

Agenda

Advisory Committee on Rules of Appellate Procedure

June 6, 2019

12:00 to 1:30 p.m.

Scott M. Matheson Courthouse
450 South State Street, Salt Lake City, UT
Judicial Council Room

ACTION: Welcome and approval of May 2019 minutes	Tab 1	Paul C. Burke, Chairman
DISCUSSION AND ACTION: Incorporating Standing Order No. 11 in Rule 21(a)	Tab 2	Mary Westby and Lisa Collins
DISCUSSION AND ACTION: Review updated language in intervention rules: URAP 25A, URCrP 12, and URCP 24	Tab 3	Nancy Sylvester
DISCUSSION AND ACTION: Update on discussion of Appellate Representation recommendation to amend URAP 1 to add parental termination to child welfare procedures	Tab 4	Nancy Sylvester
DISCUSSION AND ASSIGNMENTS: <ul style="list-style-type: none">• Advisory committee notes project• Unrepresented litigants and the appellate rules• Judicial efficiency		Clark Sabey, Mary Westby
DISCUSSION: Other business		Paul C. Burke

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

Meeting schedule:

August 1, 2019

September 5, 2019

October 3, 2019

November 7, 2019

December 5, 2019

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

Judicial Council Room
Thursday, May 2, 2019
12:00 p.m. to 1:30 p.m.

PRESENT

Christopher Ballard
Troy Booher
Paul C. Burke- Chair
Judge Gregory Orme
Adam Pace – Recording Secretary
Rodney Parker
Judge Jill Pohlman
Clark Sabey
Lori Seppi
Nancy Sylvester- Staff
Ann Marie Taliaferro
Mary Westby

EXCUSED

Lisa Collins
Cathy Dupont- Staff
R. Shawn Gunnarson
Alan Mouritsen
Bridget Romano

1. Welcome and approval of March 2019 minutes

Paul Burke

Mr. Burke welcomed the committee to the meeting and invited a motion to approve the minutes from the last meeting. *Ms. Westby moved to approve the minutes from the April 2019 meeting. Judge Pohlman seconded the motion and it passed unanimously.*

2. Discussion and Action: Manner of service in the appellate courts under Rules 21 and 26

Mary Westby
Lisa Collins

Ms. Westby presented a clean draft of the proposed amendments to appellate rules 21 and 26 to allow service by email, which include the changes that were discussed at the last meeting. She pointed out that lines 5-6 of Rule 26 has been amended to read: “Briefs filed by email will be considered timely if the email is ~~received~~ **sent** before midnight on the last day for filing.”

Mr. Parker suggested that the rule should provide some flexibility for situations where an email is not received by the Court at the same time it is sent, if the delay is due to technical issues on the Court's end. Mr. Booher suggested that the rule should be clear that the sender of an email bears the risk that the Court's server may be down, or else maybe put something in the rule that allows credit for a filing that is timely sent, but not timely received. Mr. Burke said that these are good issues to review further, and suggested adding them to the agenda for further discussion.

The committee discussed the proposed change to Rule 21(a) to add "or the date of sending if email is used" to the end of the sentence on Line 6. Mr. Parker and Ms. Westby suggested that it would be better to restructure the whole sentence. Mr. Burke asked Ms. Sylvester to prepare draft language for discussion at a future meeting that breaks subsection (a) into (a)(1), (a)(2), and (a)(3), addressing the timeliness of filings by mail, email, and by inmates. He asked the committee to consider the rest of the proposal in the packet and adopt what they can today.

Ms. Westby moved to adopt the proposed changes to Rules 21 and 24 except for the proposed change to Rule 21(a), which will be addressed at a future meeting. Ms. Taliaferro seconded the motion and it passed unanimously.

3. Discussion and Action: Review updated language in intervention rules: URAP 25A, URCrP 12, and URCP 24 **Nancy Sylvester**

The committee continued its discussion of coordinating the intervention rules in appellate rule 25A, criminal rule 12, and civil rule 24.

At the last meeting the committee had discussed changing the references to governmental attorneys throughout appellate Rule 25A to say "an attorney representing a governmental entity." Ms. Sylvester reported that the civil rules committee did not like this language, and that it decided to refer to governmental attorneys in civil rule 24 as "county or municipal" attorneys. Ms. Westby said, and Mr. Booher agreed, that the language does not necessarily have to be the same in the appellate and civil rules.

Ms. Sylvester commented that the term "attorney representing a governmental entity" doesn't fit well in Rule 25A(c) because that section is calling for the views of the county or municipality itself, not the personal views of the attorney representing them. Mr. Burke agreed, and suggested that references to the attorney in other parts of the rule should be corrected as well. He suggested striking "attorney representing the" from Rule 25A(a), (a)(2), (a)(3), and (c).

Mr. Ballard proposed amending Rule 25A(b)(1) to permit the Attorney General to elect whether to file an amicus brief after it receives the appellant's brief and any responsive briefs. He said this is how it is done in the United States Supreme Court. Mr. Booher said this could create a problem if the Attorney General agrees with the appellant's brief and the appellee's brief is already filed—then the appellee would not have an opportunity to respond. Mr. Ballard said he would table this suggestion for now and propose it later.

Mr. Ballard also proposed eliminating the requirement in Rule 25A(b)(1) for the Attorney General to explain its reasons for declining to file an amicus brief. Mr. Sabey suggested asking the court about this first to find out why it wants the explanation.

