



## Approved Minutes

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

Utah Supreme Court  
450 South State Street  
Salt Lake City, Utah 84114

Via WebEx Videoconference  
Thursday, September 3, 2020  
12:00 pm to 1:30 pm

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#### PRESENT

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

Judge Gregory Orme  
Rodney Parker  
Judge Jill Pohlman  
Sarah Roberts—Staff  
Clark Sabey  
Nathalie Skibine  
Scarlet Smith  
Douglas Thompson—Guest  
Mary Westby

#### EXCUSED

Patrick Burt  
R. Shawn Gunnarson  
Alan Mouritsen

#### 1. Welcome and Approval of June 2020 Minutes Paul C. Burke

The meeting began with an introduction to Sarah Roberts, who will be taking over staffing the committee. Larissa Lee will remain on the committee in an advisory role. Paul C. Burke then invited comments regarding the June 2020

minutes. Clark Sabey noted that the word “production” in Item 2 should be corrected to “productive.” There were no objections to that proposed correction.

*Mary Westby moved to approve the minutes from the June 2020 meeting with the noted correction. Judge Gregory Orme and Judge Jill Pohlman seconded the motion and it passed by unanimous consent.*

**2. Discussion: Paul C. Burke**  
**Annual Report**

The committee reviewed the 2019–2020 annual report. Mr. Burke remarked on the committee’s productivity, and told the committee that the Supreme Court had asked him to pass along its gratitude to the committee for its work and service.

**3. Action: Larissa Lee**  
***Arreguin-Leon* and Rule 11**

The committee’s current focus on Rule 11 relates to the ambiguity of the phrase “the record on appeal.” Larissa Lee explained the basis for the proposed amendments, as well as the history of the committee’s prior consideration of the amendments. Ms. Lee noted that the Supreme Court’s *Arreguin-Leon* decision raises a new issue about Rule 11, specifically whether a document filed with the trial court after an action ends becomes part of the record on appeal. The committee discussed how the rule should be limited, and how any such limitation may relate to past practices regarding the introduction of expected testimony by proffer. The committee engaged in an extended discussion about the problem, including the potential policy implications. After that discussion, Christopher Ballard offered to draft and circulate a new version of the rule that seeks to address the issues raised by the committee and by the Supreme Court in the *Arreguin-Leon* case.

*Mr. Ballard moved for approval of his offer to draft new Rule 11 language. Ms. Westby seconded the motion and it passed without objection by unanimous consent.*

4. **Action:** **Christopher Ballard**  
**Rule 23B and Issues Outside Remand Request** **Nathalie Skibine**

Christopher Ballard explained the concerns prompting the proposed amendment, including the possibility that an appellate court may reach a partial decision on the merits of a case while, at the same time, remanding for reconsideration of issues that could ultimately affect the reasoning in that partial decision. Mr. Ballard and Nathalie Skibine thus proposed an addition to Rule 23B providing that if the court grants a Rule 23B remand, it will not reach a final decision on any other part of the appeal until the Rule 23B remand has been completed. Douglas Thompson, who attended the meeting as a guest to discuss Rule 23B specifically, agreed with Mr. Ballard’s appraisal of the challenges associated with Rule 23B for appellate practitioners. Troy Booher suggested that if a Rule 23B motion is granted, the appeal be stayed while remand occurs, but that a Rule 23B motion only be denied at the time the merits panel reaches a decision on the appeal as a whole. Judge Orme suggested that the problem at issue could potentially be addressed by something less formal than a rule amendment.

*Judge Orme moved that further consideration of Rule 23B be tabled until the Court of Appeals judges are able to discuss other approaches to resolve the underlying problem without need for an amendment to the rule. Judge Pohlman seconded the motion to table and it passed without objection by unanimous consent.*

5. **Discussion:** **Paul C. Burke**  
**Aligning Rule 15 with Statutory Language**

The proposed changes to Rule 15 are intended to correct a reference to a statute and to otherwise clean up the rule. Mr. Booher also mentioned that the reference to “Utah Code Ann.” be changed to a reference to “Utah Code,” to promote consistency with the Utah Supreme Court’s style guide. Judge Orme questioned whether, in this rule, a general reference to a statutory concept may suffice, rather than a reference to a specific code provision, to ensure that any future changes to statutory numbering do not render the rule reference obsolete.

*The committee considered a motion to strike the reference to “Ann.” in this rule, and elsewhere within the rules, to promote consistency with Supreme Court practice. There were no objections.*

*Judge Orme moved to strike reference to statutory number, and Ms. Westby second that motion. Ms. Westby then moved to adopt the amendments to Rule 15 as they appeared on the screen at the committee meeting. After further discussion, the committee decided to investigate further the proposed stricken reference and the other proposed changes to the rule, in order to ensure that the proposed changes would not cause confusion.*

*Ms. Westby withdrew her motion to adopt, and Rod Parker moved to table the proposed amendment until it could be considered further. Ms. Westby seconded that motion and it passed without objection by unanimous consent.*

**6. Discussion:  
Old/New Business**

**Paul C. Burke**

None.

**7. Adjourn**

*A motion to adjourn was made and there were no objections. The committee is scheduled to meet again on October 1, 2020.*