

1991

# In the Matter of the License of Carl W. Barney to Practice as a Health Facility Administrator in the State of Utah

Utah Supreme Court

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 91-0755-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE MATTER OF THE LICENSE	:	Case No. OPL-91-80
OF CARL W. BARNEY TO PRACTICE	:	91-0755-CA
AS A HEALTH FACILITY	:	92-0213
ADMINISTRATOR IN THE STATE	:	
OF UTAH	:	
	:	Priority 14
	:	

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RESPONDENT'S ANSWER TO PETITIONER'S WRIT OF CERTIORARI  
FROM THE SUPREME COURT TO THE UTAH COURT OF APPEALS, THE  
HONORABLE PAMELA T. GREENWOOD, RUSSELL W. BENCH, AND  
GREGORY K. ORME, JUDGES.

---

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### STATEMENT OF JURISDICTION

Petitioner's motion is not properly before the Supreme Court on Certiorari. There is no final agency order in this case. Petitioner's motion is pre-mature because it appeals from an interlocutory order. The Utah Supreme Court has held that "parties must exhaust administrative remedies as a prerequisite to seeking judicial review. . . ." Merrihew v. Salt Lake County Planning, 659 P.2d 1065, 1067 (Utah 1983).

In Sloan v. Bd. of Rev. of Industrial Comm'n., 781 P.2d 463, 464 (Utah App. 1989), the Court held that a remand order in an administrative hearing was not a final appealable order. Likewise, Mr. Barney's interlocutory order on the double jeopardy issue is not a final order. The Court stated that "an order of the Agency is not final so long as it reserves something to the agency for further decision." Id.

In Eliason v. Buhler, et at., (order of the Utah Court of Appeals, case no. 900518-CA, December 5, 1990), the Court of Appeals noted that the ALJ's "final order" is "his order 'at the close of [the instant] adjudicative proceeding.'" Id., citing U.C.A. § 13-1-12(1)(a) (Supp. 1990). When the Utah Court of Appeals addressed the jurisdictional issue in its decision, it stated, "The Utah Court of Appeals has appellate jurisdiction over proceedings of state agencies." Utah Code Ann. § 78-2a-3(2)(a)



(Supp. 1991). This statute does not authorize the court to review the orders of every administrative agency, but allows judicial review of agency decisions "when the legislature expressly authorizes a right of review." DeBry v. Salt Lake County Bd. of Appeals, 764 P.2d 627, 628 (Utah App. 1988).

Proceedings in the Division are governed by the Utah Administrative Procedures Act. Utah Code Ann. § 63-46b-16(1) (1989) grants this court jurisdiction to review final agency actions resulting from formal adjudicative proceedings. See Barney v. Division of Occupational and Professional Licensing, (Utah Court of Appeals case no. 910755-CA March 26, 1992).

Furthermore, Petitioner improperly seeks a review of the administrative decision rather than seeking a review of the Court of Appeals decision. In a recent case of Butterfield v. Okubo, No. 900272, slip opinion at 6 n.2 (Ut. Sup. Ct., April 17, 1992), the Supreme Court stated that to address other than the Court of Appeals decision is an improper use of the Certiorari procedure. The Utah Supreme Court stated:

Many lawyers, after a writ of certiorari has been granted, ignore the court of appeals' decision to which the writ applies and brief the correctness or incorrectness of the trial court ruling as though we were considering that ruling instead of the court of appeals'. In fact, on occasion, the briefs filed with this court appear to be only copies of those originally filed with the court of appeals. Given the relatively new existence of the court of appeals and certiorari procedure in Utah,

such an approach may be understandable, though wrong. But five years have passed since the court of appeals was created. We take this opportunity to remind the bar that when exercising our certiorari jurisdiction granted by section 78-2-2(3)(a), we review a decision of the court of appeals, not of the trial court. See Utah Code Ann. § 78-2-2(3)(a). Therefore, the briefs of the parties should address the decision of the court of appeals, not the decision of the trial court. To restate the matter: We do not grant certiorari to review de novo the trial court's decision. See Utah R. App. P. 46. Accordingly, Petitioner's motion before the Utah Supreme Court improperly seeks a writ of certiorari to review the administrative ruling.

Subject to clearly defined exceptions, the Rules of the Utah Court of Appeals and the Utah Rules of Civil Procedure allow appeal only from the final judgment that concludes that action. See Pate v. Marathon Steel Co., 692 P.2d 765, 767 (Utah 1984); Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157, 1159 (Utah App. 1988). The exceptions to the general rule are an interlocutory appeal under Utah Rules of Appellate Procedure 5 or an appeal of an order properly certified by the trial court as a final order for purposes of appeal under Utah Rules of Civil Procedure. Based on the above analysis, the Utah Supreme Court does not have jurisdiction over this matter.

