



INDIGENT APPELLATE DEFENSE DIVISION

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IADD Core Principles

In 2020, after a one-year pilot program, the Utah Legislature passed SB 139, creating the Indigent Appellate Defense Division (IADD) within the Office of Indigent Defense Services (OIDS). The duties and responsibilities of the Appellate Defense Division are defined in part nine of the Indigent Defense Act.¹ The Appellate Defense Division is mandated to “provide appellate defense services in counties of the third, fourth, fifth, and sixth class . . . in accordance with the core principles adopted by the commission . . . and any other state and federal standards for appellate defense services.”² The Division is also mandated to adopt, in consultation with the Indigent Defense Commission and Executive Director of the Office of Indigent Defense Services, a budget for the division, as well as appellate performance standards, case weighting standards, and any other relevant measures or information to assist with appellate defense services.³

Under the direction of the Appellate Defense Division's Chief Appellate Officer, the division provides centralized oversight, management, quality, and consistency of the representation of indigent individuals in appeals arising from participating counties.⁴ The division accomplishes this representation through its appellate staff attorneys and by contracting with independent appellate attorneys from the Appellate Roster who are in a position to provide effective, efficient, and vigorous assistance of counsel to indigent individuals⁵, in accordance with the Sixth Amendment of the United States Constitution, and article I, section 12 of the Utah Constitution.

MISSION STATEMENT:

The IADD is dedicated to protecting and defending the rights and dignity of each of our clients through zealous, compassionate, and client-centered advocacy. The goal of the office is to ensure delivery throughout the state—at the trial and appellate stages—of indigent defense services that do not merely meet the *Strickland* constitutional standard for effective assistance but provide all clients the highest quality of representation they deserve.

¹ Utah Code §§ 78B-22-901–78B-22-904.

² Utah Code § 78B-22-903(1)(a)–(b).

³ Utah Code § 78B-22-903(2)(a)–(b).

⁴ See Utah Code § 78B-22-904.

⁵ See *id.*

PRINCIPLES

Principle 1: Role of the Attorney

Every person, indigent or not, has a right to a first, direct appeal from a conviction or other final court order,⁶ which encompasses the right to the effective assistance of counsel when pursuing all direct appeals.⁷ The central role of the appellate attorney is the protection of these rights by providing ethical, competent, and effective representation throughout the appeal process.

To be ethical, competent, and effective, all attorneys must fulfil their duties to their clients, be sufficiently knowledgeable in the relevant areas of law, possess and maintain the proper qualifications and training, and be proficient in all facets of appellate representation, including brief writing and oral advocacy. Every indigent defense appellate attorney must strive to meet these standards in each case without exception.

Principle 2: Duties to Client

Ethical representation by an appellate defense attorney encompasses many of the same goals as at the trial level plus additional duties unique to the appellate process.

The attorney's duties include:

- **Respect for your client as an individual:** Your client is a person, not a defendant, not an appellant, and not a felon. All efforts should be made, both written and orally, to always refer to your client by name and not as “defendant” or “inmate.”
- **Undivided loyalty to your client:** All appellate attorneys must take steps to ensure no conflict of interest exists. All attorneys should maintain a case management system that permits conflict checks, including the names of not only past or current clients but also past and current key civilian witnesses. The goal is to identify all possible conflicts in order to then be in a position to determine, in conversation with your client, whether an actual conflict exists. At minimum, on appeal, one attorney should never represent two people who were charged and convicted in the same case or represent a person who has been convicted if the attorney either in the past or currently also represented a co-defendant or a prosecution witness in the case. If it is determined a conflict exists, counsel must promptly move to be relieved.
- **Separating trial and appellate representation:** While it is not a per se conflict, an attorney from the trial court should not generally represent the same person on appeal from that case and also, especially after a trial, should not be advising the person about whether to note an appeal or not. The better practice is to file the notice of appeal and allow an appellate attorney to review the case and then engage the client in discussions about any pros and cons about pursuing an appeal.
- **Confidentiality:** Often, in particular when a client is incarcerated during the appeal, an attorney will communicate with the client's family members. All such communications must still protect a client's right to confidentiality and not share case-specific information unless the client has specifically approved of the conversation. Best practice, for example, if a client's family contacts you, the attorney should attempt to alert the client that the person tried to contact you and determine what, if any, information the client wants shared with the family member. Do not

⁶ Utah Const. art 1. § 12.

