Agenda

Utah Supreme Court Advisory Committee
Utah Rules of Appellate Procedure

Chris Ballard, Chair
Nathalie Skibine, Vice Chair

Location:	Webex (see calendar appointment for instructions)
Date:	November 3, 2022
Time:	12:00 to 1:30 p.m.

Action: Welcome and approval of October 6, 2022 Minutes	Tab 1	Chris Ballard, Chair
Action: Rule 4	Tab 2	Chris Ballard
Action: Rule 22-Juneteenth	Tab 3	Mary Westby, Lisa Collins
Action: Rule 57	Tab 4	Mary Westby
Action: Utah Rule of Evidence 506	Tab 5	Nathalie Skibine
Action: Appellate Court Disqualification	Tab 6	Nick Stiles
Discussion: Old/new business • Rule 50		Chris Ballard, Chair

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

2022/2023 Meeting schedule:

December 1, 2022	March 2, 2023	June 1, 2023
January 5, 2023	April 6, 2023	July 6, 2023
February 2, 2023	May 4, 2023	August 3, 2023

Tab 1

Minutes

Supreme Court's Advisory Committee on the
Utah Rules of Appellate Procedure

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

In Person and by WebEx Videoconference
Thursday, October 6, 2022
12:00 pm to 1:30 pm

PRESENT
Emily Adams (by Webex)
Christopher Ballard—Chair (in person)
Patrick Burt (by Webex)
Jacqueline Carlton—Guest (by Webex)
Lisa Collins (by Webex)
Carol Funk (in person)
Amber Griffith (in person)
Michael Judd—Recording Secretary (in person)
Michelle Quist (in person)
Clark Sabey (by Webex)
Nathalie Skibine—Vice Chair (by Webex)
Scarlet Smith (in person)
Douglas Thompson—Guest (by Webex)
Mary Westby (in person)

EXCUSED
Troy Booher—Emeritus Member
Judge Michele Christiansen Forster
Tyler Green
Judge Gregory Orme
Stanford Purser
Nick Stiles—Staff

Action: Chris Ballard
Approval of September 2022 Minutes

The committee reviewed the September 2022 minutes. Chris Ballard noted two corrections needed in Item 3.

With those corrections made, Mary Westby moved to approve the September 2022 minutes. Carol Funk seconded that motion, and it passed without objection by unanimous consent.

Action: Emily Adams
Rule 20—Rule 19 Advisory Committee Note

The committee began by identifying the remaining concern with Rule 20: ensuring that a route exists for parties to file a petition for extraordinary relief directly with

the Utah Supreme Court. The question now presented, then, is whether Rule 19 provides that route after Rule 20's repeal.

Emily Adams and Nathalie Skibine worked together on this issue and prepared a draft advisory committee note, which they presented to the committee. Mary Westby asked whether Rule 65B(b) may be a better fit for the note than 65C. Carol Funk wondered whether the note is needed, and the committee discussed the potential benefits associated with including the note. Michelle Quist observed that the text of the note should refer to "extraordinary relief" rather than to "extraordinary writs." The committee then worked together to refine the language of the note.

Following that discussion, the committee agreed that it is comfortable moving forward with a repeal of Rule 20, based on the understanding that Rule 19 provides an adequate route to file a petition for extraordinary relief.

Scarlet Smith then moved to approve the advisory committee note as it appeared on the screen at the committee meeting. Ms. Westby seconded that motion, and it passed without objection by unanimous consent.

Ms. Skibine moved that the advisory committee note be published under both Rule 19 and Rule 20, for clarity's sake. Lisa Collins seconded that motion, and it too passed without objection by unanimous consent.

Action: Mary Westby,
Rule 19 Clark Sabey

After several months of work, the committee turned to what it hopes is a final Rule 19-related task: ensuring that there is no conflict between the proposed amendment to Rule 19 and the text of Rule 23C. The committee discussed minor changes to the text, both to the new language proposed this month and to the proposed changes to Rule 19 as a whole.

Following that discussion, Ms. Westby moved to approve the proposed amendment to Rule 19 as it appeared on the screen at the committee meeting. Ms. Smith seconded that motion, and it passed without objection by unanimous consent.

Action: Chris Ballard
Rule 4

The committee discussed a proposal, made through public comment, that any bar to a reinstatement of appeal rights under Rule 4 be premised on a showing by the prosecution that the defendant acted in bad faith by delaying the filing of the motion.

The committee also discussed whether that test could be reformulated—slightly—as "lacked a good-faith basis" rather than "acted in bad faith." Mr. Ballard volunteered to put together draft language based on this public-comment suggestion, and the committee welcomed that idea.

Ms. Adams moved to table discussion of Rule 4 to allow time for Mr. Ballard to complete that work. Ms. Quist seconded that motion, and it passed without objection by unanimous consent.

Action: Chris Ballard
Rule 22—Juneteenth Holiday

The committee discussed potential changes to Rule 22. The initial call for change came because orders were being entered on weekends and holidays, prompting concerns about calculating deadlines.

It's also come to the committee's attention, however, that under current rules, Utah may celebrate Juneteenth on two separate days, and while the appellate rules may encompass *both* days, the Utah Rules of Civil Procedure would call for the date to be observed only once (on the day designated by Utah).

The committee discussed mimicking the approach in the Utah Rules of Civil Procedure, and Ms. Westby and Ms. Collins agreed to draft language for the committee to consider.

Ms. Funk moved to table discussion of Rule 4 to allow for that drafting. Ms. Westby seconded that motion, and it passed without objection by unanimous consent.

Action: Mary Westby
Rule 57

Given a lack of time to address all issues slated for discussion in October, the committee opted to defer discussion of Rule 57 until November's meeting.

Action: Nick Stiles
Appellate Court Disqualification

The committee likewise opted to defer discussion of appellate court disqualification until November's meeting.

Discussion: Chris Ballard
Old/New Business

None.

Adjourn

Following that discussion, Ms. Quist moved to adjourn, and Ms. Funk seconded that motion. The committee's next meeting will take place on November 3, 2022.

Tab 2

1. **Ann Taliaferro**
   July 14, 2022 at 9:11 am

This is much better… Thank you.

I have one final suggestion, and propose that you delete the language "or should have known in the exercise of reasonable diligence". Almost everything "should have been known" and it guts the rule's requirement of the defendant's personal knowledge of the problem. This language is used to impute knowledge on a defendant where the defendant may not have had personal knowledge, but where his or her attorney did.

I propose the rule reads–

"The motion must be filed within one year, or within a reasonable time, whichever is later, from the day on which the defendant personally knew [deleted phrase] of evidentiary facts forming the basis of the claim that the defendant was deprived of the right to appeal".

2. **Doug Thompson**
   July 14, 2022 at 3:19 pm

I've already raised some form of these concerns to the committee, but I wanted to make them in public to see whether anyone else might agree.

The proposed rule's use of the phrase "evidentiary facts forming the basis of the claim that the defendant was deprived of the right to appeal" sounds straightforward at first glance, but I expect it will be very difficult to apply in actual cases, especially the common reinstatement scenarios. I think judges will vary widely about what kinds of facts are relevant or determinative on this proposed language. For example, consider the scenarios from Manning:

The first example is the "defendant asked his or her attorney to file an appeal but the attorney, after agreeing to file, failed to do so". Assume defendant never hears from attorney again after asking for an appeal. Nothing happens. What fact gives rise to the claim? This is a defendant who knows his right, has attempted to exercise his right and relies upon his attorney to do so. How long can a reasonably diligent defendant wait before the "no news" creates an evidentiary basis that he's been deprived of the right to appeal?

