

# Agenda

## Advisory Committee on Rules of Appellate Procedure

December 1, 2016

12:00 to 1:30 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes	Tab 1	Paul Burke
Rule 37. Suggestion of mootness; voluntary dismissal	Tab 2	Judge Voros
Selection of subcommittee member re Logue vs. Court of Appeals, 2016 UT 44 (2016)		Paul Burke
Rule 52 Proposals re child welfare appeals	Tab 3	Supreme Court
Appellate Rules Committee outreach		Paul Burke

**Committee Webpage:** [http://www.utcourts.gov/committees/appellate\\_procedure/](http://www.utcourts.gov/committees/appellate_procedure/)

**Meeting Schedule.** All meetings are from 12:00 to 1:30 at the Administrative Office of the Courts in the Matheson Courthouse.

January 5, 2017

February 2, 2017

March 2, 2017

April 6, 2017

May 4, 2017

June 1, 2017

September 7, 2017

October 5, 2017

November 2, 2017

December 7, 2017

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, November 3, 2016  
12:00 p.m. to 1:30 p.m.

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**PRESENT**

Joan Watt- Chair  
Troy Booher  
Paul Burke  
Marian Decker  
R. Shawn Gunnarson  
James Ishida-Staff  
Judge Gregory Orme  
Adam Pace – Recording Secretary  
Rodney Parker  
Bridget Romano  
Clark Sabey  
Lori Seppi  
Ann Marie Taliaferro

**EXCUSED**

Alan Mouritsen  
Judge Fred Voros  
Mary Westby

**1. Welcome and approval of minutes**

**Joan Watt**

Ms. Watt welcomed the committee to the meeting and invited a motion to approve the minutes from the October meeting. *Mr. Burke moved to approve the October minutes. Mr. Booher seconded the motion and it passed unanimously.*

Ms. Watt reported that the Utah Supreme Court adopted the committee’s proposed amendments to Rule 24 and 24A. These rules will be sent out for public comment. Ms. Watt also announced that Mr. Burke will serve as the new chair of the committee starting in December. The committee thanked Ms. Watt for her service on the committee.

**2. Rule 22. Computation and enlargement of time-  
Conforming amendment**

**Clark Sabey**

The committee resumed its discussion of the proposed amendment to Rule 22(b)(2) to clarify the circumstances under which the court can extend jurisdictional deadlines. Everyone agreed with

the idea behind the proposed change, but there was some discussion over the proposed language. *Following this discussion, Mr. Booher moved to amend Rule 22(b)(2) to read as follows:*

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

*Mr. Sabey seconded the motion, and it passed unanimously.*

**3. Rule 37. Suggestion of mootness; voluntary dismissal** **Judge Voros**

The committee decided to table discussion of this issue until the next meeting so that Judge Voros could participate.

**4. *Logue v. Court of Appeals*, 2016 UT 44 (October 20, 2016)** **Joan Watt**

Ms. Watt discussed the background of *Logue v. Court of Appeals*, 2016 UT 44 and the Utah Supreme Court’s direction to the committee to consider revising the rules so that they do not act as a categorical bar to motions for new trials in cases like these. Ms. Decker commented that if a change is made, it should be made in the criminal rules. Ms. Watt suggested setting up a working subcommittee between the civil, criminal, and appellate rules committees to evaluate this issue. The committee agreed with this approach, and Mr. Ishida said he would contact the other committees to see what they think. Ms. Watt asked everyone to consider who should serve on the subcommittee, but suggested waiting to make a decision until the other committees have agreed to participate.

**5. Rule 40. Attorney’s or party’s certificate; sanctions and discipline** **James Ishida**

Mr. Ishida introduced a proposed amendment to Rule 40(c) that was drafted by Tim Shea before he retired that describes the grounds for sanctions imposed by the court, the process, and what those sanctions might be. After a lengthy discussion, the committee concluded that it needed more information from the Utah Supreme Court about the intended purpose of this amendment. Several members of the committee expressed concern that terms used in the amendment such as “disciplinary order” and “inadequate representation of a client” are far too vague. The committee also agreed that the rule should be consistent with the disciplinary procedures used by the Office of Professional Conduct. Judge Orme commented that the rule should not be so overbroad that it interferes with the court’s inherent power to manage cases before it. Mr. Ishida said that he would ask the Court for more information about the purpose of the amendment, and that he would redraft the amendment and present it to the committee at a later meeting.

