



Agenda

Utah Supreme Court Advisory Committee Utah Rules of Appellate Procedure

Paul C. Burke, Chair

Location: Webex (see calendar appointment for instructions)
Date: March 4, 2021
Time: 12:00 to 1:30 p.m.

Action: Welcome and approval of February 4, 2021 minutes	Tab 1	Paul C. Burke, Chair
Discussion: Legislative update (if any) and appellate case management		Paul C. Burke
Discussion: Cross-petitions for review in administrative cases	Tab 2	Judge Orme
Action: Rule 22	Tab 3	Paul C. Burke, Sarah Roberts
Action: Rule 50	Tab 4	Tyler Green
Action: Rules 30 & 31	Tab 5	Judicial Efficiency Subcommittee
Discussion: Old/new business		Paul C. Burke

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

2021 Meeting schedule:

April 1, 2021	July 1, 2021	October 7, 2021
May 6, 2021	August 5, 2021	November 4, 2021
June 3, 2021	September 2, 2021	December 2, 2021

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

Via WebEx Videoconference
Thursday, February 4, 2021
12:00 pm to 1:30 pm

PRESENT

Christopher Ballard
Troy Booher—
Emeritus Member
Paul C. Burke—Chair
Patrick Burt
Lisa Collins
Tyler Green
Michael Judd—
Recording Secretary
Larissa Lee—Staff

Alan Mouritsen
Judge Gregory Orme
Rodney Parker
Judge Jill Pohlman
Sarah Roberts—Staff
Clark Sabey
Nathalie Skibine
Scarlet Smith
Nick Stiles—Staff
Mary Westby

EXCUSED

R. Shawn Gunnarson

1. **Welcome, Approval of January 2021 Minutes** **Paul C. Burke**

Paul Burke welcomed the committee. The committee reviewed the January 2021 minutes. No changes or concerns were noted.

Mary Westby moved to approve the minutes from the January 2021 meeting. Judge Jill Pohlman seconded the motion and it passed by unanimous consent.

2. **Action:** **Chris Ballard**
Rule 15

Chris Ballard explained to the committee that the proposed changes to Rule 15 were initially designed to eliminate a reference to a specific tax statute as the committee has attempted to do throughout the rules. Mr. Ballard reported that he had discussed the changes with tax practitioners, who had blessed that removal. After that approval, the proposed changes were sent along to the Supreme Court, which expressed concern about clunky language that now appears in lines 16–20. Mr. Ballard reworked that language in response.

The proposed changes to Rule 15 now remove the statutory reference that initially drew the committee’s attention, but also make other minor alterations. The rule itself exists because of unique procedure associated with appeal from a tax-commission decision, and the rule now provides a separate “track” for appeals: a case may move either to the Supreme Court through appeal or to the district court through review in the district court. The rule is designed to prohibit simultaneous review in both courts.

Judge Pohlman proposed a minor change to line 7 (so that the rule reads “proceeding,” and not “proceedings”). The committee also discussed the pour-over procedure and what may constitute “compelling circumstances” under the rule, as well as other practical concerns.

Following that discussion, Mr. Ballard moved to adopt the rule as amended as it appeared on the screen at the committee meeting. Ms. Westby seconded the motion and it passed without objection by unanimous consent.

3. **Action:** **Tyler Green**
Rules 25 & 50

The proposed amendments to Rule 25 and 50 are intended to rework the rules regarding amicus curiae practice in Utah appellate courts. Tyler Green reported that in drafting new versions of these rules, he relied upon both the United States Supreme Court’s rules of practice and the Federal Rules of Appellate Procedure. Mr. Green introduced the draft version of the rules and walked the committee through the highlights.

The committee discussed the proposed changes at length. Scarlet Smith

recommended that the committee remove reference to “verbatim quotations” in line 56. The committee discussed changes to paragraph (a) (changing “all parties to a case” to “all parties to an appeal” as well as a discussion of due dates and timing), paragraph (b) (considering the deletion of the words “brief states that” and “granted on motion”), paragraph (c) (cleaning up the language), paragraph (d) (considering availability of extensions to amici), and paragraph (h) (evaluating how to handle oral argument requests and presumptions). The committee also discussed a potential conflict in the rules with respect to constitutional challenges.

