Agenda

Advisory Committee on Rules of Civil Procedure

August 23, 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
Certificates of Appreciation Ginger Smith Tom Karrenberg	Fran Wikstrom
Welcome new members Barbara Townsend Milo Marsden	Fran Wikstrom
Review comments to draft rules. Final action.	Tim Shea
Sanctions. Rules 16, 35 and 37.	Tom Lee Tim Shea
Finality of judgments. Rule 7.	Leslie Slaugh

Meeting Schedule

September 27, 2006
October 25, 2006
November 29, 2006 (5th Wednesday)
January 24, 2007
February 28, 2007
March 28, 2007
April 25, 2007
May 23, 2007
June 27, 2007
September 26, 2007
October 24, 2007
November 21, 2007 (3d Wednesday)

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

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, May 24, 2006
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Terrie T. McIntosh, Leslie W. Slaugh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Janet H. Smith, Jonathan Hafen, Thomas R. Lee, Virginia S. Smith, Judge R. Scott Waterfall, David W. Scofield, Cullen Battle

EXCUSED: Thomas R. Karrenberg, James T. Blanch, Todd M. Shaughnessy, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, Debora Threedy, Lori Woffinden

STAFF: Tim Shea, Matty Branch, Trystan B. Smith

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m. Mr. Waterfall moved to approve the April 26, 2006 minutes as submitted. The committee unanimously approved the minutes.

II. SANCTIONS. RULES 16, 35 AND 37.

Mr. Wikstrom asked the committee to revisit Rules 16, 35, and 37 at the next meeting.

III. LIMITED APPEARANCE RULES. RULES 5, 11, 74 AND 75.

Mr. Hafen brought the unbundling rules back to the committee.

Mr. Wikstrom entertained comments regarding the proposed revisions to Rule 5. Seeing none, Mr. Wikstrom asked for comments regarding the proposed revisions to Rule 11.

As for Rule 11, Judge Nuffer suggested that for the sake of clarity the committee use the same phrase as stated in subsection (b) — "pleading, written motion, or other paper" — in the proposed subsection (c) which defines "present." Judge Nuffer also suggested replacing the word "client" with "party" in the proposed subsection (c).

Mr. Battle questioned why the committee needed to alter Rule 11. The committee discussed the merits of amending Rule 11 and their concern with unintended consequences.

Mr. Wikstrom gauged the committee's interest in amending Rule 11. Seeing no interest, the committee agreed to leave Rule 11 as is, but indicated it may revisit Rule 11 depending on future feedback. The committee further indicated that if it chose to revisit Rule 11, it would address any future amendment with the changes previously agreed to.

As for Rule 74, the committee discussed replacing the word "may" with "shall" in subsection (b). The committee discussed the pros and cons of giving counsel discretion to file a withdrawal. After discussion, the committee agreed that a withdrawal should be mandatory.

As for Rule 75, Mr. Hafen indicated that the list (a)(1) - (6) was intended to be formulaic and limit the purposes for which an attorney could enter a limited appearance.

Ms. Branch suggested replacing "client" with "party" in subsection (a). The committee agreed with the recommendation.

Mr. Wikstrom suggested amending Rule 75 (a)(2) to state "*acting as counsel for* a specific motion or motions."

Mr. Scofield recommended deleting the word "filing" in subsection (a)(2) so it would state "arguing a specific motion or motions."

Mr. Wikstrom suggested replacing "filing or arguing" with "handling" in subsection (a)(2) and deleting "or motions" in subsection (a)(2). After discussion, the committee agreed to replace "filing or arguing" with "acting as counsel."

Ms. Janet Smith recommended replacing the phrase "conducting one or more" in subsection (a)(3) with "participating." After discussion, the committee agreed to replace "conducting one or more" with "acting as counsel."

Ms. Janet Smith also recommended replacing the phrase "acting as counsel for" with "participating in" in subsection (a)(4). After discussion, the committee decided it would not revise (a)(4).

Mr. Shea recommended deleting subsection (a)(5) and allowing the Appellate Committee to address appeals in the context of limited appearances. The committee agreed with the recommendation.

Mr. Wikstrom suggested amending (a)(6) to state "*with any other purpose* with leave of court."

