Agenda

Advisory Committee on Rules of Civil Procedure

February 22, 2006
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Approval of minutes.	Fran Wikstrom
Rule 37. Spoliation of evidence.	Colin King
Rule 63. Disqualification.	Tim Shea
Finality of judgments.	James Blanch Leslie Slaugh
Rule 8. Writing under penalty of perjury.	Tim Shea

Meeting Schedule

March 22, 2006
April 26, 2006
May 24, 2006
June 28, 2006
September 27, 2006
October 25, 2006
November 29, 2006 (5th Wednesday)

Committee Web Page: http://www.utcourts.gov/committees/civproc/

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, January 25, 2006
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, James T. Blanch, Honorable David Nuffer, Virginia S. Smith, Paula Carr, Terrie T. McIntosh, Tom Lee, Cullen Battle, Leslie W. Slaugh, David W. Scofield, Honorable Anthony W. Schofield, R. Scott Waterfall, Honorable Lyle R. Anderson, Thomas R. Karrenberg

EXCUSED: Francis J. Carney, Debora Threedy, Jonathan Hafen, Todd M. Shaughnessy, Matty Branch, Lance Long, Honorable Anthony B. Quinn, Janet H. Smith

STAFF: Tim Shea, Trystan Smith, Matty Branch

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m. Judge Nuffer moved to approve the minutes as submitted. Mr. Karrenberg seconded the motion. The Committee unanimously approved the minutes.

II. REVIEW OF COMMENTS TO DRAFT RULES. RECOMMENDATIONS FOR FINAL ACTION.

Mr. Wikstrom brought Rules 4, 6, 62, 64C, 68, 71A, and 71B back to the committee to review the comments thereto, and for final action.

Mr. Shea introduced Mark Olson who discussed the proposed repeal of Rule 71b. Mr. Olson expressed his concern that if Rule 71b were eliminated debtors could face the potential of facing two judgments covering the same debt. The committee expressed its due process concerns concerning the present rule. In response, Mr. Olson suggested the committee could protect debtors by incorporating the language of Rule 71b into Rule 4, but allow the second debtor to be served at any time. The committee decided to move forward with the repeal.

Mr. Shea discussed the remaining comments beginning with the amendment of Rule 6 to allow for 3 additional days to respond to motions even with electronic service. The committee reiterated its concerns about abuse, and also expressed its desire to maintain uniformity for practitioners.

Mr. Shea then discussed Judge Westphal's concerns regarding Rule 62 and the 10 day stay after entry of judgment. Judge Westphal commented that a judgment is something less than final if you have an automatic stay. Judge Schofield agreed with the rule change and mentioned that he as a matter of course will give a 10 stay, if the party has good cause. Judge Nuffer further agreed with the rule change and mentioned the federal rules also contained the 10 day stay.

The committee also discussed the comments supporting the inclusion of attorney fees to Rule 68 Settlement offers. An offer under the revised Rule would include all attorney fees as permitted by law or contract incurred up to the date of the offer. Mr. Schofield questioned whether "claims" means all claims between the parties or all claims raised in the present action. Mr. Shea mentioned the intent of the language means all claims in the action. Mr. Karrenberg moved to add claims "in the action." Judge Nuffer seconded the motion. The committee unanimously approved the motion.

As discussion concluded, Mr. Lee moved to approve the amendments, and submit the same to the Supreme Court. Judge Waterfall seconded the motion. The committee unanimously approved the motion.

III. RULE 45 AND FORM 40. SUBPOENA.

Mr. Shea entertained questions/changes from the committee.

Mr. Slaugh questioned the language in Rule 45(c)(2)(B) allowing a party to issue a subpoena. Mr. Slaugh expressed concerns that only the Court or an attorney can issue a subpoena. Mr. Slaugh also questioned subsection 4(e) which allows the person subject to the subpoena to object, but not the person who's personal or confidential information is subject to production to object. Mr. Slaugh used the example of a bank and the bank's customers.

The committee expressed concern about allowing a pro se party subpoena power. The committee further commented that typically the customer or person who's information was subject to disclosure would be involved in the litigation and would have an opportunity to object or move to quash.

Mr. Lee suggested a change to subsection (e)(2) to add the phrase "for any purpose" after "... to produce documents or tangible things ..." and strike the phrase "for inspection and copying." The committee agreed with the change.

After further discussion, Mr. Karrenberg moved to approve the language of Rule 45 with Mr. Lee's amendment. Judge Waterfall seconded the Motion. The committee unanimously approved the motion.

The committee's discussion then turned to the language contained in Form 40.

Mr. Slaugh questioned the 14 day notice limitation. Mr. Slaugh suggested the committee clarify that the 14 day notice requirement is limited to the production of documents. A subpoena to appear at trial, hearing, or deposition, only needs to be served at a "reasonable time." Mr. Slaugh further suggested the committee clarify paragraph 1 to allow a party commanded to appear at a trial, hearing, deposition, or other place $18.50 plus 25 cents per mile. Mr. Slaugh suggested that this language should be consistent throughout Rule 45 and Form 40. The committee expressed its consent to the changes.

Mr. Lee moved to approve Rule 45 and Form 40 with the amendments stated above. Mr. Battle seconded the motion. The committee unanimously approved the motion.

IV. URCP 7(f)(2) REGARDING FINALITY OF JUDGMENTS.

Mr. Shea brought Rule 7(f)(2) to the committee. Mr. Shea indicated that confusion has arisen as to when the time period for filing an appeal runs if there is not a final signed Order, but just a minute entry. After some discussion, Mr. Wikstrom asked Mr. Blanch and Mr. Slaugh to serve on a sub-committee to look at the issue and suggest language.

V. URCP 10. FORM OF PLEADINGS AND OTHER PAPERS. COURT FORMS AND FORMAT REQUIREMENTS.

Mr. Shea brought Rule 10 to the Committee. The Board of District Court judges asked for an amendment to the rule to allow an exception for district court forms. Mr. Shea indicated the intent is to move the forms from behind their applicable rules (civil, criminal, small claims, and appellate) to the website. The purpose is to have preprinted forms for pro se parties.

Mr. Battle suggested an amendment to Rule 10(d) which stated "court approved forms in the court approved format." After some discussion, Mr. Karrenberg moved to approve the language as suggested by the Board. Mr. Battle seconded the motion. The committee unanimously approved the motion.

VI. ADJOURNMENT.

The meeting adjourned at 5:40 p.m. The next committee meeting will be held on Wednesday, February 22, 2006, at the Administrative Office of the Courts.

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Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a)(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(a)(2) Motion.

(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(a)(2)(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(a)(3) Evasive or incomplete disclosure, answer, or response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(a)(4) Expenses and sanctions.

(a)(4)(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(a)(4)(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(b)(1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b)(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 16(b), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(b)(2)(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b)(2)(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(b)(2)(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(b)(2)(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(b)(2)(E) where a party has failed to comply with an order under Rule 35(a), such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the party's attorney or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Failure to participate in the framing of a discovery plan. If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

(f) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court may order any other sanction, including payment of reasonable costs and attorney fees, any order permitted under subpart (b)(2)(A), (B) or (C) and informing the jury of the failure to disclose.

(g) Spoliation of evidence. If a party destroys, conceals, alters, tampers with, or fails to preserve and produce a document, tangible item, electronic data, or other evidence which existed and which was required or would have been required to be disclosed under Rule 26(a), Rule 26(e)(1), or another party's discovery request, that party shall be subject to an appropriate sanction or sanctions available under any section of this Rule, unless that party shows good cause for the spoliation of the document, item, or other evidence. The court may in addition instruct the jury regarding an adverse inference or effect of the spoliation of the evidence.

Spoliation in Utah – A Problem In Search of a Remedy

by Robert B. Sykes & James W. McConkie

When a party is once found to be fabricating, or suppressing, documents, the natural, indeed, the inevitable, conclusion is that he has something to conceal, and is conscious of guilt.[1]

—Judge Learned Hand, 1939

"Contra spoliatorem omnia raesumuntur"
(All things presumed against the destroyer)[2]

I. SCOPE OF THE PROBLEM

Spoliation is the destruction, alteration or suppression of evidence relevant to a cause of action or potential cause of action.[3] National commentators describe spoliation as a very significant ongoing problem in litigation.[4] The renowned Harvard Law Professor, Charles R. Nesson, has stated:

> Interviews and surveys of litigators suggest a prevalent practice. For example, one half of litigators believe that "unfair and inadequate disclosure of material information prior to trial [is] a 'regular or frequent' problem . . . [and] 69% of surveyed antitrust attorneys [have] encountered unethical practices," including, most commonly, destruction of evidence. . . . ***Spoliation is an effective, and, I believe, a growing litigation practice which threatens to undermine the integrity of civil trial process.*** It is a form of cheating which blatantly compromises the ideal of the trial as a search for truth yet judges seem willing, even anxious, to ignore or minimize the role of spoliation rather than to recognize and address it as a serious problem. The practice of spoliation and the ethical hypocrisy which it spawns will continue to grow until judges stop treating the problem with what amounts to hollow rhetoric and mild sanctions.