Following the committee’s discussion, Mr. Green recommended that the committee consider drafting a committee note explaining the scope and purpose of the changes to the rules regarding amicus curiae practice.

Following the committee’s discussion, Judge Pohlman moved to adopt the rule as amended as it appeared on the screen at the committee meeting. Ms. Westby seconded the motion and it passed without objection by unanimous consent.

4. Action: Sarah Roberts
Rules 23, 27 & 56

Because the committee’s discussion of Rules 15, 25, and 50 consumed all the time available for the February meeting, the committee opted to defer discussion of Rule 23, 27, and 56 until the March meeting.

5. Discussion: Paul C. Burke
Old/New Business

Mr. Burke introduced Nick Stiles, who has assumed the role of Appellate Courts Administrator. The committee expressed its enthusiasm about working with Mr. Stiles.

6. Adjourn

Mr. Green moved to adjourn, and Judge Orme seconded that motion. No objections were noted. The committee adjourned and will meet again on March 4, 2021.

Tab 2



Sarah Roberts <sarahr@utcourts.gov>

Appellate Rules: Homework assignment for March meeting

Larissa Lee <larissal@utcourts.gov>

Mon, Jan 25, 2021 at 8:00 AM

To: Alan Mouritsen <amouritsen@parsonsbehle.com>, Chris Ballard <cballard@agutah.gov>, Chris Williams <cwilliams@le.utah.gov>, Clark Sabey <clarks@utcourts.gov>, Jacqueline Carlton <jcarlton@le.utah.gov>, Judge Gregory Orme <jorme@utcourts.gov>, Judge Jill Pohlman <jpohlman@utcourts.gov>, Larissa Lee <larissal@email.utcourts.gov>, Lisa Collins <lisaac@utcourts.gov>, Mary Westby <maryw@utcourts.gov>, Michael Judd <mjudd@joneswaldo.com>, Nathalie Skibine <nskibine@slda.com>, Patrick Burt <pburt@kipbandchristian.com>, "Paul C. Burke" <pburke@rqn.com>, "R. Shawn Gunnarson" <sgunnarson@kmclaw.com>, Rodney Parker <rparker@scmlaw.com>, Ron Gordon <rbgordon@utah.gov>, Scarlet Smith <ssmith@strongandhanni.com>, "Troy L. Booher" <tbooher@zjbappeals.com>, Tyler Green <tyler@consovoymccarthy.com>, Sarah Roberts <sarahr@utcourts.gov>

Dear Appellate Rules Committee:

At the end of our January meeting, Judge Orme briefly introduced a question that was raised in a recent Court of Appeals case, *Watson v. Labor Commission*, 2020 UT App 170. The question is whether there's any reason not to allow cross-petitions for review in administrative cases.

Your assignment, should you choose to accept it, is to consider your past experience (or ask your colleagues who have experience in administrative cases) and provide feedback in March's meeting as to whether it would make sense to allow cross-appeals in these cases, or if there are valid reasons for retaining the prohibition.

For your reference, here's the relevant language from the *Watson* opinion:

2020 UT App 170, fn 1:

We are resolving *Watson's* and *Horizon's* petitions for review in one opinion for efficiency. If this were an appeal from a court proceeding, one party would typically appeal an adverse decision and the opposing party would then have the option to cross-appeal any decision below that was also adverse to its interests, resulting in a single appellate case and less briefing. See Utah R. App. P. 4(d). But because the rules of appellate procedure do not allow for a cross-petition in the administrative context, akin to a cross-appeal in a judicial proceeding, each party must file its own petition for review if they both wish to contest the administrative agency's ruling, allowing, in essence, two "appeals" from a single case. See *id.* R. 18 (stating that rules 3–8 are not applicable to judicial review of administrative orders). This encourages inefficiency, and the Supreme Court's Advisory Committee on the Rules of Appellate Procedure may wish to consider amending the rules to allow cross-petitions for review in administrative cases.

