

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 video conference
Thursday, October 1, 2020
12:00 pm to 1:30 pm

PRESENT

Christopher Ballard
Patrick Burt
Troy Booher—
Emeritus Member
Paul C. Burke—Chair
Lisa Collins
Tyler Green
R. Shawn Gunnarson
Larissa Lee—Staff

Alan Mouritsen
Judge Gregory Orme
Rodney Parker
Judge Jill Pohlman
Clark Sabey
Nathalie Skibine
Scarlet Smith
Mary Westby

EXCUSED

Michael Judd—
Recording Secretary
Sarah Roberts—Staff

GUESTS

Chris Williams—Office
of Legislative Research
& General Counsel

1. Welcome and approval of Sept. 2020 minutes

Paul C. Burke

Paul C. Burke welcomed the committee. Michael Judd had a conflict with today's meeting so Larissa Lee filled in for Mr. Judd as recording secretary. Mr. Burke thanked Mr. Judd for September's minutes and asked for a motion to approve.

Judge Jill Pohlman moved to approve the minutes from the September 2020 meeting. Rod Parker seconded the motion and it passed by unanimous consent.

2. Action: Arreguin-Leon & Rule 11

Chris Ballard & Larissa Lee

The committee returned to the proposed Rule 11 amendments. Because the Court of Appeals currently has a case under advisement involving Rule 11(h) (now proposed as Rule 11(g)), Judge Orme and Judge Pohlman did not participate in the discussion on this part of the rule.

Christopher Ballard explained the Supreme Court's three main concerns in the *Arreguin-Leon* decision: (1) inadequate definition of the record on appeal, (2) what is meant by "conforming to the truth" in Rule 11(h), and (3) what it means when something is omitted from the record by error or accident. Mr. Ballard emphasized that the issues arising in *Arreguin-Leon* may not be able to be resolved by rule change, because the documents at issue had been filed and were part of the record but they may not have been properly presented to the trial court.

The committee discussed how to ensure documents that may not have been formally filed in the trial court are still considered part of the record on appeal (e.g. discovery responses). The committee settled on defining the record on appeal as consisting "of the documents and exhibits filed in or considered by the trial court" The committee similarly amended 11(g)(1) to say "[t]he trial court will change the record to reflect what was filed in or considered by the trial court."

Rather than saying the record "truly discloses what occurred in the trial court" the committee recommended amending 11(g) to say "[i]f any dispute arises as to whether the record is complete and accurate..." The committee discussed 11(g) at length and how to best restructure it. Larissa Lee will work on this paragraph with other court committee members and will present at the next committee meeting.

Lisa Collins moved to table Rule 11. Mary Westby seconded the motion and it passed by unanimous consent.

3. Action: Rule 15

Paul C. Burke

The committee discussed whether statutory pin cites are necessary in 15(a) and 15(c) at its last meeting and tabled this item to discuss with tax attorneys. Paul Burke and

Shawn Gunnarson reached out to their colleagues and reached a consensus that the statutory pin cites are not necessary. Troy Booher raised a question regarding a potential ambiguity in cross-appeals when an appeal is filed both in the district court and appellate court. Chris Ballard agreed to review this question with the Tax Section of the Attorney General's Office and will bring a proposal to the next meeting.

Rod Parker moved to table Rule 15. Shawn Gunnarson seconded the motion and it passed by unanimous consent.

4. Action: Rule 23B

Lisa Collins, Judge Jill Pohlman, Judge Greg Orme

The committee returned to Rule 23B discussions after tabling this rule at its last meeting and allowing the Court of Appeals judges time to discuss. Judge Jill Pohlman explained the bench discussed this internally and from a practical standpoint agreed not to issue decisions before the Rule 23B remand is decided. Judge Pohlman recommended not amending the rule.

Mary Westby moved to not amend Rule 23B. Chris Ballard seconded the motion and it passed by unanimous consent.

5. Action: Rule 34

Larissa Lee

Larissa Lee presented proposed amendments to this rule designed to conform the rule to Standing Order 11 (Regarding filing documents by email) and to clean up the language in accordance with the Supreme Court's style guide. Judge Jill Pohlman recommended changing paragraph (c) "expenses" to "costs" for consistency. Judge Pohlman also recommended removing "prevailing party" in paragraph (c) because the categories of allowable costs are defined in paragraph (a). The committee discussed whether vacated judgments should be treated the same as reversed judgments for determining costs and decided not to treat it the same because at times a judgment is vacated because there is no jurisdiction. Rod Parker recommended amending Rule 34(c)(1) to provide a flat \$3.00 per page for costs as opposed to determining the actual costs associated with copying the briefs.

Mary Westby moved to amend 34(c)(1) to a flat fee. Shawn Gunnarson seconded the motion and it passed by unanimous consent.

Clark Sabey recommended adding “the” before “appellant” in (a)(2) to be consistent with (a)(1) and (a)(3).

Judge Pohlman moved to recommend proposed amendments to Rule 34 to the Supreme Court for public comment. Rod Parker seconded the motion and it passed by unanimous consent.

6. Discussion: Old/New Business

Paul C. Burke

The committee discussed scheduling 2021 meetings. The committee decided to keep meeting at noon the first Thursday of every month.

7. Adjourn

Rod Parker moved to adjourn the meeting. Mary Westby seconded the motion and it passed by unanimous consent.

The meeting adjourned at 1:29 p.m. The committee is scheduled to meet again on November 5, 2020.