## **6. Other Business**

Mr. Ishida reported that the proposed amendment to Rule 22 has been approved for publication. He asked whether the committee views this amendment as a technical and conforming amendment, and if so, whether the committee recommends expediting it so that it becomes effective at the same time as the amendment to Rule 2. *Mr. Parked moved to expedite consideration of the amendment to Rule 22 so that it becomes effective at the same time as the amendment to Rule 2. Ms. Taliaferro seconded the motion and it passed unanimously.*

## **7. Adjourn**

The meeting was adjourned at 12:57 p.m.. The next meeting will be held on December 1, 2016.

# Tab 2

1 **Rule 37. Suggestion of mootness; voluntary dismissal.**

2 (a) *Suggestion of mootness.* ~~It is the duty of each party at all times during the~~  
3 ~~course of an appeal or other proceeding to inform the court of any~~ Any party  
4 aware of ~~circumstances which have transpired subsequent to the filing of the~~  
5 ~~appeal or other proceeding which~~ that ~~render moot one or more of the issues~~  
6 ~~raised.~~ presented for review must promptly ~~If a party determines that one or~~  
7 ~~more, but less than all, of the issues have been rendered moot, the party shall~~  
8 ~~promptly advise the court by filing~~ file ~~a “suggestion of mootness” in the form of~~  
9 ~~a motion under Rule 23. If all parties to an appeal or other proceeding agree as to~~  
10 ~~the mootness of one or more, but less than all, of the issues raised, a stipulation~~  
11 ~~to that effect shall be filed with the suggestion of mootness. If an appellant~~  
12 ~~determines all issues raised in the appeal or other proceeding are moot, a motion~~  
13 ~~for voluntary dismissal shall be filed pursuant to the provisions of paragraph (b)~~  
14 ~~of this rule.~~

15 (b) *Voluntary dismissal.* ~~At any time prior to the issuance of a decision an~~  
16 ~~appellant may move to voluntarily dismiss an appeal or other proceeding. If all~~  
17 ~~parties to an appeal or other proceeding agree that dismissal is appropriate,~~  
18 ~~a stipulation to that effect shall be filed with the~~ and stipulate to a motion for  
19 voluntary dismissal, the appeal will be promptly dismissed. ~~Any such stipulation~~  
20 ~~shall specify the terms as to payment of costs, if applicable, and provide for~~  
21 ~~payment of whatever fees are due.~~

22 (c) *Affidavits.* ~~If~~ the ~~appellant has the right to effective assistance of counsel,~~  
23 ~~a motion to voluntarily dismiss~~ the appeal ~~for reasons other than mootness shall~~  
24 must ~~be accompanied by appellant’s personal affidavit or declaration under~~  
25 Section 78B-5-705 ~~demonstrating that~~ the ~~appellant’s decision to dismiss the~~  
26 ~~appeal is voluntary and~~ is ~~made with knowledge of the right to an appeal and an~~  
27 ~~understanding of the consequences of voluntary dismissal. If counsel for the~~

28 appellant is unable to obtain the required affidavit or declaration from the  
29 appellant, the motion must be accompanied by counsel's affidavit or declaration  
30 stating that, after reasonable efforts, counsel is unable to obtain the required  
31 affidavit and certifying that counsel has a reasonable factual basis to believe that  
32 the appellant no longer wishes to pursue the appeal.

33 ~~(d) A suggestion of mootness or motion for voluntary dismissal shall be~~  
34 ~~subject to the appellate court's approval.~~

35

36 **Advisory Committee Note.**

37 Criminal defendants have a constitutional right to the effective assistance  
38 of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Arguelles*, 921  
39 P.2d 439, 441 (Utah 1996). Parties in juvenile court proceedings have a statutory  
40 right to effective assistance of counsel. *State ex rel. E.H. v. A.H.*, 880 P.2d 11, 13  
41 (Utah App. 1994). ~~; see Utah Code Ann. § 78-3a-913(1)(a)(Supp. 1998). To protect~~  
42 ~~these rights and the right to appeal, Utah Code Ann. § 77-18a-1(1)(Supp. 1998); id.~~  
43 ~~§ 78-3a-909(1)(1996), the last sentence was added to Rule 37(b) to assure that the~~  
44 ~~decision to abandon an appeal is an informed choice made by the appellant, not~~  
45 ~~unilaterally by appellant's attorney.~~



