



Agenda

Utah Supreme Court Advisory Committee Utah Rules of Appellate Procedure

Paul C. Burke, Chair

Location: Webex (see calendar appointment for instructions)

Date: May 7, 2020

Time: 12:00 to 1:30 p.m.

Action: Welcome and approval of April 2, 2020 minutes	Tab 1	Paul C. Burke, Chair
Discussion: Legislative update (if any)		Paul C. Burke, Judge Jill Pohlman, Christopher Ballard
Action: Rule 8 Stay or injunction pending appeal	Tab 2	Clark Sabey
Action: Rule 48 Time for petitioning	Tab 3	Judge Jill Pohlman, Clark Sabey, Larissa Lee
Action: Rule 3 Appeal as of right: how taken	Tab 4	Larissa Lee
Discussion & Action: Rule 29 Oral argument	Tab 5	Larissa Lee
Discussion: Other business		Paul C. Burke

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

2020 meeting schedule:

June 4, 2020

July 2, 2020

August 6, 2020

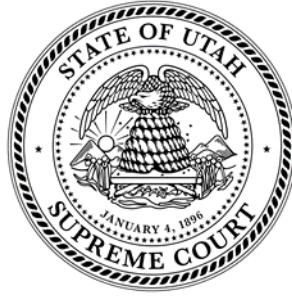
September 3, 2020

October 1, 2020

November 5, 2020

December 3, 2020

Tab 1



Minutes

Supreme Court's Advisory Committee on the Utah Rules of Appellate Procedure

450 South State Street
Salt Lake City, Utah 84114

WebEx
Thursday, April 2, 2020
12:00 pm to 1:30 pm

PRESENT

Christopher Ballard
Troy Booher—
Emeritus Member
Paul C. Burke—Chair
Lisa Collins
Tyler Green
R. Shawn Gunnarson
Michael Judd—
Recording Secretary

Larissa Lee—Staff
Alan Mouritsen
Judge Gregory Orme
Rodney Parker
Judge Jill Pohlman
Clark Sabey
Nathalie Skibine
Scarlet Smith

EXCUSED

Patrick Burt
Mary Westby

1. Welcome and approval of March 2020 minutes Paul C. Burke

Paul C. Burke welcomed the committee, and the committee discussed their review of the March 2020 minutes.

Shawn Gunnarson moved to approve and adopt the minutes from the March 2020 meeting. Lisa Collins seconded the motion and it passed without objection, by unanimous consent.

2. **Discussion: Legislative Update (if any)** **Paul C. Burke**
Judge Jill Pohlman
Christopher Ballard

The Legislative Outreach Subcommittee reported that there were no updates related to legislative outreach.

3. **Discussion and Action:** **Clark Sabey**
Rule 8

Clark Sabey met with Troy Booher and Tyler Green after last month's meeting to discuss how Rule 8 would overlap with other rules, including Rules 65 and 62. Mr. Sabey has proposed a change that would "carve out" parts of the proposed Rule 8 (in paragraph (b)(3)) to adjust for those rules. Mr. Booher stated that the proposed changes addressed his concerns.

Judge Orme observed that the committee is likely on the right track, but that further analysis is likely needed before specific rule language is proposed.

Judge Orme moved to table the proposed amendment, with the intent to resume discussion next month after further analysis, and Tyler Green seconded. The motion passed unanimously without objection.

4. **Discussion and Action:** **Larissa Lee**
Rule 35 (and related Rules 36 & 48) **Clark Sabey**

The committee discussed the utility of a length limitation for nonsubstantive or clerical errors, and Rodney Parker and Lisa Collins both suggested that such a limitation was unnecessary, given the nature of the rule and prior filings by practitioners.

Lisa Collins moved to amend paragraph (b) to remove the length limitation and Rodney Parker seconded that motion. The motion passed unanimously without objection.

The committee discussed whether a specific time limitation would prove useful. Judge Orme explained that the court prefers prompt action on such filings because quick attention to clerical errors prevents those errors from being included in printed reporters. The committee also discussed the

courts' discretion to make such corrections without prompting and whether or not notice to the parties in advance of such corrections is needed.