Thanks,
Larissa

Tab 3

1 **Rule 22. Computation and enlargement of time.**

2 (a) **Computation of time.** In computing any period of time prescribed by these rules, by
3 ~~an order of the~~ court order, or by any applicable statute, the day of the act, event, or
4 default from which the designated period of time begins to run is ~~shall not be~~ included.
5 The last day of the period is ~~shall be~~ included, unless it is a Saturday, a Sunday, or a
6 legal holiday, in which event the period extends until the end of the next business day
7 ~~that is not a Saturday, a Sunday, or a legal holiday~~. When the period of time prescribed
8 or allowed, without reference to any additional time under paragraph~~subsection~~ (d), is
9 less than 11 days, intermediate Saturdays, Sundays, and legal holidays are ~~shall be~~
10 excluded in the computation. As used in this rule, “legal holiday” includes days
11 designated as holidays by the state or federal governments.

12 (b) **Enlargement of time.**

13 ~~(b)~~(1) Motions for an enlargement of time for filing briefs beyond the time
14 permitted by stipulation of the parties under Rule 26(a) are not favored.

15 ~~(b)~~(2) The court for good cause shown may upon motion extend the time
16 prescribed by these rules or by its order for doing any act, or may permit an act
17 to be done after the expiration of time. This rule does not authorize the court to
18 extend the jurisdictional deadlines specified by any of the rules listed in Rule 2.
19 For the purpose of this rule, good cause includes, but is not limited to, the
20 complexity of the case on appeal, engagement in other litigation, and extreme
21 hardship to counsel.

22 ~~(b)~~(3) A motion for an enlargement of time must ~~shall~~ be filed prior to the
23 expiration of the time for which the enlargement is sought.

24 ~~(b)~~(4) A motion for enlargement of time must~~shall~~ state:

25 ~~(b)~~(4)(A) with particularity the good cause for granting the motion;

26 ~~(b)~~(4)(B) whether the movant has previously been granted an enlargement
27 of time and, if so, the number and duration of such enlargements;

28 ~~(b)(4)~~(C) when the time will expire for doing the act for which the
29 enlargement of time is sought; and

30 ~~(b)(4)~~(D) the date on which the act for which the enlargement of time is
31 sought will be completed.

32 ~~(b)(5)~~(A) If the good cause relied upon is engagement in other litigation,
33 the motion must~~shall~~:

34 ~~(b)(5)(A)~~(i) identify such litigation by caption, number and court;

35 ~~(b)(5)(A)~~(ii) describe the action of the court in the other litigation on
36 a motion for continuance;

37 ~~(b)(5)(A)~~(iii) state the reasons why the other litigation should take
38 precedence over the subject appeal;

39 ~~(b)(5)(A)~~(iv) state the reasons why associated counsel cannot
40 prepare the brief for timely filing or relieve the movant in the other
41 litigation; and

42 ~~(b)(5)(A)~~(v) identify any other relevant circumstances.

43 ~~(b)(5)~~(B) If the good cause relied upon is the complexity of the appeal, the
44 movant must~~shall~~ state the reasons why the appeal is so complex that an
45 adequate brief cannot reasonably be prepared by the due date.

46 ~~(b)(5)~~(C) If the good cause relied upon is extreme hardship to counsel, the
47 movant must ~~shall~~ state in detail the nature of the hardship.

48 ~~(b)(5)~~(D) All facts supporting good cause must~~shall~~ be stated with
49 specificity. Generalities, such as “the motion is not for the purpose of
50 delay” or “counsel is engaged in other litigation,” are insufficient.

51 (c) **Ex parte motion.** Except as to enlargements of time for filing and service of briefs
52 under Rule 26(a), a party may file one ex parte motion for enlargement of time not to
53 exceed 14 days if no enlargement of time has been previously granted, if the time has

54 not already expired for doing the act for which the enlargement is sought, and if the
55 motion otherwise complies with the requirements and limitations of paragraph (b) of
56 this rule.

