



Agenda

Utah Supreme Court Advisory Committee Utah Rules of Appellate Procedure

Paul C. Burke, Chair

Location: Webex (see calendar appointment for instructions)

Date: June 4, 2020

Time: 12:00 to 1:30 p.m.

Action: Welcome and approval of May 7, 2020 minutes	Tab 1	Paul C. Burke, Chair
Action: Rule 8 (Stay or injunction pending appeal)	Tab 2	Clark Sabey
Action: Rule 3 (Appeal as of right: how taken)	Tab 3	Larissa Lee
Action: Incorporating Standing Order 11 (Rules 20, 34, 43, 50, 56)	Tab 4	Larissa Lee
Discussion: Rule 23B and deciding issues outside the remand request	Tab 5	Christopher Ballard, Nathalie Skibine
Discussion: Old/new business		Paul C. Burke

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

Meeting schedule:

July 2, 2020

August 6, 2020

September 3, 2020

October 1, 2020

November 5, 2020

December 3, 2020

Tab 1

Minutes

Utah Supreme Court Advisory Committee Utah Rules of Appellate Procedure

450 South State Street
Salt Lake City, Utah 84114

WebEx
Thursday, May 7, 2020
12:00 pm to 1:30 pm

PRESENT

Christopher Ballard	Larissa Lee—Staff
Troy Booher— Emeritus Member	Alan Mouritsen Judge Gregory Orme
Paul C. Burke—Chair	Rodney Parker
Lisa Collins	Judge Jill Pohlman
R. Shawn Gunnarson	Clark Sabey
Michael Judd— Recording Secretary	Nathalie Skibine Mary Westby

EXCUSED

Patrick Burt
Tyler Green
Scarlet Smith

1. Welcome and approval of April 2, 2020 minutes **Paul C. Burke**

Paul C. Burke welcomed the committee, and the committee discussed their review of the April 2020 minutes. No comments or objections were noted.

Judge Gregory Orme moved to approve and adopt the minutes from the April 2, 2020 meeting. Lisa Collins seconded the motion and it passed without objection by unanimous consent.

2. **Discussion: Legislative update (if any)**

**Paul C. Burke
Judge Jill Pohlman
Christopher Ballard**

The Legislative Outreach Subcommittee reported that there were no updates related to legislative outreach, except to note that our committee's skillful use of videoconference meetings appears to have paved the way for successful use of videoconferences by other groups, including our legislature.

3. **Action:
Rule 8 – Stay or injunction pending appeal**

Clark Sabey

Clark Sabey introduced proposed language related to Rule 8. Troy Booher offered recommendations regarding restructuring provisions and clarifying internal references and the committee discussed that restructuring at length. Shawn Gunnarson raised a separate restructuring question related to how a provision related to criminal stays is "broken out" in the rule. The committee worked together to make significant organizational changes to clarify the proposed amendment.

With Mr. Booher leading out, the committee also worked to develop language that addresses the problems and delays associated with successive requests for the same relief aimed first at the trial court and then the appellate court.

Rodney Parker moved to table the proposed amendments to give the committee additional time to consider the rule in full before it's put before the committee for a vote. Christopher Ballard seconded the motion and it passed without objection by unanimous consent.

4. **Action:
Rule 48 – Time for petitioning**

**Judge Jill Pohlman
Clark Sabey
Larissa Lee**

Larissa Lee introduced proposed language for Rule 48 and explained that she, Judge Jill Pohlman, Clark Sabey, and Lisa Collins had met offline to discuss a format for this amendment. The committee discussed whether a request for extension that comes *after* the deadline should require a showing of *either* good cause or excusable neglect or *both* good cause and excusable neglect. Mr. Booher mentioned that Rule 4 contains similar language and urged the committee to consider those parallel stretches of language in tandem.

The committee clarified the proposed language to ensure it is consistent with both recent amendments made to other rules and with existing practices.

After several final revisions, Mr. Sabey moved to approve the amendments to Rule 48 as it appeared on the screen at the committee meeting. Judge Pohlman seconded the motion and it passed without objection by unanimous consent.

5. Action: Larissa Lee
Rule 3 – Appeal as of right: how taken

Discussion of Rule 3 was reserved for next month’s meeting.

6. Discussion & Action: Larissa Lee
Rule 29 – Oral argument

The proposed changes allow the appellate courts to conduct oral arguments by “alternative means.” Mr. Parker expressed concern that parties may file future motions to utilize this procedure where the procedure may not be necessary or advisable. Lisa Collins and Judge Gregory Orme suggested that oral argument by “alternative means” may actually be necessary or advisable in a variety of circumstances and that the practice of holding oral arguments by videoconference may continue (at least in certain cases) even after current concerns regarding the COVID-19 pandemic dissipate.

Mr. Parker moved to approve the amendments to Rule 29 as it appeared on the screen at the committee meeting. Mary Westby seconded the motion and it passed without objection by unanimous consent.

7. Discussion: Paul C. Burke
Other Business

None.