Mr. Ballard also proposed amending lines 63-64 of Rule 25A(d) to say that the Attorney General or governmental entity “will be permitted to participate at oral argument by timely declaring an intent to participate on the court’s oral argument acknowledgment form.” *Mr. Ballard moved to make this change to lines 63-64 of Rule 25A(d). Judge Pohlman seconded the motion and it passed unanimously.*

Mr. Burke asked the committee to vote on the agreed-upon changes so far and to continue the discussion of Mr. Ballard’s other proposals at a future meeting, after Mr. Sabey and/or Mr. Burke get input from the court on why it wanted the Attorney General to state its reasons for not filing a brief. He summarized the changes as 1) striking “attorney representing the” from Rule 25A(a), (a)(2), (a)(3), and (c); and 2) amending lines 63-64 of Rule 25A(d) in accordance with Mr. Ballard’s suggestion.

Judge Pohlman moved to adopt these changes. Ms. Westby seconded the motion and it passed unanimously.

4. Discussion and Action: Continue discussion of Appellate Representation recommendation to amend URAP 1 to add parental termination to child welfare procedures

**Nancy Sylvester
Margaret Lindsay**

Ms. Sylvester explained that Margaret Lindsay intended to present a proposal to amend appellate rule 1(f) to include appeals taken from termination of parental rights in both juvenile and district courts. However, the committee was unable to reach Margaret Lindsay by phone to hear her input on this issue. Mr. Burke suggested tabling this issue for discussion at a later time when she is available.

5. Discussion and Assignments

Mr. Burke asked for an update from the three newly formed subcommittees.

Mr. Booher reported that the subcommittee on judicial efficiency has already met once. Ms. Westby said she has drafted a proposed rule and that the subcommittee is moving forward with a few ideas.

Judge Orme reported that he met with Mr. Mouritsen and Mr. Sabey to discuss the advisory committee notes project. He said they could report on their progress at the June meeting, or else maybe later in August. Mr. Burke said he would put this issue on the end of the agenda for the next meeting.

Ms. Westby reported that she emailed Ms. Collins to discuss the unrepresented litigant project, but they have not done much else yet.

6. Other business

The committee did not discuss other business.

7. Adjourn

The meeting was adjourned. The next meeting will be held on June 6, 2019.

Tab 2



Nancy Sylvester <nancyjs@utcourts.gov>

Appellate Rules Committee Takeaways 5/2/19

Mary Westby <maryw@utcourts.gov>
To: Nancy Sylvester <nancyjs@utcourts.gov>

Fri, May 31, 2019 at 12:35 PM

Nancy

Attached is an amended draft rule 21 with additional language from standing order 11. There is no "allowance" in the standing order for email problems. Although practitioners may be nervous about this, the reality is that the same risks were involved if they mailed documents--if the mail was slow for a jurisdictional document, they still bore the risk. The only real drop dead jurisdictional filings that are not otherwise able to be addressed by a motion for an extension of time are interloc petitions and petitions for review of agency orders.

Also, I have drafted a couple of rules for the efficiency subcommittee but we haven't met to discuss those drafts, so I'm not sure they are ready for prime time. And, I will review the appellate self help materials on the website before Thursday's meeting. Thanks for the reminders.

Mary
[Quoted text hidden]

 **URAP021(mw amend may 31).docx**
20K

Rule 21. Filing and service.

(a) Filing. Papers required or permitted to be filed by these rules ~~must shall~~ be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk, or by email sent to the appropriate court. Documents filed by email in the Supreme Court may be sent to supremecourt@utcourts.gov. Documents filed by email in the Court of Appeals may be sent to court of appeals@utcourts.gov. All risks associated with email are borne by the sender.

(a)(1) Except as provided in ~~subpart-paragraph~~ (f), filing is not considered timely unless the papers are received by the clerk within the time fixed for filing. ~~except that b~~ Documents filed by email will be considered timely if the email is received before midnight on the last day for filing.

(a)(2) Briefs will shall be deemed filed on the date of the postmark if first class mail is ~~utilized~~ used, or the date of sending by email.

(a)(3) If a motion requests relief which may be granted by a single justice or judge, the justice or judge may accept the motion, note the date of filing, and transmit it to the clerk.

(b) Service of all papers required. Copies of all papers filed with the appellate court shall, at or before the time of filing, be served on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel of record, or, if the party is not represented by counsel, upon the party at the last known address or email address provided to the appellate court. A copy of any paper required by these rules to be served on a party shall be filed with the court and accompanied by proof of service.

(c) Manner of service. Service may be personal, by mail, or by email. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail or email is complete on mailing.

(d) Proof of service. Papers presented for filing shall contain an acknowledgment of service by the person served or a certificate of service in the form of a statement of the date and manner of service, the names of the persons served, and the addresses at which they were served. The certificate of service may appear on or be affixed to the papers filed. If counsel of record is served, the certificate of service shall designate the name of the party represented by that counsel.

30 (e) Signature. All papers filed in the appellate court shall be signed by counsel of record or
31 by a party who is not represented by counsel. For documents filed by email, the sending of the
32 email is an electronic signature.

33 (f) Filing by inmate.

34 (f)(1) For purposes of this paragraph (f), an inmate is a person confined to an institution
35 or committed to a place of legal confinement.

36 (f)(2) Papers filed by an inmate are timely filed if they are deposited in the institution's
37 internal mail system on or before the last day for filing. Timely filing may be shown by a
38 contemporaneously filed notarized statement or written declaration setting forth the date of
39 deposit and stating that first-class postage has been, or is being, prepaid, or that the inmate has
40 complied with any applicable requirements for legal mail set by the institution. Response time
41 will be calculated from the date the papers are received by the court.

42 (g) Filings containing other than public information and records. If a filing, including an
43 addendum, contains non-public information, the filer must also file a version with all such
44 information removed. Non-public information means information classified as private,
45 controlled, protected, safeguarded, sealed, juvenile court legal, or juvenile court social, or any
46 other information to which the right of public access is restricted by statute, rule, order, or case
47 law.