Mr. Booher stated that a concern he previously raised still remains—that the opposing party may disagree about whether the target of a proposed correction is, in fact, a “clerical error” or something more substantive. The committee worked together on new language that would allow an appellate court to construe a letter filed under paragraph (b) as a petition for rehearing. Shawn Gunnarson recommended several changes to the language of the proposed rule to make the rule clearer and more consistent, and the committee agreed with each of those changes. Christopher Ballard recommended retention or revision of two phrases set for removal. The committee agreed with each of those changes.

Mr. Parker moved to approve the amendments to Rule 35 as indicated on the screen at the committee meeting. Judge Orme seconded the motion and it passed by unanimous consent.

The committee considered the corresponding changes to Rule 36. Mr. Booher mused about frequent confusion among district court judges about what—if anything—a district court can do with a case while it is on appeal. Ms. Collins and Judge Orme suggested that this may be an issue of “inter-judicial education” more than an issue for this committee to take up through the rulemaking process.

Judge Pohlman moved to approve the amendments to Rule 36 as indicated on the screen at the committee meeting. Mr. Parker seconded the motion and it passed by unanimous consent.

Judge Pohlman moved to approve an amendment to Rule 35 as indicated on the screen at the committee meeting, which used the word “rejected” rather than refused. That motion was seconded and it passed by unanimous consent.

The committee turned to accompanying changes to Rule 48, which are meant to modernize the language. The committee discussed whether an untimely petition should be deemed “refused” (as the rule now reads) or “rejected.” The committee decided to change that language to “rejected.” The committee worked together to sharpen the language of paragraph (e), which provides the framework for requesting extensions of time. The committee suggested breaking this into three parts: stipulated extension requests within 30 days, nonstipulated requests within 30 days, and requests made 30–60 days, to be reviewed at the next meeting.

The committee determined that the appropriate approach is to table the proposed amendment and update paragraph (e).

5. Discussion and Action: Larissa Lee
Rule 3

Ms. Lee introduced changes to Rule 3 that address the payment of fees by a cross-appellant, as well as other clean-up to the rule. Mr. Parker expressed concern about taking up a number of changes within the limited amount of time remaining.

The committee agreed to table the proposed amendment, with the intent to resume discussion next month after further analysis. The motion passed unanimously without objection.

6. Discussion: Paul C. Burke
Other Business

Mr. Burke passed along to the committee gratitude expressed by the Utah Supreme Court for the attention given by the committee to revisions to the advisory committee notes.

7. Adjourn

Mr. Burke adjourned the meeting. The committee is scheduled to meet again on May 7, 2020.

Tab 2

1 **Rule 8. Stay or injunction pending appeal.**

2 (a) Motion for stay.

3 (a)(1) Initial motion in the trial court. A party must ordinarily move first in the trial
4 court for the following relief:

5 (a)(1)(A) a stay of the judgment or order of the trial court without security
6 pending appeal or disposition of a petition under Rule 5; or

7 (a)(1)(B) approval of a bond or other security provided to obtain a stay of
8 judgment; or

9 (a)(1)(C) an order suspending, modifying, restoring, or granting an injunction
10 while an appeal is pending.

11 (a)(2) Motion in the appellate court.

12 (a)(2)(A) Except in the most extraordinary circumstances, an appellate court will
13 not act on a motion for a stay or for suspension, modification, restoration, or grant
14 of an injunction, unless the movant first requested relief in the trial court and that
15 court denied the request.

16 (a)(2)(B) The motion must include:

17 (a)(2)(B)(i) the reasons the trial court denied the request;

18 (a)(2)(B)(ii) the reasons for granting the relief requested and the facts
19 relied on;

20 (a)(2)(B)(iii) copies of affidavits or other sworn statements supporting
21 facts subject to dispute; and

22 (a)(2)(B)(iv) relevant parts of the record, including a copy of the trial
23 court's order.

24 (a)(2)(C) Any motion must comply with Rule 23.