The second example is the defendant that "diligently but futilely attempted to appeal within the statutory time frame without fault on defendant's part". The pro se letter/request for an appeal is sent in the mail and is lost, never delivered, or because it is not properly titled or conform to the court's expectation for notice of appeal, not recorded as such. Again, nothing happens and the defendant sits in solitary confinement for 5 years wondering what has happened with his appeal, never knowing about the failed attempt or, even if he assumes something went wrong, not knowing about the availability of Rule 4(f) reinstatement. How long can a reasonably diligent defendant wait before the "no news" creates an evidentiary basis that he's been deprived of the right to appeal?

Finally, the third example is the defendant who is not properly informed of his right to appeal. He never requests an appeal because he doesn't know he can. What kind of evidence will

start the one-year time limit? Can the State bring in cellmates who exercised their right to appeal to establish that a reasonably diligent defendant would have asked questions about his own appellate rights? What if the defendant attends a court hearing in another case where the court instructs another defendant of the right to appeal, does that constitute evidence to form the basis of the claim that he was deprived? The evidentiary questions needed to establish qualification for the timeframe will be very arbitrary and not serve any real legitimate purpose, other than to give the State an avenue of continuing to deprive defendants of their constitutional rights.
The proponents of the time limit want to foreclose resurrecting appeals in old cases. Though I disagree that is a worthwhile policy (after all, these are by definition defendants who have been utterly denied their constitutional right to appeal through no fault of their own), I understand why they support it. But the proposed language places the burden on the defendant, generally unrepresented, who has already been deprived of his constitutional rights. That burden will require him to justify the weeks and months and years he didn't fix the deprivation that was "no fault of his own." And the language requires the defendant to file this specific motion. Many defendants, deprived of their right to appeal, and the accompanying right to counsel, will try any number of desperate and generally useless "legal" forms of self-help. If the defendant spends months or years litigating a ill-conceived Rule 22 motion because he hasn't had qualified counsel, instead of filing the motion to reinstate, he'll miss this timeframe. Not because he wasn't diligent, not because he was purposefully delaying, but because he was unrepresented and ignorant of the limitations of the rule.
I stand by my original position that no timeframe should apply, but if one is absolutely necessary it should be the government's burden to establish bad faith on the part of the defendant. What about something like this:

If the prosecution believes the motion was filed beyond one year, or beyond a reasonable time, whichever is later, from the day on which the defendant personally knew, or should have known in the exercise of reasonable diligence, of evidentiary facts forming the basis of the claim that the defendant was deprived of the right to appeal, the prosecution can file an objection on that basis. The prosecution will have the burden of demonstrating by a preponderance of the evidence that the defendant acted in bad faith by delaying the filing of the motion.

3. **David Ferguson**
July 29, 2022 at 3:14 pm

I write in agreement with the comments of both Ann and Doug and wholeheartedly agree with the bad faith standard that Doug proposes.

Every time I speak with a prisoner I am reminded of just how little legal information they are actually given. What kind of reasonable diligence should be expected of prisoners? There is no law library at the prison, meaning they have no rule books or code books. The contract attorneys who are assigned to help them were essentially absentee through much of the pandemic and are sometimes non-responsive to prisoners. Prisoners may not necessarily keep records of their efforts because they wouldn't even know that the "reasonable diligence" standard applies to them, because they won't know that this rule exists. Any prisoner who says, "I didn't know what the law was" will always face the same "ignorance of the law is no defense" position. And yet, nearly every time an inmate expresses awareness of a legal topic

to me it has come through word of mouth through other inmates who have discussed the topic. They have almost no ability to fact check each other because they don't have a law library, the money to personally pay for law books, or regular access to competent legal services. Perhaps our trial courts will give prisoners the benefit of the doubt. My experience is that when prisoners or jailees complain about how difficult their conditions are, judges tend to tune out those protests. When the same complaints are heard all of the time it stops sounding like a good explanation. It sounds like another inmate with the same excuses trying to get different treatment from everyone else. Those issues fall on deaf ears when courts should instead be alarmed at how frequently they hear about the obstacles that inmates face.

This proposal runs the risk of creating a structural injustice. The term structural injustice comes from an extensive body of literature discussing situations in which a person is deprived of a right due to a group of obstacles put in that person's way by different organizations. Structural injustice describes those situations in which no one can be blamed for depriving someone of their rights; it is the structure of the system itself that causes the depravation. Where the prison (i.e., organization one) makes legal information difficult to obtain and verify while the courts (i.e., organization two) creates procedural rules that inadequately consider the obstacles that the prison (organization one) puts in place, then neither organization can take blame for creating an unjust system because both organizations can point to the other as being at fault. That's structural injustice.

A prisoner may come before a judge on a Manning motion. That prisoner may have low IQ, may be marginalized by other inmates, speak poor English as an immigrant, or be illiterate (there's quite a few of those folks in the criminal legal system) among any other variety of conditions.

It may be that a relaxed rule will allow some inmates to get appeals by falsely claiming ignorance. To the extent that the appellate courts see their primary role as correcting substantive errors in trial courts, then being confronted with a few more potential errors than they otherwise would have seen seems like a small price to pay for the rights of the convicted to have erroneous convictions reversed. If it is worse that one innocent person go to prison than 10 guilty go free, then it is also worse that 10 otherwise procedurally barred appeals get heard than 1 innocent person losing the right to appeal on a burdensome procedural standard.

I support the standard that Doug proposes. If anything, the Court should try it out first before trying something more restrictive.

4. **Lori Seppi**
August 26, 2022 at 4:01 pm

I disagree with amending rule 4(f) to include a time limit. Rule 4(f) was created to protect a criminal defendant's constitutional right to appeal. If a defendant has been deprived of that right through no fault of his own, he should be granted his appeal without additional hurdles that will be difficult for an incarcerated person to meet. If there must be a time limit, I agree with Ann Taliaferro's, Doug Thompson's, and David Ferguson's concerns.

Rule 4. Appeal as of right: when taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Time for appeal extended by certain motions.**

(1) If a party timely files in the trial court any of the following, the time for all parties to appeal from the judgment runs from the entry of the dispositive order:

(A) A motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(B) A motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(C) A motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(D) A motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure;

(E) A motion for relief under Rule 60(b) of the Utah Rules of Civil Procedure if the motion is filed no later than 28 days after the judgment is entered;

(F) A motion or claim for attorney fees under Rule 73 of the Utah Rules of Civil Procedure; or

(G) A motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in paragraph (b), shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in paragraph (b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) **Filing prior to entry of judgment or order.** A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(e) **Motion for extension of time.**

(1) The trial court, upon a showing of good cause, may extend the time for filing a notice of appeal upon motion filed before the expiration of the time prescribed by paragraphs (a) and (b) of this rule. Responses to such motions for an extension of time are disfavored and the court may rule at any time after the filing of the motion. No extension shall exceed 30 days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(2) The trial court, upon a showing of good cause or excusable neglect, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this

rule. The court may rule at any time after the filing of the motion. That a movant did not file a notice of appeal to which paragraph (c) would apply is not relevant to the determination of good cause or excusable neglect. No extension shall exceed 30 days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(f) **Motion to reinstate period for filing a direct appeal in criminal cases.** ~~Upon a showing that~~

(1) If no timely appeal is filed in a criminal case, a defendant ~~was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall~~ may file a ~~written~~ motion in the ~~sentencing court and serve the prosecuting entity.~~ trial court to reinstate the time to appeal. The motion must be filed within one year, or within a reasonable time, whichever is later, from the day on which the defendant personally knew, or should have known in the exercise of reasonable diligence, of evidentiary facts forming the basis of the claim that the defendant was deprived of the right to appeal.