# Tab 3

**UTAH RULES APPELLATE  
PROCEDURE**

**PENDING PROPOSALS**

Rule	Topic	Raised by	Pending since	Priority	Status
01	Incorrect reference to 78-3a-320.	Tim Shea	2016/05	3	
02	Adds Rule 14(a) to the list of rules that the court cannot suspend.	Clark Sabey		2	-Comment period expired July 1. Scheduled for September 1.  -Supreme Court approved. Effective 11/1/16
03	E-filing. Removes paragraph (e) on service of the notice of appeal, which is governed by the rules of civil, criminal, and juvenile procedure. Removes paragraph (d) on payment of the filing fee, which is governed by statute. Removes or modernizes provisions for the internal movement of records.  The Supreme Court has asked the committee to consider the order of parties in the title of the case.  When should party file a co-notice of appeal and when a cross-appeal?	E-filing subcommittee  Supreme Court  Rod Parker	2016/04  2016/04  2015/12	E  1  3	Unless high priority issue is presented, hold until e-filing is ready.
04	Time limit on motion to reinstate the time to appeal.			1	Letter to Supreme Court recommending no change.

Rule	Topic	Raised by	Pending since	Priority	Status
47	E-filing. Amends to reflect current operations. Other technical amendments.  Respondents on cert are determined in a way that seems to allow a party on the same side as a cert petitioner in the court of appeals to ride the coattails of a cert petitioner (and become a party to a cert proceeding) without filing or joining in a cert petition. Compare SCOTUS rule 12(6).	E-filing subcommittee  Judge Voros	2016/04  2015/12	E  3	Unless high priority issue is presented, hold until e-filing is ready.
48	E-filing. Eliminates multiple copies. Changes “refuse” a petition to “reject” a petition. Other technical changes.	E-filing subcommittee	2016/04	E	Unless high priority issue is presented, hold until e-filing is ready.
50	E-filing. Eliminates multiple copies. Changes 7 days to 14. Improves organization and readability.  Proposed as part of “global” changes. No record that the committee ever reached this rule.	E-filing subcommittee  Troy Booher	2016/04  2013/08	E  3	Unless high priority issue is presented, hold until e-filing is ready.
51	E-filing. Amends to reflect current operations. Improves organization and readability.	E-filing subcommittee	2016/04	E	Unless high priority issue is presented, hold until e-filing is ready.
52-59	Is there a way to expedite adoption appeals similar to child welfare appeals? Work with civil and juvenile rules committees to expedite trial court proceedings.	Supreme Court	2015/05	1	

Rule	Topic	Raised by	Pending since	Priority	Status
52-59	Child welfare appeals. Is there a mechanism for a party to raise an ineffective assistance of counsel claim when trial court counsel is required to file the petition to appeal? How can a party have appellate counsel independent of trial counsel? Should there be a process like Rule 23B to supplement the record? How does the policy of an expedited appeal for the benefit of the child weigh against these other policies?	Supreme Court	2016/05	1	
52	Makes effect of post-trial motions consistent with Rule 4.	Mary Westby	2016/01	2	Comment period expired June 25. Scheduled for September.  -Supreme Court approved. Effective 11/1/16
53	E-filing. Eliminates the requirement that the clerk of the juvenile court deliver an informational copy of the notice of appeal to the clerk of the Court of Appeals.	E-filing subcommittee	2016/04	E	Unless high priority issue is presented, hold until e-filing is ready.
54	E-filing. Changes 4 days to 7. Amends to reflect current operations. Improves organization and readability.	E-filing subcommittee	2016/04	E	Unless high priority issue is presented, hold until e-filing is ready.
55	E-filing. Eliminates the special form of the petition and specifies that the petition must comply with Rule 27.	E-filing subcommittee	2016/04	E	Unless high priority issue is presented, hold until e-filing is ready.