25 ~~Stay must ordinarily be sought in the first instance in trial court; motion for stay in~~
26 ~~appellate court. Application for a stay of the judgment or order of a trial court pending appeal,~~
27 ~~or disposition of a petition under Rule 5, or for approval of a supersedeas bond, or for an order~~

28 ~~suspending, modifying, restoring, or granting an injunction during the pendency of an appeal~~
29 ~~must ordinarily be made in the first instance in the trial court. A motion for such relief may be~~
30 ~~made to the appellate court, but the motion shall show that application to the trial court for the~~
31 ~~relief sought is not practicable, or that the trial court has denied an application, or has failed to~~
32 ~~afford the relief which the applicant requested, with the reasons given by the trial court for its~~
33 ~~action. The motion shall also show the reasons for the relief requested and the facts relied upon,~~
34 ~~and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn~~
35 ~~statements or copies thereof. With the motion shall be filed such parts of the record as are~~
36 ~~relevant, including a copy of the order sought to be stayed. Any motion for stay shall be filed~~
37 ~~under rule 23.~~

38 (b) **Bond requirement.**

39 (b)(1) Stay ~~may be~~ordinarily conditioned upon giving of bond. For requests for relief
40 to which Rule 62(d) of the Utah Rules of Civil Procedure applied below, ~~R~~relief available
41 in the appellate court under this rule pending appeal ~~may will~~ be conditioned upon ~~the~~
42 filing ~~of~~ a bond or other appropriate security in the trial court, unless there is no
43 reasonable means of quantifying the security in monetary or other terms and the
44 conditions of paragraph (b)(2) are met.

45 (b)(2) Stay in cases not conditioned on giving of bond. Ordinarily a stay without a
46 bond or other security will not be granted unless the movant demonstrates a likelihood of
47 success on the merits or the case presents serious issues on the merits warranting
48 appellate review and the appellant demonstrates:

49 (b)(2)(A) a likelihood of irreparable harm to the movant outweighing the harm to
50 any other party, a significant harm to the public interest; or

51 (b)(2)(B) an extraordinary circumstance that justifies issuing a stay.

52 (b)(3) Injunctions. For requests for relief to which Rule 65A or 62(c) of the Utah Rules
53 of Civil Procedure applied below, any relief available pending appeal is governed by
54 those rules.

55 (c) **Stays in criminal cases.** Stays pending appeal in criminal cases in which the defendant has
56 been sentenced are governed by Utah Code Ann. Section 77-20-10 and Rule 27, Utah. R. Crim.
57 P. Stays in other criminal cases are governed by this rule.

Tab 3

1 **Rule 48. Time for petitioning.**

2 (a) **Timeliness of petition.** A petition for a writ of certiorari must be filed with the ~~Clerk of the~~
3 Supreme Court clerk within 30 days after ~~the entry of the final decision by~~ the Court of Appeals'
4 final decision is issued, and not from the date the remittitur is issued. The docket fee ~~shall~~must
5 be paid when at the time of filing the petition is filed.

6 (b) ~~Refusal-Rejection~~ **of petition.** The clerk will ~~refuse-reject to receive~~ any petition for a writ
7 of certiorari not timely filed or ~~which is beyond the time indicated in paragraph (a) of this rule or~~
8 ~~which is not~~ accompanied by the docket fee.

9 (c) **Effect of petition for rehearing.** ~~The time for filing a petition for a writ of certiorari runs~~
10 ~~from the date the decision is entered by the Court of Appeals, not from the date of the issuance of~~
11 ~~the remittitur~~. If a petition for rehearing that complies with Rule 35(a) is timely filed by any
12 party, the time for filing the petition for a writ of certiorari for all parties runs from the date ~~of~~
13 ~~the denial of~~ the petition for rehearing is denied or ~~of the entry of~~ a subsequent decision
14 on entered upon the rehearing or motion is issued. A request filed under Rule 35(b) does not
15 affect the time for filing a petition for a writ of certiorari.

16 (d) **Time for cross-petition.**

17 (d)(1) A cross-petition for a writ of certiorari must be filed:

18 (d)(1)(A) within the time provided in ~~Subdivisions-paragraphs~~ (a) and (c) of this
19 rule; or

20 (d)(1)(B) within 30 days of the filing of the petition for a writ of certiorari.

21 (d)(2) Any cross-petition that is timely only ~~pursuant to~~under paragraph (d)(1)(B) ~~of this~~
22 ~~rule~~ will not be granted unless a timely petition for a writ of certiorari of another party to
23 the case is granted.