Charles R. Nesson, "Incentives to Spoliate Evidence in Civil Litigation: the Need for Vigorous Judicial Action," Cardozo Law Review, 1991, p. 793 (citations omitted).

The problem is serious, yet judges seem reluctant to take firm action, even when the spoliation is quite blatant. Attorneys and judges who encounter spoliation should bear in mind the importance of fashioning some kind of remedy, and not simply allowing the conduct to continue. The West Virginia Supreme Court has recently observed:

> In considering these issues, we are mindful that "[f]or every wrong there is supposed to be a remedy somewhere." . . . This court has opined that "[t]he concept of American justice . . . pronounces that for every wrong there is a remedy. It is incompatible with this concept to deprive a wrongfully injured party of a remedy[.]" . . . "It is the proud boast of all lovers of justice that for every wrong there is a remedy." . . . Accordingly, one of our considerations in answering certified questions is whether a sufficient remedy already exists for the conduct at issue.

Hannah v. Heeter, 584 S.E.2d 560, 566 (W. Va. 2003) (citations omitted).

Is spoliation a concern in Utah? An informal canvas of several well-known Utah litigators suggests that it is a significant problem in this state, a problem urgently seeking a judicial remedy. The authors hope that attorneys and courts, in appropriate cases, will fashion stern remedies to discourage and punish spoliation.

II. HISTORICAL BACKGROUND

Recognition of spoliation by courts dates back to the eighteenth century case *Armory v. Delamirie,* 93 Eng. Rep. 664 (K.B. 1722). In that case a young boy working as a chimney sweeper found an old ring with a jewel in it. He took the ring to the defendant to

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be appraised. The defendant claimed the jewel was not valuable and he would only pay for the setting. The plaintiff declined the offer and asked for the ring back, but the defendant would not return the jewel. The plaintiff sued, but the defendant failed to produce the jewel for the trial. The court instructed the jury that it should assume the jewel's value to be equal to the highest possible value that could fit in that setting when determining damages. This was the first known instance of spoliation leading to an adverse inference.

III. SPOLIATION EXAMPLES

Phantom Chart Notes. Anecdotal evidence and the authors' personal experience confirm that spoliation is an ongoing, significant problem in Utah, particularly in certain types of litigation. For example, consider a recent medical malpractice case handled by one of the authors involving the failure to diagnose fetal distress and do a timely cesarean section. Plaintiffs claim that there were significant signs of fetal distress for several hours that were not properly evaluated and treated by the nursing staff, the resident and the attending physician. During a critical period, the resident admits that she made at least one, and maybe two, handwritten chart notes and placed them in the file. The medical chart is examined during discovery, but the chart notes are nowhere to be found. The defense claims there is no prejudice because, after all, plaintiffs' counsel may simply ask the defendant resident (2 1/2 years after the event) what the chart notes said. Said defendant's memory should cure any potential prejudice of the missing chart notes!

Vanishing Placenta. There is drama in labor and delivery. About eight minutes before birth, the baby's heart rate crashes and the FHR (fetal heart rate) monitor goes into a "terminal pattern." People are scurrying around and looking worried. Strange persons start showing up in the delivery room. This is nothing like Mom's other three births. The client's treating OB/GYN is called at his office but misses the delivery of a severely stressed infant by about a minute. The nurse takes the infant in her hands and literally runs down the hall to Newborn ICU. Bewildered dad and aunt follow, but are told to stay away. Mom doesn't even know yet if she has a new daughter or son. Meanwhile, the baby is fighting for her life in NICU. She is born without a pulse and with severely depressed APGARs that don't even reach the lower end of normal (i.e., about 7) until 20 minutes of life.[5] The doctor arrives just after the birth, observes the commotion, undoubtedly sees the running nurse, and then goes into the delivery room full of distressed family members. The doctor is aware that his newest patient is in NICU. A main question in the case is whether the injury resulted from medical negligence in failing to diagnose fetal distress several hours before birth, or whether problems naturally occurred due to a placental abruption a few minutes before birth (defense claim). The placenta is considered the "diary of the labor and

delivery," and its examination after a bad outcome in an obstetrics case will often confirm or exclude competing causes. For example, one can usually tell whether there has been an abruption, as claimed by the defense, by examination of the placenta. One could almost certainly have determined whether an abnormal vessel (vasa previa) had been cut during the artificial rupture of membranes. All of this was impossible because the defendant doctor sent the placenta for routine destruction just minutes following this traumatic birth.

Mysteriously Erased Tape. In a 2002 criminal case, the defendant was charged with conspiracy to sell drugs to a confidential informant. The informant goes to defendant's home and has a 20-25 minute conversation with the defendant, which the defendant alleges was about cars and tools, but not drugs. Two police officers sitting out in the car are tape-recording the conversation as it is being broadcast from the informant's "wire." The defendant allegedly discovers that the informant has a wire and makes a comment about it. The officers deem the informant to be "in danger," and burst in without a warrant, allegedly to protect the informant. The defendant is charged with conspiracy to distribute a controlled substance, based upon the affidavits of the officers, who claim that is what they "heard" during the tape-recorded conversation. The informant, however, backs up the defendant; i.e., there was no discussion of drugs. The tape would prove the issue. However, when the tape is produced, it has been almost totally erased; no actual words can be made out. It is now the officers' word against the defendant's.

Missing Ultrasound Videotape Turns Up. A case tried to a jury in Salt Lake County about two years ago involved a claim of birth injury medical malpractice. The case centered around whether there was sufficient amniotic fluid around the fetus to avoid injury to the fetus during the last few weeks of pregnancy. The plaintiffs claimed that the mother's amniotic fluid was dangerously low and that the defendant doctors and nurses misread the ultrasound videotaped films used to determine the amount of fluid in the womb and thereafter falsely concluded that there was enough fluid when in truth and fact there was not. Consequently, the baby was severely injured and suffered a severe case of cerebral palsy which required the injured baby to be confined to a wheel chair and be required to feed through a tube for the remainder of her life. Defendants claimed that there was sufficient amniotic fluid and that they had measured the amount of the fluid accurately; therefore, low fluid could not possibly be the cause of the baby's cerebral palsy. Plaintiffs sought discovery of the videotaped ultrasound films, the most complete and telling evidence of the amount of amniotic fluid. Plaintiffs were told that the actual videotaped record of the ultrasounds in question could not be found. In the alternative, defendants produced individual pictures of a few isolated portions of the videotape used by the doctors and nurses to record and determine the amniotic fluid levels. Having no alternative, the plaintiffs' lawyers sculpted their entire case around the isolated ultrasound photographs taken from the missing videotape. After two years of litigation, and a few weeks before trial, the defense moved to exclude the isolated ultrasound pictures based upon the "best evidence" rule. The trial judge denied the motion. Miraculously, a couple of days after the motion was denied, and just eleven days before trial, the missing ultrasound videotape turned up. Defendants moved for a continuance of the trial based upon the discovery of the videotape. Plaintiffs successfully opposed the motion and went to trial as scheduled. Plaintiffs were forced to re-theorize the case based upon the find. During the trial, evidence was introduced which suggested to one of plaintiff's expert witnesses that the last part of the tape which contained some of the most important pictorial evidence had been lost, erased, or otherwise destroyed.

Conversations with colleagues suggest that our experience with spoliation, sadly, is not isolated. Our colleagues regularly have problems with disappearing or altered evidence and generally get very little help from the court.