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Utah Supreme Court Standing Order No. 11 (Regarding filing documents by email)

Effective September 20, 2016 revised May 22, 2017

As an interim step before electronic filing in the appellate courts, any document that is a public record required or permitted to be filed with the Supreme Court or Court of Appeals may be filed by attaching a searchable PDF file of no more than 25 MB to an email sent to the address of the clerk of the appropriate court listed below.

If a document other than a brief is delivered by email, a paper copy does not need to be delivered. A document is deemed filed when the email is received.

If a brief under Rule 24 or Rule 25 of the Rules of Appellate Procedure is delivered by email, paper copies of the brief that comply with Rule 27 must be delivered no more than 7 days after filing by email. For matters pending in the Supreme Court, eight (8) copies of each brief must be delivered to the Supreme Court. For matters pending in the Court of Appeals, six (6) copies must be delivered to the Court of Appeals. If paper copies of a brief are not timely delivered, the brief may be stricken.

Unless the court orders, otherwise, the filing of documents and briefs is timely if the email is received before midnight on the last day for filing. Under the Utah Uniform Electronic Transactions Act, sending the email is an electronic signature, and it carries all of the representations and consequences under Rule 40 of the Rules of Appellate Procedure.

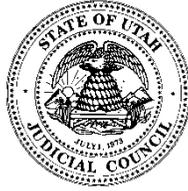
All risks associated with email are borne by the sender. If a statute or rule establishes a fee for the filing, the party must pay the fee to the clerk of the court no more than 7 days after the filing, or the filing will be stricken.

Documents filed in the Supreme Court may be sent to: supremecourt@utcourts.gov.

Documents filed in the Court of Appeals may be sent to: courtofappeals@utcourts.gov.

Under Rule 2, any Rules of Appellate Procedure inconsistent with this order are suspended, and the parties may proceed in accordance with this order.

Tab 3



Administrative Office of the Courts

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

MEMORANDUM

Hon. Mary T. Noonan
Interim State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

To: Appellate Rules Committee
From: Nancy Sylvester *Nancy J. Sylvester*
Date: May 31, 2019
Re: Intervention rules coordination: URCP 24, URAP 25A, and URCrP 12

The Civil Rules Committee reviewed this committee's terminology amendments in Rule 25A ("governmental entity") and adopted them in URCP 24, but further updated the terminology with respect to the enactment being challenged. The terminology it elected broadens the scope of review to include a "governmental entity's ordinance, rule, or other administrative or legislative enactment."

The three rules have been updated and attached with those amendments. Separately included is Christopher Ballard's suggested change to Rule 25A(b)(1).

**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.**

1 **Rule 25A. Challenging the constitutionality of a statute, ~~or ordinance,~~ or other**
2 **governmental enactment .**

3 **(a) Notice to the Attorney General or ~~the county or municipal attorney~~ other**
4 **governmental entity; penalty for failure to give notice.**

5 (a)(1) When a party challenges the constitutionality of a statute in an appeal or
6 petition for review in which the Attorney General has not appeared, every party must
7 serve its principal brief and any subsequent brief on the Attorney General on or before
8 the date the brief is filed.

9 (a)(2) When a party challenges the constitutionality of a governmental entity's
10 ~~ordinance, rule, or other administrative or legislative enactment~~ an county or
11 ~~municipal ordinance~~ in an appeal or petition for review in which the responsible
12 ~~county or municipal~~ governmental entity attorney has not appeared, every party must
13 serve its principal brief and any subsequent brief on the governmental entity ~~county or~~
14 ~~municipal attorney~~ on or before the date the brief is filed, and file proof of service
15 with the court.

16 (a)(3) If an appellee or cross-appellant is the first party to challenge the
17 constitutionality of a statute, ~~or ordinance, rule, or other administrative or legislative~~
18 ~~enactment~~, the appellant must serve its principal brief on the Attorney General or ~~the~~
19 ~~county or municipal~~ other governmental entity no more than 7 days after receiving the
20 appellee's or the cross-appellant's brief and must serve its reply brief on or before the
21 date it is filed.

22 (a)(4) Every party must serve its brief on the Attorney General by email or, if
23 circumstances prevent service by email, by mail at the addresses below, or mail at the
24 ~~following address~~ and ~~must~~ file proof of service with the court.

25 Email:

26 notices@agutah.gov

27 Mail:

28 Office of the Utah Attorney General

29 Attn: Utah Solicitor General
 30 350 North State Street, Suite 230
 31 ~~320 Utah State Capitol~~
 32 P.O. Box 142320
 33 Salt Lake City, Utah 84114-2320

34 (a)(5) If a party does not serve a brief as required by this rule and supplemental
 35 briefing is ordered as a result of that failure, a court may order that party to pay the
 36 costs, expenses, and attorney fees of any other party resulting from that failure.

37 (b) **Notice by the Attorney General or other governmental entity ~~county or~~**
 38 **~~municipal attorney~~; amicus brief.**

39 (b)(1) Within 14 days after service of ~~the a~~ brief that presents a constitutional
 40 challenge the Attorney General or ~~other government attorney~~ other governmental
 41 entity will notify the appellate court whether ~~it the~~ entity intends to file an amicus
 42 brief. The Attorney General or ~~other government attorney~~ other governmental entity
 43 may seek up to an additional 7 days' extension of time from the court. ~~Should the~~
 44 ~~Attorney General or other government attorney decline to file an amicus brief, that~~
 45 ~~entity should plainly state the reasons therefor.~~

Comment [NS1]: Chris Ballard will propose some language here.

Comment [NS2]: Paul will take up this suggestion with the Supreme Court to figure out what the sentiment is behind this.

46 (b)(2) If the Attorney General or ~~other government attorney~~ other governmental
 47 entity declines to file an amicus brief, the briefing schedule is not affected.