8. Adjourn

Mr. Burke adjourned the meeting. The committee is scheduled to meet again on June 4, 2020.

Tab 2

1 **Rule 8. Stay or injunction pending appeal.**

2 (a) Motion for stay.

3 (a)(1) Initial motion in the trial court. A party must ordinarily move first in the trial
4 court for the following relief:

5 (a)(1)(A) a stay of the judgment or order of the trial court without security
6 pending appeal or disposition of a petition under Rule 5;

7 (a)(1)(B) approval of a bond or other security provided to obtain a stay of
8 judgment; or

9 (a)(1)(C) an order suspending, modifying, restoring, or granting an injunction
10 while an appeal is pending, unless the trial court has already rejected the basis for
11 the requested relief.

12 (a)(2) Motion in the appellate court.

13 (a)(2)(A) The motion for a stay must include:

14 (a)(2)(A)(i) the reasons the trial court denied the request;

15 (a)(2)(A)(ii) the reasons for granting the relief requested and the facts
16 relied on;

17 (a)(2)(A)(iii) copies of affidavits or other sworn statements supporting
18 facts subject to dispute; and

19 (a)(2)(A)(iv) relevant parts of the record, including a copy of the trial
20 court's order.

21 (a)(2)(B) Any motion must comply with Rule 23. ~~Stay must ordinarily be sought~~
22 ~~in the first instance in trial court; motion for stay in appellate court.~~ Application for a stay of
23 ~~the judgment or order of a trial court pending appeal, or disposition of a petition under Rule 5, or~~
24 ~~for approval of a supersedeas bond, or for an order suspending, modifying, restoring, or granting~~
25 ~~an injunction during the pendency of an appeal must ordinarily be made in the first instance in~~
26 ~~the trial court. A motion for such relief may be made to the appellate court, but the motion shall~~
27 ~~show that application to the trial court for the relief sought is not practicable, or that the trial~~
28 ~~court has denied an application, or has failed to afford the relief which the applicant requested,~~

29 ~~with the reasons given by the trial court for its action. The motion shall also show the reasons for~~
30 ~~the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion~~
31 ~~shall be supported by affidavits or other sworn statements or copies thereof. With the motion~~
32 ~~shall be filed such parts of the record as are relevant, including a copy of the order sought to be~~
33 ~~stayed. Any motion for stay shall be filed under rule 23.~~

34 (a)(2)(C) Except in extraordinary circumstances, an appellate court will not act on
35 a motion to stay or suspend, modify, restore, or grant an injunction, unless the
36 movant first requested a stay or opposed the injunction in the trial court.

37 (a)(3) **Stays in criminal cases.** Stays pending appeal in criminal cases in which the
38 defendant has been sentenced are governed by Utah Code Ann. Section 77-20-10 and
39 Rule 27, of the Utah Rules of Criminal Procedure. Stays in other criminal cases are
40 governed by this rule.

41
42
43 ~~(b) Stay may be conditioned upon giving of bond. Relief available in the~~
44 ~~appellate court under this rule may be conditioned upon the filing of a bond or~~
45 ~~other appropriate security in the trial court.~~

46 ~~(c) **Stays in criminal cases.** Stays pending appeal in criminal cases in which the defendant has~~
47 ~~been sentenced are governed by Utah Code Ann. Section 77-20-10 and Rule 27, Utah R. Crim.~~
48 ~~P. Stays in other criminal cases are governed by this rule. (b) **Bond requirement.**~~

49 (b)(1) **Stay ordinarily conditioned upon giving of bond.** For requests for relief to
50 which Rule 62(d) of the Utah Rules of Civil Procedure applied in the trial court, relief
51 available pending appeal will be conditioned upon filing a bond or other appropriate
52 security in the trial court, unless there is no reasonable means of quantifying the security
53 in monetary or other terms and the conditions of paragraph (b)(2) are met.

54 (b)(2) **Stay in cases not conditioned on giving of bond.** Ordinarily a stay without a
55 bond or other security will not be granted unless the movant demonstrates a likelihood of
56 success on the merits or the case presents serious issues on the merits warranting
57 appellate review and the appellant demonstrates:

58 (b)(2)(A) a likelihood of irreparable harm to the movant outweighing the harm to
59 any other party, a significant harm to the public interest; or

60 (b)(2)(B) an extraordinary circumstance that justifies issuing a stay.

61 (c) **Injunctions.** For requests for relief to which Rules 65A or 62(c) of the Utah Rules of Civil
62 Procedure applied in the trial court, any relief available pending appeal is governed by those
63 rules.

64

Tab 3

1 **Rule 3. Appeal as of right: how taken.**

2 (a) ~~Filing appeal from final orders and judgments~~ the notice of appeal.

3 (1) Except as otherwise provided by law, A ~~a party may~~ appeal ~~may be taken~~ a final order
4 or judgment from a district or juvenile court to the appellate court ~~with jurisdiction over~~
5 ~~the appeal from all final orders and judgments, except as otherwise provided by law,~~ by
6 filing a notice of appeal with the trial court clerk ~~of the trial court~~ within the time allowed
7 by Rule 4.