IV. SPOLIATION IN UTAH – *BURNS* and *COOK*

Utah law is scarce with regards to spoliation, but the implication is that the doctrine would be adopted in the appropriate case. The first reported case, *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415 (Utah App. 1994), deals with spoliation in a tangential manner. The plaintiff had purchased a Cannondale bicycle from a local shop. While riding, the bike suddenly seized, throwing him over the handlebars and injuring him. A few weeks later, Burns asked an employee to return the bike for repairs and/or to determine what had caused the bike to suddenly stop. There was a conflict in the evidence between the plaintiff's employees who dealt with the bike shop and the owner of the bike shop, as to what conversations had occurred and exactly what, if anything, was wrong with the bike. The shop owner claimed that there were no problems with the bike and he couldn't determine a cause that made the bike stop suddenly. The case was actually filed *three years after the accident!* Defendants moved for summary judgment on the grounds that plaintiff could not show a product defect. The Court of Appeals notes:

> Burns admits that he cannot prove the existence of a defect. However, he claims the existence of a defect would properly be inferred if the factfinder determined The Bicycle Center disposed of a part while it had Burns' bike in for repair. Burns bases his claim on the doctrine of "spoliation of evidence," which holds that where a *party to an action* fails to provide or destroys evidence favorable to the opposing party, the court will infer the evidence's adverse content.

Burns, 876 P.2d at 419 (emphasis in original; citations omitted). The court then describes the spoliation doctrine as "an inference [that] will be drawn '[w]here one party wrongfully denies another

the evidence necessary to establish a fact in dispute.'" *Id.* (citation omitted). The court notes that Burns "cites no authority demonstrating that Utah has adopted the spoliation doctrine," but the court concluded that the doctrine would not apply in this case in any event. *Id.* The Court of Appeals recites these critical reasons for rejecting spoliation in this case:

> In sum, even assuming that a part was discarded, it cannot be inferred that the part was defective because defendants ***had no notice*** of the pendency of Burns's legal claim ***nor a duty to retain*** the part on any other basis.

Burns, 876 P.2d at 419 (emphasis added).

Burns was urging the adoption of spoliation as "an adverse inference;" not as a separate cause of action. This application, but not the doctrine, was rejected because the defendants had no "notice of the pendency of Burn's legal claim," and there was otherwise no "duty" to retain the part. There is an inference that the court would have entertained the question of spoliation under different facts; i.e., had there been a "duty" to retain the part.

In the recent case of *Cook Associates, Inc. v. PCS Sales, Inc.*, 271 F.Supp.2d 1343 (D.Utah 2003), Judge Paul Cassell dealt with a claim of spoliation. In *Cook,* a manufacturer of explosives for the mining industry brought suit against a supplier for alleged defects in materials. Among many other claims, Cook claimed that the defendant destroyed documents that would have proven that the products were defective. Apparently, PCS had earlier made the decision to close certain non-economically viable plants, and as part of that process various plant documents were shredded, beginning in January 2000. Cook filed its claim in May 2001, but apparently claimed that the defendant was on notice much earlier that Cook was receiving off-spec product. There was no actual evidence that any of the destroyed documents would have affirmatively demonstrated the alleged defect in the product. *Cook,* 271 F.Supp.2d at 1356. Cook was seeking both a finding of the independent tort of spoliation, and an evidentiary remedy for it. However, "Cook fails to cite any judicial authority supporting a *tort of spoliation." Id.* at 1357 (emphasis added). Referring to *Burns,* the court noted:

> The Utah Supreme Court [sic – i.e., Court of Appeals], having had the opportunity to adopt ***a tort of spoliation,*** refused to do so. As a result, Cook has no legal basis for asserting a tort of spoliation.

Id. at 1357 (emphasis added). The court then proceeds to explore a possible "evidentiary remedy for spoliation" under Rule 37(b)(2), but finds that the case law on this issue "only applies to parties who have violated a court order or acted in bad faith." *Id.* at 1357. A litigant would have to be on notice that documents or information in its possession were relevant to litigation or

potential litigation "and destroy such documents and information." *Proctor & Gamble Co. v. Haugen,* 179 F.R.D. 622, 631 (D.Utah 1998) (citations omitted).

The trial court found here that the defendant "neither violated a court order nor acted in bad faith." *Id.* at 1357. It described the destruction of the documents as "a routine housecleaning operation," which occurred "well before the filing of a lawsuit." *Id.* "There was never any notice concerning the need for documents" from a certain plant and so under these circumstances, "Cook is not entitled to any evidentiary remedy for spoliation." *Id.*

Neither *Burns* nor *Cook* contained a strong factual basis for spoliation. The alleged critical evidence was destroyed or discarded long (in fact, years) before suit was filed. The other spoliation prong, a "duty to retain" the evidence, is also either nonexistent or exceptionally weak in these cases. For example, it is difficult to see how the bicycle shop in *Burns* could have even a scintilla of duty to retain a bicycle part when it had no knowledge that the part was allegedly defective until long after the bike had been repaired. *Burns,* 876 P.2d at 419 ("By his own admission, *Burns* did not even contemplate filing suit at that time [of the bicycle repair]"). Accordingly, neither *Burns* nor *Cook* should be read as authority against adopting spoliation as an independent tort or against imposing stern sanctions as a discovery or evidentiary remedy.

V. ELEMENTS AND VARIETIES OF SPOLIATION

Spoliation has been treated as a rule of evidence, a discovery violation, or an independent tort, depending on the jurisdiction. K. Kadigh, *Spoliation: To the Careless Go the Spoils,* 67 U. Mo. Kan. City L. Rev. 597 (Summer, 1999). Additionally, the cases often distinguish *first-party* from *third-party* spoliation and *intentional* from *negligent* spoliation. There is much overlap in the elements of these variations of spoliation.

Competing public policies are highlighted in the different ways in which courts deal with the varieties of spoliation. These policies are explained well in *Hannah,* 584 S.E.2d 560, where the West Virginia Supreme Court certified three questions by a federal court regarding the availability of an independent tort for spoliation in West Virginia. The court surveys extensively the case law and expressions of public policy from other jurisdictions and presents a well-reasoned view of current judicial treatment of spoliation.

There is general agreement by courts as to the elements of *negligent spoliation* by a *third party,* which consists of the following basic elements:

> (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and (6) damages. Once the first five elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The third-party spoliator must overcome the rebuttable presumption or else be liable for damages.

Hannah, 584 S.E.2d at 563-4. Note that a "potential civil action" suffices; the action need not have actually been filed.[6] A second important feature is that the duty to preserve the evidence may arise from a variety of fairly predictable sources, such as a contract, statute, etc., but this is not an exclusive list. The duty may also arise from "other special circumstances," which leaves the rule broad enough to deal with the innovative spoliator. This rule also puts the burden on the spoliator to overcome a "rebuttable presumption" that arises once the first five elements are established.

The tort of *intentional spoliation* consists of the following elements:

> (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages.

Hannah, 584 S.E.2d at 564. These elements are similar in many respects to negligent spoliation, with this prominent difference: intentional spoliation requires "willful destruction of evidence," with the intent to "defeat a party's ability to prevail."

A controversy exists as to the remedy available in cases of first-party vs. third-party spoliation. In first-party spoliation, of course, one of the parties is the spoliator, whereas a third party obviously does the deed in a third-party spoliation. Should there be an independent tort allowing the disadvantaged party to file suit and seek damages? Or are the traditional discovery and evidentiary remedies sufficient?

The availability of the independent tort remedy for spoliation seems to be dependent on whether or not sufficient non-tort remedies exist. For example, in *Hannah,* the court held that West Virginia did not recognize "spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence *of a party* to a civil action." *Id.* at 566 (emphasis added). The reason: "suffi-

cient remedies already exist to compensate the party injured by the negligent spoliation[,]" which include "an adverse inference instruction . . . or sanctions levied [against] a party." *Id.* However, a court obviously doesn't have the same hold on a third party. Accordingly, the West Virginia Supreme Court answered the question affirmatively against a third-party spoliator:

> Unlike a party to a civil action, a third-party spoliator is not subject to an adverse inference instruction or discovery sanctions. Thus, when a third party destroys evidence, the party who is injured by the spoliation does not have the benefit of existing remedies. Such a result conflicts with our policy of providing a remedy for every wrong and compensating the victims of tortious conduct. Accordingly, we believe that the negligent spoliation of evidence by a third party ought to be actionable in certain circumstances.

Hannah, 584 S.E.2d at 568. In order to find this tort, it must be shown that the spoliating third-party defendant is "guilty of some act or omission in violation of a duty owed to the plaintiff." *Id.* Even though there is no general duty to preserve evidence, such a duty "may arise through an agreement, a contract, a statute or other special circumstance." *Id.* at 569.

The West Virginia Supreme Court answered the third certified question in the affirmative to the effect that West Virginia ***"recognizes intentional spoliation of evidence as a stand-alone tort*** when done by ***either party*** to a civil action or a third party." *Id.* at 571 (emphasis added).