Mr. Battle suggested a revision to subsection (b) to state, "Prior to the commencement of the limited appearance, the attorney shall file a Notice of Limited Appearance signed by the attorney and the party." The committee agreed with the suggested revision.

The committee voted unanimously to approve Rule 5 as written, and Rules 74 and 75 as revised above.

IV. FINALITY OF JUDGMENTS. RULE 7.

Mr. Slaugh brought Rule 7 back to the committee.

Mr. Slaugh revised proposed Rule 7 to clarify that unless a written ruling is signed by the Court and expressly states that no further order is needed, there is no final order.

The committee thoroughly discussed how to protect practitioners and clarify in what context a written ruling becomes a final order. The committee indicated that an oral ruling never constitutes a final order, the proposed amendment only refers to written rulings.

The committee debated whether it should address an amendment to the Rules to address, when, and if, a written ruling becomes a final order. It discussed whether it should address the issue in Rule 54 or Rule 7, or whether the Appellate Committee should address the issue. The committee agreed it should address the issue with the Rules of Civil Procedure. The committee further agreed it should start anew and consider a revision to Rule 7 to address the issue.

The committee also agreed to revise subsection (f)(2) to clarify how a proposed Order and any objections thereto should be submitted to the Court. Mr. Wikstrom asked Mr. Shea to bring back a suggested revision to subsection (f)(2).

V. DERIVATIVE ACTIONS BY SHAREHOLDERS. RULE 23.1.

Mr. Wikstrom asked the committee to examine Rule 23.1 at the next meeting.

VI. MOTIONS TO RECONSIDER. RULES 59 AND 60.

Mr. Wikstrom brought Rules 59 and 60 to the committee's attention.

The committee indicated there was no need to address Rules 59 and 60 in light of the Supreme Court's *Gillett v. Price* decision filed April 28, 2006. The committee also agreed that Rules 59 and 60 contained appropriate remedies for a party wanting to file post-judgment motions. The committee members further indicated that the proper rule for a party to seek reconsideration of a dispositive motion is through a Motion for New Trial under Rule 59, even though a Motion for New Trial may be an inaccurate description.

VII. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, June 28, 2006, at the Administrative Office of the Courts.

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Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: June 19, 2006
Re: Comments to rule amendments

Rules

The following Rules of Civil Procedure were published for comment. The comment period has expired and the rules are ready for the committee's final recommendations.

URCP 045. Subpoena. Amend. Require person scheduling deposition to give advance notice before serving subpoena. Permit person serving subpoena rather than recipient to decide whether records should be copied and delivered or delivered for inspection and copying. Requires advance payment of costs upon request. Clarifies the grounds and procedures for objecting to a subpoena. Requires declaration under penalty of perjury to accompany documents produced under a subpoena. Delete committee note.

URCP Form 40. Subpoena. Repeal & Reenact. Subpoena, Notice of Rights, Objection, Declaration of compliance.

URCP 063. Disability or disqualification of a judge. Amend. Clarify that judge is to take no action in a case after a motion to recuse has been filed.

URCP 074. Withdrawal of counsel. Amend. Requires judicial consent for withdrawal if a hearing has been set.

Comments

We received only three comments. They all address Rule 45.

From: "Donaldson, Peter" <pdonaldson@swlaw.com>
To: <tims@email.utcourts.gov>
Date: 6/16/06 9:43AM
Subject: Comments on Proposed Rule 45
CC: "Morris, Mark" <mmorris@swlaw.com>, "Lalli, Matthew" <mlalli@swlaw.com>

Dear Mr. Shea:

The following comment is made on behalf of Snell & Wilmer L.L.P.'s Salt Lake City office:

***Proposed Text in Amended Rule 45 Creating Advanced Notice Provision*:**

Lines 40-45 of the draft amendment, dated January 26, 2006, provide for the following changes to Utah R. Civ. P. 45:

> (b)(3) ~~Prior notice of any commanded production or inspection of documents tangible things or~~ If the subpoena commands a person to copy and mail documents, produce documents or tangible things for inspection and copying, or to permit inspection of premises~~, before trial shall be served~~ the party or attorney issuing the subpoena shall serve prior notice on each party in the manner prescribed by Rule 5(b) at least seven days before the subpoena is served on the person to whom it is directed.