(2) If the defendant is not represented by counsel and is indigent, the trial court ~~shall~~must appoint counsel.

(3) The motion must be served on the prosecuting entity. The prosecutor ~~shall have 30 days after service of the motion to~~ may file a ~~written~~ response~~. If the prosecutor opposes~~ to the motion within 28 days after being served.

~~(4) If the motion to reinstate the time to appeal is opposed~~, the trial court ~~shall~~must set a hearing at which the parties may present evidence.

5(a) If the prosecutor opposes the motion on the ground that the defendant filed it beyond the time limit in subsection (f)(1), the prosecutor must prove, by a preponderance of the evidence, that the defendant's delay was unreasonable.

The court can deny the motion as untimely only if the court finds that the prosecutor has carried this burden.

(5)(b) Otherwise, ~~T~~the defendant must show that the defendant was deprived of the right to appeal through no fault of the defendant.

Formatted: Indent: Left: 0.5"

(6) If the trial court finds by a preponderance of ~~the~~ evidence that the defendant has ~~demonstrated that the defendant was~~been deprived of the right to appeal, ~~it shall~~the court must enter an order reinstating the ~~time for~~right to appeal. The defendant~~'~~s notice of appeal must be filed with the clerk of the trial court within 30 days after the date the order is entered~~of entry of the order~~.

(g) **Motion to reinstate period for filing a direct appeal in civil cases.**

(1) The trial court shall reinstate the thirty-day period for filing a direct appeal if the trial court finds by a preponderance of the evidence that:

(A) The party seeking to appeal lacked actual notice of the entry of judgment at a time that would have allowed the party to file a timely motion under paragraph (e) of this rule;

(B) The party seeking to appeal exercised reasonable diligence in monitoring the proceedings; and

(C) The party, if any, responsible for serving the judgment under Rule 58A(d) of the Utah Rules of Civil Procedure did not promptly serve a copy of the signed judgment on the party seeking to appeal.

(2) A party seeking such reinstatement shall file a written motion in the trial court within one year from the entry of judgment. The party shall comply with Rule 7 of the Utah Rules of Civil Procedure and shall serve each of the parties in accordance with Rule 5 of the Utah Rules of Civil Procedure.

(3) If the trial court enters an order reinstating the time for filing a direct appeal, a notice of appeal must be filed within 30 days after the date of entry of the order.

Tab 3

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part III. Employees (Refs & Annos)
Subpart E. Attendance and Leave
Chapter 61. Hours of Work (Refs & Annos)
Subchapter I. General Provisions (Refs & Annos)

5 U.S.C.A. § 6103

§ 6103. Holidays

Effective: June 17, 2021
Currentness

(a) The following are legal public holidays:

New Year's Day, January 1.

Birthday of Martin Luther King, Jr., the third Monday in January.

Washington's Birthday, the third Monday in February.

Memorial Day, the last Monday in May.

Juneteenth National Independence Day, June 19.

Independence Day, July 4.

Labor Day, the first Monday in September.

Columbus Day, the second Monday in October.

Veterans Day, November 11.

Thanksgiving Day, the fourth Thursday in November.

Christmas Day, December 25.

(b) For the purpose of statutes relating to pay and leave of employees, with respect to a legal public holiday and any other day declared to be a holiday by Federal statute or Executive order, the following rules apply:

(1) Instead of a holiday that occurs on a Saturday, the Friday immediately before is a legal public holiday for--

(A) employees whose basic workweek is Monday through Friday; and

(B) the purpose of section 6309 of this title.

(2) Instead of a holiday that occurs on a regular weekly non-workday of an employee whose basic workweek is other than Monday through Friday, except the regular weekly non-workday administratively scheduled for the employee instead of Sunday, the workday immediately before that regular weekly nonworkday is a legal public holiday for the employee.

(3) Instead of a holiday that is designated under subsection (a) to occur on a Monday, for an employee at a duty post outside the United States whose basic workweek is other than Monday through Friday, and for whom Monday is a regularly scheduled workday, the legal public holiday is the first workday of the workweek in which the Monday designated for the observance of such holiday under subsection (a) occurs.

This subsection, except subparagraph (B) of paragraph (1), does not apply to an employee whose basic workweek is Monday through Saturday.

(c) January 20 of each fourth year after 1965, Inauguration Day, is a legal public holiday for the purpose of statutes relating to pay and leave of employees as defined by section 2105 of this title and individuals employed by the government of the District of Columbia employed in the District of Columbia, Montgomery and Prince Georges Counties in Maryland, Arlington and Fairfax Counties in Virginia, and the cities of Alexandria and Falls Church in Virginia. When January 20 of any fourth year after 1965 falls on Sunday, the next succeeding day selected for the public observance of the inauguration of the President is a legal public holiday for the purpose of this subsection.

(d)(1) For purposes of this subsection--

(A) the term “compressed schedule” has the meaning given such term by section 6121(5); and

(B) the term “adverse agency impact” has the meaning given such term by section 6131(b).

(2) An agency may prescribe rules under which employees on a compressed schedule may, in the case of a holiday that occurs on a regularly scheduled non-workday for such employees, and notwithstanding any other provision of law or the terms of any collective bargaining agreement, be required to observe such holiday on a workday other than as provided by subsection (b), if the agency head determines that it is necessary to do so in order to prevent an adverse agency impact.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 515; Pub.L. 90-363, § 1(a), June 28, 1968, 82 Stat. 250; Pub.L. 94-97, Sept. 18, 1975, 89 Stat. 479; Pub.L. 98-144, § 1, Nov. 2, 1983, 97 Stat. 917; Pub.L. 104-201, Div. A, Title XVI, § 1613, Sept. 23, 1996, 110 Stat. 2739; Pub.L. 105-261, Div. A, Title XI, § 1107, Oct. 17, 1998, 112 Stat. 2142; Pub.L. 117-17, § 2, June 17, 2021, 135 Stat. 287.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 10358

Ex. Ord. No. 10358, June 9, 1952, 17 F.R. 1529, as amended by Ex. Ord. No. 11226, May 27, 1965, 30 F.R. 7213; Ex. Ord. No. 11272, Feb. 23, 1966, 31 F.R. 3111, formerly set out as a note under this section, which related to the observance of holidays, was revoked by Ex. Ord. No. 11582, Feb. 11, 1971, 36 F.R. 2957, set out under this section.

EXECUTIVE ORDER NO. 11582

<Feb. 11, 1971, 36 F.R. 2957>

Observance of Holidays

By virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

Section 1. Except as provided in section 7, this order shall apply to all executive departments, independent agencies, and Government corporations, including their field services.