8 (2) An appellant's ~~F~~ ~~failure of an appellant~~ to take any step other than ~~the~~ timely filing ~~of~~
9 a notice of appeal does not affect the validity of the appeal, but is ground only for ~~such~~
10 ~~action as~~ the appellate court to act as it deems considers appropriate, ~~which may include~~
11 ing dismissal ~~of ing~~ the appeal or other sanctions short of dismissal, ~~as well as~~ and ~~the~~
12 awarding ~~of~~ attorney fees.

13 (b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment
14 or order and their interests are such as to make joinder practicable, they may file a joint notice of
15 appeal or may join in an appeal of another party after filing separate timely notices of appeal.
16 Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be
17 consolidated by order of the appellate court upon its own motion or upon motion of a party, or by
18 stipulation of the parties to the separate appeals.

19 (c) ~~Party Designation of parties.~~ The party taking the appeal ~~shall be~~ is known as the appellant
20 and the adverse party as the appellee. Unless otherwise directed by the appellate court, ~~T~~ ~~he~~
21 appeal will not change the title of the action or proceeding ~~shall not be changed in consequence~~
22 ~~of the appeal, except where otherwise directed by the appellate court.~~ In For original proceedings
23 in the appellate court, the party making the original application ~~shall be~~ is known as the petitioner
24 and any other party as the respondent.

25 (d) ~~Content of n~~ Notice of appeal contents. The notice of appeal ~~shall~~ must:

26 (1) specify the party or parties taking the appeal;

27 (2) ~~shall~~ designate the judgment, or order, or part thereof; being appealed ~~from~~;

28 ~~(3) shall designate name~~ the court from which the appeal is taken; and

29 ~~(4) shall designate name~~ the court to which the appeal is taken.

30 (e) ~~Service of~~ **the notice of appeal.** The ~~party taking the appeal shall~~ **appellant must give**
31 ~~notice of the filing of a~~ **serve the** notice of appeal ~~by serving on~~ each party to the judgment or
32 order in accordance with the requirements of the court from which the appeal is taken. If counsel
33 of record is served, the certificate of service ~~shall must designate~~ **include** the name of the party
34 represented by that counsel.

35 (f) **Filing fee in civil appeals.** ~~At the time of~~ **When** filing any notice of separate, joint, or cross
36 appeal in a civil case, the party taking the appeal ~~or cross appeal shall~~ **must** pay **the filing fee**
37 **established by law** to the **trial court** clerk ~~of the trial court the filing fee established by law.~~ The
38 **trial court** clerk ~~of the trial court shall~~ **must** accept a notice of appeal regardless of whether the
39 filing fee has been paid. Failure to pay the filing fee within a reasonable time may result in
40 dismissal.

41 (g) **Docketing of appeal.** ~~Upon the~~

42 **(1) Transmitting notice of appeal to the appellate court.** ~~After an appellant files~~ **ing of**
43 the notice of appeal, the **trial court** clerk ~~of the trial court shall~~ **must** immediately ~~transmit~~
44 ~~a certified email~~ a copy of the notice of appeal **to the appellate court clerk. This will**
45 **include;**

46 **(A)** ~~showing~~ the date **the notice of appeal was filed** ~~of its filing;~~ **and**

47 **(B)** ~~the clerk's~~ a statement ~~by the clerk indicating~~ **declaring** whether the filing fee
48 was paid; **and**

49 **(C)** whether the cost bond required by Rule 6 was filed.

50 **(2) Docketing the appeal.** ~~Upo~~ **On** receipt ~~of~~ **ving** the copy of the notice of appeal **from**
51 **the trial court clerk,** the **appellate court** clerk ~~of the appellate court shall~~ **will** enter the
52 appeal ~~upon-on~~ the docket. An appeal ~~shall~~ **will** be docketed under the title given to the
53 action in the trial court, with the appellant identified as such, but if the title does not
54 contain the name of the appellant, such name ~~shall~~ **will** be added to the title.

55 **Advisory Committee Note**

56 ~~But for the order of filing, the cross-appellant would have been the appellant and therefore the~~
57 ~~designation of an appeal as a “cross-appeal” does not eliminate the obligation to pay filing and~~
58 ~~docketing fees.~~

59 *Adopted 2020*

Tab 4

1 **Rule 20. Habeas corpus proceedings.**

2 (a) **Application for an original writ; when appropriate.** ~~If a~~A petition for a writ of habeas
3 corpus must be filed in the district court unless the petitioner demonstrates that the district court
4 is unavailable or other exigent circumstances exist. ~~is filed in the appellate court or submitted to~~
5 ~~a justice or judge thereof, it will be referred to the appropriate district court unless it is shown on~~
6 ~~the face of the petition to the satisfaction of the appellate court that the district court is~~
7 ~~unavailable or other exigent circumstances exist.~~ If a petition is initially filed in a district court or
8 the appellate court ~~is referred~~s the petition to athe district court ~~by the appellate court~~ and the
9 district court denies or dismisses the petition, ~~a~~the petitioner may not ~~refiling~~of the petition
10 with the appellate court. ~~is inappropriate; Instead, the petitioner must proper procedure in such an~~
11 ~~instance is an appeal from the district court's order of the district court.~~