DETERMINATIVE CONSTITUTIONAL PROVISIONS,  
STATUTES, ORDINANCES, RULES AND REGULATIONS

Interpretation of the following statutes and rules is determinative of this appeal: Utah Code Ann. § 58-1-2(6) (1953); Utah Code Ann. § 78-2-2(3)(a); Utah Code Ann. Title 58; 2 Am.Jur. 2d, 21 392; Federal Rules of Civil Procedure 11; 5 C. Wright A. Miller, Federal Practice and Procedure § 1333 at 177 (1987 Supp); Rules Utah Court of Appeals 40(a); Utah Rules of Appellate Procedure 33, 40; Utah Rules of Appellate Procedure 46. (Appendix A)

STATEMENT OF FACTS

Petitioner is licensed by the Division of Occupational and Professional Licensing to administer a Health Care Facility. The Division is empowered to suspend, revoke or place on probation the license of any licensee who is or has been guilty of unprofessional conduct, as defined by statute or rule. (See § 58-1-2(6) Utah Code Ann. (1953)) On May 2, 1991, the Division filed its initial petition alleging that the petitioner engaged in unprofessional conduct including physically abusing four patients, administering contaminated medicines, and administering medication without a physician's order. On July 22, 1991, the Division filed an amended petition alleging similar conduct.

On May 14, 1990, Petitioner was found by the Second Circuit

Court to be not guilty of assault of one of the four patients. On April 25, 1991, charges of "Abuse of Mentally Ill Persons" were dismissed. Petitioner moved to dismiss the Division's petitions on grounds that the proceeding constituted double jeopardy under the federal and state constitutions, and on a claim that the Division did not have subject matter jurisdiction under the Utah Administrative Procedures Act. Administrative Law Judge Steve Eklund denied the initial motion to dismiss on August 2, 1991, and denied the motion to dismiss the amended petition on October 30, 1991.

Petitioner then filed a Petition for Agency Review, requesting a review of the denial of the motion to dismiss. On December 18, 1991, the agency issued an order denying Petitioner's request for agency review of the denial of the motion to dismiss. Petitioner then appealed the Motion to Dismiss with the Court of Appeals.

The Court of Appeals dismissed the matter for lack of jurisdiction in a published opinion filed March 26, 1992. Petitioner subsequently filed a Petition with the Court of Appeals for a Stay of Remittitur to file an appeal with the Utah Supreme Court. His motion was denied by the Court of Appeals. Petitioner now files this Petition for Certiorari dated April 24, 1992, requesting that the Supreme Court review the agency action on the merits rather than to properly review the denial of the Request for

Stay of Remittitur.

Respondent contends Petitioner's Motion is without merit and frivolous and should be dismissed. Respondent further requests sanctions against Petitioner and his attorney and reasonable attorney fees be awarded to Respondent.

#### POINT I

THIS APPEAL IS BROUGHT IN VIOLATION OF RULES 33 AND 40, UTAH RULES OF APPELLATE PROCEDURE.

In bringing this appeal, the Petitioner and Attorney Stratford have violated Rules 33 and 40, Utah Rules of Appellate Procedure, which state that no appeal shall be frivolous or brought for the purpose of delay. Several cases discuss issues of sanctions and attorney's fees raised by these rules.

In Taylor v. Estates of Taylor, 770 P.2d 163 (Utah 1989) the Court stated concerning Rule 40:

This rule, which mirrors Fed.R.Civ.P. 11, 'requires some inquiry into both the facts and the law before the paper is filed; the level of inquiry is tested against a standard of reasonableness under the circumstances.' 5 C. Wright A. Miller, Federal Practice and Procedure § 1333 at 177 (1987 Supp.) This objective approach allows sanctions to be imposed in a greater range of circumstances than did the pre-amendment, subjective 'bad faith' approach. See Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1536-38 (9th Cir. 1986); Davis v. Veslan Enters., 765 F.2d 494, 497 (5th Cir. 1985). Cf. Cady v. Johnson, 671 P.2d 149, 151-52 (Utah 1983)

