument.

(~~b~~c) If the Court of Appeals affirms, reverses, or remands the juvenile court order, judgment, or decree, further review pursuant to Rule 35 may be sought, but refusal to grant full briefing shall not be a ground for such further review.

Rule 1. Scope of rules.

(a) **Applicability of rules**. These rules govern the procedure before the Supreme Court and the Court of Appeals of Utah in all cases. Applicability of these rules to the review of decisions or orders of administrative agencies is governed by Rule 18. When these rules provide for a motion or application to be made in a trial court or an administrative agency, commission, or board, the procedure for making such motion or application shall be governed by the Utah Rules of Civil Procedure, Utah Rules of Criminal Procedure, and the rules of practice of the trial court, administrative agency, commission, or board.

(b**) Reference to "court."** Except as provided in Rule 43, when these rules refer to a decision or action by the court, the reference shall include a panel of the court. The term "trial court" means the court or administrative agency, commission, or board from which the appeal is taken or whose ruling is under review. The term "appellate court" means the court to which the appeal is taken.

(c) **Procedure established by statute.** If a procedure is provided by state statute as to the appeal or review of an order of an administrative agency, commission, board, or officer of the state which is inconsistent with one or more of these rules, the statute shall govern. In other respects, these rules shall apply to such appeals or reviews.

(d) **Rules not to affect jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the Supreme Court or Court of Appeals as established by law.

(e) **Title.** These rules shall be known as the Utah Rules of Appellate Procedure and abbreviated Utah R. App. P.

(f) **Rules for appeals in child welfare proceedings.** Appeals taken from juvenile court orders related to abuse, neglect, dependency, termination of parental rights, ~~and~~ adoption proceedings, and district court orders related to termination of parental rights, are governed by Rules 52 through 59, except for orders related to substantiation proceedings under Section 78-3a-320. Rules 9 and 23B do not apply. Due to the summary nature of child welfare appeals, Rule 10(a)(2)(A) does not apply. Other appellate rules apply if not inconsistent with Rules 52 through 59.

Tab 6

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
Email:supremecourt@utcourts.gov

Catherine J. Dupont
Appellate Court Administrator

Nicole J. Gray
Clerk of Court

June 27, 2018

Dear Advisory Committee Chairs,

We are contacting each Supreme Court advisory committee to inform you of two initiatives we are requesting each advisory committee to undertake.

Our first request concerns our efforts to try to make the judicial system more accessible to unrepresented individuals who often find our rules and processes confusing and daunting. In the course of reviewing your committee's rules and proposed amendments, we want to challenge your committee to consider the impact of the rule on the unrepresented party and whether there is a simpler process or clearer language that can be recommended. When you submit a proposed rule or amendment to the Court for approval, we are interested in hearing from you about your consideration of how the rule may impact the unrepresented party. We acknowledge that this additional inquiry creates work for the committee, however, we believe that the goal of improving access to the courts is compelling.

Our second initiative concerns a change to the Advisory Committee Notes published with the rules. We request that each advisory committee review their Advisory Committee Notes to determine the following:

- Are the advisory notes accurate based on existing case law? Should an advisory note be eliminated or revised based on case law or other reasons?
- Does the advisory note explain the intent of the rule? If so, can the language of the rule be clarified so that a note regarding intent is not necessary?
- Does the advisory note provide historical context for the rule or an example that explains the application of the rule? If not, what is the purpose of the advisory note?

We recognize that each advisory committee is working on many projects and there are limited resources for undertaking the evaluation of advisory committee notes.

Please discuss this project with your committee and create a plan for the evaluation that works for your committee, and then report back to us regarding the committee's plan.

Finally, we want to express our gratitude to the advisory committee members for the hours of dedicated work provided by them to the courts.

Respectfully,

Matthew B. Durrant
Chief Justice

Administrative Office of the Courts

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

Hon. Mary T. Noonan
Interim State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Advisory Committee on the Utah Rules of Appellate Procedure
From: Nancy Sylvester
Date: March 29, 2019
Re: Judicial efficiency in appellate cases

Justice Lee sent the following in an email to Judge Orme. While the committee discussed at its last meeting the concept generally of creating more judicial efficiency in the appellate rules, this email provides further information on what the Supreme Court envisions.

> The Utah Supreme Court requests that the Advisory Committee on the Utah Rules of Appellate Procedure undertake a comprehensive review of the appellate rules to look for means of making the appellate briefing process more streamlined and more efficient. We are interested in exploring creative ways to advance these goals. We hope that this project will improve access to justice and shorten the average time for briefing across all cases, but particularly time-sensitive cases like criminal cases and adoption cases.
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> A few examples of possible ways of advancing these goals include the following:
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> 1. Consider and propose rule amendments that might shorten the briefing schedule for time-sensitive cases generally.
> 2. Identify sub-categories of time-sensitive cases that may be resolved on an expedited track (such as summary disposition) that would not require full briefing. Examples might include criminal cases in which the only issues involve sentencing or sufficiency of the evidence. Consider and propose rule amendments to enable these changes.
> 3. Consider the possibility of amendments to the rules governing requests for enlargement of time. Should the standard be revised or clarified in some way? Should an outside limit on the extent of an allowed extension be imposed? Should the rules require that each

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request for an enlargement be precisely tailored to the showing of good cause (instead of standard requests in 30-day increments)?

These are just examples. We welcome other avenues that the committee may identify for addressing the above-stated goals.