48 (b)(3) If the Attorney General or ~~other government attorney~~ other governmental
 49 entity intends to file an amicus brief, that brief will come due 30 days after the notice
 50 of intent is filed. Each governmental entity may file a motion to extend that time as
 51 provided under Rule 22. On a governmental entity filing a notice of intent, the
 52 briefing schedule established under Rule 13 is vacated, and the next brief of a party
 53 will come due 30 days after the amicus brief is filed.

54 (c) **Call for the views of the Attorney General or other governmental entity**
 55 **~~county or municipal attorney~~.** Any time a party challenges the constitutionality of a
 56 statute, ~~or ordinance,~~ or other governmental enactment, the appellate court may call

57 | for the views of the Attorney General or ~~of the county or municipal attorney~~ other
58 | governmental entity and set a schedule for filing an amicus brief and supplemental
59 | briefs by the parties, if any.

60 | (d) **Participation in oral argument.** If the Attorney General or other
61 | governmental entity ~~county or municipal attorney~~ files an amicus brief, the Attorney
62 | General or other governmental entity ~~county or municipal attorney~~ will be permitted to
63 | participate at oral argument by timely declaring an intent to participate on the court's
64 | oral argument acknowledgment form. -

Rule 25A. Challenging the constitutionality of a statute or ordinance.

(b) Notice by the Attorney General or county or municipal attorney; amicus brief.

(b)(1) Within 14 days after service of the brief that presents a constitutional challenge, ~~and all responsive briefs,~~ the Attorney General or other government attorney will notify the appellate court whether it intends to file an amicus brief. The Attorney General or other government attorney may seek up to an additional 7 days' extension of time from the court. ~~Should the Attorney General or other government attorney decline to file an amicus brief, that entity should plainly state the reasons therefor.~~

1 **Rule 24. Intervention.**

2 **(a) Intervention of right.** ~~Upon, On~~ timely application ~~motion~~, the court must permit anyone shall be
3 permitted to intervene in an action: ~~who:~~

4 (1) ~~when a statute confers~~ is given an unconditional right to intervene by a statute; or

5 (2) ~~when the applicant~~ claims an interest relating to the property or transaction ~~which~~ that is the
6 subject of the action, ~~and the applicant~~ is so situated that ~~the disposition~~ disposing of the action may
7 as a practical matter impair or impede the ~~applicant's~~ movant's ability to protect ~~that~~ its interest, unless
8 ~~the applicant's interest is adequately represented by existing parties~~ adequately represent that
9 interest.

10 **(b) Permissive intervention.** ~~Upon,~~

11 **(1) In General.** ~~On~~ timely application ~~motion~~, the court may permit anyone may be permitted to
12 intervene in an action: ~~(1) when a statute confers~~ who:

13 **(A)** is given a conditional right to intervene by a statute; or ~~(2) when an applicant's~~

14 **(B)** has a claim or defense ~~and~~ that shares with the main action ~~have a common~~ question of
15 law or fact ~~in common. When a party to an action bases.~~

16 **(2) By a Government Officer or Agency.** On timely motion, the court may permit a federal or
17 state governmental officer or agency to intervene if a party's claim or defense upon any is based on:

18 **(A)** a statute or executive order administered by ~~a governmental~~ the officer or agency; ~~or upon~~

19 **(B)** any regulation, order, requirement, or agreement issued or made ~~pursuant to~~ under the
20 statute or executive order, ~~the officer or agency upon timely application may be permitted to~~
21 intervene in the action.

22 **(3) Delay or Prejudice.** In exercising its discretion, the court ~~shall~~ must consider whether the
23 intervention will unduly delay or prejudice the adjudication of the ~~rights of the original parties~~ parties'
24 rights.

25 **(c) Procedure. Notice and motion pleading required.** ~~A person desiring~~ motion to intervene shall
26 ~~serve a motion to intervene upon~~ must be served on the parties as provided in ~~Rule~~ Rule 5. The motions
27 ~~shall~~ motion must state the grounds ~~therefor~~ for intervention and ~~shall be accompanied by a pleading~~
28 ~~setting forth that sets out~~ the claim or defense for which intervention is sought.

29 **(d) Constitutionality of Utah statutes, and ordinances, and other governmental enactments.**

30 (d)(1) **Challenges to a statute.** If a party challenges the constitutionality of a Utah statute in an action
31 in which the Attorney General has not appeared, the party raising the question of constitutionality shall
32 must notify the Attorney General of such fact as described in paragraphs (d)(1)(A), (d)(1)(B), and
33 (d)(1)(C). ~~The court shall permit the state to be heard upon timely application.~~

34 (d)(1)(A) **Form and Content.** The notice must (i) be in writing, (ii) be titled "Notice of
35 Constitutional Challenge Under URCP 24(d)," (iii) concisely describe the nature of the challenge, and
36 (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of
37 the statute.

38 (d)(1)(B) Timing. The party must serve the notice on the Attorney General on or before the date
39 the party files the paper challenging the constitutionality of the statute.

40 (d)(1)(C) Service. The party must serve the notice on the Attorney General by email or, if
41 circumstances prevent service by email, by mail at the address below, and file proof of service with
42 the court.

43 Email: notices@agutah.gov

44 Mail:

45 Office of the Utah Attorney General

46 Attn: Utah Solicitor General

47 350 North State Street, Suite 230

48 P.O. Box 142320

49 Salt Lake City, Utah 84114-2320

50 (d)(1)(D) Attorney General's response to notice.

51 (d)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers in response to
52 the constitutional challenge, the Attorney General must file a notice of intent to respond unless
53 the Attorney General determines that a response is unnecessary. The Attorney General may
54 seek up to an additional 7 days' extension of time to file a notice of intent to respond.