(pre-amendment case employing subjective 'bad faith' analysis). . . However, in a number of cases this court has imposed sanctions pursuant to our rules, including R. Utah Ct.App. 40(a) which imposes a similar duty on litigants and their counsel. Brigham City v. Mantua Torn, 754 P.2d 1230, 1236-37 (Utah Ct. App. 1988); Porco, 752 P.2d 365, 369 (Utah Ct.App. 1988); Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157, 1160 (Utah Ct.App. 1988); Barber v. The Emporium Partnership, 750 P.2d 202, 203 (Utah Ct.App. 1988); O'Brian v. Rush, 744 P.2d 306, 310 (Utah Ct. App. 1987. These cases establish that Rule 40(a) imposes a duty to investigate the factual and legal basis of an appeal or appellate document before filing. See Backstrom Family Ltd. Partnership, 751 P.2d at 1160; O'Brian, 744 P.2d at 310. Subjective intentions are essentially irrelevant; the determination of whether the rule has been violated is made on an objective basis. Id. Except to the extent that a somewhat less forgiving approach should perhaps be employed at the appellate level, we find that this analysis is equally applicable to the similarly worded Rule 11.

A frivolous appeal has been defined as one without reasonable legal or factual basis as defined in Rules of the Utah Court of Appeals 40(a). Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157, 1160 (Utah Ct.App. 1988); O'Brian v. Rush, 744 P.2d 306, 310 (Utah Ct.App. 1987). Sanctions for bringing a frivolous appeal 'should only be applied in egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions.' Porco v. Porco, 752 P.2d 365, 369 (Utah Ct.App. 1988). The Porco court categorized egregious cases as those obviously without merit, with no reasonable likelihood of prevailing, and which result in delay in implementing a judgment. Id.; see also Auburn Harpswell Ass'n v. Dan, 438 A.2d

234, 239 (Me. 1981) (per curiam). (emphasis added)

The Backstrom case, cited above, is a case involving a debtor/creditor relationship, this Court stated that "[a]n appeal must be well grounded in fact or law and must not be brought for the purposes of delay . . . . The decision to appeal should only be reached after careful consideration by counsel and client." Id.

The case at hand is not "well grounded in fact or in law." Petitioner and Attorney Stratford are doing little more than re-arguing their case on appeal in the hopes that this Court will make different findings of fact. The administrative court found Petitioner's claims were without merit. The Court of Appeals subsequently denied the Appeal for lack of jurisdiction. The record in support of the appeal before this court is flimsy. The only purpose of this appeal is to delay the right of the public to have a hearing on the Carl Barney health care licensing issue in violation of Rules 33 and 40, Utah Rules of Appellate Procedure.

Rule 33 defines a frivolous motion as follows:

For the purposes of these rules, a frivolous appeal, motion, brief or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or revise existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion,

brief, or other paper.

The Court in Maughan v. Maughan, 770 P.2d 156, 162 (Utah Ct. App. 1989) held that attorney's fees are appropriate in appeals which are "obviously without merit, with no reasonable likelihood of success, and which result in the delay of a proper judgment."

In Clark v. Booth, 821 P.2d 1146 (Utah 1991) the Utah Supreme Court recently ordered sanctions against a party and her attorneys for a "bad faith" and "meritless motion" which had been filed. In Taylor, supra, 770 P.2d 163 (Utah 1989) the Court held sanctions were appropriate for a meritless appeal.

In conclusion, both Petitioner and Attorney Stratford have not made good faith arguments, but are simply trying to re-argue their case by filing this motion. This practice is in violation of Rules 33 and 40, Utah Rules of Appellate Procedure. In the course of defending this appeal, Respondents have incurred considerable costs and now respectfully urge that sanctions and reasonable attorney's fees be imposed.

Respondent requests the court consider in determining reasonable attorney's fees those factors stated in the case of Parents Against Drunk Drivers, Assignee of Robert J. Debry, Plaintiff and Appellant, v. Graystone Pines Homeowners' Association, Counterclaimant and Respondent, v. et al., 789 P.2d 52 (Utah 1990):



Factors which court should consider when determining reasonable attorney fee are extent of services provided, amount in controversy, novelty and difficulty of issues and complexity of litigation, reasonableness of number of hours expended to reach result in case, experience and expertise of attorney, fee customarily charged by other attorneys for services performed, and how much of the work actually performed was necessary to reach result. (Id. p. 53)

## POINT II

THE LAW IS CLEAR THAT DOUBLE JEOPARDY IS NOT A BAR TO ADMINISTRATIVE PROCEEDINGS ON THE SAME SUBJECT MATTER DUE TO DIFFERENT STANDARDS OF PROOF.