The damages element causes great concern among courts. The destruction of crucial evidence is the key concept of spoliation, but it is that same destruction that often leads to a plaintiff being unable to prove the amount of damages. This factor is often cited by those courts who refuse to allow an independent tort of spoliation. The courts that have recognized an independent tort have mentioned this concern, but feel that it is acceptable for a plaintiff in a spoliation case to prove "damages as a matter of just and reasonable inference." *Smith v. Superior Court,* 151 Cal.App.3d 491, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984) (citations omitted).

VI. SPOLIATION AS AN INDEPENDENT TORT

Assuming Utah courts firmly and unequivocally adopt spoliation, should it be a rule of evidence, an adverse jury inference, a discovery violation, and/or an independent tort? Obviously, holding spoliation to be an independent tort would be a rather significant – some would say extreme – new approach. Utah would be joining a small, selected group of states, should it take such a path. The course of judicial action depends on the nature of the problem perceived by the courts. One doesn't do major surgery for a broken finger, but certain heart conditions warrant opening the chest surgically. Is spoliation a "major surgery" type of problem in Utah, or is it a hangnail? Or in between? The authors believe spoliation is a serious problem that warrants Utah adopting the

doctrine as an independent tort, or at least developing a serious, meaningful remedy to deal with the spoliators.

Hollow Judicial Rhetoric? Twelve years ago, Harvard Law Professor Charles R. Nesson warned that the practice threatened to "undermine the integrity of civil trial process," and decried the "hollow" and "mild" judicial response. Nesson, *Incentives to Spoliate, supra,* 13 Cardozo L. Rev. at 793. Professor Nesson described the judicial inertia that too often results in no serious action to deter spoliation:

> But in practice, judges are extremely reluctant either to expose discovery violations or to punish discovery violations once exposed, applying the rules instead in ways that minimize or avoid the problem. Judges understandably feel a tremendous drive to get cases resolved. Perhaps judges feel that exposing spoliation undermines respect for trial process more than camouflaging it with hollow rhetoric. The more spoliation is exposed and punished, the more endemic the practice of spoliation will appear to be, thus encouraging the public perception that lawyers are cheats and the justice of the courts a sham. Perhaps judges feel that if they seriously punish spoliation with monetary sanctions, they will create powerful incentives for opponents to raise spoliation claims, resulting in a flood. Better perhaps to leave the lid of the box closed. Perhaps complaints about spoliation strike judges as particularly unpleasant and aggravated examples of squabbling among the lawyers, all to be avoided if possible. Whatever the motivation, the resulting judicial behavior sends a message to every litigator: the rules against spoliation will not be seriously enforced. ***What is needed is a change in judicial attitude, to take the problem of spoliation seriously rather than sweep it under the rug.*** Judges and lawyers alike would like to assume that lawyers are too ethical to resort to spoliation as a litigation tactic. But this assumption is naive. Ethics can all too easily be undermined when one's opponent wins by being unethical and the ***judges who run the system and embody its values seem not to care.***

Id. at 806-7 (emphasis added). Other commentators have condemned the practice. For example, the following description was published in the *Duke Law Journal:*

> The prevalence of spoliation in civil litigation is alarming. In 1991, a study reported that ***fifty percent of all litigators consider spoliation to be a frequent or regular occurrence.*** Less than ten years later, the Tort and Insurance Practice Section of the American Bar Association published the first book devoted solely to the developing law of spoliation, in which the authors characterize spoliation as an ***"unfortunate reality of modern-day civil litigation."*** Other commentators have likewise noted that "deliberate obstructionism is commonplace" and that it is "difficult to exaggerate the pervasiveness of evasive practices."
>
> In response to the rise of spoliation cases nationwide, ***courts are subjecting spoliation to intense scrutiny.*** One court has noted that "destruction or loss of potentially relevant evidence is a long-standing problem, but it has attracted increased attention in the past decade," and this attention has prompted rather rapid development of spoliation law. Although the judicial approaches to spoliation law vary widely . . . it is nevertheless reassuring to upstanding litigators that ***recent decisions indicate the "beginning of a nationwide anti-spoliation trend."***

Note, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference,* Drew D. Dropkin, 51 Duke L. J. 1803, 1806-07 (2002) (emphasis added; internal citations omitted). Evidencing this trend are the many jurisdictions that have determined to address the problem of spoliation by providing for judicially recognized penalties. Of these jurisdictions, "six have recognized the tort for negligent spoliation of evidence, while seven have recognized the tort in situations of intentional spoliation." Note, *Spoliation of Evidence in West Virginia: Do Too Many Torts Spoliate the Broth?,* Sean R. Levine, 104 W. Va. L. Rev. 419, 420-21 (2002).

Stand-Alone Tort – The Most Effective Solution. The Ohio Supreme Court responded to the spoliation crisis a full decade ago, affirmatively declaring that in Ohio, "[a] cause of action exists in tort for interference with or destruction of evidence." *Smith v. Howard Johnson Co.,* 615 N.E.2d 1037, 1038 (Ohio 1993). A few years later a New Jersey Superior Court followed suit, justifying its decision with the following persuasive language:

> Spoliation of evidence ***creates enormous costs for both the victimized party and the judicial system, prevents fair and proper adjudication of the issues, and interferes with the administration of justice.***
>
> Recognition of the tort of negligent spoliation of evidence would likely ***reduce the possibility of negligent as well as intentional destruction of evidence by putting individuals, business, and government entities on notice of acceptable societal behavior.*** The increased availability of relevant evidence would in turn further an individual's due process right to have one's grievances heard by a court of competent jurisdiction utilizing all relevant evidence. The ***failure to recognize negligent spoliation as a separate tort would invite destruction or suppression of relevant evidence by an opponent or third party,*** thus creating or continuing the perception that individual due

process rights are unimportant or are somehow being trampled by the judicial system itself.

Recognition of negligent spoliation as a separate cause of action would also ***benefit litigants by reducing litigation costs.*** Costs associated with evidence reconstruction and identification of categories of documents requiring preservation would be avoided, as would the costs of propounding discovery to ascertain the fate of spoliated evidence.

Adoption of negligent spoliation as a separate tort would also ***benefit society*** by promoting testimonial and discovery candor. If litigating parties are made responsible for preserving all relevant evidence, the number of cases in which decisions are made based on all relevant information would increase. An explicit prohibition against negligent spoliation would also ***tend to conserve judicial resources*** by reducing the number of motions to compel production of evidence and the corresponding costs of discovery.

Callahan v. Stanley Works, 703 A.2d 1014, 1017-18 (N.J. Super. 1997) (internal citations omitted; emphasis added). Other jurisdictions have similarly considered the pros and cons of adopting an independent or stand-alone spoliation tort, and decided it was in their best interest to do so, at least in some form. *See Hannah,* 584 S.E.2d 560 (recognizing stand-alone tort for third party negligence and first or third party intentional spoliation, but rejecting stand-alone tort for first party negligence); *Holmes v. Amarex Rent-a-Car,* 710 A.2d 846, (D.C. Ct. A. 1998) (adopting tort for negligent spoliation); *Oliver v. Stimson Lumber Co.* 1993 P.2d 11, 19 (Mont. 1999) (adopting tort for negligent and intentional spoliation); *Levinson v. Citizen's Nat'l Bank,* 644 N.E. 2d 1264 (Ind. App. 1994) (intentional spoliation tort); and *Coleman v. Eddy Potash, Inc.,* 905 P.2d 185 (N.M. 1995) (intentional spoliation). For a good, recent survey of cases, see *Dowdle Butane Gas Co., Inc. v. Moore,* 831 So.2d 1124 at 1129-1130 (Miss. 2002).

The authors urge Utah courts to consider recognizing spoliation as a specific cause of action because other remedies are often shown to be "ineffective in deterring the widespread problem of spoliation." Kristin Adamski, *A Funny Thing Happened On The Way To The Courtroom: Spoliation of Evidence in Illinois,* 32 J. Marshall L. Rev. 325, 337 (1999). The District of Columbia Court of Appeals recognized one element of this limitation when it said: "[b]ecause sanctions may not be levied upon a disinterested, independent third party, an ***independent tort action*** for negligent spoliation of evidence is the ***only means to deter the negligent destruction of evidence and to compensate the aggrieved party for its destruction."*** *Holmes,* 710 A.2d at 849 (quoting John K. Stipancich, Comment, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be The Only Acceptable Alternative,* 53 Ohio St. L. J. 1135, 1141-42 (1992)).

In summary, the issue of how to handle the problem of spoliation in Utah is ripe for judicial action. Parties have all too frequently destroyed, withheld or altered critical pieces of evidence. Utah must now provide a remedy for such conduct by formally recognizing a spoliation tort.

