

AGENDA

Standing Committee on Appellate Representation

June 27, 2018
12:00p.m. to 2:00 p.m.
Scott M Matheson Courthouse
450 State Street
Judicial Council Room
3rd Floor AOC Office

1. **Welcome:** Judge Linda Jones, Chair **TAB A**
2. **Review of Committee Duties:** Judge Linda Jones, **TAB B**
 - a. Establish staggered terms for committee members
 - b. Joanna Landau, Utah Indigent Defense Council
 - c. 10th Circuit Court experiences with Appellate Roster, Judge Jones
3. **Discussion of Rule 11-401** **TAB C**
 - a. Need for Coordination with URAP 38B, 55(b), and URCrP 8
 - b. Develop due process/appeal for inclusion or exclusion from roster
 - c. Establish policy re serving on committee and applying for inclusion on the roster
 - d. Should term on roster be longer than 2 years?
4. **Discussion: Soliciting Appellate Resumes**
Notice to the State Bar, timing, content
5. **Schedule Meetings**
Please bring your calendars for the summer

Tab A

Membership

Standing Committee on Appellate Representation

Chair, Judge Linda Jones

Margaret Lindsay, Asst. Director Juvenile Appeals Division, Utah County Public Defender Assoc.

Monica Maio, Utah Juvenile Defender Attorneys

Alan S. Mouritsen, Parsons Behle & Latimer, Civil Appellate Practice

Debra M. Nelson, Appellate Attorney, Salt Lake Legal Defender Association

John Nielsen, Criminal Appeals Division of Utah Attorneys General Office

Nancy Sylvester, Office of General Counsel of Administrative Office of Courts

Ann Marie Taliaferro, Brown Bradshaw & Moffat, Criminal Defense and Appellate Practice

Fred Voros, Former Court of Appeals Judge

Tab B

Rule 11-401. Standing Committee on Appellate Representation

Intent:

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

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

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

Applicability:

This rule shall apply to the internal operation of the Board of Appellate Court Judges and the Committee on Appellate Representation and to district and appellate courts in indigent criminal cases, juvenile delinquency, and child welfare proceedings.

Statement of the Rule:

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

(1)(A) *Composition.* The Committee shall consist of one member of the Office of General Counsel of the Administrative Office of the Courts; one member from the Criminal Appeals Division of the Utah Attorney General's Office; one active or retired trial court judge from either a District or Juvenile court in the state; one active or retired appellate court judge; one private civil appellate attorney; two criminal defense appellate attorneys: at least one of whom is currently practicing in the area of indigent criminal appeals in a legal defender's office, as defined by Utah Code § 77-32-201 (11); one attorney practicing in the area of juvenile delinquency defense appeals; and one attorney practicing in the area of child welfare defense appeals.

(1)(B) *Appointment.* Committee members shall be appointed by the Supreme Court and shall serve staggered four-year terms. The Supreme Court shall select a chair from among the Committee's members. Judges who serve as members of the Committee generally shall not be selected as chair. Committee members shall serve as officers of the

court and not as representatives of any client, employer, or other organization or interest group. At the first meeting of the Committee in any calendar year, and at every meeting at which a new member of the Committee first attends, each Committee member shall briefly disclose the general nature of his or her legal practice.

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

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

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

(2) *Appellate Roster*. The Board of Appellate Judges shall create and maintain an appellate roster of attorneys skilled in handling criminal, juvenile delinquency, and abuse, neglect and dependency appeals.

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

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

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

- (i) comply with the requirements of rule 38B of the Utah Rules of Appellate Procedure, sections (b) through (e);
- (ii) be a member of the Utah Bar in good standing;
- (iii) submit at least two appellate briefs to the Committee with a certification that the applicant was substantially responsible for drafting the briefs;
- (iv) demonstrate knowledge of appellate practice as shown by experience, training, or legal education;

(v) provide citations for all appellate decisions in which the applicant was counsel of record; and

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

(2)(D) *Roster Selection*. The Board of Appellate Court Judges shall approve or disapprove the recommendations of the Committee with respect to attorneys to be included on the appellate roster. The Board may also at any time remove an attorney from the appellate roster based on an attorney's qualifications, skills, experience, and prior performance in the Utah appellate courts. The Board may not add to the roster an attorney who was not recommended by the Committee.

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

(2)(F) *Retention*. To maintain eligibility, an attorney must be recommended by the Committee and reappointed by the Board of Appellate Court Judges every two years. An attorney desiring to maintain eligibility shall submit a renewal request to the Committee by January 1 of the year in which the attorney reports his or her MCLE compliance to the Utah State Bar; provided, however, that the first such request shall not be due earlier than the first January 1 at least two years after the date on which the attorney originally qualified to be on the roster. The renewal request shall include the following:

- (i) a certification that the attorney is a member of the Utah Bar in good standing;
- (ii) a certification that the attorney has not, within the preceding three years, been the subject of an order issued by either appellate court imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before either appellate court;

- (iii) a showing that the attorney has maintained competence in appellate practice, which showing may be achieved by:

- (a) submitting two appellate briefs filed with appellate courts during the previous two years, together with a certification that the attorney was substantially responsible for drafting the briefs;

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

- (c) an equivalent demonstration of continued competence.

(2)(G) *Exemption.* Notwithstanding any other provision of this rule, any attorney currently employed in a county or other regional “Legal defender’s office” (under Utah Code § 77-32-201 (12)), to provide court-appointed representation and defense resources on appeal, shall be independently eligible for appointment to represent indigent parties on appeal.