12 (b) **Procedure on original petition.**

13 (1) Filing. A habeas corpus proceeding may be commenced in the appellate court by
14 filing a petition with the ~~clerk of the~~ appellate clerk court or, in emergency situations,
15 with a justice or judge of the court. ~~For matters pending in the Supreme court, an original~~
16 ~~petition and seven copies must be filed in the Supreme Court. For matters pending in the~~
17 ~~Court of Appeals, an original petition and four copies must be filed in the Court of~~
18 ~~Appeals.~~

19 (2) Service. The petitioner must serve ~~a copy of~~ the petition on the respondent, except:
20 ~~pursuant to any of the methods provided for service of process in Rule 4 of the Utah~~
21 ~~Rules of Civil Procedure but, if imprisoned, the petitioner may mail by United States~~
22 ~~mail, postage prepaid, a copy of the petition to the Attorney General of Utah or the~~
23 ~~county attorney of the county if imprisoned in a county jail. Such service is in lieu of~~
24 ~~service upon the named respondent, and a certificate of mailing under oath that a copy~~
25 ~~was mailed to the Attorney General or county attorney must be filed with the clerk of the~~
26 ~~appellate court.~~

27 (A) An imprisoned or otherwise in custody petitioner may mail, postage prepaid,
28 the petition to the Utah Attorney General or the applicable county attorney if
29 imprisoned in a county jail. The imprisoned petitioner must file a certificate of

30 [mailing under oath that a copy was mailed to the Attorney General or county](#)
31 [attorney with the appellate clerk.](#)

32 [\(B\) If the respondent cannot be found or the respondent does not have the person](#)
33 [in custody, the writ and any other process issued may be served on anyone having](#)
34 [the petitioner in custody, in the manner and with the same effect as if that person](#)
35 [had been made respondent in the action.](#)

Commented [LL1]: Moved up from (e)(1)

36 [\(C\) If the respondent refuses or avoids service, or attempts wrongfully to carry the](#)
37 [person imprisoned or restrained out of the county or state after service of the writ,](#)
38 [the person serving the writ must immediately arrest the respondent or other person](#)
39 [so resisting, together with the person designated in the writ, for presentation](#)
40 [before the court.](#)

Commented [LL2]: Moved up from (e)(2)

41 [\(3\) Emergencies.](#) In emergency situations, ~~an order to show cause may be issued by the~~
42 court, or a single justice or judge if the court is not available, [may issue an order to show](#)
43 [cause](#) and [may issue](#) a stay or injunction ~~may be issued~~ to preserve the court's jurisdiction
44 until such time as the court can hear argument on whether a writ should issue.

45 ~~(24)~~ [Response.](#) If the petition is not referred to the district court, the attorney general or
46 the county attorney, as the case may be, must answer the petition or otherwise plead
47 within ~~ten~~ 10 days after [the petition is served](#) ~~of a copy of the petition~~. When a
48 responsive pleading or motion is filed or an order to show cause is issued, the court must
49 set the case for hearing and the clerk must ~~give notice to~~ [notify](#) the parties.

50 ~~(35)~~ [Notice.](#) The [appellate](#) clerk ~~of the appellate court~~ must, if the petitioner is
51 imprisoned or ~~is a person~~ otherwise in the custody of the state or any political subdivision
52 thereof, give notice of the time for ~~the filing of~~ memoranda and for oral argument, to the
53 attorney general, the county attorney, or the city attorney, depending on where the
54 petitioner is held and whether the petitioner is detained pursuant to state, county, or city
55 law. ~~Similar notice must be given to any other person or an association detaining the~~
56 ~~petitioner not in custody of the state.~~

57 (c) **Contents of petition and attachments.** The petition must include the following:

58 (1) A statement of where the petitioner is detained, by whom the petitioner is detained,
59 and the reason, if known, why the respondent has detained the petitioner.

60 (2) A brief statement of the reasons why the detention is deemed unlawful. The petition
61 must state in plain and concise language:

62 (A) the facts giving rise to each claim that the confinement or detention ~~is in~~
63 ~~violation of~~violates a state order or judgment or a constitutional right established
64 by the United States Constitution or the Constitution of the State of Utah or is
65 otherwise illegal;

66 (B) whether an appeal was taken from the judgment or conviction ~~pursuant to~~
67 under which ~~a~~ petitioner is incarcerated; and

68 (C) whether the allegations of illegality were raised in the appeal and decided by
69 the appellate court.

70 (3) A statement ~~indicating of~~ whether any other petition for a writ of habeas corpus based
71 on the same or similar grounds has been filed and the reason why relief was denied.