VII. SPOLIATION AS AN ADVERSE INFERENCE

Many of the courts that recognize spoliation as a rule of evidence generally purport to remedy the problem by the adverse inference jury instruction. This concept has been explained:

> The spoliation inference is a product of the legal maxim omnia praesumuntur contra spoliatorem (all things are presumed against the destroyer). The spoliation inference allows the fact finder to draw an unfavorable inference against the spoliating party.

Hirsch v. General Motors Corp., 628 A.2d 1108, 1126 (N.J. Super. 1993). Almost every state allows for some adverse inference to be drawn against the spoliator. The adverse inference is common in medical malpractice cases, as the problem of tampering with medical records is widespread. T. G. Fischer, *Annotation, Medical Malpractice: Presumption or Inference From Failure of Hospital or Doctor to Produce Relevant Medical Records,* 69 A.L.R.4th 906 (1990).

General Adverse Inference as a Jury Instruction. In those states where an adverse inference is the method for dealing with spoliation, the inference is given as a jury instruction. The following are examples of very general model jury instructions from two states:

> FAILURE TO PRODUCE EVIDENCE
>
> PART I. GENERAL INTRODUCTION
>
> In presenting his case, defendant did not produce ___. The general rule is that where evidence which would properly be part of a case is within the control of, or available to, the party whose interest would naturally be to produce it and he or she fails to do so without satisfactory explanation, you may draw the inference that, if produced, it would be unfavorable to him or her.
>
> PART II. FAILURE TO PRODUCE AN OBJECT OR DOCUMENT
>
> Applying that general rule to this case and to defendant's failure to produce ___, you may draw the inference that it would have been unfavorable to him, if you find all of the following: that ___ exists and is within his control, that it would naturally have been in his interest to produce it and that there has been no satisfactory explanation of the failure to produce.

Pennsylvania Pattern Adverse Inference Jury Instruction, ¶5.06 (2002) (simplified, pronouns omitted).

There is a difference between Part I and Part II. Part I of Pennsylvania's Pattern Instruction is what is commonly known as an adverse inference. That is, the jury may infer that the spoliated evidence would be adverse to the party who fails to produce it. To trigger such an instruction, the injured party only needs to offer some proof that relevant evidence was spoliated by the other party.

Part II of the pattern instruction is more similar to a rebuttable presumption instruction. In other words, the jury is instructed that the failure to produce evidence raises a presumption that the evidence would be unfavorable to the spoliating party, but that presumption can be rebutted if the spoliating party can offer some sort of reasonable explanation for its failure to produce the evidence. Wyoming has a similar rebuttable pattern instruction:

> FAILURE TO PRODUCE EVIDENCE OR A WITNESS
>
> If a party to this case has failed to offer evidence within his power to produce, or to produce a witness, you may infer that the evidence or testimony of the witness would be adverse to that party if you believe each of the following elements:
>
> 1. The evidence or witness was under the control of the party and could have been produced by the exercise of reasonable diligence.
>
> 2. The evidence or witness was not equally available to an adverse party.
>
> 3. A reasonably prudent person under the same or similar circumstances would have offered the evidence or produced the witness if he believed it to be, or the testimony to be favorable to him.
>
> 4. No reasonable excuse for the failure has been shown.

Wyoming Pattern Instruction – Adverse Inference, ¶2.12 (2002) (simplified, pronouns omitted).

The problem with these general, adverse inference instructions is their failure to specifically address the wrongful nature of spoliation. In many spoliation cases, the issue isn't really failure to produce "evidence in your control"; it is alteration or destruction of evidence that hurts you. If evidence has actually been destroyed, it seems almost absurd to tell the jury that "defendant's failure to produce the destroyed evidence" should be considered "against the defendant's interests." It is one thing to tell a jury that a party may have it within its power to produce stronger evidence, and to infer an adverse interest because that evidence isn't produced. It is quite another thing to tell a jury that there is an allegation that evidence has been wrongfully destroyed, hidden, concealed or tampered with. The latter kind of spoliation requires a stronger instruction, which is referred to in this article as the "inference of impropriety" instruction.

Inference of Impropriety Instruction. Under the standard used in other jurisdictions, a trial court "may at its discretion impose an adverse inference instruction after consideration of three factors: (1) the degree of negligence or bad faith involved, (2) the importance of the evidence lost to the issues at hand, and (3) the availability of other proof enabling the party deprived of the evidence to make the same point." *Williams v. Washington Hosp. Center,* 601 A.2d 28, 32 (D.C. App. Ct. 1991) (quoting *Battocchi v. Washington Hosp. Center,* 581 A.2d 759, 767 (D.C. App. Ct. 1990). Each of these factors may support an adverse inference of impropriety instruction that is much more strongly

worded than the bland, non-specific instructions above from Pennsylvania.

In Utah, a plaintiff may request that a court grant a very specific instruction relating the law to the facts of the case. *State v. Potter*, 627 P.2d 75, 78 (Utah 1981) ("[t]he trial court has a duty to instruct the jury on the law applicable to the facts of the case"). The authors of this article have studied spoliation instructions from other jurisdictions and believe that Utah courts should adopt a version similar to that used in Alabama, which reads:

> In this case, the plaintiff claims that the defendant is guilty of wrongfully destroying, hiding, concealing, altering, or otherwise wrongfully tampering with material evidence (including attempts to influence a witness's testimony). If you are reasonably satisfied from the evidence that the defendant did or attempted to wrongfully destroy, hide, conceal, alter, or otherwise tamper with material evidence, then that fact may be considered as an inference of defendant's guilt, culpability, or awareness of the defendant's negligence.

Alabama Pattern Jury Instruction 15.13 (2002). The Alabama instruction is similar to spoliation instructions used in other jurisdictions, including Rhode Island and Maryland. In *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit affirmed the Maryland District Court's use of the following spoliation instruction, which strongly resembles the Alabama version:

> The defendants contend that their access to relevant and potentially relevant evidence was substantially hindered by the actions of plaintiff's counsel and agents, including Mr. Halsey . . . . ***It is the duty of a party, a party's counsel and any expert witness, not to take action that will cause the destruction or loss of relevant evidence where that will hinder the other side from making its own examination and investigation of all potentially relevant evidence.***
>
> If you find in this case the plaintiff's counsel and agents, including Mr. Halsey, failed to fulfill this duty, then you may take this into account when considering the credibility of Mr. Halsey and his opinions and also ***you are permitted to, if you feel satisfied in doing so, assume that the evidence made unavailable to the defendants by acts of plaintiff's counsel or agents, including Mr. Halsey, would have been unfavorable to the plaintiff's theory in this case.***

Id. at 155 (emphasis added). Similarly, the Supreme Court of Rhode Island gave a specific inference of impropriety jury instruction in the spoliation case of *Tancrelle v. Friendly Ice Cream Corp.*, 756 A.2d 744 (R.I. 2000), as follows:

> During the course of this trial, you have heard evidence that one of the parties may have destroyed, may have mutilated certain evidence. When evidence is destroyed, we call it spoilage. . . . ***And under certain circumstances, the spoilage of evidence may . . . give rise to an adverse inference, that the spoliated evidence would have been unfavorable to the position of the party who destroyed or mutilated that evidence.***
>
> Spoliation of evidence may be innocent or it may be intentional, or it can be somewhere in-between the two. It is the unexplained and deliberate destruction or mutilation of relevant evidence that gives rise to an inference that the thing which has been destroyed or mutilated would have been unfavorable to the position of the person responsible for the spoliation. ***If you find that the defendant destroyed or mutilated the stairs, the photographs of the stairs, the schedule of the employees, or any other item, and did so deliberately, then you are permitted to infer that your consideration of the evidence would have been unfavorable to the defendant's position in this case.***
>
> In deciding whether or not the destruction or mutilation of the evidence was deliberate, you may consider all of the facts and circumstances which were proved at trial,

and which are pertinent to that particular item of evidence. You may consider who destroyed it, how it was destroyed, the legitimacy, or the lack of legitimacy in the reasons given for its destruction. ***You may consider the timing of the destruction. You may consider whether the individuals destroying the evidence knew the evidence might be supportive of the opposing party.*** You may consider whether the spoliation was intended to deprive the court of evidence, as well as other facts and circumstances which you find to be true.

You may also consider the extent to which it has been shown that the spoliated evidence would indeed have been unfavorable to the defendant's position. If the spoliation of the evidence is attributable to carelessness or negligence on the part of the defendant, you may consider whether the carelessness or negligence was so gross as to amount to a deliberate act of spoliation.