55 (d)(1)(D)(ii) If the Attorney General files a notice of intent to respond within the time permitted
56 by this rule, the court will allow the Attorney General to file a response to the constitutional
57 challenge and participate at oral argument when it is heard.

58 (d)(1)(D)(iii) Unless the parties stipulate to or the court grants additional time, the Attorney
59 General's response to the constitutional challenge must be filed within 14 days after filing the
60 notice of intent to respond.

61 (d)(1)(D)(iv) The Attorney General's right to respond to a constitutional challenge under Rule
62 25A of the Utah Rules of Appellate Procedure is unaffected by the Attorney General's decision
63 not to respond under this rule.

64 (d)(2) Challenges to a governmental entity's enactment. If a party challenges the constitutionality
65 of a governmental entity's ordinance, rule, or other administrative or legislative enactment ~~county or~~
66 ~~municipal ordinance~~ in an action in which the ~~county or municipal~~ governmental entity attorney has not
67 appeared, the party raising the question of constitutionality ~~shall~~ must notify the ~~county or~~
68 ~~municipal~~ governmental entity by serving notice on the person identified in Rule 4(d)(1). ~~attorney of such~~
69 ~~fact.~~ The procedures for the party challenging the constitutionality of the enactment will be consistent with
70 paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C), except that service must be on the individual governmental
71 entity. The court shall permit the county or municipality to be heard upon timely application. The
72 procedures for the response by the governmental entity must be consistent with paragraph (d)(1)(D).

73 (d)(3) Failure to provide notice. Failure of a party to provide notice as required by this rule is not a
74 waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as

75 | required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the
76 | notice.
77

1 **Rule 12. Motions.**

2 (a) **Motions.** An application to the court for an order shall be by motion, which,
3 unless made during a trial or hearing, shall be in writing and in accordance with this
4 rule. A motion shall state succinctly and with particularity the grounds upon which it
5 is made and the relief sought. A motion need not be accompanied by a memorandum
6 unless required by the court.

7 (b) **Request to Submit for Decision.** If neither party has advised the court of the
8 filing nor requested a hearing, when the time for filing a response to a motion and the
9 reply has passed, either party may file a request to submit the motion for decision. If a
10 written Request to Submit is filed it shall be a separate pleading so captioned. The
11 Request to Submit for Decision shall state the date on which the motion was served,
12 the date the opposing memorandum, if any, was served, the date the reply
13 memorandum, if any, was served, and whether a hearing has been requested. The
14 notification shall contain a certificate of mailing to all parties. If no party files a
15 written Request to Submit, or the motion has not otherwise been brought to the
16 attention of the court, the motion will not be considered submitted for decision.

17 (c) **Time for filing specified motions.** Any defense, objection or request,
18 including request for rulings on the admissibility of evidence, which is capable of
19 determination without the trial of the general issue may be raised prior to trial by
20 written motion.

21 (c)(1) The following shall be raised at least 7 days prior to the trial:

22 (c)(1)(A) defenses and objections based on defects in the indictment or
23 information ;

24 (c)(1)(B) motions to suppress evidence;

25 (c)(1)(C) requests for discovery where allowed;

26 (c)(1)(D) requests for severance of charges or defendants;

27 (c)(1)(E) motions to dismiss on the ground of double jeopardy ; or

28 (c)(1)(F) motions challenging jurisdiction, unless good cause is shown why the
29 issue could not have been raised at least 7 days prior to trial.

30 (c)(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah
31 Code Section 76-3-402(1) shall be in writing and filed at least 14 days prior to the
32 date of sentencing unless the court sets the date for sentencing within ten days of the
33 entry of conviction. Motions for a reduction of criminal offense pursuant to Utah
34 Code Section 76-3-402(2) may be raised at any time after sentencing upon proper
35 service of the motion on the appropriate prosecuting entity.

36 (d) **Motions to Suppress.** A motion to suppress evidence shall:

37 (d)(1) describe the evidence sought to be suppressed;

38 (d)(2) set forth the standing of the movant to make the application; and

39 (d)(3) specify sufficient legal and factual grounds for the motion to give the
40 opposing party reasonable notice of the issues and to enable the court to determine
41 what proceedings are appropriate to address them.

42 If an evidentiary hearing is requested, no written response to the motion by the
43 non-moving party is required, unless the court orders otherwise. At the conclusion of
44 the evidentiary hearing, the court may provide a reasonable time for all parties to
45 respond to the issues of fact and law raised in the motion and at the hearing.

46 (e) **Motions made before trial.** A motion made before trial shall be determined
47 before trial unless the court for good cause orders that the ruling be deferred for later
48 determination. Where factual issues are involved in determining a motion, the court
49 shall state its findings on the record.

50 (f) **Failure to timely raise defenses or objections.** Failure of the defendant to
51 timely raise defenses or objections or to make requests which must be made prior to
52 trial or at the time set by the court shall constitute waiver thereof, but the court for
53 cause shown may grant relief from such waiver.

54 (g) A verbatim record shall be made of all proceedings at the hearing on motions,
55 including such findings of fact and conclusions of law as are made orally.

56 | (h) **Defects in the institution of the prosecution or indictment or information.**

57 | If the court grants a motion based on a defect in the institution of the prosecution or in
58 | the indictment or information, it may also order that bail be continued for a reasonable
59 | and specified time pending the filing of a new indictment or information. Nothing in
60 | this rule shall be deemed to affect provisions of law relating to a statute of limitations.

61 | (i) **Motions challenging the constitutionality of Utah statutes, ordinances, and**
62 | **other governmental enactments.**

63 | (i)(1) **Challenges to a statute.** If a party in a court of record challenges the
64 | constitutionality of a statute in an action in which the Attorney General has not
65 | appeared, the party raising the question of constitutionality shall notify the Attorney
66 | General of such fact as described in paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C). The
67 | court shall permit the state to be heard upon timely application.