⁷ *Evitts v. Lucy*, 469 U.S. 387, 396 (1985).

make assumptions, no matter the familiar relationship, and ensure that the family understands your duty is to your client. The duty of confidentiality extends to cover if a client later seeks a claim of ineffective assistance of counsel. Appellate counsel's duty of confidentiality to the client means that counsel should not disclose any confidential or privileged information to the prosecution and in general should not have any discussions whatsoever with the prosecution about the client's case and the decisions made during representation.⁸

- **Communication with client:** All attorneys *must*, as soon as reasonably possible after appointment, begin communications with the client in order to build trust that is necessary. Upon appointment, best practices should include:
 - contacting the client in writing to inform the client of your appointment, the general time frame for an appeal, and when you estimate you will have been able to finish an initial review of the record and be in a position to speak in detail with the client about the case.
 - meeting in person with the client, at minimum, one time before any initial brief is filed.⁹
 - learning any information from the client about what occurred at trial, the client's perspective and views on what happened in the district court, whether anything did not happen in the district court that the client believed should have (such as the filing of any motions, calling any witnesses, or introduction of evidence).¹⁰
 - maintaining regular communication, whether in person, over the phone, or in writing, to enable the attorney's understanding of the client's views of what transpired during the entire trial process, possible issues you have identified, and any additional issues the client believes should be raised.¹¹ Regular communication also is needed to maintain trust and to ensure the client has an

⁸ When challenged as ineffective, appellate counsel may wish to defend the performance rendered, but must recognize the duty to protect the client's interests. Further, while at the trial level counsel may have information vital to an ineffectiveness claim, that is rarely the case at the appellate level. The court has the transcript and the briefs, raising some issues and omitting others. The claim of ineffective assistance of appellate counsel presumably sets forth issues that purportedly should have been raised, the prosecution has every incentive to argue that appellate counsel was not ineffective for failing to raise them, and the court is in a position to make its own assessment of the comparative strength of the issues. Counsel's opinion would likely not add anything to the court's decision and may risk needlessly (even inadvertently) harming the client.

⁹ Barring exceptional circumstances, there is no excuse not to meet face-to-face with a client at least one time before filing an opening brief.

¹⁰ In particular, if a client identifies investigatory issues that were not pursued, evidence that was missed, or witnesses that were not presented at trial, it is important to learn if such information was ever shared with trial counsel and if client and trial counsel had any discussions related to such issues.

¹¹ If a client asks to raise an issue that the attorney believes is frivolous or may result in a worse outcome for client even if successful, the attorney should attempt to address any concerns with the client in order for the client to understand the attorney's thought process and to ensure the client feels heard. Ultimately, legal decisions as to what issues to raise fall within the attorney's discretion but all attempts should be made to follow the client's expressed desires.

understanding of the appellate process, including expected timelines and possible results.

- communication must always include ensuring counsel fully advises the client as to all potential risks involved in pursuing the appeal and any specific issue. Counsel can advise the client about the risk but, ultimately, it is the client's decision whether to accept the risk.
- **Case file.** Counsel must maintain the case file but the file does not belong to counsel. It belongs to the client. Both throughout the pendency of the appeal and after, counsel should maintain the file, unless the client directs otherwise. If a client obtains new counsel or successor counsel, counsel shall provide the file to the new counsel, with the exception of confidential information absent approval from the client.

Principles 3: Areas of Knowledge and Expertise

The specialized nature of criminal appeals requires knowledge in several areas of law, policy, research, and practice, including:

- United States and Utah constitutional law as it relates to criminal procedure, effective representation, and due process;
- The Utah Code of Criminal Procedure, Utah Criminal Code, Utah Rules of Evidence, Utah Rules of Appellate Procedure, Rules of Juvenile Procedure, Federal Rules of Evidence.¹²
- All relevant federal and state caselaw, including maintaining a process to stay up to date with new and developing case law at both the state and federal levels.
- Related areas of law, including immigration law and civil rights law, sufficient to permit the attorney to identify issues and make all appropriate referrals.
- Legal writing and oral advocacy.

Principle 4: Qualifications, Training, and Ongoing Education

Appellate criminal defense is a complex specialty, requiring sufficient training and qualifications and a commitment to ongoing legal education.¹³

Before accepting any appeal of a criminal case, attorneys must demonstrate competence to handle the assignment. A competent appellate attorney must know the law, rules, procedures, and principles governing appellate practice, and be sufficiently experienced in the substantive and procedural law of Utah to be in a position to obtain a complete trial record, meaningfully review the record, identify all appealable issues, write persuasive, well-researched, and professional briefs, and overall provide effective and zealous client-centered representation throughout the process.

Besides having an initial level of competence, all appellate attorneys must maintain that standard while handling indigent criminal defense appeals. On an ongoing basis, the attorney should:

¹² Due to the many similarities between the Utah Rules of Evidence and the Federal Rules of Evidence, all counsel should also have an understanding of the federal rules.