### A. Significant Cases on the Issues of Double Jeopardy.

The case of In re McCune, Utah, 717 P.2d 701 (1986) is a major case on the issue of double jeopardy in administrative proceedings. In that case, the Utah Supreme Court rejected a claim that double jeopardy principles have an application in Utah State Bar disciplinary proceedings, the purpose of which "is to maintain the honesty, integrity and professionalism of the Bar." Id. at 707.

By clear and compelling analogy, double jeopardy principles should also not apply in disciplinary licensure proceedings. The purpose of disciplinary proceedings is "to protect . . . citizens from harmful and injurious acts by persons offering or providing essential or necessary goods and services to the general public." (See § 13-1-1 of Utah Annotate Code, 1953)

Acquittal of a petitioner on charges in a criminal prosecution was held not to bar a subsequent finding in an administrative parole revocation hearing in the case of Johns v. Shulesen, 717 P.2d 1336, 1338 (Utah 1986). In this case the defendant had been acquitted on criminal charges and the same charges were used to revoke his parole. The court concluded that the administrative proceeding stemmed from a clear violation of the rules and regulations imposed as a condition of parole, and that a conviction was not requisite to parole revocation. Accordingly, evidence of a successful criminal conviction of Mr. Barney is not required to prove violation of licensing regulations.

The difference between administrative proceeding and criminal proceedings was further demonstrated in the case of In Re Friedman, 457 A.2d 983, 987 (1983). In this case, a Pennsylvania physician was the defendant in criminal and administrative proceedings brought concerning allegedly immoral and unprofessional actions. The doctor was acquitted on the criminal charges and sought to use collateral estoppel to prevent the State Board of Medicine from revoking his license. On appeal, the reviewing court rejected his claims reasoning that there was no identity of issues [between administrative and criminal matters] in view of the differing standards of proof (emphasis added).

Moreover, in Lyness v. Com. State Bd. of Medicine, 561 A.2d

362, (PA Commonwealth 1989), the court also held that the physician could be guilty of immoral and unprofessional conduct, and still be not guilty of a criminal offense (emphasis added). In Zanotto v. Commonwealth of Pennsylvania Dept. of Trans, 475 A.2d 1375, double jeopardy was held not to be an issue in an administrative proceeding involving a drivers license matter. The court stated:

Drivers suspension and revocation proceedings are remedial sanctions which are civil in nature, designed to protect the public from unsafe drivers; as such, they cannot be grounds for a double jeopardy challenge.

B. Differences in Burden of Proof.

Utah courts adhere to the general rule that "the comparative degree of proof by which a case must be established is the same before an administrative tribunal as in a judicial proceeding -- that is, a preponderance of the evidence." 2 Am.Jur. 2d, § 392. In Garcia v. Schwendiman, 645 P.2d. 651 (Utah 1982), the Utah Supreme Court held that in an administrative action the preponderance of the evidence standard applied. The Court stated that: "In contrast to prosecutions under criminal statutes, a license revocation proceeding requires proof only by a preponderance of the evidence and not beyond a reasonable doubt. Id. at 652. Similarly, in workers compensation cases, the Utah Supreme Court has held that the preponderance of the evidences standard applies. See Lipman v. Industrial Commission, 592 P.2d

616 (Utah 1979). See also Walker v. Board of Pardons, 803 P.2d 124 (Utah 1990) in which the court stated, "the burden of proof in a criminal proceeding is beyond a reasonable doubt . . . in an administrative proceeding, it is by a preponderance of the evidence." Id. Therefore, double jeopardy does not apply in the case herein. (compare Rogers v. Div. of Real Estate, 790 P.2d 102, 105 (Utah 1990)).

### POINT III

THE DIVISION HAS NOT DEPARTED FROM USUAL AND ACCEPTED PROCEDURE IN THIS CASE.

Mr. Barney alleges that the Division has not been concerned with Petitioner's rights. In truth, Petitioner has been afforded all due process rights required by the rules and statute. In his Petition, Mr. Barney derides the Division for balancing the interests of Mr. Barney against the public interest (Brief at p.7). In doing so, he ignores the Legislature's stated intent in establishing the Department of Commerce. Utah Code Ann. § 13-1-1 states as follows:

The Legislature finds that many businesses and occupations in the state have a pronounced physical and economic impact on the health, safety, and welfare of the citizens of the state. The Legislature further finds that while the overall impact is generally beneficial to the public, the potential for harm and injury frequently warrants intervention by state government.