68 | (i)(1)(A) **Form and Content.** The notice shall (i) be in writing, (ii) be titled
69 | “Notice of Constitutional Challenge Under URCrP 12(i),” (iii) concisely describe
70 | the nature of the challenge, and (iv) include, as an attachment, the pleading,
71 | motion, or other paper challenging the constitutionality of the statute.

72 | (i)(1)(B) **Timing.** The party shall serve the notice on the Attorney General on
73 | or before the date the party files the paper challenging the constitutionality of the
74 | statute.

75 | (i)(1)(C) **Service.** The party shall serve the notice on the Attorney General by
76 | email or, if circumstances prevent service by email, by mail at the address below,
77 | and file proof of service with the court.

78 | Email: notices@agutah.gov

79 | Mail:

80 | Office of the Utah Attorney General

81 | Attn: Utah Solicitor General

82 | 350 North State Street, Suite 230

83 | P.O. Box 142320

84 Salt Lake City, Utah 84114-2320

85 **(i)(1)(D) Attorney General's response to notice.**

86 (i)(1)(D)(i) Within 14 days after the deadline for the parties to file all papers
87 in response to the constitutional challenge, the Attorney General shall file a
88 notice of intent to respond unless the Attorney General determines that a
89 response is unnecessary. The Attorney General may seek up to an additional 7
90 days' extension of time to file a notice of intent to respond.

91 (i)(1)(D)(ii) If the Attorney General files a notice of intent to respond within
92 the time permitted by this rule, the court will allow the Attorney General to file
93 a response to the constitutional challenge and participate at oral argument when
94 it is heard.

95 (i)(1)(D)(iii) Unless the parties stipulate to or the court grants additional
96 time, the Attorney General's response to the constitutional challenge will be
97 filed within 14 days after filing the notice of intent to respond.

98 (i)(1)(D)(iv) The Attorney General's right to respond to a constitutional
99 challenge under Rule 25A of the Utah Rules of Appellate Procedure is
100 unaffected by the Attorney General's decision not to respond under this rule.

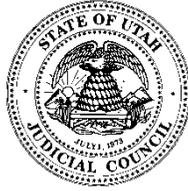
101 **(i)(2) Challenges to an ordinance or other governmental enactment.** If a party
102 challenges the constitutionality of a governmental entity's ordinance rule, or other
103 administrative or legislative enactment in an action in which the governmental entity
104 has not appeared, the party raising the question of constitutionality shall notify the
105 governmental entity by serving notice on the person identified in Rule 4(d)(1) of the
106 Utah Rules of Civil Procedure. The procedures shall be as provided in paragraphs
107 (i)(1)(A), (i)(1)(B), and (i)(1)(C) except that service will be on the individual
108 governmental entity. The procedures for the response by the governmental entity will
109 be consistent with paragraph (i)(1)(D).

110 **(i)(3) Failure to provide notice.** Failure of a party to provide notice as required by
111 this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a

112 | party does not serve a notice as required under paragraphs (i)(1) or (i)(2), the court
113 | may postpone the hearing until the party serves the notice.

114

Tab 4



Administrative Office of the Courts

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

MEMORANDUM

Hon. Mary T. Noonan
Interim State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

To: Appellate Rules Committee
From: Nancy Sylvester
Date: May 31, 2019
Re: Amendments to CJA11-401

As a reminder, the Appellate Representation Committee proposed amending Code of Judicial Administration Rule 11-401 and Appellate Rules 1 and 58, and repealing Appellate Rule 38B based on the following:

- The provisions of Appellate Rule 38B should be merged into CJA Rule 11-401 to reduce the redundancies and confusion from having two rules addressing indigent appellate representation;
- Rule 11-401 should address mentoring for roster appointees;
- Rule 11-401 should address rolling admissions;
- The tension between Rule 55 and the child welfare appellate roster should be addressed (for example, trial counsel is the same as appellate counsel for purposes of the Rule 55 petition but there are lingering concerns regarding trial counsel's inability to raise ineffective assistance of counsel claims); and
- The roster should also include appeals of private parental termination cases from the district court.

The Appellate Rules Committee approved the repeal of Rule 38B (subject to some conditions) and amendments to Rule 58, but expressed significant concerns about amending Rule 1 to bring termination of parental rights cases under the umbrella of child welfare cases. As we discussed at your last meeting, there is a lot at play with respect to the question of whether to redo the child welfare process. A prior committee of stakeholders was involved; the *David C.* case may have been the driver behind that effort; some of the child welfare appeals process is statutory; and although there is still some concern for IAC claims, the rules were designed for speed and the other stakeholders need to be involved in any of the discussions surrounding the expansion of child welfare cases.

The changes to Rule 11-401 should move along and amending Rule 1 appears to be opening a can of worms that may not be ready for release. As such, I have proposed

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.

Rule amendment proposals

May 31, 2019

Page 2

simply adding a statutory reference to TPR cases in Rule 11-401, rather than amending the definition of child welfare cases at this juncture. The amendments are found at lines 12-13, 25-26, and 47-48 in the first attached draft rule.

Also attached for your information is a draft from the Indigent Defense Commission, updated based on recent amendments to Title 78B's definitions. I will merge the two rules shortly.

1 **Rule 11-401. Standing Committee on Appellate Representation**

2 **Intent:**

3 To establish a standing ~~Committee~~committee to assist the Board of Appellate Court Judges ~~to in~~
4 ~~determining~~e-a roster of attorneys eligible for appointment to represent indigent parties on appeal to the
5 Utah Supreme Court and the Utah Court of Appeals.