***Comment*:**

This change is purportedly designed to prevent abuse of the discovery process by parties seeking discovery from third-parties. Yet consistent with the current Rule 45, a party is already entitled to receive notice when an opposing party serves a subpoena on third-parties. By requiring parties to provide seven days' advanced notice to opposing parties of third-party subpoenas before they are served, the proposed amended Rule 45 provides great potential for abuse and may, in practice, unnecessarily hamper discovery.

As it currently stands, the subpoena process is often a difficult undertaking. Service on third parties is not always easy to obtain, and it is not unusual for third parties to fail to respond within the required time frame following service of a subpoena. Often when there is a response, it is in the form of objections, coupled with requests for additional time to produce documents or otherwise respond to the subpoena.

The seven day advanced notice provision of proposed Rule 45(b)(3) would add one more complicating factor to what is already a complicated and often drawn out process. Instead of merely providing for advance party notification of service of a third party subpoena, the proposed rule creates a new opportunity, perhaps even an incentive, for an opposing party to object to a subpoena merely to prevent or delay its *service* upon third parties. It could also facilitate a party giving advanced warning to the intended recipient of a subpoena, potentially frustrating service efforts. In addition, a party objection within the seven day time period and prior to service of the subpoena could potentially put parties in the awkward position of making representations regarding a third party who is not yet present.

The proposed rule unnecessarily involves opposing parties in a process that should primarily involve the party seeking discovery and the third party who may have discoverable information. By prematurely involving the opposing party in the process before the subpoena is placed for service, the proposed rule increases the potential for unilateral interference, unnecessary objections, and satellite litigation. This conflicts with the policies in the Utah rules that favor the discovery of information.

In addition, there may be instances when a party becomes aware of potentially discoverable materials in the hands of a third party late in the discovery process. If this were to occur within seven days of a discovery deadline, the advanced notice requirement could have the unintended effect of precluding that party from serving a third party subpoena that it would otherwise serve prior to the discovery deadline.

While it should not be the case that third party subpoenas are served and responded to before the opposing party ever has notice of the subpoenas, as a practical matter such an occurrence is very rare. Contemporaneous or near contemporaneous notice of service, as opposed to seven day advanced notice, should be sufficient to notify the opposing party of third party subpoenas without creating the opportunity or incentive to delay service or otherwise engage in unnecessary satellite litigation. A notice of service of a third party subpoena sent to the parties the same day a subpoena is sent out to be served would in many cases reach the party before the subpoena is actually served on the third party. At a minimum, notice would reach the party within a day or two of the time the subpoena is actually served. As a practical matter, such notice would give parties ample time to object or otherwise raise any issues regarding the subpoena prior to the third party responding to the subpoena, and it would avoid the unnecessary complications and unintended consequences of a seven day advanced notice requirement. In other words, it should be enough that the rule require contemporaneous service. Once service is effected, any party with objections would still have ample time to object and obtain relief. The important thing is that the subpoena is served and the evidence sought is subject to it.

Please contact me if you have any questions.

I believe that the 15 day advanced notice requirement in the proposed changes to the rules governing subpoena's is problematic in that it works to cause unnessary delay in the litigation process and raises concerns about an increased potential for spoilation or destruction of evidence issues.

If the advanced notice requirement is deemed an important part of the proposed amendments, I would suggest that proposed amendment be altered in one or both of the following ways:

1. As part of a case management plan, the parties would identify those parties for which advanced notice of a subpoena would be required. All parties not so designated would not be subject to the advanced notice period.

2. Any party may be served with a subpoena prior to imposing a waiting period; That party would then be required to file a list with the court identifying the type, nature and sufficeint description of the documents requested in the subpoena so as to aid in protecting against spoliation or destruction problems. The opposing cousnel would then have 15 days to challenge the subpoena prior to those documents being released to the requesting party.

Posted by Jonathan Jaussi June 16, 2006 03:48 PM

Regarding the ability to demand payment "in advance" of document production -

My concern is three fold - (1) the "in advance" language should be made more clear (especially for counsel representing the subpoenaed parties); (2) how does this affect the response period; and (3) as proposed, the language doesn't do enough to protect the subpoenaing party from fee abuse by the subpoenaed party.

(1) The "in advance" language is not sufficiently clear.

