

COMMUNICATIONS WITH PROSECUTORS

1. **Initial Contact:** When a brief is received from a defendant, a copy will be promptly mailed to the district or county attorney or trial prosecutor with a cover letter inviting comment and a response form. The name and telephone number of the assistant attorney general assigned to the case will be provided.
2. **Concession of Serious Prosecutorial Misconduct:** An assistant attorney general who believes the State must consider conceding serious prosecutorial misconduct will contact the trial prosecutor to discuss the matter. The assistant attorney general will specifically invite an oral or written response from the trial prosecutor. If the assistant attorney general still believes that a concession of serious prosecutorial misconduct is necessary, the attorney must review the issue with the Division Director and others as necessary. In this meeting, the attorney will convey the views of the trial prosecutor. If following this meeting the Division Director determines that a concession of serious prosecutorial misconduct is necessary, that final decision will be communicated to the prosecutor before the State's brief is filed.
3. **Confession of Reversible Error:** An assistant attorney general who believes the State must consider confessing reversible error in a case will follow the procedure outlined in paragraph 2. However, after the prosecutor has had full opportunity to be heard, if the Division Chief recommends confession of error, final approval must be obtained by the Solicitor General. The final decision will be communicated to the prosecutor before the State's brief is filed.
4. **Copies of Documents:** The Division will promptly mail to the trial prosecutor courtesy copies of all briefs and dispositive pleadings, including motions for summary disposition, briefs, petitions for rehearing, and petitions for certiorari.
5. **Oral Argument:** Immediately upon receiving notice of oral argument, the Division will notify the prosecutor and invite the prosecutor to attend. If oral argument is stricken or rescheduled, the Division will promptly notify the prosecutor.
6. **Rulings:** When the Court issues a dispositive ruling or opinion, the Division will promptly mail a copy to the trial prosecutor. In addition, if the ruling or opinion reverses the conviction or if the trial prosecutor requests immediate notification, the assistant attorney general assigned to the case will promptly telephone and/or e-mail the trial prosecutor.
7. **Petitions for Rehearing or Certiorari:** Notices from the Court of the grant or denial of rehearing or certiorari will be mailed promptly to the prosecutor. If certiorari is granted, the process for direct appeal outlined above will be followed.

STATE'S APPEALS

77-18a-1. Appeals -- When proper.

- (1) A defendant may, as a matter of right, appeal from:
 - (a) a final judgment of conviction, whether by verdict or plea;
 - (b) an order made after judgment that affects the substantial rights of the defendant;
 - (c) an order adjudicating the defendant's competency to proceed further in a pending prosecution; or
 - (d) an order denying bail, as provided in Subsection 77-20-1(7).
- (2) In addition to any appeal permitted by Subsection (1), a defendant may seek discretionary appellate review of any interlocutory order.
- (3) The prosecution may, as a matter of right, appeal from:
 - (a) a final judgment of dismissal, including a dismissal of a felony information following a refusal to bind the defendant over for trial;
 - (b) a pretrial order dismissing a charge on the ground that the court's suppression of evidence has substantially impaired the prosecution's case;
 - (c) an order granting a motion to withdraw a plea of guilty or no contest;
 - (d) an order arresting judgment or granting a motion for merger;
 - (e) an order terminating the prosecution because of a finding of double jeopardy or denial of a speedy trial;
 - (f) an order granting a new trial;
 - (g) an order holding a statute or any part of it invalid;
 - (h) an order adjudicating the defendant's competency to proceed further in a pending prosecution;
 - (i) an order finding, pursuant to Title 77, Chapter 19, Part 2, Competency for Execution, that an inmate sentenced to death is incompetent to be executed;
 - (j) an order reducing the degree of offense pursuant to Section 76-3-402; or
 - (k) an illegal sentence.
- (4) In addition to any appeal permitted by Subsection (3), the prosecution may seek discretionary appellate review of any interlocutory order entered before jeopardy attaches.

CONSIDERATIONS GOVERNING WHETHER TO APPEAL

- I. When is our filing deadline?
 - A. Notice of appeal must be filed within 30 days of entry of final order.
 - B. Petition for interlocutory appeal must be filed within 20 days of entry of the order appealed from.

- II. How good is our record?
 - A. Suppression cases require evidentiary hearing, not just preliminary hearing.
 - B. In warrant cases, we need to see the warrant and affidavit.
 - C. All state's appeals are subject to the record on appeal.

- III. Is the issue preserved?
 - A. Did the prosecutor make a record of the issue, grounds, arguments, and any proffers needed to win on appeal?

- IV. How likely are we to win on appeal?
 - A. Controlling law
 - B. Standard of review
 - 1. Factual findings are reviewed for clear error.
 - 2. Legal conclusions are reviewed for correctness.
 - 3. Unpreserved issues are reviewed for plain (obvious) error.

- V. How important is the issue?
 - A. Is this an issue with statewide implications?
 - B. Does this case present an opportunity to make good law?
 - C. Is a legislative fix preferable or already in the works?

- VI. How great is the risk of creating bad law?
 - A. Does this case hold the potential of making a bad result statewide law?

- VII. How grave is the public danger if we do not appeal?

- VIII. Is judicial education needed?
 - A. Pattern of error on the part of a judge that needs correcting?

- IX. How adamant is the prosecutor?
 - A. Does the prosecutor have alternate ways to correct the problem?
 - B. Can the prosecutor wait two years for a ruling?

- X. How available are the AG resources needed to take an appeal?

STATE'S APPEAL REQUEST FORM

Prosecutor:

Defendant:

Date:

County:

Phone:

Email:

Judge:

DefCo:

Charge:

Order:

Order date:

Evid. hrg?

Facts:

Ruling:

Assessment:

Next step:

Deadline:

AG's Statutory Authority in Criminal Appeals

Utah Code Ann. § 67-5-1 defines the AG's general duties. Under subsection (2), the AG has the duty, “except as provided in Sections 10-3-928 and 17-18-1,” to “attend the Supreme Court and the Court of Appeals of this state, and all courts of the United States, and prosecute or defend all causes to which the state, or any officer, board, or commission of the state in an official capacity is a party... .”

Section 17-18a-1, et. seq., defines the duties of county and district attorneys as public prosecutors. Section 17-18a-403(1) provides that a public prosecutor “shall assist and cooperate, as required by the attorney general, in a case that may be appealed to the Court of Appeals or Utah Supreme Court regarding a criminal violation of state statute.” Section 17-18a-403(2) provides that the public prosecutor “shall appear and prosecute all appeals in the appropriate court, for a crime charged as a misdemeanor in district court or as a violation of a county criminal ordinance.”

The Utah Supreme Court has interpreted the nearly identical predecessors of these two provisions as meaning that a county or district attorney may not prosecute an appeal from a felony case in the name of the State without the authorization of the Attorney General. *See State v. Loddy*, 618 P.2d 60 (Utah 1980) (dismissing criminal appeal brought by county alone without authorization from the attorney general); *State v. Owens*, 627 P.2d 70 (Utah 1980) (same). *See also State v. Wilson*, 710 P.2d 801 (Utah 1985) (noting that although the Attorney General had declined to take State's appeal, he had authorized the county attorney to proceed with the appeal).

In other words, the Attorney General represents the State in all appeals in felony cases in our state appellate courts. As counsel for the State, the Attorney General thus makes the ultimate call on whether to pursue an appeal or, for that matter, to confess reversible error in an appeal. The county's duty in felony criminal appeals is to “assist and cooperate, as required by the attorney general.”