24 (d)(3) The docket fee ~~shall~~must be paid when at the time of filing the cross-petition is
25 filed. The clerk ~~shall will~~ refuse-reject any cross-petition not accompanied by the docket
26 fee.

27 (d)(4) A cross-petition for a writ of certiorari may not be joined with any other filing. The
28 clerk ~~of the court shall~~ will ~~refuse-reject~~ any filing so joined.

29 (e) Time Extensions of time.

30 (e)(1) Before the time prescribed by paragraph (a) or (c) expires, the court will grant a
31 party's request to extend the time for filing a petition or cross-petition, not to exceed 30
32 days past the prescribed time.

33 ~~The Supreme Court, upon a showing of good cause, may extend the time for filing a~~
34 ~~petition or a cross-petition for a writ of certiorari upon motion filed not later than 30 days~~
35 ~~after the expiration of the time prescribed by paragraph (a) or (c) of this rule. Responses~~
36 ~~to such motions are disfavored and the court may rule at any time after the filing of the~~
37 ~~motion. No extension shall exceed 30 days past the prescribed time or 14 days from the~~
38 ~~date of entry of the order granting the motion, whichever occurs later, and no more than~~
39 ~~one extension will be granted.~~

40 (e)(2) Within 30 days after the time prescribed by paragraph (a) or (c) expires, a party
41 may file a motion to extend the time for filing a petition or cross-petition. The court will
42 grant the motion only upon a showing of good cause and excusable neglect. No extension
43 may exceed 30 days past the prescribed time or 14 days from the date the order granting
44 the motion is entered, whichever occurs later, and no more than one extension will be
45 granted. Responses to such motions are disfavored and the court may rule at any time
46 after the motion is filed.

47 ~~The Supreme Court, upon a showing of good cause or excusable neglect, may extend the~~
48 ~~time for filing a petition or a cross-petition for a writ of certiorari upon motion filed not~~
49 ~~later than 30 days after the expiration of the time prescribed by paragraph (a) or (c) of~~
50 ~~this rule, whichever is applicable. No extension shall exceed 30 days past the prescribed~~
51 ~~time or 14 days from the date of entry of the order granting the motion, whichever occurs~~
52 ~~later, and no more than one extension will be granted.~~

53 ~~(f) Seven copies of the petition for a writ of certiorari, one of which shall contain an original~~
54 ~~signature, shall be filed with the Clerk of the Supreme Court.~~

55

Tab 4

1 **Rule 3. Appeal as of right: how taken.**

2 (a) ~~Filing appeal from final orders and judgments~~ the notice of appeal.

3 (1) Except as otherwise provided by law, A ~~a party may~~ appeal ~~may be taken~~ a final order
4 or judgment from a district or juvenile court to the appellate court ~~with jurisdiction over~~
5 ~~the appeal from all final orders and judgments, except as otherwise provided by law,~~ by
6 filing a notice of appeal with the trial court clerk ~~of the trial court~~ within the time allowed
7 by Rule 4.

8 (2) An appellant's ~~F~~ ~~failure of an appellant~~ to take any step other than ~~the~~ timely filing ~~of~~
9 a notice of appeal does not affect the validity of the appeal, but is ground only for ~~such~~
10 ~~action as~~ the appellate court to act as it deems considers appropriate, ~~which may include~~
11 ing dismissal ~~of ing~~ the appeal or other sanctions short of dismissal, ~~as well as~~ and ~~the~~
12 awarding ~~of~~ attorney fees.

13 (b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment
14 or order and their interests are such as to make joinder practicable, they may file a joint notice of
15 appeal or may join in an appeal of another party after filing separate timely notices of appeal.
16 Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be
17 consolidated by order of the appellate court upon its own motion or upon motion of a party, or by
18 stipulation of the parties to the separate appeals.

19 (c) ~~Party Designation of parties.~~ The party taking the appeal ~~shall be~~ is known as the appellant
20 and the adverse party as the appellee. Unless otherwise directed by the appellate court, ~~T~~ ~~the~~
21 appeal will not change the title of the action or proceeding ~~shall not be changed in consequence~~
22 ~~of the appeal, except where otherwise directed by the appellate court.~~ ~~In~~ For original proceedings
23 in the appellate court, the party making the original application ~~shall be~~ is known as the petitioner
24 and any other party as the respondent.