72 (4) Copies of the court order or legal process, court opinions, and findings ~~pursuant~~
73 ~~to~~under which the petitioner is detained or confined, affidavits, copies of orders, and
74 other supporting written documents must be attached to the petition or ~~it must be~~
75 ~~stated~~petitioner must state ~~by petitioner~~ why the same are not attached.

76 (d) **Contents of answer.** The answer must concisely set forth specific admissions, denials, or
77 affirmative defenses to the petition's allegations ~~of the petition~~ and must state plainly and
78 unequivocally whether the respondent has, or at any time has had, the person designated in the
79 petition under control and restraint and, if so, the cause for the restraint. The answer must not
80 contain citations of legal authority or legal argument.

81 (e) **Other provisions.**

82 ~~(1) If the respondent cannot be found or if the respondent does not have the person in~~
83 ~~eustody, the writ and any other process issued may be served upon anyone having the~~
84 ~~petitioner in eustody, in the manner and with the same effect as if that person had been~~
85 ~~made respondent in the action.~~

Commented [LL3]: Moved up to (b)(2)(B)

86 ~~(2) If the respondent refuses or avoids service, or attempts wrongfully to carry the person~~
87 ~~imprisoned or restrained out of the county or state after service of the writ, the person~~
88 ~~-serving the writ must immediately arrest the respondent or other person so resisting, for~~
89 ~~presentation, together with the person designated in the writ, forthwith before the court.~~

90 (31) At the time ~~of the issuance of~~ the writ is issued, the court may, if it appears that the
91 person detained will be carried out of the court's jurisdiction ~~of the court~~ or will suffer
92 some irreparable injury before compliance with the writ can be enforced, cause a warrant
93 to issue, reciting the facts and directing the sheriff to bring the detained person before the
94 court to be dealt with according to law.

95 (42) The respondent must appear at the proper time and place with the person designated
96 or show good cause for not doing so. If the person designated has been transferred, the
97 respondent must state when and to whom the transfer was made, and the reason and
98 authority for the transfer. The writ must not be disobeyed for any defect of form or
99 misdescription of the person restrained or of the respondent, if enough is stated to show
100 the meaning and intent.

101 (53) The person restrained may waive any rights to be present at the hearing, in which
102 case the writ must be modified accordingly. Pending decision ~~a determination of the~~
103 ~~matter~~, the court may place such person in the custody of an individual or association as
104 may be deemed proper.

Commented [LL4]: Moved up to (b)(2)(C)

1 **Rule 34. Award of eCosts.**

2 (a) ~~To whom allowed~~Against whom assessed. Costs are only allowed or taxed in civil cases.

3 Except as otherwise provided by law or court order;

4 (1) if an appeal is dismissed, costs ~~shall~~must be taxed against the appellant unless the
5 parties agree otherwise ~~agreed by the parties or ordered by the court~~;

6 (2) if a judgment or order is affirmed, costs ~~shall~~must be taxed against appellant ~~unless~~
7 ~~otherwise ordered~~;

8 (3) if a judgment or order is reversed, costs ~~shall~~must be taxed against the appellee ~~unless~~
9 ~~otherwise ordered~~;

10 (4) if a judgment or order is affirmed or reversed in part, or is vacated, costs ~~shall~~ are
11 taxed only as the court orders ~~be allowed as ordered by the court. Costs shall not be~~
12 ~~allowed or taxed in a criminal case.~~

13 (b) **Costs for and against the sState of Utah.** In cases involving the sState of Utah or an agency
14 or officer thereof, an award of costs for or against the sState ~~shall~~will be at the court's discretion
15 ~~of the court~~ unless specifically required or prohibited by law.

16 (c) ~~Costs of briefs and attachments, record, bonds and other e~~Expenses on appeal. The
17 following expenses may be ~~taxed as costs~~awarded in favor of the prevailing party in the appeal:

18 (1) the actual costs of a printed or typewritten brief ~~or memoranda~~ and attachments not to
19 exceed \$3.00 ~~for each~~ per page;

20 (2) actual costs incurred in ~~the preparation and transmission of~~preparing and transmitting
21 the record, including costs of the reporter's transcript unless the court orders otherwise
22 ~~ordered by the court~~;

23 (3) premiums paid for supersedeas or cost bonds to preserve rights pending appeal; and

24 (4) the fees for filing and docketing the appeal.