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

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

9 **Applicability:**

10 This rule shall apply to the internal operation of the Board of Appellate Court Judges and the
11 Committee on Appellate Representation and to ~~district and appellate courts of record~~ in indigent criminal
12 cases, juvenile delinquency, ~~and child welfare proceedings~~ as defined in Rule 1(f) of the Utah Rules of
13 Appellate Procedure, and termination of parental rights proceedings under Section 78B-6-112.

14 **Statement of the Rule:**

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

17 (1)(A) **Composition.** The Committee shall consist of one ~~member~~attorney from of the Office of
18 General Counsel of the Administrative Office of the Courts; one ~~member~~attorney from the Criminal
19 Appeals Division of the Utah Attorney General's Office; one active or retired trial court judge from
20 either a District or Juvenile court in the state; one active or retired appellate court judge; one private
21 civil appellate attorney; two criminal defense appellate attorneys: at least one of whom is currently
22 practicing in the area of indigent criminal appeals in a legal defender's office, under Utah Code § 77-
23 32-302(2)(a) or (2)(b); one attorney practicing in the area of juvenile delinquency defense appeals;
24 and one attorney practicing in the area of child welfare proceedings as defined in Rule 1(f) of the Utah
25 Rules of Appellate Procedure~~child welfare defense appeals, and one attorney practicing in the area of~~
26 termination of parental rights proceedings under Section 78B-6-112. The Director or designee of the
27 Indigent Defense Commission shall be an ex-officio, non-voting member.

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

35 (1)(C) **Vacancies.** In the event of a vacancy on the Committee ~~due to death, incapacity,~~
36 ~~resignation or removal~~, the Supreme Court, after consultation with the Committee chair, shall appoint

37 a new Committee member from the same category as the prior Committee member to serve for the
38 remainder of the unexpired term.

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

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

45 (2) **Appellate Roster.** The Board of Appellate Judges shall create and maintain an appellate roster of
46 attorneys skilled in handling criminal, juvenile delinquency, ~~and child welfare proceedings as defined in~~
47 Rule 1(f) of the Utah Rules of Appellate Procedure, and termination of parental rights proceedings under
48 Section 78B-6-112 . abuse, neglect and dependency appeals.

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

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

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

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

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

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

68 ~~(2)(C)(iii) submit at least two appellate briefs to the Committee with a certification that the~~
69 ~~applicant was substantially responsible for drafting the briefs;~~ (2)(C)(iiiv) demonstrate knowledge
70 of appellate practice as shown by experience, training, or legal education;

71 (2)(C)(iv) certify that the attorney has not, within the preceding three years, been the subject
72 of an order issued by any appellate court imposing sanctions against counsel, discharging

73 counsel, or taking other equivalent action against counsel because of counsel's substandard
 74 performance before an appellate court;

75 (2)(C)(v) not have been removed from the appellate roster within the past year;

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

78 (2)(C)(vii) submit an Appellate Rule 55 petition if the person is applying to be on the roster for
 79 appeals from child welfare proceedings;

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

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

84 ~~(2)(C)(vix)~~ (2)(C)(vix) certify that the applicant has sufficient time and administrative support to
 85 accept an appointment to represent indigent parties on appeal and to provide the effective
 86 assistance of counsel in every case and a willingness to commit those resources to that
 87 representation.

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

91 (2)(E) Mentoring. If an attorney is selected for the roster on the condition that they have a
 92 mentor, then they must select a mentor who meets the qualifications set forth in this rule at
 93 paragraphs (2)(C)(i)-(v). A mentor must have briefed the merits in at least three appeals within the
 94 past three years or in 12 appeals total. The attorney subject to the mentoring requirement shall certify
 95 in each brief filed on behalf of an indigent party that the attorney was directly supervised in drafting
 96 the brief by a mentor qualified under paragraphs (2)(C)(i)-(v). The attorney is not required to name the
 97 mentor in their certification.

98 ~~(2)(FE) Removal.~~ (2)(FE) Removal. The Board may also at any time remove an attorney from the appellate roster
 99 based on an attorney's qualifications, skills, experience, ~~and or~~ prior performance in the ~~any~~ Utah
 100 appellate courts, ~~or an attorney's failure to maintain eligibility under paragraph (2)(C).~~ The Board may
 101 not add to the roster an attorney who was not recommended by the Committee.

102 ~~(2)(EGF) Reconsideration.~~ (2)(EGF) Reconsideration. An attorney who submitted an application to the Committee but was
 103 not chosen by the Board for inclusion on the appellate roster, or who was removed from the roster,
 104 may ~~file a~~ petition for reconsideration in the form of a letter submitted to the Board of Appellate Court
 105 Judges. The letter must be submitted within 30 days from the date of the removal notice. ~~The~~
 106 ~~petitioner shall submit an original letter and twelve copies.~~

107 ~~(2)(FHG) Retention.~~ (2)(FHG) Retention. To maintain eligibility, an attorney must be recommended by the Committee
 108 and reappointed by the Board of Appellate Court Judges every ~~two~~ three years ~~by submitting a~~. ~~An~~
 109 ~~attorney desiring to maintain eligibility shall submit a renewal request to the Committee by January~~

110 ~~September 1 of the attorney's third year on the roster, in which the attorney reports his or her MCLE~~
111 ~~compliance to the Utah State Bar; provided, however, that the first such request shall not be due~~
112 ~~earlier than the first January 1 at least two years after the date on which the attorney originally~~
113 ~~qualified to be on the roster.~~ The renewal request shall include the following:

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

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

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

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

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

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

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

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

136 (3) **Annual Schedule.** The Committee shall meet at least annually and shall submit its
137 recommendations to the Board of Appellate Court Judges by ~~February-December 31~~ of each year. If the
138 Committee determines that additional recommendations should be submitted to the Board of Appellate
139 Court Judges, the Committee may call for additional applications at any time. The Board of Appellate
140 Court Judges shall at its next meeting thereafter approve or disapprove the recommendations of the
141 Committee with respect to attorneys to be included on the appellate roster.