Sec. 2. As used in this order:

(a) Holiday means the first day of January, the third Monday of February, the last Monday of May, the fourth day of July, the first Monday of September, the second Monday of October, the fourth Monday of October, the fourth Thursday of November, the twenty-fifth day of December, or any other calendar day designated as a holiday by Federal statute or Executive order.

(b) Workday means those hours which comprise in sequence the employee's regular daily tour of duty within any 24-hour period, whether falling entirely within one calendar day or not.

Sec. 3. (a) Any employee whose basic workweek does not include Sunday and who would ordinarily be excused from work on a holiday falling within his basic workweek shall be excused from work on the next workday of his basic workweek whenever a holiday falls on Sunday.

(b) Any employee whose basic workweek includes Sunday and who would ordinarily be excused from work on a holiday falling within his basic workweek shall be excused from work on the next workday of his basic workweek whenever a holiday falls on a day that has been administratively scheduled as his regular weekly nonworkday in lieu of Sunday.

Sec. 4. The holiday for a full-time employee for whom the head of a department has established the first 40 hours of duty performed within a period of not more than six days of the administrative workweek as his basic workweek because of the impracticability of prescribing a regular schedule of definite hours of duty for each workday, shall be determined as follows:

(a) If a holiday occurs on Sunday, the head of the department shall designate in advance either Sunday or Monday as the employee's holiday and the employee's basic 40-hour tour of duty shall be deemed to include eight hours on the day designated as the employee's holiday.

(b) If a holiday occurs on Saturday, the head of the department shall designate in advance either the Saturday or the preceding Friday as the employee's holiday and the employee's basic 40-hour tour of duty shall be deemed to include eight hours on the day designated as the employee's holiday.

(c) If a holiday occurs on any other day of the week, that day shall be the employee's holiday, and the employee's basic 40-hour tour of duty shall be deemed to include eight hours on that day.

(d) When a holiday is less than a full day, proportionate credit will be given under paragraph (a), (b), or (c) of this section.

Sec. 5. Any employee whose workday covers portions of two calendar days and who would, except for this section, ordinarily be excused from work scheduled for the hours of any calendar day on which a holiday falls, shall instead be excused from work on his entire workday which commences on any such calendar day.

Sec. 6. In administering the provisions of law relating to pay and leave of absence, the workdays referred to in sections 3, 4, and 5 shall be treated as holidays in lieu of the corresponding calendar holidays.

Sec. 7. The provisions of this order shall apply to officers and employees of the Post Office Department and the United States Postal Service (except that sections 3, 4, 5, and 6 shall not apply to the Postal Field Service) until changed by the Postal Service in accordance with the Postal Reorganization Act [see Short Title note under 39 U.S.C.A. § 101].

Sec. 8. Executive Order No. 10358 of June 9, 1952, entitled **Observance of Holidays by Government Agencies**, and amendatory Executive Orders No. 11226 of May 27, 1965, and No. 11272 of February 23, 1966, are revoked.

Sec. 9. This order is effective as of January 1, 1971.

Richard Nixon

Notes of Decisions (13)

5 U.S.C.A. § 6103, 5 USCA § 6103
Current through P.L. 117-102. Some statute sections may be more current, see credits for details.

2022 Utah Laws H.B. 238 (West's No. 328)

UTAH 2022 SESSION LAWS

64th LEGISLATURE, 2022 GENERAL SESSION

Additions are indicated by **Text**; deletions by ~~Text~~.
Vetoes are indicated by ~~Text~~;
stricken material by ~~**Text**~~.

HB 238

West's No. 328
STATE HOLIDAY MODIFICATIONS

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Sandra Hollins

Senate Sponsor: Jacob L. Anderegg

LONG TITLE

General Description:

This bill amends provisions related to state holidays.

Highlighted Provisions:

This bill:

. provides for the observation of Juneteenth National Freedom Day each year as a holiday throughout the State.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

63G–1–301, as last amended by Laws of Utah 2021, Chapters 335 and 344

Be It enacted by the Legislature of the state of Utah:

Section 1. Section 63G–1–301 is amended to read:

<< UT ST § 63G–1–301 >>

§ 63G–1–301. Legal holidays—Personal preference day—Governor authorized to declare additional days

(1)(a) The following-named days are legal holidays in this state:

(i) every Sunday, except as provided in Subsection (1)(e);

(ii) January 1, called New Year's Day;

(iii) the third Monday of January, called Dr. Martin Luther King, Jr. Day;

(iv) the third Monday of February, called Washington and Lincoln Day;

(v) the last Monday of May, called Memorial Day;

(vi) on the day described in Subsection (1)(f), Juneteenth National Freedom Day;

~~(vi)~~**(vii)** July 4, called Independence Day;

~~(vii)~~**(viii)** July 24, called Pioneer Day;

~~(viii)~~**(ix)** the first Monday of September, called Labor Day;

~~(ix)~~**(x)** the second Monday of October, called Columbus Day;

~~(x)~~**(xi)** November 11, called Veterans Day;

~~(xi)~~**(xii)** the fourth Thursday of November, called Thanksgiving Day;

~~(xii)~~**(xiii)** December 25, called Christmas; and

~~(xiii)~~**(xiv)** all days which may be set apart by the President of the United States, or the governor of this state by proclamation as days of fast or thanksgiving.

(b) If any of the holidays under Subsections (1)(a)(ii) through ~~(xiii)~~ **(v) or Subsections (1)(a)(vii) through (xiv)**, falls on Sunday, then the following Monday shall be the holiday.

(c) If any of the holidays under Subsections (1)(a)(ii) through ~~(xiii)~~ **(v) or Subsections (1)(a)(vii) through (xiv)** falls on Saturday, then the preceding Friday shall be the holiday.

(d) Each employee may select one additional day, called Personal Preference Day, to be scheduled pursuant to rules adopted by the Division of Human Resource Management.

(e) For purposes of Utah Constitution Article VI, Section 16, Subsection (1), regarding the exclusion of state holidays from the 45–day legislative general session, Sunday is not considered a state holiday.

(f)(i) The Juneteenth National Freedom Day holiday is on June 19, if that day is on a Monday.

(ii) If June 19 is on a Tuesday, Wednesday, Thursday, or Friday, the Juneteenth National Freedom Day holiday is on the immediately preceding Monday.

(iii) If June 19 is on a Saturday or Sunday, the Juneteenth National Freedom Day holiday is on the immediately following Monday.

(2)(a) Whenever in the governor's opinion extraordinary conditions exist justifying the action, the governor may:

(i) declare, by proclamation, legal holidays in addition to those holidays under Subsection (1); and

(ii) limit the holidays to certain classes of business and activities to be designated by the governor.

(b) A holiday may not extend for a longer period than 60 consecutive days.

(c) Any holiday may be renewed for one or more periods not exceeding 30 days each as the governor may consider necessary, and any holiday may, by like proclamation, be terminated before the expiration of the period for which it was declared.

Effective May 4, 2022.

Approved March 24, 2022

End of Document

Rule 22. Computation and enlargement of time.

Option 1

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

(1) "Legal holiday" means the day for observing:

(A) New Year's Day;

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

(C) Washington and Lincoln Day;

(D) Memorial Day;

(E) Juneteenth Day;

(F) Independence Day;

(G) Pioneer Day;

(H) Labor Day;

(I) Columbus Day;

(J) Veterans' Day;

(K) Thanksgiving Day;

(L) Christmas; and

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

Option 2

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

(1) "Legal holiday" means the day for observing:

(A) https://www.utcourts.gov/lawlibrary/holidays.html

Note: Highlighted sections are amendments previously approved by the Committee.

