

REVISED AGENDA

Standing Committee on Appellate Representation

January 7, 2019

4:00 p.m. to 5:30 p.m.

Scott M Matheson Courthouse

Executive Dining Room W18A

1. **Welcome and Approval of Minutes** **TAB A**
(Judge Linda Jones)
2. **Report from Rule 11-401 Subcommittee** **TAB B**
(Nancy Sylvester)(Approve proposed amendments)
3. **Discussion about posting the Roster and notice
To the Courts**
(Joanna Landau)
4. **Discussion of frequently asked questions.** **TAB C**
5. **Discussion about implementing Rolling admissions
And next steps**
(Judge Linda Jones)
5. **Other Business**

Tab A

**SUPREME COURT'S STANDING COMMITTEE
ON APPELLATE REPRESENTATION**

**Minutes
November 20, 2018
Executive Dining Room
Matheson Courthouse
450 S. State St.
Salt Lake City, Utah 84111
8:00 a.m. –2:00 p.m.**

Honorable Linda Jones, Presiding

Attendees:

Judge Linda Jones, Chair
Margaret Lindsay
Monica Maio
Alan Mourietsen
Debra Nelson
John Nielsen
Nancy Sylvester (via phone)
Ann Marie Taliaferro
Fred Voros

Staff:

Cathy Dupont, Staff

1. Welcome and Adoption of Minutes (Judge Linda Jones)

Judge Linda Jones welcomed the members to the meeting.

2. Review of applicants to the Appellate Rosters.

The committee reviewed the applications for the Appellate Rosters, and for each applicant, voted whether to include the applicant on the Appellate Roster for Criminal Appeals, the Appellate Roster for Juvenile Delinquency Appeals, or the Appellate Roster for Child Welfare Appeals. The committee also approved the letter templates for informing applicants of the committee's decision.

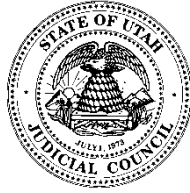
5. Other Business

There was no other business discussed.

6. Adjourn

The meeting adjourned at 2:00 p.m.

Tab B



Administrative Office of the Courts

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

MEMORANDUM

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

To: Appellate Representation Committee
From: Nancy Sylvester on behalf of the Rules Subcommittee
Date: December 12, 2018
Re: Amendments to CJA11-401, URAP001, URAP058 and Repeal of URAP038B

The Rules Subcommittee of the Appellate Representation Committee met today to discuss the following topics:

- Merging the provisions of Appellate Rule 38B into CJA Rule 11-401;
- Mentoring when required for maintaining roster eligibility;
- Rolling admissions;
- Addressing the tension between Rule 55 and the child welfare appellate roster (i.e. trial counsel being the same as appellate counsel for purposes of the petition; concerns about trial counsel's inability to raise ineffective assistance of counsel); and
- Addressing appeals of private parental termination cases from the district court.

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

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

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

There were several provisions that the Subcommittee did not bring over. For example, paragraphs (a) and (b) of Rule 38B are redundant to 11-401 as currently written. The Subcommittee did not feel the need to add any more to the new rule. The Subcommittee also elected not to bring over paragraph 38B(d) (appointing irrespective of requirements) because Criminal Rule 8(f) now deals with it. Regarding Rule 38B(f) (ineffective assistance of counsel), the subcommittee thought this was irrelevant. The paragraph is more of a truism and will depend on the facts of any individual case. Finally, the Rules Subcommittee did not bring over paragraph (c)(3) from Rule 38B, but

**The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.**

would like the Committee's opinion on whether it should.¹ The Committee has placed this language in the application.

Mentoring when required for maintaining roster eligibility

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

- (2)(E) Mentoring. If an attorney is selected for the roster on the condition that they have a mentor, then they must select a mentor in their practice area who meets the qualifications set forth in this rule at paragraph (2)(C). An attorney subject to the mentoring requirement shall certify in each brief the attorney files on behalf of an indigent party that the attorney was directly supervised in drafting the brief by another attorney who is qualified under this rule.

Notably, a mentoring attorney does not have to be a roster appointee. An attorney who could otherwise qualify for the roster in the mentee's practice area is qualified to be a mentor for that attorney. The reasoning for this is that a well-qualified attorney may be simply uninterested in providing indigent representation. Regarding maintaining a list of mentoring attorneys, the Subcommittee thought that one solution to that issue was that the members of the full Committee in each practice area could either act as mentors or refer a roster member to a list of qualified attorneys.

