



Utah Supreme Court's Standing Committee on Appellate Representation

AGENDA

Location: Webex

Date: November 30, 2020

Time: 9:30-12:30 p.m.

Action: Welcome and approval of August and October minutes	Tab 1	Judge Linda Jones, Chair
Action: Discussion of exemption provisions in Rule 11-401	Tab 2	Judge Linda Jones Joanna Landau Adam Trupp Debra Nelson
Action: Discussion and recommendation vote on 5 roster applicants	Email	Committee members
Discussion: Old business/new business		

[Committee Website](#)

Committee Members:

Judge Linda Jones, Chair
Margaret Lindsay
Joanna Landau (ex officio)
Monica Maio
Alan S. Mouritsen
Debra Nelson
John Neilsen
Nancy Sylvester
Ann Marie Taliaferro
Judge J. Frederic Voros (Ret.)

Tab 1

**Utah Supreme Court's
Standing Committee on Appellate Representation**

Draft Meeting Minutes
August 26, 2020
Via Webex

Honorable Linda Jones, Presiding

Attendees:

Judge Linda Jones, Chair
Lisa Collins
Joanna Landau
Margaret Lindsay
Monica Maio
Alan Mouritsen
Debra Nelson
John Nielsen
Anne Marie Taliaferro
Fred Voros

Staff:

Nancy Sylvester, Associate General Counsel

Guests:

Kirstin Norman
Adam Trupp

1. Welcome and approval of November 7, 2019 minutes: (Judge Linda Jones)

Judge Linda Jones welcomed everyone to the meeting and requested a motion to approve the minutes. Ms. Nelson moved to approve them and Ms. Taliaferro seconded the motion. The motion carried.

2. Child welfare rule amendments: (Adam Trupp, Kirstin Norman, Margaret Lindsay)

The committee discussed proposed child welfare rule amendments with guests Adam Trupp and Kirstin Norman and committee member Margaret Lindsay. The primary concern addressed by the amendments is the lack of requirement that appellate counsel file child welfare petitions with the appellate courts. The amendments will be made to the Rules of Appellate Procedure, Rule 55(a) and (b) and will appointment of appellate counsel and word counts (petition should be 7,000 words or less, rather than 15 pages). The committee discussed IAC (ineffective assistance of counsel) claims and a recent Court of Appeals case that discusses remand with those claims.

The committee then discussed that appointment of appellate counsel would be immediate upon notice of appeal and that appellate counsel would need to enter an appearance. The Rules of Juvenile Procedure will also require amendments so that juvenile court knows to make the appointment of counsel. Ms. Norman noted that the best case law has developed out of a warm hand off from trial counsel to appellate counsel. Having mentoring from appellate counsel would also significantly help trial counsel. Ms. Collins noted that the records on appeal are being prepared faster, so the delay concerns that originally accompanied Rule 55 should be gone.

Judge Jones suggested adding the phrase "who has been approved" to Rule 55 here: "If the petitioner has appointed counsel in the juvenile court, or has been found to be indigent, then the petition on appeal must be prepared by appellate counsel who has been approved pursuant to the requirements of Rule 11-401 of the Utah Code of Judicial Administration."

Judge Voros, Ret., observed that the rule change will cost counties money so the drafters should communicate with the counties ahead of time. He also observed that the Legislature would be interested in this issue and it would be helpful if it created a statewide office.

Ms. Taliaferro moved to recommend adoption of the changes as proposed. Judge Voros, Ret., amended the motion to say that as a logistical matter, this presents no concern to this committee. Ms. Taliaferro seconded the motion as amended. The motion carried.

3. Discussion of capital murder case appointment: (Debra Nelson)

Ms. Nelson, who is the Chief Appellate Officer for the Indigent Defense Commission, reported that her office does not handle capital murder cases but that there is a fund that counties can opt into. Ms. Taliaferro is currently the only one in the state qualified to take these cases, so the IDC is drafting a sole source contract with her.

4. Setting deadlines:

The committee set the following deadlines for its annual call for applicants for the Appellate Roster:

- Deadline for applications: September 25
- Teleconference to divide: September 30
- Review of applicants: October 21

5. Discussion of questions for study:

The committee discussed the following study questions:

1. Whether to require accepted applicants to attend appellate advocacy CLEs.
2. Whether applicants must show a demonstrated ability in the area for which they are applying.

3. Whether there should be a new category of applicants who are provisionally accepted and required to receive mentoring guiding them in the appellate process.

Ms. Nelson said the answer is yes on all of the questions. Regarding question 1, her office has a statutory mandate to put on CLE's. They are free. Ms. Maio noted that her office, Ms. Norman's office, and UACDL also do these on the juvenile side. Committee members proposed amending 11-401 to add a CLE requirement.