Rule 22. Computation and enlargement of time.

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

(b) **Enlargement of time**.

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

~~(b)~~(2) The court for good cause shown may upon motion extend the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of time. This rule does not authorize the court to extend the jurisdictional deadlines specified by any of the rules listed in Rule 2. For the purpose of this rule, good cause includes, but is not limited to, the complexity of the case on appeal, engagement in other litigation, and extreme hardship to counsel.

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

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

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

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

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

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

(E) the position of every other party on the requested extension or why the movant was unable to learn a party's position.

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

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

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

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

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

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

~~(b)~~(6~~5~~)~~(B)~~ If the good cause relied upon is the complexity of the appeal, the movant ~~shall~~ must state the reasons why the appeal is so complex that an adequate brief cannot reasonably be prepared by the due date.

~~(b)~~(7~~5~~)~~(C)~~ If the good cause relied upon is extreme hardship to counsel, the movant ~~shall~~ must state in detail the nature of the hardship.

~~(b)~~(8~~5~~)~~(D)~~ All facts supporting good cause ~~shall~~ msut be stated with specificity. Generalities, such as "the motion is not for the purpose of delay" or "counsel is engaged in other litigation," are insufficient.

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

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

Effective November 14, 2016

Advisory Committee Note

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

Both appellate courts place appeals in the oral argument queue in accordance with the priority of the case and after principal briefs have been filed. Delays in the completion of briefing will likely delay the date of oral argument.

Adopted 2020

Tab 4

Rule 57. Record on appeal; transmission of record.

(a) The record on appeal ~~must include~~consists of the legal file, any exhibits admitted as evidence, and any transcripts.

(b) The record will be transmitted by the juvenile court clerk to the Court of Appeals clerk upon the request of an appellate court.

Tab 5

Memo on intervention on appeal

In *F.L. v. Court of Appeals*, 2022 UT 32, the Utah Supreme Court granted a crime victim's petition for extraordinary relief to intervene as a limited-purpose party in a criminal case on appeal. *F.L.* held that a crime victim could intervene as a limited-purpose party where the issue on appeal was whether the trial court erred when it did not release the crime victim's mental health records following in-camera review.

The Supreme Court included this footnote:

> Though we determine that the typical standard of review for extraordinary relief applies in this case, we are concerned that the deference inherent in that standard may not sufficiently protect the rights of those seeking to intervene as limited-purpose parties in an appeal where access to their privileged information is at stake. We accordingly refer the issue to our appellate rules committee and instruct it to consider whether our rules should be amended to give privilege holders other avenues of appellate review for denials of a motion to intervene in an appeal.

Id. ¶ 29, n.22.

A petition for extraordinary relief sets a high bar because even if there was an error, the court retains discretion to deny the relief requested. The Supreme Court granted the petition in *F.L.* and clarified that crime-victim patients can intervene as limited purpose parties on appeal to assert the physician and mental health therapist – patient privilege under Utah Rule of Evidence 506.

Utah Rule of Civil Procedure 24 addresses intervention. A judgment denying the right to intervene in district court is appealable. *Com. Block Realty Co. v. U.S. Fid. & Guar. Co.*, 28 P.2d 1081, 1082 (1934). Utah does not have a rule about intervention on appeal. In *F.L.*, the Supreme Court wrote that:

> Rule 24 allows a person to become "a full-fledged party to the proceeding in every respect," *In re Adoption of C.C.*, 2021 UT 20, ¶ 27, 491 P.3d 859, with the right to "protect [her] interests as a fully participating party." *Supernova Media, Inc. v. Pia Anderson Dorius Reynard & Moss, LLC*, 2013 UT 7, ¶ 53, 297 P.3d 599. But we have held that "[t]he traditional parties to a criminal proceeding are the prosecution and the defense, and … a victim is not entitled to participate at all stages of the proceedings or for all purposes." *Brown*, 2014 UT 48, ¶ 16, 342 P.3d 239. We therefore choose the narrower option and resolve this case based on *Brown* and Utah Rule of Evidence 506 rather than rule 24.

Memo on intervention on appeal

F.L., 2022 UT 32, ¶37, n.36.

I found three state court rules for intervention on appeal, but no rules for challenging an appellate court's denial of a motion to intervene. I didn't find any rules specifically addressing intervention by a crime victim as a limited-purpose party.

Here are the state court rules:

> **Idaho Appellate Rule 7.1. Intervention.**
>
> Any person or entity who is a real party in interest to an appeal or proceeding governed by these rules or whose interest would be affected by the outcome of an appeal or proceeding under these rules may file a verified petition with the Supreme Court asking for leave to intervene as a party to the appeal or proceeding and serve a copy thereof upon all parties to the appeal or proceeding. The petition shall be processed as a motion in accordance with Rule 32 of these rules, and if the Supreme Court finds that such petitioning person or entity is a real party in interest or would be affected by the outcome of the appeal or proceeding, the Court may, in its discretion, grant leave to the petitioning party to intervene as a party appellant or respondent; and if leave is so granted such petitioning party shall thereafter be a party to the appeal or proceedings for all purposes under these rules.
>
> (Adopted April 11, 1979, effective July 1, 1979.)
>
> **Wis. Stat. Ann. § 809.13 (West)**
>
> A person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal. A party may file a response to the petition within 11 days after service of the petition. The court may grant the petition upon a showing that the petitioner's interest meets the requirements of s. 803.09(1) , (2), or (2m) [civil rule on intervention].
>
> **West Virginia Rule of Appellate Procedure 32 Intervention**
>
> Upon timely motion, anyone shall be permitted to intervene in an appeal or an original jurisdiction proceeding pending in the Supreme Court or in an appeal pending in the Intermediate Court from an

> administrative agency, but only when (1) a statute of this State confers an unconditional right to intervene; or (2) the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant is or may be bound by judgment in the action. Intervention may be permitted in other cases in the discretion of the Intermediate Court or the Supreme Court. A party to the case may respond to a motion to intervene within ten days of the date the motion was filed.

There are some cases reviewing an intermediate appellate court's ruling denying a motion to intervene in Wisconsin, but they do not cite a rule about that process. Utah's "caselaw and rules of appellate procedure make clear that a person may only petition for certiorari after the court of appeals issues a final decision." *F.L.*, 2022 UT 32, ¶ 20.

We could continue to handle intervention as a limited-purpose party on appeal through case law and petitions for extraordinary relief. Or we could craft a rule specific to crime victims requesting to file briefs as limited-purpose parties. The rule could include a right to appeal the denial of a motion to intervene if the committee concludes that such a right can be created by rule. After *F.L.*, the court of appeals is unlikely to deny a motion to intervene in similar circumstances. And although the Supreme Court was concerned that our rules are not protective enough, that Court retains discretion to grant petitions for extraordinary relief on the issue of intervention on appeal.

Rule 506. Physician and Mental Health Therapist-Patient.

(a) Definitions.

(a)(1) "Patient" means a person who consults or is examined or interviewed by a physician or mental health therapist.

(a)(2) "Physician" means a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state.

(a)(3) "Mental health therapist" means a person who

(a)(3)(A) is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor; and

(a)(3)(B) is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction.