It is the function of the jury exclusively to resolve factual issues and to decide what it is that really happened here. It is your obligation and duty to zealously guard against any erosion of that function, however unintentional that it might have been.

Id. at 749 (emphasis added).

Applying the Alabama instruction to the facts in the birth asphyxia case cited in Part III above, the Utah version might read:

> In this case, the plaintiffs claim that the defendants are guilty of wrongfully destroying, hiding, concealing, altering, or otherwise wrongfully tampering with material evidence, including (1) destroying or refusing to produce chart notes made by Dr. Doe, a resident during client's labor and delivery; (2) negligently or intentionally destroying, or allowing to be destroyed, the placenta, which could have provided confirmatory evidence of vasa previa or other cause of bleeding; and (3) negligently or intentionally allowing the original fetal heart rate strip to be destroyed, which could have included important handwritten notes. If you are reasonably satisfied from the evidence that any defendant or his or her counsel did or attempted to wrongfully destroy, hide, conceal, alter, or otherwise tamper with material evidence, then that fact may be considered as an inference of defendants' guilt, culpability, or awareness of the defendants' negligence.

This instruction is appropriate because it permits the jury to consider the significance of those specific pieces of evidence which are not available for examination, but which are critical in determining the facts of a particular, specific case. This instruction is also in line with those of other jurisdictions, including Rhode Island and Maryland.

VIII. SPOLIATION AS A DISCOVERY VIOLATION

Spoliation has also been treated by the courts as a discovery violation to be punished by appropriate sanctions. These sanctions include preclusion of evidence (*Nally v. Volkswagen of America, Inc.*, 539 N.E.2d 1017 (Mass. 1989)), and the dismissal of the case with prejudice or summary judgment. *Friend v. Pep Boys*, 3 Phila. 363, 1979 Phila. Cty. Rptr. LEXIS 96 (1979). Factors to be considered in determining the severity of the punishment include:

> (1) the degree of willfulness of the offending party; (2) the extent to which the non-offending party would be prejudiced by a lesser sanction; (3) the severity of the sanction of dismissal relative to the severity of the discovery abuse; (4) whether any evidence has been irreparably lost; (5) the policy favoring adjudication on the merits; (6) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney; and (7) the need to deter both the parties and future litigants from similar abuses.

Rivlin, J.E., *Recognizing an Independent Tort Action Will Spoil a Spoliator's Splendor,* 26 Hofstra L.Rev. 1003 (Summer 1998). Other courts have discussed when it is appropriate to mete severe punishments on the spoliator for discovery violations. One such case, *Keene v. Brigham and Women's Hospital, Inc.*, 775 N.E.2d 725 (Mass. App. 2002) (also discussed in Part IX, *infra*), upheld a default judgment as a sanction where:

> . . . the missing records and information were critical to the plaintiff's proof of his claim, and without those records, the plaintiff's claim would be irreparably prejudiced; no lesser sanction was appropriate; the defendant must bear the responsibility for the loss of the records because it was required by law to preserve the same and it had failed in its statutory duty; and the imposition of those penalties would deter future litigants from similar abuses.

Keene, 775 N.E.2d at 730. Where the rules allow entry of default judgment as a discovery sanction in cases of wilfulness, bad faith, or fault, the court held that fault included negligently failing to preserve records that the defendant was required by law to preserve. *Id.* at 732. That court also listed several factors to consider in imposing a sanction:

> . . . the degree of culpability of the nonproducing party; the degree of actual prejudice to the other party; whether less drastic sanctions could be imposed; the public policy favoring disposition of the case on the merits; and the deterrent effect of the sanction.

Id. at 733-734 (citing *Poulis v. State Farm Fire & Cas. Co.*, 747 F.3d at 868; *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990); *Wlazquez-Rivera v. Sea-Land Serv., Inc.*, 920 F.2d at 1076-1078; *Archibeque v. Atchison, Topeka & Santa Fe Ry. Co.*, 70 F.3d 1172, 1174 (10th Cir. 1995); and *Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995)). Based on these criteria,

the hospital's failure to produce necessary medical records that were in its control for the period of time after the birth of the plaintiff justified the sanction of default judgment against the defendant. *Keene,* 775 N.E.2d at 735.

Keene was appealed to the Massachusetts Supreme Court, which upheld the sanction of a default judgment for the conduct in question, noting:

> [T]he matter should have been disposed of under the doctrine of spoliation, which permits the imposition of sanctions and remedies for the destruction of evidence in civil litigation. The doctrine is based on the premise that a party who has negligently or intentionally lost or destroyed evidence known to be relevant for an upcoming legal proceeding should be held accountable for any unfair prejudice that results. . . . That the missing records vanished years before the commencement of the lawsuit does not make the doctrine of spoliation inapplicable. As we stated in the *Kippenhan* decision, '[s]anctions may be appropriate for the spoliation of evidence that occurs even before an action has been commenced, if a litigant or its expert knows or reasonably should know that the evidence might be relevant to a possible action.'

Keene v. Brigham and Women's Hosp., Inc., 786 N.E. 2d 824, 832-3 (Mass. 2003) (citations omitted).

IX. RECENT COURT REMEDIES FOR SPOLIATION

Independent Tort – Split of Authority. Spoliation as an independent tort is controversial, but accepted by a significant number of courts. *Hannah,* 584 S.E. 2d at 568-573. Spoliation as a stand-alone tort has also been rejected by a number of courts. *See Dowdle Butane Gas,* 831 So.2d at 1124. The recent history in California illustrates this debate.

The independent tort of spoliation was first recognized in California in the case *Smith v. Superior Court,* 151 Cal. App.3d 491, 198 Cal. Rptr. 829 (Cal. App. 1984), where the plaintiff was injured when the wheel came off a van and struck her windshield. The defendant agreed to maintain certain evidence but destroyed or lost it before the plaintiff's experts could look at it. That court quoted from Prosser regarding the recognition of new torts, holding:

> "New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. . . . *Where it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant,* the mere fact that the claim is novel will not of itself operate as a bar to the remedy." (Italics added, quoting Prosser, Torts (4th ed. 1971) § 1, pp. 3-4).

Id. at 495-496. The court held that the tort of intentional spoliation of evidence met the criteria laid out by Prosser and recognized the stand-alone tort.

However, in 1998, the California Supreme Court retreated from *Smith,* refused to recognize a tort for *first-party spoliation,* and left open the question of a tort for third party spoliation. *Cedars-Sinai Medical Center v. Superior Court,* 954 P.2d 511 (Cal. 1998). The Court held that there are *adequate remedies* to the injured party for spoliation of evidence through the rules of evidence and discovery sanctions; any additional benefit from having an independent tort of spoilation was outweighed by policy considerations and costs. *Id.* at 521. In 1999, the California Supreme Court, weighing the usefulness of third party spoliation claims against the burdens of allowing them and taking into account existing non-tort remedies that deter spoliation, declined to recognize a tort for *third party spoliation* claims. *Temple Community Hospital v. Superior Court,* 20 Cal. 4th 464, 976 P.2d 223, 233, 84 Cal. Rptr.2d 852 (Cal. 1999). *Accord: Timber Tech Engineered Building Products v. The Home Insurance Co.,* 55 P.3d 952 (Nev. 2002).

Thus, we are left with a split of authority on the issue of an independent, stand-alone tort for spoliation. However, almost all the cases that reject the stand-alone tort option have done so because of the view that non-tort remedies and sanctions, such as a default judgment on the issue of liability, issue preclusion and similar remedies, are adequate to deal with the problem. This brings us back to a Catch-22 issue. The basis for rejecting the independent tort is the adequacy of the remedies that will be applied by our judges, but what if the judiciary is non-responsive, as alleged by Prof. Nesson? If the judicial response is to "sweep it [spoliation] under the rug" [Nesson, *supra* at 807], then the spoliators have the best of both worlds: no risk of tort liability and no risk of serious sanctions. The authors respectfully submit that the better judicial choice is to affirm the stand-alone tort of spoliation. Absent that, there must be a strong judicial response to spoliation with an array of effective sanctions.

Spoliation Jury Instruction. A good jury instruction can be very effective in the appropriate case. *See* Part VII, *infra.* The instructions for spoliation in Rhode Island and Maryland were undoubtedly extremely effective in those cases. *See* discussion of *Vodusek* and *Tancrelle,* above.