The committee tabled the mentoring issue for now (question 3).

Regarding question 2, the committee discussed instances where an attorney's ability to issue-spot may be lacking. If someone is interested in a certain subject area, that attorney can work closely with another attorney in the area to get that experience before joining the roster. Nonetheless, observed committee members, talented attorneys may still be capable of the work in spite of a lack of experience in a certain area.

Committee members proposed the following amendment to Rule 11-401(G): "submit at least two appellate briefs, at least one of which is in the relevant subject matter area, to the Committee with a certification that the applicant was primarily responsible for drafting the briefs;"

6. Adjournment and next meeting:

The meeting adjourned at 2:30 p.m. The next meeting will be held on September 30, 2020 via teleconference for purposes of dividing up the applicants for review.

**Utah Supreme Court's
Standing Committee on Appellate Representation**

Draft Meeting Minutes
October 21, 2020
Via Webex

Honorable Linda Jones, Presiding

Attendees:

Judge Linda Jones, Chair
Lisa Collins
Joanna Landau
Margaret Lindsay
Monica Maio
Alan Mouritsen
Debra Nelson
John Nielsen
Anne Marie Taliaferro
Fred Voros

Staff:

Nancy Sylvester, Associate General Counsel

1. Welcome and approval of August 25, 2020 minutes: (Judge Linda Jones)

Judge Jones welcomed everyone to the meeting. Ms. Sylvester noted that the August minutes were not yet ready and would be circulated later for an email vote.

2. Rule 11-401 (All)

The committee discussed amendments to Rule 11-401 in light of recent legislation. The committee also added new language requiring continuing legal education on topics relevant to roster membership. Based on a question about exemptions, the committee also discussed and voted, with reservations, to sunset the rule's exemption provision as of December 31, 2021.

The committee will place information about the CLE requirement in the roster application and FAQ's. The committee will also encourage roster attorneys to join the appellate section of the Bar, which provides CLE hours.

3. Discussion – Review applicant recommendations: (All)

The committee reviewed, discussed, and voted on four applications for the Utah Appellate Roster. The committee's recommendations will go on to the Board for its decisions.

4. Exemptions/Lokken letter (All)

The committee discussed a letter from Lokken & Associates requesting that the firm be added to the list of exempt providers under the rule. The committee determined that a past decision to add contracted providers to the roster created confusion and that the committee's only role is to assist in creating the roster of attorneys, not to house exemptions. The committee discussed that the IDC could keep an exemptions list.

Ms. Collins noted that the districts are only deciding indigency now and the appellate courts are actually making the appointments.

5. Rolling admissions assignments (Judge Linda Jones)

The committee received more applications after the September admissions period that it will vet and review at its November 30, 2020 meeting. Judge Jones assigned the applicants to committee members.

6. Adjournment and next meeting:

The committee adjourned at approximately 2:30 p.m. The next meeting will be held November 30, 2020 at 9:30 a.m. via Webex.

Tab 2

Rule 11-401. Standing Committee on Appellate Representation and the Appellate Roster

Intent:

To establish a standing committee to assist the Board of Appellate Court Judges in determining a roster of indigent service provider attorneys who are eligible for appointment to represent indigent individuals on appeal to the Utah Supreme Court and the Utah Court of Appeals.

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

To establish a schedule for recommending the appointment of indigent defense service provider attorneys to, or the removal of indigent defense service provider attorneys from, the Appellate Roster.

Definitions:

The terms “indigent defense service provider,” “indigent individual,” ~~and “indigent defense services,”~~ and “Indigent Appellate Defense Division” are defined in [Utah Code Sections 78B-22-102 and -802](#).

For purposes of this rule, “indigent defense service provider entity” means a legal defender office that is under contract to perform indigent defense services for one or more counties in the state; “indigent defense service provider attorney” means an attorney who has been appointed to the Appellate Roster; and “Appellate Roster” means the list of indigent service provider attorneys who are eligible for appointment to represent indigent individuals on appeal to the Utah Supreme Court and the Utah Court of Appeals.

Applicability:

This rule ~~shall apply~~ applies to the internal operation of the Board of Appellate Court Judges and the Committee on Appellate Representation and to courts of record in cases involving indigent individuals.