As counsel for businesses that are subpoenaed for large document productions, the new ability to demand "advance" payment is intriguing. But it begs several questions, including the basic question - in advance of what? - in advance of having to incur any costs in connection with complying with the subpoena, or in advance of actually handing over the documents? Let me give you an example:

Often in commercial cases, the subpoenaed party is called upon to produce thousands of documents. This often requires the employer to take several of its staff and assign them to this project. This is costly, and aggravating to the employer. As counsel for the employer (subpoenaed party), does the amended rule mean that the producing party need not begin efforts (labor costs, etc) to begin the document copying/collection until it is actually paid some amount of anticipated reasonable fees, or, does the amended rule merely mean that the employer can only hold back the copies/production until it is paid for the reasonable fees already incurred in the gathering/copying process?

This difference matters a great deal in advising business clients going forward who call upon us after being asked to comply with subpoenas that call for large document productions that are costly to the business itself. As written, there is room to argue that reasonable payment can be demanded before the subpoenaed party must begin to incur costs associated with complying with the subpoena request. Whereas, the latter

scenario, which is the scenario I assume is likely intended, requires the business to swallow the business costs up front, and only gives it the ability to withhold actual production until payment is made.

Language should be added to make the ability to demand advance payment, more clear.

(2) Response time to subpoenas

If a demand for advance payment on document production is made, is the 14 day period to comply tolled until payment is made? Or, must the 14 day period be complied with, so long as payment is received by the subpoena deadline?

This question may be made moot depending on how the issue above is treated, as the two issues overlap somewhat. However, here is an example - let's say a business owner is subpoenaed, and called upon to copy or produce roughly 2,000 pages of documents. Upon being served, the subpoenaed party demands payment in advance. However, because the subpoenaed party does not hear from the issuing party, and has not received any payment, the subpoenaed party does not begin efforts to gather/copy the voluminous documents. Then, on the 14th day, the subpoenaed party receives a check for the demanded amount, leaving the subpoenaed party unable to meet the 14 day deadline. Is he/she exposed to contempt?

Language should be added to make clear whether the response date, after a demand is made, is tolled or otherwise affected, until the payment demanded is received.

(3) Justification for the "advance payment" demand

Currently, we are typically billed after or concurrent with the production, with a price per page or number of documents produced to support the amount charged. Since payment may be demanded in advance, and must be paid in advance if so demanded, we should ensure that there are sufficient steps required of the subpoenaed party to justify the amount demanded before it is actually paid.

I acknowledge that there is a requirement for the producing party to execute a declaration under penalty of perjury regarding the reasonableness of the fees demanded. However, the timing of the submission of this declaration appears to be concurrent with production itself. Language should be added to clarify that the subpoenaed party should send a declaration concerning the reasonableness of the fees demanded, at the time of the advance fee demand, if so demanded, not concurrent with production. Moreover, it should be required that the declaration include a specific reference to the price per page charged, or the total number of documents being paid for, as justification for the amount so demanded.

In sum, although the subpoenaed party may be entitled to advance payment prior to production to protect itself, the subpoenaing party should be assured that the fees demanded are indeed "reasonable," prior to having to make payment.

Posted by Jason McNeill April 28, 2006 05:37 PM

Encl. Rule 45
Form 40
Rule 63
Rule 74

Rule 45. Subpoena.

(a) Form; issuance.

(a)(1) Every subpoena shall:

(a)(1)(A) issue from the court in which the action is pending;

(a)(1)(B) state the title of the action, the name of the court from which it is issued, the name and address of the party or attorney ~~serving~~ issuing the subpoena, and its civil action number;

(a)(1)(C) command each person to whom it is directed

(a)(1)(C)(i) to appear ~~to~~ and give testimony at a trial, ~~or at~~ hearing~~,~~ or ~~at~~ deposition, or

(a)(1)(C)(ii) to appear and produce ~~or to permit~~ for inspection and copying ~~of~~ documents or tangible things in the possession, custody or control of that person, or

(a)(1)(C)(iii) to copy documents in the possession, custody or control of that person and mail the copies to the party or attorney issuing the subpoena before a date certain, or

(a)(1)(C)(iv) to appear and to permit inspection of premises~~, at a time and place therein specified~~;

(a)(1)(D) if an appearance is required, specify the date, time and place for the appearance; and

~~(a)(1)(D)~~ (a)(1)(E) set forth the ~~text of~~ Notice to Persons Served with a Subpoena~~,~~ in a form substantially similar ~~form~~ to the subpoena form appended to these rules.