57 (d) **Additional time after service by mail.** Whenever a party is required or permitted to
58 do an act within a prescribed period after service of a document ~~paper~~ and the
59 document ~~paper~~ is served by mail, 3 days will ~~shall~~ be added to the prescribed period.

60 *Effective November 14, 2016*

61 **Advisory Committee Note**

62 A motion to enlarge time must be filed prior to the expiration of the time sought to be
63 enlarged. A specific date on which the act will be completed must be provided. The
64 court may grant an extension of time after the original deadline has expired, but the
65 motion to enlarge the time must be filed prior to the deadline.

66 Both appellate courts place appeals in the oral argument queue in accordance with the
67 priority of the case and after principal briefs have been filed. Delays in the completion
68 of briefing will likely delay the date of oral argument.

69 *Adopted 2020*

70

71

Tab 4

1 **Rule 50. Response; reply; ~~brief of amicus curiae.~~**

2 (a) **Response.** Within 30 days after ~~service of~~ a petition for a writ of certiorari is served,
3 any other party may file a response ~~to the petition.~~ Or, if the satisfaction of a
4 petitioner's ~~obligation to~~ pay at the required filing fee or ~~to obtain~~ a waiver of that fee
5 ~~is accomplished~~ after service, then the time for response ~~shall~~ will run from the date
6 that obligation is satisfied ~~of satisfaction of that obligation.~~ The response ~~shall~~ must
7 comply with Rule 27 and, as applicable, Rule 49. ~~Seven copies of the response, one of~~
8 ~~which shall contain an original signature, shall be filed with the Clerk of the Supreme~~
9 ~~Court.~~ A party opposing a petition may so indicate by letter in lieu of a formal
10 response, but the letter ~~shall~~ may not include any argument or analysis.

11 (b) **Page limitation.** A response ~~shall~~ must be as short as possible and may not, ~~in any~~
12 ~~single case,~~ exceed 20 pages, excluding the table of contents ~~subject index~~, the table of
13 authorities, and the appendix.

14 (c) **Objections to jurisdiction.** The court will not accept a ~~No~~ motion ~~by a respondent~~ to
15 dismiss a petition for a writ of certiorari ~~will be received.~~ Objections to the Supreme
16 Court's jurisdiction ~~of the Supreme Court~~ to grant the petition may be included in the
17 response.

18 (d) **Reply.** A petitioner may file a reply addressed to arguments first raised in the
19 response ~~may be filed by any petitioner~~ within ~~fourteen~~ 14 days after ~~service of~~ the
20 response is served, but distribution of the petition and response to the court ordinarily
21 will not be delayed pending the filing of any such reply unless the response includes a
22 new request for relief, such as an award of attorney fees for the response. The reply
23 ~~shall~~ must be as short as possible, and but may not exceed five pages, and ~~shall~~ must
24 comply with Rule 27. ~~The number of copies to be filed shall be as described in Rule~~
25 ~~50(a).~~

26 ~~(e) Brief of amicus curiae. The Supreme Court will not accept an amicus curiae brief~~
27 ~~concerning a petition for certiorari unless the court grants a motion for leave to file such~~