25 (d) ~~Content of n~~ Notice of appeal contents. The notice of appeal ~~shall~~ must:

26 (1) specify the party or parties taking the appeal;

27 (2) ~~shall~~ designate the judgment, or order, or part thereof; being appealed ~~from~~;

28 ~~(3) shall designate name~~ the court from which the appeal is taken; and

29 ~~(4) shall designate name~~ the court to which the appeal is taken.

30 (e) ~~Service of~~ **the notice of appeal.** The ~~party taking the appeal shall~~ **appellant must give**
31 ~~notice of the filing of a~~ **serve the** notice of appeal ~~by serving on~~ each party to the judgment or
32 order in accordance with the requirements of the court from which the appeal is taken. If counsel
33 of record is served, the certificate of service ~~shall must designate~~ **include** the name of the party
34 represented by that counsel.

35 (f) **Filing fee in civil appeals.** ~~At the time of~~ **When** filing any notice of separate, joint, or cross
36 appeal in a civil case, the party taking the appeal ~~or cross appeal shall must~~ pay **the filing fee**
37 **established by law** to the **trial court** clerk ~~of the trial court the filing fee established by law.~~ The
38 **trial court** clerk ~~of the trial court shall must~~ accept a notice of appeal regardless of whether the
39 filing fee has been paid. Failure to pay the filing fee within a reasonable time may result in
40 dismissal.

41 (g) **Docketing of appeal.** ~~Upon the~~

42 **(1) Transmitting notice of appeal to the appellate court.** ~~After an appellant files~~ **ing of**
43 the notice of appeal, the **trial court** clerk ~~of the trial court shall must~~ immediately ~~transmit~~
44 ~~a certified email~~ a copy of the notice of appeal **to the appellate court clerk. This will**
45 **include;**

46 **(A)** ~~showing~~ the date **the notice of appeal was filed** ~~of its filing;~~ **and**

47 **(B)** ~~the clerk's~~ a statement ~~by the clerk indicating~~ **declaring** whether the filing fee
48 was paid; **and**

49 **(C)** whether the cost bond required by Rule 6 was filed.

50 **(2) Docketing the appeal.** ~~Upo~~ **On** receipt ~~of~~ **ving** the copy of the notice of appeal **from**
51 **the trial court clerk,** the **appellate court** clerk ~~of the appellate court shall will~~ enter the
52 appeal ~~upon-on~~ the docket. An appeal ~~shall will~~ be docketed under the title given to the
53 action in the trial court, with the appellant identified as such, but if the title does not
54 contain the name of the appellant, such name ~~shall will~~ be added to the title.

55 **Advisory Committee Note**

56 ~~But for the order of filing, the cross-appellant would have been the appellant and therefore the~~
57 ~~designation of an appeal as a “cross-appeal” does not eliminate the obligation to pay filing and~~
58 ~~docketing fees.~~

59 *Adopted 2020*

Tab 5

1 **Rule 29. Oral argument.**

2 **(a) Holding oral argument.**

3 (1) ~~In cases before the Supreme Court.~~ Oral argument will be held in cases before the
4 Supreme Court unless the ~~court~~Supreme Court determines that it will not aid the
5 decisional process.

6 (2) ~~In cases before the Court of Appeals.~~ Oral argument will be allowed in all cases in
7 which the ~~court~~Court of Appeals determines that oral argument will significantly aid the
8 decisional process.

9 **(3) Alternative means.** The court may hold oral argument in person, by phone, or by
10 videoconference.