¹³ Utah Code § 78B-22-404(1)(a)(ii)(F) (systems must ensure providers have “appropriate experience or training in the area for which the indigent defense service provider is representing indigent individuals”).

- Participate in training in areas of law and practice that specifically impact criminal appellate defense practice (*see* “Principle 3: Areas of knowledge and expertise”).
- Develop and maintain affiliation and mutually supportive relationships with other indigent criminal defense attorneys and criminal appellate attorneys.
- Seek consultation and mentorship from experienced practitioners in areas of law and practice less familiar to the attorney and in areas of particular importance.
- Make oneself available to other attorneys to provide consultation and mentorship in areas where the attorney feels particularly knowledgeable.
- Become familiar with available resources and experts with whom they can consult on related areas of expertise, including but not limited to forensics and surveillance issues, immigration law, mental health law, and civil rights law.
- Attend (virtually or in person) continuing education not just from classes provided by Utah-based practitioners but also from practitioners across the country; for instance, seek out CLEs sponsored by groups such as the National Association of Criminal Defense Attorneys, National Association of Public Defense, and National Legal Aid and Defender Association.
- Keep up to date on legislative and court rule developments related to criminal defense trial and appellate practice.

Principle 5: Scope of Representation

Effective representation commences in a timely manner, extends for the proper period of representation, and proceeds with reasonable continuity. (*See* “Principle 1: Role of the Attorney.”)

- Represent the client from the moment of appointment through the direct appeal, and if necessary, the filing of a petition for writ of certiorari with the Utah Supreme Court in order to protect federal post-conviction rights.
- Determine the current location of the client, whether the person is incarcerated or not.
- If representation includes the filing of a motion pursuant to rule 23B of the Utah Rules of Appellate Procedure, be present and prepared for all hearings before the district court.
- Timely file all briefs, including reply briefs in all but the rarest of circumstances.
- If oral argument is scheduled, be present and prepared for argument; do not waive argument in all but the rarest of circumstances.
- Maintain contact with the client while awaiting a decision, which includes continuing to timely respond to any questions or inquiries from the client.
- Upon receiving a decision from the Court of Appeals, discuss the decision and all of its possible implications with the client as soon as reasonably possible, preferably in person. If the direct appeal is successful, counsel client on what to expect next and the possible timeline.
- If the direct appeal is unsuccessful, be sure to protect the client’s federal post-conviction rights and file a petition for writ of certiorari absent written waiver from client.¹⁴

¹⁴ *See* 28 U.S.C. § 2254; *see also* *Bossett v. Walker*, 41 F.3d 825, 828 (2d Cir. 1994) (a claim is deemed to be exhausted when “the substance of [a defendant’s] federal claims” has been presented “to the highest court of the pertinent state” and a federal habeas petition will be generally dismissed if it contains “unexhausted claims”); *see also* *Picard v. Conner*, 404 U.S. 270, 275 (1971) (“federal claim must be fairly

“The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.”
—*Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

Principle 6: Brief Writing Basics

The main component of any appeal will be contained in the briefs filed with the Court of Appeals, in particular the opening brief. The appellate brief should be clear, concise, and well organized, and it should provide the court with the facts and law necessary to make a well-reasoned decision. The brief should be professional in appearance, free of typographical errors, consistent with court rules and citation requirements, and accurate in record and legal cites.

Principle 7: Oral argument

It is a rare occurrence that counsel should waive oral argument before the Court of Appeals.¹⁵ Zealous, effective representation requires that counsel thoroughly prepare for oral argument by reviewing the briefs, the record, and all relevant case law, including post-briefing decisions. Counsel should strive to present oral argument in a clear, cogent, and persuasive manner. A person listening to the argument who is unfamiliar with the case should be able to ascertain quickly which party you represent and what your argument is. The client should be informed promptly of the date, time, and place scheduled for oral argument.

Principle 8: Workload

The indigent defense appellate attorney should not carry a total workload that interferes with the ability to render effective assistance of counsel to each client in every single case. It is the responsibility of the attorney to decline new case assignments if it will interfere with the ability to deliver effective assistance. The IADD has the discretion to refuse to assign attorneys new cases if it is believed the attorney has taken on too heavy of a workload.

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“The Due Process Clause of the Fourteenth Amendment guarantees the right to effective assistance of appellate counsel.”
— *Bruner v. Carver*,
920 P.2d 1153, 1157 (Utah 1996).

presented to the state courts”).

¹⁵ Utah R. App. P. 29 governs oral argument before both the Court of Appeals and the Supreme Court.