The Legislature declares that it is appropriate and necessary for state government to protect its citizens from harmful and injurious acts by persons offering or providing essential or necessary goods and services to the general public. The Legislature further declares that business regulation should not be unfairly discriminatory. However, the general public interest must be recognized and regarded as the primary purpose of all regulation by state government (emphasis added).

In Cannon v. Gardner, 611 P.2d 1207, 1210 (Utah 1980), the Utah Supreme Court interpreted Title 58, Utah Code Ann., as follows:

[I]t's general purpose is to provide for the qualification, registration and licensing of persons who hold themselves out to the public as having qualifications in specialized areas which affect the public health, safety or welfare and thus to guard against unqualified persons deluding others into believing that they are competent to render such specialized services.

In balancing the public's interest against the Petitioner's interests, the Division is performing the legislatively and judicially mandated duty to the Division and is acting properly.

#### CONCLUSION

Respondent respectfully requests Petitioner's Writ of Certiorari be denied. Respondent's further urges that this Court award sanctions and reasonable attorney's fees against Petitioner and his attorney for the filing of a frivolous appeal pursuant to Rules 33 and 40, Utah Rules of Appellate Procedure.

DATED this 18<sup>th</sup> day of May, 1992.




DELLA M. WELCH  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Respondent's Reply Brief to Petition for Writ of Certiorari was caused to be mailed, postage pre-paid on this 18<sup>th</sup> day of May, 1992 to the following:

Dale E. Stratford  
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by   
Della M. Welch

## **APPENDIX A**

## **78-2-2. Supreme Court jurisdiction.**

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) a judgment of the Court of Appeals;
- (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
- (c) discipline of lawyers;
- (d) final orders of the Judicial Conduct Commission;
- (e) final orders and decrees in formal adjudicative proceedings originating with:

- (i) the Public Service Commission;
- (ii) the State Tax Commission;
- (iii) the Board of State Lands and Forestry;
- (iv) the Board of Oil, Gas, and Mining; or
- (v) the state engineer;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony; and

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

- (a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
- (b) election and voting contests;
- (c) reapportionment of election districts;
- (d) retention or removal of public officers;
- (e) general water adjudication;
- (f) taxation and revenue; and
- (g) those matters described in Subsection (3)(a) through (f).

(5) The Supreme Court has sole discretion in granting or denying a petition or writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Chapter 46b, title 63, in its review of agency adjudicative proceedings.



- (a) administer the rotation and scheduling of panels;
  - (b) act as liaison with the Supreme Court;
  - (c) call and preside over the meetings of the Court of Appeals; and
  - (d) carry out duties prescribed by the Supreme Court and the Judicial Council.
- (5) Filing fees for the Court of Appeals are the same as for the Supreme Court.

**History:** C. 1953, 78-2a-2, enacted by L. 1986, ch. 47, § 45; 1988, ch. 248, § 7.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, in Subsection (1), divided and rewrote the former third sentence, which read "Thereafter, the term of of-

fice of a judge of the Court of Appeals is 6 years and until a successor is appointed and approved under Section 20-1-7.1," into the present third and fourth sentences and made minor stylistic changes.

### **78-2a-3. Court of Appeals jurisdiction [Effective until January 1, 1992].**

- (1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:
  - (a) to carry into effect its judgments, orders, and decrees; or
  - (b) in aid of its jurisdiction.
- (2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
  - (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;
  - (b) appeals from the district court review of:
    - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
    - (ii) a challenge to agency action under Section 63-46a-12.1;
  - (c) appeals from the juvenile courts;
  - (d) appeals from the circuit courts, except those from the small claims department of a circuit court;
  - (e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;
  - (f) appeals from district court in criminal cases, except those involving a conviction of a first degree or capital felony;
  - (g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;
  - (h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;
  - (i) appeals from the Utah Military Court; and
  - (j) cases transferred to the Court of Appeals from the Supreme Court.
- (3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate

review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings.

### **Court of Appeals jurisdiction [Effective January 1, 1992].**

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

- (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
- (ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings.

**History:** C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 3; 1991, ch. 268, § 22.

**Amended effective January 1, 1992. —**

Laws 1991, ch. 268, § 22 amends this section effective January 1, 1992. See amendment note below.

**Amendment Notes.** — The 1988 amendment by ch. 73, effective April 25, 1988, inserted subsection designations (a) and (b) in

**58-1-1. Short title.**

This chapter is known as the "Division of Occupational and Professional Licensing Act."