25 (d) **Bill of costs taxed after remittitur.** A party claiming costs ~~shall~~must, within 15 days after
26 the remittitur is filed with the trial court clerk ~~of the trial court~~, serve ~~up~~ on the adverse party and
27 file with the trial court clerk ~~of the trial court~~ an itemized and verified bill of costs. The adverse
28 party may, within ~~five~~5 days of service of the bill of costs, serve and file a notice of objection,

29 together with a motion to have the costs taxed by the trial court. If there is no objection to the
30 cost bill within the allotted time, the trial court clerk ~~of the trial court shall~~ must tax the costs as
31 filed and enter judgment for the party entitled thereto, which judgment ~~shall~~ must be entered in
32 the judgment docket with the same force and effect as in the case of other judgments of record. If
33 the cost bill of the prevailing party is timely opposed, the clerk, upon reasonable notice and
34 hearing, ~~shall~~ must tax the costs and enter a final determination and judgment which ~~shall~~ must
35 thereupon be entered in the judgment docket with the same force and effect as in the case of
36 other judgments of record. The clerk's determination ~~of the clerk shall~~ will be reviewable by the
37 trial court upon the request of either party made within ~~five~~ 5 days of the entry of the judgment.

38 **(e) Costs in other proceedings and agency appeals.** In all other matters before the court,
39 including appeals from an agency, costs may be allowed as in cases on appeal from a trial court.
40 Within 15 days after the ~~expiration of the time in which~~ time to file a petition for rehearing ~~may~~
41 ~~be filed~~ expires or within 15 days after an order denying such a petition, the party to whom costs
42 have been awarded may file with the appellate clerk ~~of the appellate court~~ and serve ~~up~~
43 adverse party an itemized and verified bill of costs. The adverse party may, within ~~five~~ 5 days
44 after ~~the service of~~ the bill of costs is served, file a notice of objection and a motion to have the
45 costs taxed by the clerk. If no objection to the cost bill is filed within the allotted time, the clerk
46 ~~shall~~ must thereupon tax the costs and enter judgment against the adverse party. If the adverse
47 party timely objects to the cost bill, the clerk, upon reasonable notice and hearing, ~~shall~~ will
48 determine and settle the costs, tax the same, and a judgment ~~shall~~ will be entered thereon
49 against the adverse party. The clerk's determination ~~by the clerk shall~~ will be reviewable by the
50 court upon either party's ~~the~~ request ~~of either party~~ made within ~~five~~ 5 days ~~of the entry of~~
51 ~~judgment~~ after judgement is entered; ~~U~~ unless otherwise ordered, oral argument ~~shall~~ will not be
52 permitted. A judgment under this ~~section~~ paragraph may be filed with the clerk of any district
53 court in the state, who ~~shall~~ must docket ~~a certified copy of the same~~ the judgment in the same
54 manner and with the same force and effect as district court judgments ~~of the district court~~.

1 **Rule 43. Certification by the Court of Appeals to the Supreme Court.**

2 (a) **Transfer.** In any case over which the Court of Appeals has original appellate jurisdiction, the
3 court may, upon the affirmative vote of at least four judges of the court, certify a case for
4 immediate transfer to the Supreme Court for determination.

5 (b) **Procedure for transfer.**

6 (1) The Court of Appeals may, on its own motion, decide whether a case should be
7 certified. Any party to a case may, however, file ~~and serve an original and eight copies of~~
8 a suggestion for certification not exceeding five pages, ~~setting forth the reasons~~explaining
9 why the party believes that the case should be certified. The suggestion may not be filed
10 ~~prior to the filing of~~before a docketing statement is filed. Within ~~ten~~10 days of service, an
11 adverse party may file and serve ~~an original and eight copies of a~~ statement not ~~in excess~~
12 ~~of~~exceeding five pages either supporting or opposing the suggestion for certification.

13 (2) Upon ~~entry of~~entering the certification order-~~of certification~~, the Court of Appeals
14 Clerk ~~of the Court of Appeals shall~~must immediately transfer the case, including the
15 record and file of the case from the trial court, all papers filed in the Court of Appeals,
16 and a written statement of all docket entries in the case up to and including the
17 certification order, to the Supreme Court Clerk-~~of the Supreme Court~~. The Court of
18 Appeals Clerk-~~of the Court of Appeals shall~~must promptly notify all parties and the trial
19 court clerk-~~of the trial court~~ that the case has been transferred.

20 (3) Upon ~~receipt of~~receiving the certification order-~~of certification~~, the Supreme Court
21 Clerk-~~of the Supreme Court shall~~must enter the appeal ~~upon~~ the Supreme Court's docket
22 ~~of the Supreme Court~~. The ~~clerk of the~~ Supreme Court Clerk shallmust immediately send
23 notices to all parties and to the trial court clerk-~~of the trial court~~ that the case has been
24 docketed and that all further filings will be made with the Supreme Court Clerk-~~of the~~
25 ~~Supreme Court~~. The notice ~~shall~~must state the docket number assigned to the case in the
26 Supreme Court. The case ~~shall~~will proceed before the Supreme Court to final decision
27 and disposition as in other appellate cases ~~pursuant to~~under these rules.