A contrary view was recently taken in *Wal-Mart Stores, Inc. v. Johnson,* 39 S.W.3d 729 (Tex. App. 2001), where the court faced a claimed destruction of a decorative reindeer that fell off a shelf and injured the plaintiff. There was a conflict as to whether the reindeer was heavy and made of wood, or light and made of paper products. Wal-Mart claimed that the reindeer was seasonal and had been disposed of in the ordinary course of business (either sold, broken down or thrown away). Wal-Mart offered to produce "a reasonable facsimile," but plaintiff claimed this was insufficient. Plaintiffs requested and obtained a spoliation instruction similar to the Pennsylvania sample in Part VII above. The jury found Wal-Mart negligent and awarded $76,000 in damages, and the Texas Court of Appeals affirmed.

The Texas Supreme Court was concerned about the appropriate remedy for Wal-Mart's perceived misconduct, and thus faced a classic issue that appears in some spoliation cases: was plaintiff entitled to a spoliation instruction for conduct which is merely "negligent"? The Court noted that other Texas appellate courts had generally limited spoliation instructions to two circumstances: deliberate destruction of evidence and the "failure of a party to produce relevant evidence or to explain its non-production." The Texas court avoided that issue by observing that the analysis must begin with the threshold "issue of duty," and "the opposing party must establish that the non-producing party had a duty to preserve the evidence in question." *Wal-Mart Stores, Inc.* at ¶ 8-9. The court observed that such a duty arises only when a party knows, or reasonably should know, that there is a substantial chance that a claim will be filed and that the evidence in its possession or control would be relevant to that claim. *Id.* Wal-Mart argued that it had no duty to preserve the reindeer as evidence because it had no notice of any future claim until after the reindeer had been disposed of in the normal course of business. This was disputed by the plaintiffs.

On its face, these facts appear hauntingly similar to the Utah *Burns* case. The Texas Supreme Court observed that it was undisputed that neither Wal-Mart nor the plaintiff knew on the day of the accident that the injury might be serious and that it might result in legal action. Since the foundation of a spoliation instruction required plaintiffs to show that the reindeer was disposed of after Wal-Mart knew, or should have known, about the substantial chance of litigation, and plaintiffs could not show that fact, the instruction was erroneous. *Id.* at ¶3. The Supreme Court further found that the instruction was prejudicial "because it unfairly stigmatized Wal-Mart as a party who [sic] had concealed evidence, thereby prejudicing the jury's view of its side of this closely contested case." *Id.* at ¶14. The verdict was accordingly reversed.

Sanction – Default Judgment. In *Keene v. Brigham and Women's Hospital, Inc.,* 775 N.E.2d 725 (Mass. App. 2002), the Massachusetts Court of Appeals upheld a default judgment against the defendant as ***a sanction*** for its failure to produce lost hospital records. The plaintiffs were the parents of a young man born at the defendant hospital, who was discharged with a note that the parents should watch for signs of sepsis. There were 20 critical hours of records missing, and when they resumed they showed that the plaintiff had gone into septic shock and began having seizures. The records had been requested numerous times, but the defendants testified that they could not be found and that defendants' agents did not know the names of the doctors or nurses who treated the plaintiff during that relevant period of time.

Ultimately, plaintiffs filed a motion for sanctions and asked that the answer be stricken and the defendant be defaulted due to the irreparable loss of the records, which caused prejudice. *Id.* at 729. Defendant argued for a lesser sanction. The judge had found that the defendant's inability to comply with an order to produce the documents was not due to willfulness or bad faith, but rather was due to negligence in preserving the records. The court also noted that the plaintiffs' case would be irreparably prejudiced by the loss of the records because the condition during the missing period was critical to prove that antibiotics should have been administered sooner and that the failure to do so caused the injuries.

This is a classic case of the use of spoliation *as a discovery sanction.* The court found this sanction to be just because the loss of the records "irreparably damaged the plaintiffs' proof of his case and deprived him of the opportunity to litigate his claim against his individual caregivers." *Id.* at 735. The Massachusetts Supreme Court upheld the sanction of a default, but reversed the damages award because of a local statute limiting damages against a charitable institution. *Keene,* 786 N.E. 2d at 835.

Sanction – Answer Stricken. The case of *Baglio v. St. John's Queens Hospital,* 755 N.Y.S.2d 427 (2003), involved the failure to diagnose fetal distress in a medical malpractice case. The infant suffered oxygen deprivation and brain damage allegedly due to the hospital's negligence. Just prior to commencing the action, plaintiff's attorney requested that the hospital provide the fetal heart rate (FHR) strips which continually assess the heart rate in relationship to the maternal contractions. These strips are continually analyzed to determine whether there is fetal distress caused by lack of oxygen. Initially, the hospital sent the incorrect FHR strips (from another pregnancy), and then stated that it was "unable to locate the correct monitoring strips." *Id.* at 428. Plaintiff moved to strike the hospital's answer based upon spoliation of evidence, which was denied by the trial court. Plaintiffs appealed, and the *Baglio* appellate court provided this statement of law:

> It is well settled that when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading. . . . A pleading may be stricken 'even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation.'

Baglio, 755 N.Y.S.2d at 428 (citations omitted). The court held that the plaintiff had demonstrated that the FHR strips were the most critical evidence to determine fetal well-being, and that the strips would provide fairly conclusive evidence as to the presence of fetal distress. The court further found that their loss deprived the plaintiff of the means of proving the medical malpractice, and accordingly imposed the sanction. *Id.*

Intentional Spoliation Tort Rejected – Detailed Discussion. In *Dowdle Butane Gas Co., Inc. v. Moore,* 831 So.2d 1124 (Miss. 2002), the court faced injury claims arising from an exploding underground propane tank. After the tank exploded, the gas company contacted a propane expert and engineer and requested that he perform an initial inspection on the premises. The State of Mississippi had also dispatched an investigator who, with the gas company's investigator, entered the property in question and removed the tank. These actions were alleged to have intentionally destroyed some particular evidence. The court addressed the issue of a separate cause of action for intentional spoliation (while leaving the issue of a cause of action for *negligent spoliation* for another day). *Dowdle,* 831 So.2d at 1128. The court held:

> We refuse to recognize a separate tort for intentional spoliation of evidence against both first and third party spoliators. . . . Chief among these concerns [in rejecting the tort] is the important interest of finality in adjudication. We should not adopt a remedy that itself encourages a spiral of lawsuits, particularly where sufficient remedies, short of creating a new cause of action, exist for a plaintiff. . . . ***Non-tort remedies for spoliation are sufficient in the vast majority of cases,*** and certainly, as the California courts learned after 14 years of experience with this tort, any benefits obtained by recognizing the spoliation tort are outweighed by the burdens imposed.

Id. at 1135 (emphasis added). Thus, the adequacy of "non-tort remedies" is hoisted as the banner reason for rejecting the stand-alone tort.

X. RESPONSE TO ARGUMENTS AGAINST AN INDEPENDENT TORT

Why should Utah adopt the independent tort of spoliation, especially when the trend in some recent cases seems to be to the contrary? Wouldn't an independent tort simply encourage more litigation between two parties who probably have already been litigating for some time? Doesn't it have adverse social consequences and costs? Aren't there sufficient non-tort remedies to handle the problem?

These questions, and the affirmative answers given in the cases rejecting the independent tort concept, reflect a naivete about the reality, breadth and depth of the problem. It is akin to taking a fly swatter to the barn to take care of an obvious problem. Sure, you will dispatch a few flies, but at the end of the day the flies will still be overwhelming.

Take, for example, the problem of the destroyed placenta discussed in Part III. It is uncontested medically that the placenta literally is "the diary of the labor and delivery" of a pregnant woman at

term. It usually will tell the story of what went wrong in a "bad outcome" birth. In that case, the doctor examined the placenta, pronounced it normal and then ordered it processed for destruction, all within minutes of a disastrous outcome (child was born severely depressed and in distress). Defense counsel had nothing to do with this destruction, so all discovery and professional sanctions against counsel are not applicable. Under the majority opinion in *Dowdle,* the plaintiff would be basically left with an adverse evidentiary inference. As noted above, some of the states give some pretty bland instructions. *See, e.g.,* Pennsylvania's Instruction, Part VII above. The authors strongly suspect that some Utah judges would only go that far, and no further, were this issue to come before them. In other words, for the doctor's destruction of the single most important piece of evidence in the case, the jury might be told that it might find an "adverse inference" because a party failed to "produce more powerful evidence" that it had in its possession. That hardly seems an adequate remedy for such an egregious action.