1 **Rule 11-401. Standing Committee on Appellate Representation**

2 **Definitions:** Terms used in this rule are defined in Section 78B-22-102.

3 **Intent:**

4 To establish a standing ~~Committee~~ committee to assist the Board of Appellate Court Judges ~~to in~~
5 ~~determining~~ a roster of attorneys-indigent service providers who are eligible for appointment to
6 represent indigent ~~parties~~ individuals on appeal to the Utah Supreme Court and the Utah Court of
7 Appeals.

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

9 To establish a schedule for recommending the appointment of indigent service providers ~~attorneys~~ to,
10 or the removal of indigent service providers ~~attorneys~~ from, the appellate roster.

11 **Applicability:**

12 This rule shall apply to the internal operation of the Board of Appellate Court Judges and the
13 Committee on Appellate Representation and to ~~district and appellate courts of record in indigent criminal~~
14 ~~cases, juvenile delinquency, and child welfare proceedings, and termination of parental rights~~
15 ~~proceedings under Section 78B-6-112~~ cases involving indigent individuals.

16 **Statement of the Rule:**

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

19 (1)(A) **Composition.** The Committee shall consist of one ~~member-attorney from~~ of the Office of
20 General Counsel of the Administrative Office of the Courts; one ~~member-attorney~~ from the Criminal
21 Appeals Division of the Utah Attorney General's Office; one active or retired trial court judge from
22 either a District or Juvenile court in the state; one active or retired appellate court judge; one private
23 civil appellate attorney; two criminal defense appellate attorneys: at least one of whom is currently
24 practicing in the area of indigent criminal appeals in a legal defender's office, under Utah Code § 77-
25 32-302(2)(a) or (2)(b); one attorney practicing in the area of juvenile delinquency defense appeals;
26 and one attorney practicing in the area of child welfare proceedings as defined by Rule 1(f) of the
27 Utah Rules of Appellate Procedure ~~child welfare defense appeals~~. The Director or designee of the
28 Indigent Defense Commission shall be an ex-officio, non-voting member who shall not participate in
29 the committee's recommendation of attorneys for the roster.

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

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

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

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

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

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

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

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

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

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

71 | (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)(iiiiv) demonstrate knowledge of appellate practice as shown by experience, training, or legal education;

(2)(C)(iv) 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)(v) not have been removed from the appellate roster within the past year;

~~(2)(C)(iv) demonstrate knowledge of appellate practice as shown by experience, training, or legal education;~~ (2)(C)(iiv) submit at least two appellate briefs to the Committee with a certification that the applicant was substantially responsible for drafting the briefs;

(2)(C)(vii) submit an Appellate Rule 55 petition if the person is applying to be on the roster for appeals from child welfare proceedings;

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

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

~~(2)(C)(2)(C)(vix) certify that the applicant has sufficient time and administrative support to accept an appointment to represent provide indigent defense services for indigent parties individuals 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 not add to the roster an ~~attorney~~ indigent defense services provider who was not recommended by the Committee.

(2)(E) **Mentoring.** If an indigent defense services provider ~~attorney~~ is selected for the roster on the condition that they have a mentor, then they must select a mentor who meets the qualifications set forth in this rule at paragraphs (2)(C)(i)-(v). A mentor must have briefed the merits in at least three appeals within the past three years or in 12 appeals total. The indigent defense services provider ~~attorney~~ subject to the mentoring requirement shall certify in each brief filed on behalf of an indigent party that the attorney was directly supervised in drafting the brief by a mentor qualified under paragraphs (2)(C)(i)-(v). The indigent defense services provider ~~attorney~~ is not required to name the mentor in their certification.

(2)(FE) **Removal.** The Board may also at any time remove an indigent defense services provider ~~attorney~~ from the appellate roster based on an indigent defense services provider's ~~attorney's~~ qualifications, skills, experience, ~~and or~~ prior performance in the ~~any Utah~~ appellate courts, or an indigent defense services provider's ~~attorney's~~ failure to maintain eligibility under paragraph (2)(C). The Board may not add to the roster an attorney who was not recommended by the Committee.

109 | (2)(~~EGF~~) **Reconsideration.** An indigent defense services provider attorney who submitted an
110 | application to the Committee but was not chosen by the Board for inclusion on the appellate roster, or
111 | who was removed from the roster, may ~~file a~~ petition for reconsideration in the form of a letter
112 | submitted to the Board of Appellate Court Judges. The letter must be submitted within 30 days from
113 | the date of the removal notice. ~~The petitioner shall submit an original letter and twelve copies.~~

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

122 | (2)(~~FHG~~)(i) a certification that the indigent defense services provider attorney is a member of
123 | the Utah Bar in good standing;

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

129 | (2)(~~FHG~~)(iii) a showing that the indigent defense services provider attorney has maintained
130 | competence in appellate practice, which showing may be achieved by:

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

134 | (2)(~~FHG~~)(iii)(b) certification that the indigent defense services provider attorney has
135 | attended at least six hours of CLE dealing with the area of appellate practice in which the
136 | attorney has accepted court-appointments on appeal in the previous two years; or

137 | (2)(~~FHG~~)(iii)(c) an equivalent demonstration of continued competence.

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

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

148 | (3) **Annual Schedule.** The Committee shall meet at least annually and shall submit its
149 | recommendations to the Board of Appellate Court Judges by ~~February~~ December 31 of each year. If the
150 | Committee determines that additional recommendations should be submitted to the Board of Appellate
151 | Court Judges, the Committee may call for additional applications at any time. The Board of Appellate
152 | Court Judges shall at its next meeting thereafter approve or disapprove the recommendations of the
153 | Committee with respect to attorneys to be included on the appellate roster.