Statement of the Rule:

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

~~(A1)~~ **Composition.** The Committee ~~shall consist of at least one attorney from the Office of General Counsel of the Administrative Office of the Courts; one attorney from the~~

29 Criminal Appeals Division of the Utah Attorney General's Office; one attorney from
30 each roster area set forth in paragraph (2)(b), one active or retired judge from an appellate
31 court and one active or retired judge from a court of record, and the Chief Appellate
32 Officer or designee of the Indigent Defense Commission. one active or retired trial court
33 judge from either a district or juvenile court in the state; one active or retired appellate
34 court judge; one private civil appellate attorney; two criminal defense appellate attorneys;
35 at least one of whom is currently practicing in the area of indigent criminal appeals for an
36 indigent defense provider entity; one attorney practicing in the area of juvenile
37 delinquency defense appeals; one attorney practicing in the area of child welfare
38 proceedings as defined in Rule 1(f) of the Utah Rules of Appellate Procedure; and one
39 attorney practicing in the area of termination of parental rights proceedings under Section
40 78B-6-112. The Director or designee of the Indigent Defense Commission shall be
41 an ex officio, non-voting member who shall does not participate in the cCommittee's
42 recommendation of attorneys for the roster.

43 (B2) **Appointment.** Committee members ~~shall be~~ appointed by the Supreme Court
44 and serve staggered four-year terms. The Supreme Court ~~shall select~~ a chair from among
45 the Committee's members. Judges who serve as members of the Committee generally
46 ~~shall will~~ not be selected as chair. Committee members ~~shall~~ serve as officers of the court
47 and not as representatives of any client, employer, or other organization or interest group.
48 At the ~~first meeting of the~~ Committee's first meeting in any calendar year, and at every
49 meeting at which a new Committee member ~~of the Committee~~ first attends, each
50 Committee member ~~shall~~ briefly disclose the general nature of ~~his or her~~ their legal
51 practice.

52 (E3) **Vacancies.** In the event of a ~~vacancy on the~~ Committee vacancy, the Supreme
53 Court, after consultation ~~ing~~ with the Committee chair, ~~shall will~~ appoint a new
54 Committee member from the same category as the prior Committee member to serve for
55 the ~~remainder of the~~ remaining unexpired term.

56 (D4) **Absences.** ~~In the event that~~ If a Committee member fails to attend two consecutive
57 Committee meetings, the chair may notify the Supreme Court of those absences and may
58 request that the Supreme Court replace that Committee member.

59 | ~~(E5)~~ **Administrative assistance.** The Administrative Office of the Courts ~~shall~~
60 | coordinates staff support to the Committee, including the ~~assistance of the Office of~~
61 | General Counsel's assistance in research and drafting.

62 | ~~(2b)~~ **Appellate Roster.** The Board of Appellate Judges ~~shall create and maintains~~ an appellate
63 | roster of indigent service provider attorneys skilled in handling criminal, juvenile delinquency,
64 | and child welfare proceedings as defined in [Rule 1\(f\)](#) of the Utah Rules of Appellate Procedure,
65 | and termination of parental rights proceedings under [Section 78B-6-112](#).~~–~~

66 | ~~(A1)~~ **Purpose of the Committee.** The ~~purpose of the Committee's purpose shall be~~ to
67 | recommend to the Board of Appellate Court Judges attorneys for inclusion on an
68 | appellate roster of indigent defense service provider attorneys eligible for appointment by
69 | the courts of this state to represent indigent individuals on appeal before the Utah
70 | Supreme Court or the Utah Court of Appeals. Except as specified in paragraph ~~(2b)(19)~~ of
71 | ~~this rule~~, only attorneys on the Appellate Roster ~~shall be~~ are eligible for such court
72 | appointments.

73 | ~~(B2)~~ **Committee recommendations.** The Committee ~~shall considers~~ and recommends
74 | attorneys for inclusion on the Appellate Roster based on the eligibility criteria listed in
75 | paragraph ~~(2b)(C3)~~, together with any other factor bearing on an applicant's ethics,
76 | diligence, competency, abilities in briefing and oral advocacy, and willingness to fairly,
77 | efficiently, and effectively provide appellate representation to indigent individuals on
78 | appeal. The Committee ~~shall considers~~ issues such as quality of briefing, the applicant's
79 | frequency of inadequate briefing, summary dismissals, or involuntary dismissals, and the
80 | applicant's professionalism and civility. The Committee may also recommend ~~the~~
81 | ~~removal of removing~~ an attorney from the Appellate Roster.