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

(3) *Annual Schedule.* The Committee shall meet at least annually and shall submit its recommendations to the Board of Appellate Court Judges by February 1 of each year. The Board of Appellate Court Judges shall at its next meeting thereafter approve or disapprove the recommendations of the Committee with respect to attorneys to be included on the appellate roster.

Effective May 1, 2018

Tab C

Rule 38B. Qualifications for Appointed Appellate Counsel.

- (a) In all appeals where a party is entitled to appointed counsel, only an attorney proficient in appellate practice may be appointed to represent such a party before either the Utah Supreme Court or the Utah Court of Appeals.
- (b) The burden of establishing proficiency shall be on counsel. Acceptance of the appointment constitutes certification by counsel that counsel is eligible for appointment in accordance with this rule.
- (c) Counsel is presumed proficient in appellate practice if any of the following conditions are satisfied:
- (c)(1) Counsel has briefed the merits in at least three appeals within the past three years or in 12 appeals total; or
- (c)(2) Counsel is directly supervised by an attorney qualified under subsection (c)(1); or
- (c)(3) Counsel has completed the equivalent of 12 months of full time employment, either as an attorney or as a law student, in an appellate practice setting, which may include but is not limited to appellate judicial clerkships, appellate clerkships with the Utah Attorney General's Office, or appellate clerkships with a legal services agency that represents indigent parties on appeal; and during that employment counsel had significant personal involvement in researching legal issues, preparing appellate briefs or appellate opinions, and experience with the Utah Rules of Appellate Procedure.
- (d) Counsel who do not qualify for appointment under the presumptions described above in subsection (c) may nonetheless be appointed to represent a party on appeal if the appointing court concludes there is a compelling reason to appoint counsel to represent the party and further concludes that counsel is capable of litigating the appeal. The appointing court shall make findings on the record in support of its determination to appoint counsel under this subsection.
- (e) Notwithstanding counsel's apparent eligibility for appointment under subsection (c) or (d) above, counsel may not be appointed to represent a party before the Utah Supreme Court or the Utah Court of Appeals if, during the three-year period immediately preceding counsel's proposed appointment, counsel was the subject of an order issued by either appellate court imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before either appellate court.
- (f) The fact that appointed counsel does not meet the requirements of this rule shall not establish a claim of ineffective assistance of counsel.

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

Rule 55. Petition on appeal.

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

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

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

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

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

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

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

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

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

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

- (d)(7) The petition on appeal must have attached to it:
- (d)(7)(A) a copy of the order, judgment, or decree on appeal;
 - (d)(7)(B) a copy of any rulings on post-judgment motions.

Effective May 1, 2018

Rule 8. Appointment of counsel.

(a) A defendant charged with a public offense has the right to self representation, and if indigent, has the right to court-appointed counsel if the defendant faces a substantial probability of deprivation of liberty.

(b) In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court shall appoint two or more attorneys to represent such defendant and shall make a finding on the record based on the requirements set forth below that appointed counsel is proficient in the trial of capital cases. In making its determination, the court shall ensure that the experience of counsel who are under consideration for appointment have met the following minimum requirements:

(b)(1) at least one of the appointed attorneys must have tried to verdict six felony cases within the past four years or twenty-five felony cases total;

(b)(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a capital or a felony homicide case which was tried to a jury and which went to final verdict;

(b)(3) at least one of the appointed attorneys must have completed or taught within the past five years an approved continuing legal education course or courses at least eight hours of which deal, in substantial part, with the trial of death penalty cases; and

(b)(4) the experience of one of the appointed attorneys must total not less than five years in the active practice of law.

(c) In making its selection of attorneys for appointment in a capital case, the court should also consider at least the following factors:

(c)(1) whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case;

(c)(2) the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant;

(c)(3) the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years;

(c)(4) the diligence, competency and ability of the attorneys being considered; and

(c)(5) any other factor which may be relevant to a determination that counsel to be appointed will fairly, efficiently and effectively provide representation to the defendant.

(d) In all cases where an indigent defendant is sentenced to death, the court shall appoint one or more attorneys to represent such defendant on appeal and shall make a finding that counsel is proficient in the appeal of capital cases. To be found proficient to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:

(d)(1) at least one attorney must have served as counsel in at least three felony appeals; and

(d)(2) at least one attorney must have attended and completed within the past five years an approved continuing legal education course which deals, in substantial part, with the trial or appeal of death penalty cases.

(e) In all cases in which counsel is appointed to represent an indigent petitioner pursuant to Utah Code Ann. Section 78B-9-202(2)(a), the court shall appoint one or more attorneys to represent such petitioner at post-conviction trial and on post-conviction appeal and shall make a finding that counsel is qualified to represent persons sentenced to death in post-conviction cases. To be found qualified, the combined experience of the appointed attorneys must meet the following requirements:

(e)(1) at least one of the appointed attorneys must have served as counsel in at least three felony or post-conviction appeals;

(e)(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise demonstrated proficiency in the area of post-conviction litigation;

(e)(3) at least one of the appointed attorneys must have attended and completed or taught within the past five years an approved continuing legal education course which dealt, in substantial part, with the trial and appeal of death penalty cases or with the prosecution or defense of post-conviction proceedings in death penalty cases;

(e)(4) at least one of the appointed attorneys must have tried to judgment or verdict three civil jury or felony cases within the past four years or ten cases total; and

(e)(5) the experience of at least one of the appointed attorneys must total not less than five years in the active practice of law.

(f) Mere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal.

(g) Cost and attorneys' fees for appointed counsel shall be paid as described in Chapter 32 of Title 77.

(h) Costs and attorneys fees for post-conviction counsel shall be paid pursuant to Utah Code Ann. Section 78B-9-202(2)(a).