28 (4) If the record on appeal has not been filed with the Court of Appeals Clerk ~~of the Court~~
29 ~~of Appeals~~ as of the date of the certification order-~~of transfer~~, the Court of Appeals Clerk
30 ~~of the Court of Appeals shall~~must notify the trial court clerk-~~of the trial court~~ that upon

31 ~~completion of~~completing the conditions for filing the record by that court, the clerk
32 ~~shall~~must transmit the record on appeal to the Supreme Court Clerk ~~of the Supreme~~
33 ~~Court~~. If, however, the record on appeal has already been transmitted to and filed with the
34 Court of Appeals Clerk ~~of the Court of Appeals~~ as of the date the certification order is
35 entered~~of the entry of the order of transfer~~, the Court of Appeals Clerk ~~of the Court of~~
36 ~~Appeals~~ ~~shall~~must transmit the record on appeal to the Supreme Court Clerk ~~of the~~
37 ~~Supreme Court~~ within five days ~~of the date of the entry of the order of transfer~~after the
38 certification order is entered.

39 (c) **Criteria for transfer.** The Court of Appeals ~~shall~~must consider certification only in the
40 following cases:

41 (1) Cases ~~which are of such a nature that~~where it is apparent that the case should be
42 decided by the Supreme Court and that the Supreme Court would ~~probably~~likely grant a
43 petition for a writ of certiorari in the case if decided by the Court of Appeals, irrespective
44 of how the Court of Appeals might rule; and

45 (2) Cases ~~which~~that will govern a number of other cases involving the same legal issue
46 or issues pending in the district courts, juvenile courts, or the Court of Appeals, or ~~which~~
47 ~~are~~ cases of first impression under state or federal law ~~which~~that will have wide
48 applicability.

1 **Rule 50. Response; reply; brief of amicus curiae.**

2 (a) **Response.** Within ~~30~~28 days after ~~service of a~~ petition for a writ of certiorari is served, any
3 other party may file a response ~~to the petition~~. ~~Or, if the satisfaction of a petitioner's obligation~~
4 ~~to~~ pays at the required filing fee or ~~to~~ obtains a waiver of that fee ~~is accomplished~~ after service,
5 then the time for response ~~shall~~will run from the date that obligation is satisfied~~of satisfaction of~~
6 ~~that obligation~~. The response ~~shall~~must comply with Rule 27 and, as applicable, Rule 49. ~~Seven~~
7 ~~copies of the response, one of which shall contain an original signature, shall be filed with the~~
8 ~~Clerk of the Supreme Court.~~ A party opposing a petition may so indicate by letter in lieu of a
9 formal response, but the letter ~~shall~~may not include any argument or analysis.

10 (b) **Page limitation.** A response ~~shall~~must be as short as possible and may not, ~~in any single~~
11 ~~case,~~ exceed 20 pages, excluding the subject index, the table of authorities, and the appendix.

12 (c) **Objections to jurisdiction.** ~~The court will not accept a~~No motion ~~by a respondent~~ to dismiss
13 a petition for a writ of certiorari ~~will be received~~. Objections to the Supreme Court's jurisdiction
14 ~~of the Supreme Court~~ to grant the petition may be included in the response.

15 (d) **Reply.** A petitioner may file a reply addressed to arguments first raised in the response ~~may~~
16 ~~be filed by any petitioner~~ within ~~fourteen~~14 days after ~~service of~~ the response is served, but
17 distribution of the petition and response to the court ordinarily will not be delayed pending the
18 filing of any such reply unless the response includes a new request for relief, such as an award of
19 attorney fees for the response. The reply ~~shall~~must be as short as possible, ~~and~~ but may not
20 exceed five pages, and ~~shall~~must comply with Rule 27. ~~The number of copies to be filed shall be~~
21 ~~as described in Rule 50(a).~~

22 (e) **Brief of amicus curiae.** Amicus curiae may only file a brief ~~of an amicus curiae~~ concerning a
23 petition for certiorari ~~may be filed only if the~~ by leave of the Supreme Court ~~granted a~~on motion
24 for leave to file an amicus curiae brief ~~or if the Supreme Court~~ at the requests it of the Supreme
25 ~~Court.~~ A The motion for leave ~~shall~~must be accompanied by a proposed amicus brief, not to
26 exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations
27 required by Rule 49(a)(7), and the appendix. The proposed amicus brief ~~shall~~must comply with
28 Rule 27, and, as applicable, Rule 49. ~~The number of copies of the proposed amicus brief~~
29 ~~submitted to the Supreme Court shall be the same as dictated by Rule 48(f).~~ A motion for leave
30 ~~shall~~must identify the applicant's interest ~~of the applicant~~ and ~~shall~~ state the reasons why an

31 amicus curiae brief ~~of an amicus curiae~~ is desirable. The motion for leave ~~shall~~must be filed on
32 or before the date ~~of the filing of~~ the timely petition or response of the party whose position the
33 amicus curiae will support is filed, unless the Supreme Court for good cause shown otherwise
34 orders. Parties to the proceeding in the Court of Appeals may indicate their support for, or
35 opposition to, the motion. Any party's response ~~of a party~~ to a motion for leave ~~shall~~must be
36 filed within seven days ~~of service of~~after the motion is served. If leave is granted, the proposed
37 amicus brief will be accepted as filed and, unless the order granting leave otherwise
38 ~~indicates~~directs, amicus curiae also will be permitted to submit a brief on the merits, provided it
39 ~~is submitted in compliance~~complies with the briefing schedule of the party the amicus curiae
40 supports. Denial of a motion for leave to file brief of an amicus curiae concerning a petition for
41 certiorari ~~shall~~will not preclude a subsequent amicus motion relating to the merits after a grant
42 of certiorari. All motions for leave to file brief of an amicus curiae on the merits after a grant of
43 certiorari are governed by Rule 25.