~~(a)(2) A command to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises, may be joined with a command to appear at trial, or at hearing, or at deposition, or may be issued separately.~~

~~(a)(3)~~ (a)(2) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney admitted to practice in ~~the court in which the action is pending~~ Utah may ~~also~~ issue and sign a subpoena as an officer of the court.

(b) Service; ~~scope~~ fees; prior notice.

(b)(1) ~~Generally.~~

~~(b)(1)(A)~~ A subpoena may be served by any person who is at least 18 years of age and not a party ~~and is not less than 18 years of age~~ to the case. Service of a subpoena upon ~~a~~ the person ~~named therein~~ to whom it is directed shall be made as provided in Rule 4(d) ~~for the service of process and, if the~~.

(b)(2) If the subpoena commands a person's appearance, ~~is commanded, by tendering to that person~~ the party or attorney issuing the subpoena shall tender with the subpoena the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States, or this state, or any officer or agency of either, fees and mileage need not be tendered in advance.

(b)(3) ~~Prior notice of any commanded production or inspection of documents or tangible things or~~ If the subpoena commands a person to copy and mail documents, to produce documents or tangible things for inspection and copying, or to permit inspection of premises, ~~before trial shall be served~~ the party or attorney issuing the subpoena shall serve prior notice on each party in the manner prescribed by Rule 5(b) at least seven days before the subpoena is served on the person to whom it is directed.

~~(b)(1)(B) Proof of service when necessary shall be made by filing with the clerk of the court from which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.~~

~~(b)(1)(C) Service of a subpoena outside of this state, for the taking of a deposition or production or inspection of documents or tangible things or inspection of premises outside this state, shall be made in accordance with the requirements of the jurisdiction in which such service is made.~~

~~(b)(2) Subpoena for appearance at trial or hearing. A subpoena commanding a witness to appear at a trial or at a hearing pending in this state may be served at any place within the state.~~

~~(b)(3) Subpoena for taking deposition.~~ (c) Appearance; resident; non-resident.

~~(b)(3)(A)~~ (c)(1) A person who resides in this state may be required to appear:

(c)(1)(A) at a trial or hearing in the county in which the case is pending; and

(c)(1)(B) at a deposition, or to produce documents or things, or to permit inspection of premises only in the county ~~where~~ in which the person resides, ~~or~~ is employed, or transacts business in person, or at such other place as the court may order.

(c)(2) A person who does not reside in this state but who is served within this state may be required to appear:

(c)(2)(A) at a trial or hearing in the county in which the case is pending; and

(c)(2)(B) at a deposition, or to produce documents or things, or to permit inspection of premises only in the county ~~in this state where~~ in which the person is served ~~with a subpoena,~~ or at such other place as the court may order.

~~(b)(3)(B) A subpoena commanding the appearance of a witness at a deposition may also command the person to whom it is directed to produce or to permit inspection and copying of documents or tangible things relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 30(b) and paragraph (c) of this rule.~~

~~(b)(4) Subpoena for production or inspection of documents or tangible things or inspection of premises. A subpoena to command a person who is not a party to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises may be served at any time after commencement of the action. The scope and procedure shall comply with Rule 34, except that the person must be allowed at least 14 days to comply as stated in subparagraph (c)(2)(A) of this rule.~~ (d) Payment of production or copying costs. The party ~~serving~~ or attorney issuing the subpoena shall pay the reasonable cost of producing or copying ~~the~~ documents or tangible things. Upon the request of the person subject to the subpoena, the party or attorney issuing the subpoena shall pay the reasonable cost in advance. Upon the request of any other party and the payment of reasonable costs, the party ~~serving~~ or attorney issuing the subpoena shall provide to the requesting party copies of all documents or tangible things obtained in response to the subpoena or shall make the tangible things available for inspection.

~~(c)~~ (e) Protection of persons subject to subpoenas; objection.

~~(c)(1) A~~ (e)(1) The party or ~~an~~ attorney ~~responsible for the issuance and service of~~ issuing a subpoena shall take reasonable steps to avoid imposing an undue burden or

expense on ~~a~~ the person subject to ~~that~~ the subpoena. The court ~~from which the subpoena was issued~~ shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable ~~attorney's~~ attorney fee.