**History:** C. 1953, 58-1-1, enacted by L. 1985, ch. 187, § 10.

**Repeals and Reenactments.** — Laws 1985, ch. 187, § 10 repealed former §§ 58-1-1 to 58-1-43 (L. 1921, ch. 130, §§ 1 to 7, 11, 12, 1923, ch. 49, §§ 1, 2, Code Report, R.S. 1933 & C. 1943, 79-1-1 to 79-1-4, 79-1-6, 79-1-18 to 79-1-20, 79-1-22 to 79-1-39, L. 1941 (1st S.S.), ch. 28, § 1, 1943, ch. 61, § 1, 1953, ch. 96, § 1A, 1953, ch. 97, § 1, 1957, ch. 114, § 1, 1963, ch. 113, § 1, 1963, ch. 115, § 1, 1963, ch. 116, §§ 1 to 3, 1967, ch. 133, § 1; 1967, ch. 134,

§§ 1 to 3, 1969, ch. 165, § 1, 1973, ch. 126, §§ 1 to 3, 1979, ch. 11, § 1, 1979, ch. 19, § 2, 1981, ch. 19, § 1; 1981, ch. 34, §§ 1 to 4, 1984, ch. 67, § 29, 1984 (2nd S.S.), ch. 15, §§ 62, 63), general provisions relating to the division of registration, and enacted present §§ 58-1-1 to 58-1-20

**Effective Dates.** — Section 108 of Laws 1985, ch. 187 provided "This act takes effect on July 1, 1985"

**Cross-References.** — Divisions created in Department of Commerce, § 13-1-2

## COLLATERAL REFERENCES

**Utah Law Review.** — Recent Developments in Utah Law, 1986 Utah L. Rev. 95, 130

**Am. Jur. 2d.** — 51 Am. Jur. 2d Licenses and Permits § 1 et seq

**C.J.S.** — 53 C.J.S. Licenses § 2 et seq

**58-1-2. Definitions.**

For purposes of this title:

- (1) "Department" means the Department of Commerce.
- (2) "Director" means the director of the Division of Occupational and Professional Licensing.
- (3) "Division" means the Division of Occupational and Professional Licensing.
- (4) "Executive director" means the executive director of the Department of Commerce.
- (5) "Licensee" includes any holder of a license, certificate, permit, student card, or apprentice card authorized under this title.
- (6) "Unprofessional conduct" means acts, knowledge, and practices which fail to conform with the accepted standards of the specific licensed occupation or profession and which could jeopardize the public health, safety, or welfare and includes the violation of any statute regulating an occupation or profession under this title.

**History:** C. 1953, 58-1-2, enacted by L. 1985, ch. 187, § 10; 1989, ch. 225, § 24.

**Repeals and Reenactments.** — See note under same catchline following § 58-1-1

**Amendment Notes.** — The 1989 amendment, effective March 14, 1989, substituted

"Department of Commerce" for "Department of Business Regulation" in Subsections (1) and (4)

**Cross-References.** — Department of Commerce, Chapter 1 of Title 13

### Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

#### NOTES TO DECISIONS

##### ANALYSIS

**Frivolous appeal.**

—Defined.  
—Sanctions.  
Cited.

**Frivolous appeal.**

A husband's appeal from a judgment relating to alimony and distribution of marital property was frivolous, where there was no basis for the argument presented and the evidence and law was mischaracterized and misstated. *Eames v. Eames*, 735 P.2d 395 (Utah 1987).

Plaintiff's counsel violated rule and was therefore subject to sanction when, after he investigated plaintiff's malpractice action

against defendant orthodontist and found that he could not prove breach of duty or causation, the record was devoid of any relevant, admissible evidence showing negligence, and after losing on summary judgment, he persisted in filing an appeal. *Hunt v. Hurst*, 785 P.2d 414 (Utah 1990).

An appeal brought from an action that was properly determined to be in bad faith is necessarily frivolous under this rule. *Utah Dep't of Social Servs. v. Adams*, 806 P.2d 1193 (Utah Ct. App. 1991).

—Defined.

For purposes of this rule, a "frivolous" appeal is one having no reasonable legal or factual basis. Lack of good faith is not required.

**A.L.R. —** Abatement effects of accused's death before appellate review of federal criminal conviction, 80 A.L.R. Fed. 446.

**Key Numbers. —** Appeal and Error ⇐ 329 et seq.

### **Rule 39. Duties of the clerk.**

(a) **General provisions.** The office of the Clerk of the Court, with the clerk or a deputy in attendance, shall be open during business hours on all days except Saturdays, Sundays and legal holidays.