(b) Statement of the Privilege. A patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing information that is communicated in confidence to a physician or mental health therapist for the purpose of diagnosing or treating the patient. The privilege applies to:

(b)(1) diagnoses made, treatment provided, or advice given by a physician or mental health therapist;

(b)(2) information obtained by examination of the patient; and

(b)(3) information transmitted among a patient, a physician or mental health therapist, and other persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist. Such other persons include guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician or mental health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.

(d) Exceptions. No privilege exists under paragraph (b) in the following circumstances:

(d)(1) Condition as Element of Claim or Defense. For communications relevant to an issue of the physical, mental, or emotional condition of the patient:

(d)(1)(A) in any proceeding in which that condition is an element of any claim or defense, or

(d)(1)(B) after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense;

~~(d)(2)~~ **Necessary to a Criminal Case.** If a party shows by the preponderance of the evidence that ~~a~~the communication is necessary to a fair determination of guilt or innocence and the communication: ~~it appears from the evidence in the case, or from another showing of extrinsic evidence by a party, that the preponderance of the evidence shows the communication is necessary to a fair determination of guilt or innocence and: . A party claiming an exception under this paragraph has the burden of establishing with extrinsic evidence, to a preponderance of the evidence, that the communication the com~~

(d)(2)(A) contains a recantation or material inconsistency;

(d)(2)(B) shows that the accusation was the product of suggestion or undue influence;

(d)(2)(C) relates to the reliability of the method or means by which the communication was disclosed; or

(d)(2)(D) is ~~otherwise~~ necessary to protect a criminal defendant's constitutional rights.

(d)~~(2)~~ (3)Hospitalization for Mental Illness. For communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization; and

(d)~~(3)~~(4) Court Ordered Examination. For communications made in the course of, and pertinent to the purpose of, a court-ordered examination of the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise.

(e) Effect of Claiming any Exception in a Criminal Proceeding. The following provisions apply only in criminal cases and only if a party is claiming an exception under paragraphs (d)(1) or (d)(2).

Formatted: Not Highlight

Formatted: Strikethrough

Formatted: Strikethrough

(e)(1) If the party claiming any exception makes the required showing, the court shall conduct an in-camera review of the communications and shall release to the parties any communication to which the exception applies.

(e)(2) If the party claiming the exception makes the required showing and the court has not released all communications that were subject to the in-camera review, upon motion of a party based on changed circumstances, the court shall conduct further in-camera review of the communications to re-examine the applicability of an exception and to release any additional communication to which the exception applies.

(e)(3) All communications submitted to the court for in-camera review and that are not otherwise released under an exception shall be sealed and made part of the record. If an appeal is taken, the sealed records will be transmitted to the appellate court as part of the record on appeal. However, the sealed records will be made available to the parties on appeal only upon a motion showing that the sealed records are necessary to the appeal.

Formatted: Highlight

Formatted: Highlight

(f) Reasonable Orders and Procedures. The court may make reasonable orders regarding the procedure to be followed when a party claims an exception.

2021 Advisory Committee Note. The language of this rule has been amended in light of the Utah Supreme Court's decision in *State v. Bell*, 2020 UT 38, 469 P.3d 929. There, the Court noted "that Mr. Bell raise[d] important constitutional and policy concerns regarding a criminal defendant's access to records that may contain exculpatory evidence[,]" and referred the rule to its advisory committee for review. *Id.* ¶ 1. Specifically, the court directed the committee "to consider the importance of": (1) "maintaining a strong privilege rule"; (2) "more clearly defining what is required to qualify for exceptions to the privilege"; and (3) "respecting a criminal defendant's constitutional rights." *Id.* The amendments contained in subsections (d)(2) and (e) are intended to address the court's directive. Further, the amendment in subsection (d)(2) is not intended to change the longstanding requirement that "some type of extrinsic indication" is necessary to show the exception applies. *See State v. Worthen*, 2009 UT 79, ¶ 38. ~~, so long as a party demonstrates with extrinsic evidence, by a preponderance of the evidence, yada yada yada~~ Finally, the amendments do not limit the availability of this rule's other exceptions in criminal proceedings. Communications released to the parties may qualify as private records and be subject to Rules 4-202.02 and 4-202.03 of the Utah Rules of Judicial Administration.

2011 Advisory Committee Note. The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make class and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Original Advisory Committee Note. Rule 506 is modeled after Rule 503 of the Uniform Rules of Evidence, and is intended to supersede Utah Code §§ 78-24-8(4) and 58-25a-8. There is no corresponding federal rule. By virtue of Rule 501, marriage and family therapists are not covered by this Rule.

The differences between existing Utah Code § 78-24-8 and Rule 506 are as follows:

(1) Rule 506 specifically applies to psychotherapists and licensed psychologists, it being the opinion of the Committee that full disclosure of information by a patient in those settings is as critical as and as much to be encouraged as in the "physician" patient setting. The Utah Supreme Court requested that Rule 506 further apply to licensed clinical social workers. To meet this request, the Committee included such individuals within the definition of psychotherapists. Under Utah Code § 58-35-2(5), the practice of clinical social work "means the application of an established body of knowledge and professional skills in the practice of psychotherapy. . . ." Section 58-35-6 provides that "[n]o person may engage in the practice of clinical social work unless that person: (1) is licensed under this chapter as a certified social worker," has the requisite experience, and has passed an examination. Section 58-35-8(4) refers to licenses and certificates for "clinical social worker[s]." As a result of including clinical social workers, Rule 506 is intended to supplant Utah Code § 58-35-10 in total for all social workers.

(2) Rule 506 applies to both civil and criminal cases, whereas Utah Code § 78-24-8 applies only to civil cases. The Committee was of the opinion that the considerations supporting the privilege apply in both.

(3) In the Committee's original recommendation to the Utah Supreme Court, the proposed Rule 506 granted protection only to confidential communications, but did not extend the privilege to observations made, diagnosis or treatment by the physician/psychotherapist. The Committee was of the opinion that while the traditional protection of the privilege should extend to confidential communications, as is the case in other traditional privileges, the interests of society in discovering the truth during the trial process outweigh any countervailing interests in extending the protection to observations made, diagnosis or treatment. However, the Supreme Court requested that the scope of the privilege be broadened to include information obtained by the physician or psychotherapist in the course of

diagnosis or treatment, whether obtained verbally from the patient or through the physician's or psychotherapist's observation or examination of the patient. The Court further requested that the privilege extend to diagnosis, treatment, and advice. To meet these requests, the Committee relied in part on language from the California evidentiary privileges involving physicians and psychotherapists. See Cal. Evid. Code §§ 992 and 1012. These features of the rule appear in subparagraphs (a)(4) and (b). The Committee also relied on language from Uniform Rule of Evidence 503.

Upon the death of the patient, the privilege ceases to exist.

The privilege extends to communications to the physician or psychotherapist from other persons who are acting in the interest of the patient, such as family members or others who may be consulted for information needed to help the patient.

The privilege includes those who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist. For example, a certified social worker practicing under the supervision of a clinical social worker would be included. See Utah Code § 58-35-6.

The patient is entitled not only to refuse to disclose the confidential communication, but also to prevent disclosure by the physician or psychotherapist or others who were properly involved or others who overheard, without the knowledge of the patient, the confidential communication. Problems of waiver are dealt with by Rule 507.