~~(c)(2)(A)~~ (e)(2) A subpoena ~~served upon a person who is not a party~~ to copy and mail documents, to produce ~~or to permit inspection and copying of~~ documents or tangible things for any purpose, or to permit inspection of premises~~, whether or not joined with a command to appear at trial, or at hearing, or at deposition, must allow the person at least 14 days after service to comply, unless a shorter time has been ordered by the court for good cause shown~~ shall comply with Rule 34(a) and (b)(1), except that the person subject to the subpoena must be allowed at least 14 days after service to comply.

~~(c)(2)(B) A person commanded to produce or to permit inspection and copying of documents or tangible things or to permit inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear at trial, at hearing, or at deposition.~~

~~(c)(2)(C) A person commanded to produce or to permit inspection and copying of documents or tangible things or inspection of premises may, before the time specified for compliance with the subpoena, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the documents or tangible things or inspection of the premises.~~ (e)(3) The person subject to the subpoena may object if the subpoena:

(e)(3)(A) fails to allow reasonable time for compliance;

(e)(3)(B) requires a resident of this state to appear at other than a trial or hearing in a county in which the person does not reside, is not employed, or does not transact business in person;

(e)(3)(C) requires a non-resident of this state to appear at other than a trial or hearing in a county other than the county in which the person was served;

(e)(3)(D) requires the person to disclose privileged or other protected matter and no exception or waiver applies;

(e)(3)(E) requires the person to disclose a trade secret or other confidential research, development, or commercial information;

(e)(3)(F) subjects the person to an undue burden; or

(e)(3)(G) requires the person to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(e)(4)(A) If the person subject to the subpoena objects, the objection must be made before the date for compliance.

(e)(4)(B) The person subject to the subpoena shall state the objection in a concise, non-conclusory manner. If the objection is that the information commanded by the subpoena is privileged or protected and no exception or waiver applies, or requires the person to disclose a trade secret or other confidential research, development, or commercial information, the objection shall sufficiently describe the nature of the documents, communications, or things not produced to enable the party or attorney issuing the subpoena to contest the objection.

(e)(4)(C) The person shall serve the objection on the party or attorney issuing the subpoena. The party or attorney issuing the subpoena shall serve a copy of the objection on the other parties.

(e)(5) If objection is made, the party ~~serving~~ or attorney issuing the subpoena ~~shall~~ is not ~~be~~ entitled to ~~inspect and copy the materials or inspect the premises except pursuant to an order of the court. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce,~~ compliance but may move ~~at any time~~ for an order to compel ~~the production~~ compliance. The motion shall be served on the other parties and on the person subject to the subpoena. ~~Such an~~ An order to compel ~~production~~ compliance shall protect ~~any~~ the person ~~who is not a party or an officer of a party~~ subject to the subpoena from significant expense ~~resulting from the inspection and copying commanded~~ or harm. The court may quash or modify the subpoena. If the party or attorney issuing the subpoena shows a substantial need for the information that cannot be met without undue hardship, the court may order compliance upon specified conditions.

~~(c)(3)(A) On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it:~~

~~(c)(3)(A)(i) fails to allow reasonable time for compliance;~~

~~(c)(3)(A)(ii) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or requires a non-resident of this state to appear at deposition in a county other than the county in which the person was served;~~

~~(c)(3)(A)(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies;~~

~~(c)(3)(A)(iv) subjects a person to undue burden.~~

~~(c)(3)(B) If a subpoena:~~

~~(c)(3)(B)(i) requires disclosure of a trade secret or other confidential research, development, or commercial information;~~

~~(c)(3)(B)(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party;~~

~~(c)(3)(B)(iii) requires a resident of this state who is not a party to appear at deposition in a county in which the resident does not reside, or is not employed, or does not transact business in person; or~~

~~(c)(3)(B)(iv) requires a non-resident of this state who is not a party to appear at deposition in a county other than the county in which the person was served;~~

~~the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party serving the subpoena shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.~~

~~(d)~~ (f) Duties in responding to subpoena.