(b) **The docket; calendar; other records required.** The clerk shall keep a record, known as the docket, in form and style as may be prescribed by the court, and shall enter therein each case. The number of each case shall be noted on the page of the docket whereon the first entry is made. All papers filed with the clerk and all process, orders and opinions shall be entered chronologically in the docket on the pages assigned to the case. Entries shall be brief but shall show the nature of each paper filed or decision or order entered and the date thereof. The clerk shall keep a suitable index of cases contained in the docket.

The clerk may keep a minute book, in which shall be entered a record of the daily proceedings of the court. The clerk shall prepare, under the direction of the Chief Justice of the Supreme Court or the Presiding Judge of the Court of Appeals, a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk shall give preference to appeals in accordance with the priority of cases provided in Rule 29.

(c) **Notice of orders.** Immediately upon the entry of an order or decision, the clerk shall serve a notice of entry by mail upon each party to the proceeding, together with a copy of any opinion respecting the order or decision. Service on a party represented by counsel shall be made upon counsel.

(d) **Custody of records and papers.** The clerk shall have custody of the records and papers of the court. The clerk shall not permit any original record or paper to be removed from the court, except as authorized by these rules or the orders or instructions of the court. Original papers transmitted as the record on appeal or review shall upon disposition of the case be returned to the court or agency from which they were received. The clerk shall preserve copies of briefs and attachments, as well as other printed papers filed.

### **Rule 40. Attorney's or party's certificate; sanctions and discipline.**

(a) **Attorney's or party's certificate.** Every motion, brief, and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member in good standing of the Bar of this state. The attorney shall sign his or her individual name and give his or her business address, telephone number, and Utah State Bar number. A party who is not represented by an attorney shall sign any motion, brief, or other paper and state the party's address and telephone number. Except when otherwise specifically provided by rule or statute, motions, briefs, or other papers need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate that the attorney or party has read the motion, brief, or other paper; that to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, it is not frivolous or interposed for the purpose of delay as defined in Rule 33. If a motion, brief, or other paper is not

signed as required by this rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the attorney or party. If a motion, brief, or other paper is signed in violation of this rule, the authority and the procedures of the court provided by Rule 33 shall apply.

(b) **Sanctions and discipline of attorneys and parties.** The court may, after reasonable notice and an opportunity to show cause to the contrary, and upon hearing, if requested, take appropriate action against any attorney or person who practices before it for inadequate representation of a client, conduct unbecoming a member of the Bar or a person allowed to appear before the court, or for failure to comply with these rules or order of the court. Any action to suspend or disbar a member of the Utah State Bar shall be referred to the Ethics and Discipline Committee of the State Bar for proceedings in accordance with the Rules of Discipline of the State Bar.

(c) **Rule does not affect contempt power.** This rule shall not be construed to limit or impair the court's inherent and statutory contempt powers.

(d) **Appearance of counsel *pro hac vice*.** An attorney who is licensed to practice before the bar of another state or a foreign country but who is not a member of the Bar of this state, may appear, upon motion, *pro hac vice*. Such attorney shall associate with an active member in good standing of the Bar of this state and shall be subject to the provisions of this rule and all other rules of appellate procedure.

**Advisory Committee Note.** — The rule is amended to require that counsel provide the court with counsel's Bar number and business telephone number.

#### NOTES TO DECISIONS

Cited in *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah Ct. App. 1990).

#### COLLATERAL REFERENCES

**A.L.R.** — Award of damages for dilatory tactics in prosecuting appeal in state court, 91 A.L.R.3d 661.

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies, 13 A.L.R.4th 533.

Adequacy of defense counsel's representation of criminal client regarding appellate and post-conviction remedies, 15 A.L.R.4th 582.

Attorneys: revocation of state court *pro hac vice* admission, 64 A.L.R.4th 1217.

**Key Numbers.** — Costs ⇐ 252.

### TITLE VI.

## CERTIFICATION AND TRANSFER BETWEEN COURTS.

### Rule 41. Certification of questions of law by United States courts.

(a) **Authorization to answer questions of law.** The Utah Supreme Court may in its discretion answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court acting in accordance with the provisions of this rule, but only if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain and

**TITLE VII.****JURISDICTION ON WRIT OF CERTIORARI  
TO COURT OF APPEALS.****Rule 45. Review of judgments, orders, and decrees of  
Court of Appeals.**

Unless otherwise provided by law, the review of a judgment, an order, and a decree (herein referred to as "decisions") of the Court of Appeals shall be initiated by a petition for a writ of certiorari to the Supreme Court of Utah.