28 ~~a brief or the court requests it. A brief of an amicus curiae concerning a petition for~~
29 ~~certiorari may be filed only by leave of the Supreme Court granted on motion or at the~~
30 ~~request of the Supreme Court. AThe motion for leave shall must be accompanied by a~~
31 ~~proposed amicus curiae brief, not to exceed 20 pages, excluding the table of contents~~
32 ~~subject index, the table of authorities, any verbatim quotations required by Rule~~
33 ~~49(a)(7), and the appendix. The proposed amicus curiae brief shall must comply with~~
34 ~~Rule 27, and, as applicable, Rule 49. The number of copies of the proposed amicus brief~~
35 ~~submitted to the Supreme Court shall be the same as dictated by Rule 48(f). A motion~~
36 ~~for leave shall must identify the applicant's interest of the applicant and shall state the~~
37 ~~reasons why an amicus curiae brief of an amicus curiae is desirable. The motion for~~
38 ~~leave shall must be filed on or before the date of the filing of the timely petition or~~
39 ~~response of the party whose position the amicus curiae will support is filed, unless the~~
40 ~~Supreme Court for good cause shown otherwise orders. Parties to the proceeding in the~~
41 ~~Court of Appeals may indicate their support for, or opposition to, the motion. Any~~
42 ~~party's response of a party to a motion for leave shall must be filed within seven days of~~
43 ~~service of after the motion is served. If leave is granted, the proposed amicus curiae brief~~
44 ~~will be accepted as filed and, unless the order granting leave otherwise indicates directs,~~
45 ~~amicus curiae also will be permitted to submit a brief on the merits, provided it is~~
46 ~~submitted in compliance complies with the briefing schedule of the party the amicus~~
47 ~~curiae supports. Denial of a motion for leave to file an amicus curiae brief of an amicus~~
48 ~~curiae concerning a petition for certiorari shall will not preclude a subsequent amicus~~
49 ~~motion relating to the merits after a grant of certiorari. All motions for leave to file~~
50 ~~brief of an amicus curiae brief on the merits after a grant of certiorari are governed by~~
51 ~~Rule 25.~~

Tab 5

1 **Rule 30. Decision of the court; notice of decision.**

2 (a) **Decision in civil cases.** The court may reverse, affirm, modify, or otherwise dispose
3 of any appealed order or judgment ~~appealed from~~. If the findings of fact in a case are
4 incomplete, the court may order the trial court or agency to supplement, modify, or
5 complete the findings to make them conform to the issues presented and the facts as
6 found from the evidence and may direct the trial court or agency to enter judgment in
7 accordance with the findings as revised. The court may also order a new trial or further
8 proceedings to be conducted. If a new trial is granted, the court may pass upon and
9 determine all questions of law involved in the case presented upon the appeal and
10 necessary to the final determination of the case.

11 (b) **Decision in criminal cases.** If a judgment of conviction is reversed, a new trial ~~shall~~
12 will be held unless the court specifies otherwise ~~specified by the court~~. If a judgment of
13 conviction or other order is affirmed or modified, the judgment or order affirmed or
14 modified ~~shall~~will be executed.

15 (c) **Decision and opinion in writing; ~~entry of decision~~.** When a judgment, decree, or
16 order is reversed, modified, or affirmed, the reasons ~~shall~~will be stated concisely in
17 writing and filed with the clerk. Any justice or judge concurring or dissenting may
18 likewise give reasons in writing and file the same with the clerk. The clerk's entry ~~by~~
19 ~~the clerk~~ in the court's records ~~of the court shall~~ constitutes the entry of the judgment of
20 the court.

21 (d) Form of decision. An appellate court's decision may be entered by order, published
22 opinion, or per curiam decision. An order may be used to render a decision only in
23 cases that do not present novel issues of law on appeal, with reference to well-
24 established case law or unambiguous Utah statute. An order will not stand as precedent
25 but will otherwise have the same force and effect as other court decisions.

26 ~~(e)~~ Rule 31 decision. If a motion for expedited decision is granted under Rule 31, the
27 court may dispose of the case by order or opinion as provided in that rule. **Decision**

Comment [ML1]: This is from *Grand Cty. v. Rogers*, 2002 UT 25:

"Memorandum decisions are intended to address cases which do not present novel issues of law on appeal, with reference to well-established precedent arising either from case law or from unambiguous statutory language." (Paragraph 7).

OR:

"A memorandum decision may not be used to render a decision in any matter not clearly and unequivocally disposed of on the basis of well-established Utah case law or Utah statute." (Paragraph 14).

Comment [ML2]: Recommendation from Judge Pohlman/Mary.