11 **(b) Notice; waiver; cancellation; continuance.**

12 (b)(1) ~~Notice by Supreme Court; request for cancellation or continuance.~~ Not later
13 than ~~30~~28 days ~~prior to~~before the date on which a case is calendared, the clerk ~~shall~~will
14 give notice of the time and place of oral argument, and the time to be allowed each side.
15 If all parties to a case believe oral argument will not benefit the court, they may file a
16 joint motion to cancel oral argument not later than ~~15~~4 days from the date of the clerk's
17 notice. The court will grant the motion only if it determines that oral argument will not
18 aid the decisional process. A motion to continue oral argument must be supported by (1)
19 a stipulation of all parties or a statement that the movant was unable to obtain such a
20 stipulation, and (2) an affidavit of counsel specifying the grounds for the motion. A
21 motion to continue filed not later than ~~15~~4 days from the date of the clerk's notice may be
22 granted on a showing of good cause. A motion to continue filed thereafter will be granted
23 only on a showing of exceptional circumstances.

24 (b)(2) ~~Notice by Court of Appeals; waiver of argument; continuance.~~ Not later than
25 ~~30~~28 days ~~prior to~~before the date on which a case is calendared, the clerk shall give
26 notice to all parties that oral argument is to be permitted, the time and place of oral
27 argument, and the time to be allowed each side. Any party may waive oral argument by
28 filing a written waiver with the clerk not later than ~~15~~4 days from the date of the clerk's
29 notice. If one party waives oral argument and any other party does not, the party waiving

30 oral argument may nevertheless present oral argument. A request to continue oral
31 argument or for additional argument time must be made by motion. A motion to continue
32 oral argument must be supported by (1) a stipulation of all parties or a statement that the
33 movant was unable to obtain such a stipulation, and (2) an affidavit of counsel specifying
34 the grounds for the motion. A motion to continue filed not later than 15 days from the
35 date of the clerk's notice may be granted on a showing of good cause. A motion to
36 continue filed thereafter will be granted only on a showing of exceptional circumstances.

37 (c) **Argument Order of argument.** The appellant ~~shall~~argues first and the appellee ~~shall~~
38 responds. The appellant may reply to the appellee's argument if appellant reserved part of
39 appellant's time for this purpose. Such argument in reply ~~shall be~~is limited to responding to
40 points made by appellee in appellee's oral argument and answering any questions from the court.

41 (d) **Cross and separate appeals.** A cross or separate appeal ~~shall be~~is argued with the initial
42 appeal at a single argument, unless the court otherwise directs. If a case involves a separate
43 appeal, the plaintiff in the action below ~~shall be~~is deemed the appellant for the purpose of this
44 rule unless the parties otherwise agree or the court otherwise directs. If separate appellants
45 support the same argument, care ~~shall~~must be taken to avoid duplication ~~of five~~ arguments.
46 Unless otherwise agreed by the parties, in cases involving a cross-appeal the appellant, as
47 determined pursuant to Rule 24A, ~~shall~~opens the argument and presents only the issues raised in
48 the appellant's opening brief. The cross-appellant ~~shall~~then presents an argument ~~which that~~
49 answers the appellant's issues and addresses original issues raised by the cross-appeal. The
50 appellant ~~shall~~then presents an argument ~~which that~~ replies to the cross-appellant's answer to the
51 appellant's issues and answers the issues raised on the cross-appeal. The cross-appellant may
52 then present an argument ~~which that~~ is confined to a reply to the appellant's answer to the issues
53 raised by the cross-appeal. The court ~~shall~~will grant reasonable requests, for good cause shown,
54 for extended argument time.

55 (e) **Non-appearance of parties.** If the appellee fails to appear to present argument, the court will
56 hear argument on behalf of the appellant, if present. If the appellant fails to appear, the court may
57 hear argument on behalf of the appellee, if present. If neither party appears, the case may be
58 decided on the briefs, or the court may direct that the case be rescheduled for argument.

59 (f) ~~Submission~~ting on the **briefs**. By agreement of the parties, a case may be submitted for
60 decision on the briefs, but the court may direct that the case be argued.

61 (g) **Use of physical exhibits at argument; removal**. If physical exhibits other than documents
62 are to be used at the argument, counsel ~~shall~~must arrange to have them placed in the courtroom
63 before the court convenes on the date of the argument. After the argument, counsel ~~shall~~must
64 remove the exhibits from the courtroom unless the court otherwise directs. If exhibits are not
65 reclaimed by counsel within a reasonable time after notice is given by the clerk, they ~~shall~~will
66 be destroyed or otherwise disposed of ~~as the clerk shall think best~~.