82 | ~~(C3)~~ **Eligibility criteria.** To be considered for ~~inclusion on the~~ Appellate Roster, an
83 | applicant at a minimum ~~shall must~~ complete an application in a form provided by the
84 | Committee and:

85 | ~~(iA)~~ demonstrate that the applicant has briefed the merits in at least three appeals
86 | within the past three years or in 12 appeals total, or is directly supervised by an
87 | attorney with that experience;

(~~ii~~**B**) be a member of the Utah Bar in good standing;

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

(~~iv~~**D**) demonstrate ability to adequately and effectively raise and argue issues on appeal and comply with applicable court rules;

(~~v~~**E**) certify that the attorney has not, within the ~~preceding~~past 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;

(~~vi~~**F**) must not have been removed from the Appellate Roster within the past year;

(~~vii~~**G**) submit at least two appellate briefs, at least one of which is in the relevant subject matter area, to the Committee with a certification that the applicant was primarily responsible for drafting the briefs;

(~~viii~~**H**) submit a petition ~~pursuant to~~under [Rule 55](#) of the Utah Rules of Appellate Procedure if the person is applying to be on the Appellate Roster for appeals from child welfare proceedings;

(~~ix~~**I**) provide citations for all appellate decisions in which the applicant was counsel of record; and

(~~x~~**J**) certify that the applicant has sufficient time and administrative support to accept an appointment to provide indigent defense services for indigent individuals on appeal and to provide the effective assistance of counsel in every case and a willingness to commit those resources to that representation.

(~~D4~~) **Roster Selection.** The Board of Appellate Court Judges ~~shall~~will approve or disapprove the ~~recommendations of the Committee's~~ recommendations with respect to attorneys to be included on the Appellate Roster. Except as provided in paragraph (~~2b~~)(~~G~~**7**), the Board may not add to the roster an attorney who is not recommended by the Committee.

(E5) **Mentoring.** If an attorney is selected for the Appellate Roster on the condition that the attorney have a mentor, then the attorney must select a mentor who meets the qualifications set forth in this rule at paragraphs (2b)(E3)(iA)–(viF). A mentor must have briefed the merits in at least three appeals within the past three years or in 12 appeals total. The attorney subject to the mentoring requirement ~~shall~~ must certify in each brief filed on behalf of an indigent individual that the attorney was directly supervised in drafting the brief by a mentor qualified under paragraphs (2b)(E3)(iA)–(viF). The attorney is not required to name the mentor in their certification.

(F6) **Removal.** The Board may at any time remove an attorney from the Appellate Roster based on the attorney’s qualifications, skills, experience, or prior performance in any appellate court, or the attorney’s failure to maintain eligibility under paragraph (2b)(H8).

(G7) **Reconsideration of removal or non-reappointment.** An attorney who is removed from the Appellate Roster before the end of the attorney’s three-year appointment or who is not reappointed to a subsequent term may petition for reconsideration ~~in the form of a letter submitted by~~ submitting a letter to the Standing Committee on Appellate Representation. The letter ~~shall~~ must be submitted within ~~30~~ 28 days from the date of the notice informing the attorney of the removal or non-reappointment. The Committee ~~shall~~ will review all materials relevant to the attorney’s petition and recommend to the Board of Appellate Court Judges whether the attorney’s removal or non-reappointment should be upheld. The Board of Appellate Court Judges ~~shall~~ will approve or disapprove the ~~recommendations of the Committee’s~~ recommendations.

(H8) **Term of a Appointment term, CLE requirement, and reapplication.**

(iA) An attorney’s Appellate Roster appointment term is three years.

(B) During an attorney’s Appellate Roster term, the attorney must complete at least 12 hours of continuing legal education on topics directly relevant to the attorney’s Appellate Roster work. The attorney must certify completion of the hours at the time of reapplication and provide documentation of the hours and topics completed.

Comment [NS1]: Place in application and FAQ—encourage roster attorneys to join the appellate section of the Bar, which provides CLE hours.

(#C) To maintain eligibility for appointment to provide indigent defense services on appeal, an attorney must reapply under the provisions of paragraph (2b)(C) by September 1 of the attorney's third year on the Appellate Roster. The attorney must be recommended by the Committee and reappointed to the Appellate Roster by the Board of Appellate Court Judges at the conclusion of the attorney's appointment term.

(49) **Exemption.** Attorneys employed by an indigent defense service provider entity or the Indigent Appellate Defense Division to provide indigent defense services on appeal are exempt from the requirement to be included on the Appellate Roster. This exemption does not apply to an ~~indigent defense service provider~~ attorney or an entity who that has contracted with an indigent defense service provider ~~entity in the attorney's individual capacity~~ to provide indigent defense services on appeal. The exemption will sunset effective December 31, 2021.

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

(4d) **Contracts in effect before adoption of this rule's adoption.** An attorney who, before this rule's adoption of this rule, contracted with a government entity to represent indigent individuals on appeal is subject to the provisions of [Rule 38B](#) of the Utah Rules of Appellate Procedure. Upon the contract's termination, expiration, or renewal ~~of the contract~~, the attorney is subject to ~~the provisions of this rule.~~