Comment [ML3]: From Judge Pohlman

28 ~~without opinion. If, after oral argument, the court concludes that a case satisfies the~~
29 ~~criteria set forth in Rule 31(b), it may dispose of the case by order without written~~
30 ~~opinion. The decision shall have only such effect as precedent as is provided for by Rule~~
31 ~~31(f).~~

32 (ef) Entry and Nnotice of decision. The entry of the decision in the records of the court
33 constitutes the entry of the judgment of the court. Immediately upon ~~the entry~~
34 ~~of entering~~ the decision, the clerk ~~shall~~ must give notice to the respective parties and
35 make the decision public in accordance with the court's direction ~~of the court.~~

36 (1) If the court's decision is by order, the appellate clerk will transmit the order to
37 the parties and to the lower court or agency.

38 (2) If the court's decision is by opinion or per curiam decision, the decision will
39 be published on the courts' website at utcourts.gov.

40 (fg) **Citation of decisions.** Published decisions of the Supreme Court and the Court of
41 Appeals, and unpublished decisions of the Court of Appeals issued ~~on or after~~ between
42 October 1, 1998 and December 31, 2010, may be cited as precedent in all courts of the
43 State. Other unpublished decisions may also be cited, so long as all parties and the court
44 are supplied with accurate copies at the time all such decisions are first cited.

45

Comment [ML4]: Clark and Chris wonder whether this statement is necessary, because the COA decides cases after briefing but before OA. Maybe replace with "after briefing"?

Mary suggests deleting this paragraph altogether, so that Rule 31

1 **Rule 31. Expedited appeals decided after oral argument without written opinion.**

2 (a) **Motion and stipulation for expedited hearing.** After ~~the filing of~~ all briefs in an
3 appeal have been filed, a party may move for an expedited decision without a written
4 opinion. The motion ~~shall~~ must be in the form prescribed by Rule 23 and ~~shall~~ must
5 describe: the nature of the case, the issues presented, and any special reasons the parties
6 may have for an expedited decision. The court may dispose of any qualified case under
7 this rule upon its own motion before or after oral argument.

8 (b) **Cases ~~which~~ that qualify for expedited decision.** The following are matters ~~which~~
9 that the court may consider for expedited decision without opinion:

- 10 (1) appeals involving uncomplicated factual issues based primarily on
11 documents;
- 12 (2) summary judgments;
- 13 (3) dismissals for failure to state a claim;
- 14 (4) dismissals for lack of personal or subject matter jurisdiction; and
- 15 (5) judgments or orders based on uncomplicated issues of law.

16 (c) An order may be used to render a decision in cases where the governing rules of law
17 are ~~In all motions brought under this rule, the substantive rules of law should be~~
18 deemed settled, although the parties may differ as to their application.

19 (d) **Appeals ineligible for expedited decision.** The court will not grant a motion for an
20 expedited appeal in cases raising substantial constitutional issues, issues of significant
21 public interest, issues of law of first impression, or complicated issues of fact or law.

22 (e) **Procedure if expedited motion is granted.** If a motion for expedited decision is
23 granted, the appeal will be given an expedited setting for oral argument within 45 to 60
24 days from the date of the order granting the motion. Within two days after submission
25 of the appeal, the court will conference, decide the case, and issue a written order which
26 need not be accompanied by an opinion. ~~Entry of the order by the clerk in the records of~~

27 ~~the court, shall constitute the entry of t~~The judgment of the court will be entered when
28 the clerk docket the order.

29 (f) **Effect as precedent.** Appeals decided under ~~this rule-paragraph (e)~~ will not stand as
30 precedent, but, ~~in other respects,~~ will otherwise have the same force and effect as other
31 court decisions ~~of the court.~~

32 (g) **Issuance of ing a written opinion.** If ~~it appears to the court after the case has been~~
33 ~~submitted for decision~~ the court decides to issue ~~that~~ a written opinion ~~should be issued,~~
34 the time limitation in paragraph (e) ~~shall~~ will not apply and the parties will be so
35 notified.