(f)(1) A person commanded to copy and mail documents or to produce documents or tangible things for inspection and copying shall serve on the party or attorney issuing the subpoena a declaration under penalty of perjury stating in substance:

(f)(1)(A) that the declarant has knowledge of the facts contained in the declaration;

(f)(1)(B) that the documents or tangible things copied or produced are a full and complete response to the subpoena;

(f)(1)(C) that the documents are the originals or that a copy is a true copy of the original; and

(f)(1)(D) the reasonable cost of copying or producing the documents or tangible things.

~~(d)(1)~~ (f)(2) A person ~~responding to a subpoena~~ commanded to copy and mail documents or to produce documents or tangible things for inspection and copying shall copy or produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the ~~demand~~ subpoena.

~~(d)(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.~~

~~(e)~~ (g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person ~~may be deemed a~~ is punishable as contempt of ~~the~~ court ~~from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to appear or produce at a place not within the limits provided by subparagraph (c)(3)(A)(ii).~~

~~(f)~~ (h) Procedure ~~where~~ when witness ~~conceals himself~~ evades service or fails to attend. If a witness evades service of a subpoena~~,~~ or fails to attend after service of a subpoena, the court may issue a warrant to the sheriff of the county to arrest the witness and bring the witness before the court.

~~(g)~~ (i) Procedure when witness is confined in jail. If the witness is a prisoner ~~confined in a jail or prison within the state~~, a party may move for an order ~~for examination~~ to examine the witness in the jail or prison ~~upon deposition or, in the discretion of the court, for temporary removal and production~~ or to produce the witness before the court or officer for the purpose of being orally examined~~, may be made upon motion, with or~~

~~without notice, by a justice of the Supreme Court, or by the district court of the county in which the action is pending~~.

~~(h)~~ (j) Subpoena unnecessary~~; when~~. A person present in court~~,~~ or before a judicial officer~~,~~ may be required to testify in the same manner as if the person were in attendance upon a subpoena.

~~Advisory Committee Notes~~

~~Purposes of Amendment. The 1994 amendments represent a substantial change from prior practice. Patterned on the 1991 amendments to Fed. R. Civ. P. 45, these amendments expedite and facilitate procedures for serving subpoenas, modify procedures relating to persons who are not parties to correspond to procedures relating to parties under Utah R. Civ. P. 34, and specify the rights and obligations of persons served with a subpoena.~~

~~Paragraph (a). This paragraph amends former Rule 45 in the following important respects:~~

~~First, subparagraph (a)(6)(3) authorizes an attorney to issue and sign a subpoena as an officer of the court. The subparagraph eliminates the requirement that an attorney obtain a subpoena from the clerk of the court, and the requirement that a subpoena be issued under seal of the court. An attorney who is not a member of the Utah State Bar but who has been admitted to practice pro hac vice in the court in which the action is pending is authorized to issue a subpoena. Consistent with the authority of an attorney to issue a subpoena, subparagraph (a)(1)(B) requires every subpoena to identify the attorney serving it. Subparagraph (a)(1)(A) requires every subpoena to issue from the court in which the action is pending, amending former Rule 45(d)(1), which authorized a deposition to be issued from the court where the deposition is to take place, as well as the court where the action is pending.~~

~~Second, subparagraph (a)(2) authorizes a party to serve upon a person who is not a party a subpoena to produce or to permit inspection and copying of documents or tangible things, or to permit inspection of premises. A party no longer must serve a subpoena duces tecum to discover documents or tangible things from a person who is not a party, although the amended rule preserves that option, and no longer must bring an independent action for entry onto land. Subparagraph (a)(2) also requires a person~~

~~who is not a party to produce materials within that person's control, which subjects that person to the same scope of discovery as if that person were a party served with a discovery request under Rule 34.~~

~~Third, subparagraph (a)(1)(D) requires every subpoena to state the rights and duties of a person served in a form substantially similar to the form in the Appendix to these rules.~~

~~Paragraph (b) also amends former Rule 45 in several important respects. Subparagraph (b)(1)(A) requires prior notice of each commanded production or inspection of documents or tangible things, or inspection of premises, to be served as prescribed by Rule 5(b). This subparagraph ensures that other parties will have notice enabling them to object to or participate in discovery, or to serve a demand for additional materials. No similar provision is included for depositions, because depositions are governed by Rule 30 or 31. Subparagraph (b)(1)(A) specifies that the subpoena may be served as required by Rule 4(e), amending paragraph (c) of the former rule.~~