The Committee felt that exceptions to the privilege should be specifically enumerated, and further endorsed the concept that in the area of exceptions, the rule should simply state that no privilege existed, rather than expressing the exception in terms of a "waiver" of the privilege. The Committee wanted to avoid any possible clashes with the common law concepts of "waiver."

The Committee did not intend this rule to limit or conflict with the health care data statutes listed in the Committee Note to Rule 501.

Rule 506 is not intended to override the child abuse reporting requirements contained in Utah Code § 62A-4-501 et seq.

The 1994 amendment to Rule 506 was primarily in response to legislation enacted during the 1994 Legislative General Session that changed the licensure requirements for certain mental health professionals. The rule now covers communications with additional licensed professionals who are engaged in treatment and diagnosis of mental or emotional conditions, specifically certified social workers, marriage and family therapists, specially designated advanced practice registered nurses and professional counselors.

Some mental health therapists use the term "client" rather than "patient," but for simplicity this rule uses only "patient."

The committee also combined the definition of confidential communication and the general rule section, but no particular substantive change was intended by the reorganization.

Rule 11. The record on appeal.

(a) **Composition of the record on appeal**. The record on appeal consists of the documents and exhibits filed in or considered by the trial court, including the presentence report in criminal matters, and the transcript of proceedings, if any. Privileged papers in a criminal case that are sealed by court order will be made available to the parties on appeal only upon a motion showing that the sealed records are necessary to the appeal. (b) **Preparing, paginating, and indexing the record**.

(1) Preparing the record. On the appellate court's request, the trial court clerk will prepare the record in the following order:

(A) all original documents in chronological order;

(B) all published depositions in chronological order;

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

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

(E) in criminal cases, the presentence investigation report.

(2) Pagination.

(A) Using Bates numbering, the entire record must be paginated.

(B) If the appellate court requests a supplemental record, the same procedures as in (b)(2)(A) apply, continuing Bates numbering from the last page number of the original record.

(3) Index. A chronological index of the record must accompany the record on appeal. The index must identify the date of filing and starting page of the document, deposition, or transcript.

(4) Examining the record. Appellate court clerks will establish rules and procedures for parties to check out the record after pagination.

(c) **The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered**.

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

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

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

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

necessary fully to present the issues raised by the appeal, will be approved by the trial court. The trial court clerk will transmit the statement to the appellate court clerk within the time prescribed by Rule 12(b)(2). The trial court clerk will transmit the record to the appellate court clerk on the trial court's approval of the statement.

(e) **Statement of evidence or proceedings when no report was made or when transcript is unavailable**. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, or if the appellant is impecunious and unable to afford a transcript in a civil case, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement must be served on the appellee, who may serve objections or propose amendments within 14 days after service. The statement and any objections or proposed amendments must be submitted to the trial court for resolution, and the trial court clerk will conform the record to the trial court's resolution.

(f) Supplementing or **modifying the record.**

(1) If any dispute arises as to whether the record is complete and accurate, the dispute may be submitted to and resolved by the trial court. The trial court will ensure that the record accurately reflects the proceedings before the trial court, including by entering any necessary findings to resolve the dispute.

(2) If anything material to either party is omitted from or misstated in the record by error of the trial court or court personnel, by accident, or because the appellant did not order a transcript of proceedings that the appellee needs to respond to issues raised in the appellant's brief, the omission or misstatement may be corrected and a supplemental record may be created and forwarded:

(A) on stipulation of the parties;

(B) by the trial court before or after the record has been forwarded; or

(C) by the appellate court on a motion from a party.

(3) The moving party, or the court if it is acting on its own initiative, must serve on the parties a statement of the proposed changes. Within 14 days after service, any party may serve objections to the proposed changes.

Effective November 1, 2022

Tab 6

Appellate Court Board

Nicholas Stiles
Appellate Court Administrator

450 South State Street
Salt Lake City, Utah 84114-0230
Telephone: (801) 578-3834
Email: nicks@utcourts.gov

To: Chris Ballard, Chair, Advisory Committee on the Rules of Appellate Procedure
From: Nick Stiles, Appellate Court Administrator
Re: Disqualification of Appellate Judges

Chris –

A member of the Court of Appeals recently brought this issue before all of our appellate judges. We do not currently have a rule regarding how a party may move for an appellate judge to be disqualified, recused, or be determined to be constitutionally or statutorily incompetent.

I have provided a draft version of a Utah rule. I have also provided two examples of other jurisdictions' relevant rules. One question in addition to the drafting considerations, is where within our appellate rules would be most appropriate for this new rule to be located.

Thanks!

Respectfully,

Nick Stiles

Attached:
Tab 1 Draft Utah Rule
Tab 2 Example Nevada Rule
Tab 3 Example Tennessee Rule

TAB 1

Potential Utah Rule

Rule XX - Disqualification of a Justice or Judge

(a) **Motion for Disqualification.** A request that a justice or judge of the Supreme Court or Court of Appeals be disqualified from sitting in a particular case shall be made by motion. Unless the court permits otherwise, the motion shall be in writing and shall be in the form required by Rule 23.

(1) Time to File. A motion to disqualify a justice or judge shall be filed with the clerk of the appropriate court within 60 days after filing of the notice of appeal under Rule 4, together with proof of service on all other parties. Except for good cause shown, the failure to file a timely motion to disqualify shall be deemed a waiver of the moving party's right to object to a justice's or judge's participation in a case.

(2) Contents of a Motion.

(A) Grounds, Supporting Facts, and Legal Authorities. A motion shall state clearly and concisely in separately numbered paragraphs each ground relied upon as a basis for disqualification with the specific facts alleged in support thereof and the legal argument, including citations to relevant cases, statutes or rules, necessary to support it.

(B) Verification. All assertions of fact in a motion must be supported by proper sworn averments in an affidavit or by citations to the specific page and line where support appears in the record of the case.

(i) A verification by affidavit shall be served and filed with the motion.

(ii) The affidavit shall be made upon personal knowledge by a person or persons affirmatively shown competent to testify and shall set forth only those facts that would be admissible in evidence.

(iii) The affidavit shall set forth the date or dates when the moving party first became aware of the facts set forth in the motion.

(C) Attorney's Certificate. A motion under this Rule filed by a party represented by counsel shall contain a certificate signed by at least 1 attorney of record who is an active member of the bar of this state. The certificate must contain the following information:

(i) A representation that the signing attorney has read the motion and supporting documents;

(ii) A representation that the motion and supporting documents are in the form required by this Rule; and

(iii) A representation that, based on personal investigation, the signing attorney believes all grounds asserted to be legally valid and all supporting factual allegations to be true, and that the motion is made in good faith and not for purposes of delay or for other improper motive.

(D) Striking a Motion Without an Attorney's Certificate. If a motion does not contain the certification required by Rule XX(a)(2)(C) it shall be stricken unless such a certification is provided within 14 days after the omission is called to the attorney's attention.

(b) Response.

(1) By a Party. Any party may file a response to a motion to disqualify a justice or judge. The response shall be filed within 14 days after service of the motion unless the court shortens or extends the time.

(2) By the Justice or Judge. The challenged justice or judge may submit a response to the motion in writing or orally at any hearing that may be ordered by the court.

(c) Reply. A reply may not be filed unless permission is first obtained from the court.