1 **Rule 56. Response to petition on appeal.**

2 (a) **Filing.** Any appellee, including the Guardian ad Litem, may file a response to the petition on
3 appeal with the appellate clerk. ~~An original and four copies of the response must be filed with the~~
4 ~~clerk of the Court of Appeals~~ within 15 days after service of the appellant's petition on appeal.
5 The response ~~It shall~~ must be accompanied by proof of service to. ~~The response shall be deemed~~
6 ~~filed on the date of the postmark if first class mail is utilized. The appellee shall serve a copy on~~
7 counsel of record of each party, including the Guardian ad Litem, or; on the party if the party is
8 not represented by counsel, ~~then on the party at the party's last known address, in the manner~~
9 ~~prescribed in Rule 21(e).~~

10 (b) **Format.** A response ~~shall~~ must substantially comply with the Response to Petition on Appeal
11 form that accompanies these rules. The response ~~shall~~ may not exceed 15 pages, excluding any
12 attachments, and ~~shall~~ must comply with Rule 27(a) and (b), ~~except that it may be printed or~~
13 ~~duplicated on one side of the sheet.~~

14

Tab 5

Rule 23B. Motion to remand for findings necessary to determination of ineffective assistance of counsel claim.

(a) **Grounds for motion; time.** A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel. The motion will be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.

The motion must be filed before or at the time of the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. After the appeal is taken under advisement, a remand pursuant to this rule is available only on the court's own motion and only if the claim has been raised and the motion would have been available to a party.

(b) **Content of motion.** The content of the motion must conform to the requirements of Rule 23. The motion must include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits must also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. The motion must also be accompanied by a proposed order of remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed on remand.

(c) **Orders of the court; response; reply.** If a motion under this rule is filed at the same time as appellant's principal brief, any response and reply must be filed within the time for the filing of the parties' respective briefs on the merits, unless otherwise specified by the court. If a motion is filed before appellant's brief, the court may elect to defer ruling on the motion or decide the motion prior to briefing.

(1) If the court defers the motion, the time for filing any response or reply will be the same as for a motion filed at the same time as appellant's brief, unless otherwise specified by the court.

(2) If the court elects to decide the motion prior to briefing, it will issue a notice that any response must be filed within 30 days of the notice or within such other time as the court may specify. Any reply in support of the motion must be filed within 20 days after the response is served or within such other time as the court may specify.

(3) If the requirements of parts (a) and (b) of this rule have been met, the court may order that the case be temporarily remanded to the trial court to enter findings of fact relevant to a claim of ineffective assistance of counsel. The order of remand will identify the ineffectiveness claims and specify the factual issues relevant to each such claim to be addressed by the trial court. The order will also direct the trial court to complete the proceedings on remand within 90 days of issuance of the order of remand, absent a finding by the trial court of good cause for a delay of reasonable length.

(4) If it appears to the appellate court that the appellant's attorney of record on the appeal faces a conflict of interest upon remand, the court will direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

(d) **Effect on appeal.** If a motion is filed at the same time as appellant's brief, the briefing schedule will not be stayed unless ordered by the court. If a motion is filed before appellant's brief, the briefing schedule will be automatically stayed until the court issues notice of whether it will defer the motion or decide the motion before briefing.

(e) **Proceedings before the trial court.** Upon remand the trial court will promptly conduct hearings and take evidence as necessary to enter the findings of fact necessary to determine the claim of ineffective assistance of counsel. Any claims of ineffectiveness not identified in the order of remand will not be considered by the trial court on remand, unless the trial court determines that the interests of justice or judicial efficiency require consideration of issues not specifically identified in the order of remand. Evidentiary hearings will be conducted without a jury and as soon as practicable after remand. The burden of proving a fact will be upon the proponent of the fact. The standard of proof will be a preponderance of the evidence. The trial court will enter written findings of fact concerning the claimed deficient performance by counsel and the claimed prejudice suffered by appellant as a result, in accordance with the order of remand. Proceedings on remand must be completed within 90 days of entry of the order of remand, unless the trial court finds good cause for a delay of reasonable length.

(f) **Preparation and transmittal of the record.** At the conclusion of all proceedings before the trial court, the clerk of the trial court will immediately prepare the record of the supplemental proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court will immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court will transmit the record of the supplemental proceedings upon the preparation of the entire record.

(g) **Appellate court determination.** Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals.

Effective December 1, 2018