Rolling admissions

The Subcommittee examined Rule 11-401 with an eye toward allowing rolling admissions, if necessary. The Subcommittee felt that although the rule did not explicitly state that it was permitted, the language, "The Committee shall meet at least annually and shall submit its recommendations to the Board of Appellate Court Judges by October 15 of each year," provided the discretion the Committee needed for rolling admissions. Nonetheless, the Subcommittee also added the following:

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

- “If the Committee in its discretion determines that additional recommendations should be submitted to the Board of Appellate Court Judges, the Committee may do so at any time.”

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

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

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

Addressing appeals of private parental termination cases from the district court

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

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

appeals, Rule 10(a)(2)(A) does not apply. Other appellate rules apply if not inconsistent with Rules 52 through 59.

Rule 11-401. Standing Committee on Appellate Representation**Intent:**

To establish a standing Committee 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~~ of record in indigent criminal cases, juvenile delinquency, and child welfare proceedings as defined by Rule 1(f) of the Utah Rules of Appellate Procedure.

Statement of the Rule:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2)(C)(iv) submit an Appellate Rule 55 petition if the person is applying to be on the roster for appeals from abuse, neglect, and dependency proceedings;

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

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

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

(2)(C)(vii) 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; and

(2)(C)(viii) not have been removed from the appellate roster, or have been denied admission to the appellate roster within the past year.

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

(2)(E) **Mentoring.** If an attorney is selected for the roster on the condition that they have a mentor, then they must select a mentor in their practice area who meets the qualifications set forth in this rule at paragraph (2)(C). The attorney subject to the mentoring requirement shall certify in each brief the attorney files on behalf of an indigent party that the attorney was directly supervised in drafting the brief by an attorney qualified under this rule.

(2)(FE) Removal. 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 any Utah~~ appellate courts, or an attorney's failure to maintain eligibility under paragraph (2)(G). ~~The Board may not add to the roster an attorney who was not recommended by the Committee.~~

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

(2)(FHG)(i) a certification that the attorney is a member of the Utah Bar in good standing;

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

Comment [NS1]: This was a post-meeting suggestion from Cathy and addition by Nancy.

Comment [NS2]: The subcommittee has not taken up this question, but it was raised previously: should there be any requirements in the rule about attorneys who assist a roster member on a case?

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

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

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

(2)(~~FHC~~)(iii)(c) an equivalent demonstration of continued competence.

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

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

(3) **Annual Schedule.** The Committee shall meet at least annually and shall submit its recommendations to the Board of Appellate Court Judges by ~~February-October 15 of~~ each year. If the Committee in its discretion determines that additional recommendations should be submitted to the Board of Appellate Court Judges, the Committee may do so at any time. The Board of Appellate Court Judges shall at its next meeting thereafter approve or disapprove the recommendations of the Committee with respect to attorneys to be included on the appellate roster.

Comment [3]: Counties budget for indigent counsel by September.

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.~~

Comment [NS1]: You have to have been substantially responsible for at least 2 appellate briefs. Do we even need this in 11-401? The subcommittee determined no. (2)(C) likely covers this.

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

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

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

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 58. Ruling.

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

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

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

1 **Rule 1. Scope of rules.**

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

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

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

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

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

20 **(f) Rules for appeals in child welfare proceedings.** Appeals taken from juvenile court orders
21 related to abuse, neglect, dependency, termination of parental rights, ~~and~~-adoption proceedings, and
22 district court orders related to termination of parental rights, are governed by Rules 52 through 59, except
23 for orders related to substantiation proceedings under Section 78-3a-320. Rules 9 and 23B do not apply.
24 Due to the summary nature of child welfare appeals, Rule 10(a)(2)(A) does not apply. Other appellate
25 rules apply if not inconsistent with Rules 52 through 59.
26

Tab C

Frequently Asked Questions

1. How do I apply to the Appellate Rosters?
2. What are the qualifications for the Appellate Roster?
3. How do I go about finding a mentor and certifying my briefs under Rule 38B?
4. How does the roster work?
5. Once I am on the roster, how do I get appointed to represent a party on appeal?
6. How do I get paid?
7. A member of the public asked: How do I get an appellate attorney? (may need to clarify that the roster is only for court appointed counsel)