**Rule 46. Considerations governing review of certiorari.**

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

**Rule 47. Certification and transmission of record; filing;  
parties.**

(a) **Appearance, docketing fee, filing, and service.** Counsel for the petitioner shall, within the time provided by Rule 48, pay the certiorari docketing fee and file ten copies of a petition which shall comply in all respects with Rule 49. The case then will be placed on the certiorari docket. Counsel for the petitioner shall serve four copies of the petition on counsel for each party separately represented. It shall be the duty of counsel for the petitioner to notify all parties in the case of the date of filing and of the certiorari docket number of the case. Service and notice shall be given as required by Rule 21.

(b) **Joint and separate petitions.** Parties interested jointly, severally, or otherwise in a decision may join in a petition for a writ of certiorari; any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari and involve identical or closely related questions, it will suffice to file a single petition for a writ of certiorari covering all the cases.

(c) **Cross-petition of respondent.** Counsel for a respondent wishing to file a cross-petition shall, within the time provided by Rule 48(d), pay the certio-

**13-1-1. Legislative findings and declarations.**

The Legislature finds that many businesses and occupations in the state have a pronounced physical and economic impact on the health, safety, and welfare of the citizens of the state. The Legislature further finds that while the overall impact is generally beneficial to the public, the potential for harm and injury frequently warrants intervention by state government.

The Legislature declares that it is appropriate and necessary for state government to protect its citizens from harmful and injurious acts by persons offering or providing essential or necessary goods and services to the general public. The Legislature further declares that business regulation should not be unfairly discriminatory. However, the general public interest must be recognized and regarded as the primary purpose of all regulation by state government.

**History:** C. 1953, 13-1-1, enacted by L. 1983, ch. 322, § 1.

**Repeals and Enactments.** — Laws 1983, ch 322, § 1 repealed former § 13-1-1 (L 1941

(1st SS ), ch 5, § 1, C 1943, 16A-1-1), relating to creation of the department of business regulation, and enacted present § 13-1-1

**COLLATERAL REFERENCES**

**Am. Jur. 2d** — 15A Am Jur 2d Commerce §§ 7 to 34

**C.J.S.** — 15 C.J.S Commerce § 55

**A.L.R.** — Hearsay evidence in proceedings

before state administrative agencies 36 A L R 3d 12

**Key Numbers.** — Commerce ⇐ 48

**13-1-1.1 to 13-1-1.3. Repealed.**

**Repeals.** — Sections 13-1-1.1 to 13-1-1.3 (L 1969, ch 34, §§ 1 to 3), relating to functions of the department, the executive director and continuation of the public service commission,

were repealed by Laws 1983, ch 322, § 13 Sections 13-1-1.1 and 13-1-1.3 were also repealed by Laws 1983 ch 246, § 24

**13-1-2. Creation and functions of department — Divisions created — Fees.**

(1) There is created the Department of Business Regulation, hereafter referred to as the department. The department shall execute and administer state laws regulating business activities and occupations affecting the public interest.

(2) There is created within the department the following divisions.

- (a) the Division of Occupational and Professional Licensing;
- (b) the Division of Real Estate;
- (c) the Division of Securities;
- (d) the Division of Contractors;
- (e) the Division of Public Utilities;
- (f) the Division of Consumer Protection; and
- (g) the Division of Corporations and Commercial Code.

(3) Unless otherwise provided by statute, the department may adopt a schedule of fees assessed for services provided by the department. The fee shall be reasonable and fair, and shall reflect the cost of services provided



(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

**History:** C. 1953, 63-46b-15, enacted by L. 1987, ch. 161, § 271; 1988, ch. 72, § 25.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, deleted "except that final agency action from informal adjudicative proceedings based on a record shall be reviewed by the district courts on the record

according to the standards of Subsection 63-46b-16(4)" at the end in Subsection (1)(a) and made minor stylistic changes

**Effective Dates.** — Laws 1987, ch. 161, § 315 makes the act effective on January 1, 1988

#### NOTES TO DECISIONS

##### Function of district court.

Section 63-46b-16(1) provides that all final agency decisions through formal adjudicative proceedings will be reviewed by the Utah Supreme Court or Court of Appeals. Therefore,

the district court will no longer function as intermediate appellate court except to review informal adjudicative proceedings de novo pursuant to Subsection (1)(a) of this section. In re Topik, 761 P.2d 32 (Utah Ct. App. 1988)

### 63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;