CONCLUSION

Spoliation is a very significant problem throughout the nation and in Utah. It is akin to perjury or suborning perjury. Like perjury, spoliation involves the alteration or suppression of relevant evidence in a cause of action or potential cause of action. And, like perjury, spoliation should carry with it serious consequences to the perpetrator because it goes without saying that complete, forthright and honest disclosure by both sides in a lawsuit is essential to the fact finding process. If the evidence is tampered with in an effort to alter the outcome of a proceeding, then the integrity of the process is called into question. Telling the whole truth and building in safeguards to bring to light corrupted or altered evidence is at the root of reaching a fair and just outcome. Accordingly, lawyers must be vigilant to alert judges of instances of spoliation. Likewise, judges must take seriously allegations of spoliation and fashion and implement effective, swift, and helpful remedies which discourage bad behavior. The risk of getting caught must be severe.

To punish those who engage in spoliation tactics in Utah, lawyers should be able to pursue at least three different remedies for both first and third party spoliation, including: tort liability against the spoliator, descriptive inference of impropriety jury instructions, and meaningful sanctions imposed by the court (such as default judgment and issue preclusion). The jury instruction approach should include language which allows the jury to draw adverse inferences against the perpetrator and which explains the duty of the perpetrator to maintain and not destroy or alter evidence. The Alabama and Rhode Island jury instructions are good examples of the kind of instructions that should be followed in Utah courts. The jury instruction approach is advantageous because knowing of its availability at the trial stage allows the parties and the court to address alteration or destruction of evidence during litigation, and discuss how such tactics may or may not impact on the litigation process. Most importantly, if the case proceeds to a trial, it allows the jury to factor in the extent to which spoliation should be taken into consideration when the verdict is decided.

If it makes sense to fashion jury instructions to meet the problem of spoliation head on at trial, why then shouldn't a separate tort for spoliation be permitted? In some cases the destruction of the evidence may make it difficult if not impossible to file a case against the defendant in the first place. Consequently it makes more sense to file a cause of action that focuses specifically on the issue of spoliation. At a minimum, this would allow an aggrieved party, if it could prove spoliation, to address the resultant issue of potential damages in one case.

Finally, courts should not be hesitant to consider their inherent power to impose sanctions. Such sanctions could range all the way from fines, striking the pleadings, or suppression of evidence that may be controverted by the spoliated evidence, to a default or consideration of a summary judgment motions on the issue of liability, allowing the plaintiff to move directly to the issue of damages. In light of the seriousness of the problem at hand and our experience in Utah, sanctions against those who spoliate the evidence, either intentionally or negligently, ought to be imposed by courts to squarely meet the seriousness and pervasiveness of the problem.

The authors are indebted to the research skills of Alyson E. Carter, J. Reuben Clark School of Law, 2003; Robert J. Fuller, S.J. Quinney School of Law, 2004; and M. Dean Smith, S.J. Quinney School of Law, 2004.

1. *Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha,* 102 F.2d 450, 453 (2d Cir.), modified, 103 F.2d 430 (2d Cir. 1939).
2. Black's Law Dictionary, p. 1401 (6th ed. 1990)
3. Black's Law Dictionary, p. 975 (6th ed. 1991)
4. Stephen Mackauf, a prominent medical malpractice attorney from New York City, stated his belief several years ago that spoliation occurred in at least half of all medical malpractice cases. (Personal conversation with Robert Sykes at medical malpractice seminar in Monterrey, California, 1988.)
5. The infant's Apgars were 1, 3, 5, 6 and 7 at 1, 5, 10, 15 and 20 minutes respectively. A normal healthy infant should be at least a 7 at 5 minutes.
6. Some defendants, where the issue has been brought to the court's attention, defend by citing cases that appear to say that there must be a "pending action" in order for spoliation rules to apply. If that were truly the law, which it isn't, attempts to combat spoliation would be severely hampered since the potential spoliator would have an incentive to go out and spoliate quickly before an action is actually filed.

Rule 63. Disability or disqualification of a judge.

(a) Substitute judge; Prior testimony. If the judge to whom an action has been assigned is unable to perform the duties required of the court under these rules, then any other judge of that district or any judge assigned pursuant to Judicial Council rule is authorized to perform those duties. The judge to whom the case is assigned may in the exercise of discretion rehear the evidence or some part of it.

(b) Disqualification.

(b)(1)(A) A party to any action or the party's attorney may file a motion to disqualify a judge. The motion shall be accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest.

(b)(1)(B) The motion shall be filed after commencement of the action, but not later than 20 days after the last of the following:

(b)(1)(B)(i) assignment of the action or hearing to the judge;

(b)(1)(B)(ii) appearance of the party or the party's attorney; or

(b)(1)(B)(iii) the date on which the moving party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

If the last event occurs fewer than 20 days prior to a hearing, the motion shall be filed as soon as practicable.

(b)(1)(C) Signing the motion or affidavit constitutes a certificate under Rule 11 and subjects the party or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to disqualify in an action.

(b)(2) The judge against whom the motion and affidavit are directed shall, without further hearing or proceedings, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. If the judge grants the motion, the order shall direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

(b)(3)(A) If the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so.

(b)(3)(B) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion and affidavit an affidavit responsive to questions posed by the reviewing judge.

(b)(3)(C) The reviewing judge may deny a motion not filed in a timely manner.

From: "Blanch, James" <JBlanch@parsonsbehle.com>
To: "Tim Shea" <tims@email.utcourts.gov>, <slaughl@provolawyers.com>
Date: 2/13/06 2:53PM
Subject: RE: finality of judgments
CC: "Wikstrom, Fran" <FWikstrom@parsonsbehle.com>

My thinking concerning this issue is that the Utah Rules provide much less clarity than the Federal Rules on the question of when a judgment is final for purposes of appeal. Having clarity on this issue is desirable because of the devastating consequences that accompany the failure to file a notice of appeal in a timely manner. Under the Utah Rules, where signed minute entries and other such items can be deemed final appealable orders, there is a greater danger than there is under the Federal Rules of a party failing to realize that a final judgment is in place and thus missing the deadline to appeal.

In reviewing the pertinent rules, which appear to include primarily Rules 54 and 58, there appear to be significant differences between the Utah Rules and the Federal Rules. The most significant differences are in Rule 58. Fed. R. Civ. P. 58(a) provides that "[e]very judgment and amended judgment must be set forth on a separate document. . . ." Under Fed. R. Civ. P. 58(b)(2), the judgment is deemed "entered" on the date that the "separate document" is prepared and docketed by the Clerk of the Court. Thus, in Federal Court, the Clerk prepares and mails out to the parties a separate document that leaves no possible doubt about the fact that a final judgment has been entered and the date of its entry. Indeed, these judgments are Court-approved forms. An example is attached.

Utah's rules are very different. Rule 58A does not correspond to its federal counterpart in requiring a final judgment to be entered as a separate document. This means that signed minute entries and other items that could escape a party's attention can count as appealable final judgments in some circumstances. Also, Rule 58A(d) places the burden on the prevailing party, rather than the Clerk of the Court, to notify the other parties of the entry of judgment. I imagine these differences exist for a reason, and it may be that the larger case load in State Court and other logistical considerations would make the federal approach too unwieldy. However, it strikes me that the cost of the State Court approach is that it leaves greater uncertainty about when a final judgment has occurred, and it creates a higher probability that a party will miss an appeal.

I would merely like to discuss as a conceptual matter whether it would be desirable to move toward the greater certainty that comes with the federal approach. If there is any significant support for such changes, we can proceed at that point to work on the details. This may not be feasible in State Court, and I have no desire to fix something that isn't broken, but this is the issue that caused me to speak up at the last meeting.

AO 450 (Rev.5/85) Judgment in a Civil Case

United States District Court

Central Division for the District of Utah

Kenneth R. Ivory

v.

West Jordan City, et al.

JUDGMENT IN A CIVIL CASE

Case Number: 2:03cv190 TC

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is granted in favor of the defendants on Claims Seventeen and Eighteen of the plaintiff's Complaint, as there are no genuine disputes of material fact and Mr. Ivory's free speech and equal protection claims fail as a matter of law. As these were the plaintiff's only remaining claims, the case is now closed.

February 7, 2006
Date

Markus B. Zimmer
Clerk

(By) Deputy Clerk

Rule 8. General rules of pleadings.

(a) Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; form of denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleadings as if there had been a proper designation.

(d) Effect of failure to deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied

in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be concise and direct; consistency.

(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(e)(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

(g) Writing under penalty of perjury. Other than a deposition or a verified complaint, if a matter is required or permitted to be supported by the written oath or affirmation of a person, the matter may be supported by the unsworn, dated and signed writing of the person as being true under penalty of perjury. The following form is sufficient: "I declare under penalty of perjury under the laws of Utah that the foregoing is true and correct."