(d) Order. The judge in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion. If the judge denies the motion, the movant, within 21 days of entry of the order, may file a motion for court review to be determined promptly by three other judges of the intermediate court upon a de novo standard of review.

(e) Motion concerning more than one judge. If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of more than one judge of the intermediate appellate court ("recusal motion"), and if the recusal motion is denied by the judges in question, the movant, within twenty-one days of entry of the order, may file a motion for court review to be determined promptly by three other judges of the intermediate appellate court who were not subjects of the recusal motion, upon a de novo standard of review. If there are not three judges of the intermediate appellate court who were not subjects of the recusal motion, then a motion for court review is not available; under such circumstances, the order denying the recusal motion may be appealed pursuant to Rule XX(f).

(f) Review unavailable or denied. If the motion for court review is denied, or if a motion for court review is not available pursuant to the third sentence of Rule XX(e), an accelerated appeal as of right lies to the Utah Supreme Court, which shall expeditiously decide the appeal based upon the petition and other papers filed in the intermediate appellate court. The appeal to the Supreme Court shall be titled "recusal appeal from the Court of Appeals" and shall be filed within 21 days of the intermediate appellate court's order denying the motion for court review or, if a motion for court review was not available pursuant to the third sentence of Rule XX(e), within 21 days of the order denying the motion seeking disqualification or recusal of the appellate judges in question.

(g) Supreme Court justices. If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of a Supreme Court justice, the justice in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the justice shall state in writing the grounds upon which he or she denies the motion. If the justice denies the motion, the movant, within 21 days of entry of the order, may file a motion for court review, which shall be determined promptly by the remaining justices upon a de novo standard of review.

Potential Utah Rule

(h) If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of all of the justices of the Supreme Court, and if the motion is denied by the justices, no motion for further review is available.

TAB 2

Nevada Example

Rule 35 - Disqualification of a Justice or Judge

(a) Motion for Disqualification. A request that a justice or judge of the Supreme Court or Court of Appeals be disqualified from sitting in a particular case shall be made by motion. Unless the court permits otherwise, the motion shall be in writing and shall be in the form required by Rule 27.

(1) Time to File. A motion to disqualify a justice or judge shall be filed with the clerk of the Supreme Court within 60 days after docketing of the appeal under Rule 12, together with proof of service on all other parties. Except for good cause shown, the failure to file a timely motion to disqualify shall be deemed a waiver of the moving party's right to object to a justice's or judge's participation in a case.

(2) Contents of a Motion.

(A) Grounds, Supporting Facts, and Legal Authorities. A motion shall state clearly and concisely in separately numbered paragraphs each ground relied upon as a basis for disqualification with the specific facts alleged in support thereof and the legal argument, including citations to relevant cases, statutes or rules, necessary to support it.

(B) Verification. All assertions of fact in a motion must be supported by proper sworn averments in an affidavit or by citations to the specific page and line where support appears in the record of the case.

(i) A verification by affidavit shall be served and filed with the motion.

(ii) The affidavit shall be made upon personal knowledge by a person or persons affirmatively shown competent to testify and shall set forth only those facts that would be admissible in evidence.

(iii) The affidavit shall set forth the date or dates when the moving party first became aware of the facts set forth in the motion.

(C) Attorney's Certificate. A motion under this Rule filed by a party represented by counsel shall contain a certificate signed by at least 1 attorney of record who is an active member of the bar of this state. The certificate must contain the following information:

(i) A representation that the signing attorney has read the motion and supporting documents;

(ii) A representation that the motion and supporting documents are in the form required by this Rule; and

(iii) A representation that, based on personal investigation, the signing attorney believes all grounds asserted to be legally valid and all supporting factual allegations to be true, and that the motion is made in good faith and not for purposes of delay or for other improper motive.

(D) Striking a Motion Without an Attorney's Certificate. If a motion does not contain the certification required by Rule 35(a)(2)(C). it shall be stricken unless such a certification is provided within 14 days after the omission is called to the attorney's attention.

(b) Response.

Nevada Example

(1) By a Party. Any party may file a response to a motion to disqualify a justice or judge. The response shall be filed within 14 days after service of the motion unless the court shortens or extends the time.

(2) By the Justice or Judge. The challenged justice or judge may submit a response to the motion in writing or orally at any hearing that may be ordered by the court.

(c) Reply. A reply may not be filed unless permission is first obtained from the court.

Nev. R. App. P. 35

TAB 3

Tennessee Example – Not in their Rules of App Procedure, but in their Supreme Court Rules

Section 3 - Motion Seeking Disqualification or Recusal of Appellate Judge or Justice

3.01. Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge or justice of an appellate court shall do so by a timely filed written motion. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials; the motion shall state, with specificity, all factual and legal grounds supporting disqualification of the judge or justice and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party who is represented by counsel is not permitted to file a pro se motion under this rule.

3.02.(a) Upon the filing of a motion seeking disqualification, recusal, or determination of constitutional or statutory incompetence of an intermediate appellate judge, the judge in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion. If the judge denies the motion, the movant, within twenty-one days of entry of the order, may file a motion for court review to be determined promptly by three other judges of the intermediate court upon a de novo standard of review.
(b) If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of more than one judge of the intermediate appellate court ("recusal motion"), and if the recusal motion is denied by the judges in question, the movant, within twenty-one days of entry of the order, may file a motion for court review to be determined promptly by three other judges of the intermediate appellate court who were not subjects of the recusal motion, upon a de novo standard of review. If there are not three judges of the intermediate appellate court who were not subjects of the recusal motion, then a motion for court review pursuant to this section 3.02(b) is not available; under such circumstances, the order denying the recusal motion may be appealed pursuant to section 3.02(c).**(c)** If the motion for court review is denied, or if a motion for court review is not available pursuant to the second sentence of section 3.02(b), an accelerated appeal as of right lies to the Tennessee Supreme Court, which shall expeditiously decide the appeal based upon the petition and other papers filed in the intermediate appellate court. The appeal to the Supreme Court shall be titled "recusal appeal from the [Court of Appeals or Court of Criminal Appeals]" and shall be filed within twenty-one days of the intermediate appellate court's order denying the motion for court review or, if a motion for court review was not available pursuant to the second sentence of section 3.02(b), within twenty-one days of the order denying the motion seeking disqualification or recusal of the appellate judges in question.

3.03.(a) If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of a Supreme Court justice, the justice in question shall act promptly by written order and either grant or deny the motion. If the motion is denied, the justice shall state in writing the grounds upon which he or she denies the motion. If the justice denies the motion, the movant, within twenty-one days of entry of the order, may file a motion for court review, which shall be determined promptly by the remaining justices upon a de novo standard of review.
(b) If a motion is filed seeking disqualification, recusal, or determination of constitutional or statutory incompetence of all of the justices of the Supreme Court, and if the motion is denied by the justices, no motion for court review shall be available pursuant to section 3.03(a).

Tennessee Example – Not in their Rules of App Procedure, but in their Supreme Court Rules

3.04. The time periods for filing a motion for court review pursuant to sections 3.02(a), 3.02(b), or 3.03(a) and for filing a "recusal appeal from the [Court of Appeals or Court of Criminal Appeals]" pursuant to section 3.02(c) are jurisdictional and cannot be extended by the court. The computation of time for filing the foregoing matters under section 3 shall be governed by Tenn. R. App. P. 21(a).