~~Subparagraph (b)(4) authorizes a subpoena for production or inspection of documents or tangible things or inspection of premises to be served upon a person who is not a party at any time after commencement of the action. A subpoena served upon a person who is not a party has the same scope specified in Rule 34(a) for a request served upon a party, and is subject to the same procedures specified in Rule 34(b). A person who is not a party is not required to file a written response to the subpoena, unless the party objects to the subpoena pursuant to subparagraph (c)(2)(D).~~

~~Subparagraph (b)(4) also requires each party serving a subpoena for the production of documents to provide to other parties copies of documents obtained in response to the subpoena. No comparable provision appears in the federal rule, but the Committee determined that such a provision would alleviate some of the burden imposed upon persons who are not parties and shift it to parties.~~

~~Other subparagraphs make minor amendments to the former Rule 45. Subparagraph (b)(1)(C) amends former paragraph (d)(3) to include a subpoena for document production or inspection, as well as a deposition subpoena. Subparagraph (b)(2) is the former paragraph (e) with minor modifications. Subparagraph (b)(3)(A)~~

~~requires a nonresident to attend deposition only in the county where the nonresident is served, amending former paragraph (d)(2) to eliminate the requirement that a nonresident attend a deposition within forty miles of the place of service.~~

~~Paragraph (c). Paragraph (c) states the rights of witnesses or other persons served with subpoenas. The paragraph does not diminish rights conferred by any other rule or any other authority. Subparagraph (c)(1) states the duty of an attorney to minimize the burden on a witness who is not a party, and specifies that such a witness may recover lost earnings that result from the misuse of a subpoena. Subparagraph (c)(1) expands the responsibility of an attorney stated in Rule 26(g); this responsibility is correlative to the expanded power of an attorney to issue a subpoena.~~

~~Subparagraph (c)(2)(A) specifies that a person who is not a party served with a subpoena for the production or inspection of documents or tangible things or inspection of premises must have at least 14 days to respond. A subpoena to appear at trial, at hearing, or at deposition must be served within a reasonable time, unless it also requires the production of documents.~~

~~Subparagraph (c)(2)(C) states that a person who is not a party has no obligation to make copies or to advance costs, and has no counterpart in either the federal rule or the former state rule. The Committee included this statement in the rule so that it would become part of the notice provided to each person served with a subpoena.~~

~~Subparagraph (c)(2)(D) specifies that a person served with a subpoena for the production or inspection of documents or tangible things or inspection of premises may serve written objection upon the party serving the subpoena. The party serving the subpoena bears the burden to obtain an order to compel production, and must provide prior notice to the person served of the motion to compel. A person served with a subpoena to appear at trial, at hearing, or at deposition, must appear unless the person obtains a court order to quash or modify the subpoena; a written objection to the serving party is insufficient. A person served with a subpoena duces tecum may object to providing documents by notifying the party serving the subpoena, but still must appear to testify at trial, at hearing, or at deposition, unless the person obtains an order to quash or modify the subpoena.~~

~~Subparagraph (c)(3) identifies the circumstances in which a subpoena may be modified or quashed. It follows paragraph (c)(3) of the 1991 amendments to Fed. R. Civ. P. 45, but is modified to specify the locations where residents or nonresidents of the State may be compelled to attend deposition.~~

~~Paragraph (d). This paragraph follows the 1991 amendments to Fed R. Civ. P. 45. Subparagraph (d)(2)(D) applies to privileged attorney-client communications, and to all attorney work product protected under the doctrine of Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), and progeny.~~

~~Paragraph (e). This paragraph specifies that an adequate cause for failure to obey exists when a subpoena purports to require a party to respond at a place beyond the geographic boundaries imposed by the rule, amending former paragraph (f).~~

~~Paragraph (f). This is the former paragraph (g), amended to eliminate references to the masculine pronoun.~~

~~Paragraph (g). This is the former paragraph (h).~~

~~Paragraph (h). This is the former paragraph (i), amended to eliminate references to the masculine pronoun.~~

Attorney Name
Address
Email Address
Telephone Number
Bar Number

In the District Court of the State of Utah
_____ Judicial District
_____ County
_____
(Address)

_____, Plaintiff, v. _____, Defendant.	Subpoena Case Number: _____ Judge : _____

To _____:

(1) [ ] You are commanded to appear at:
_____(date)
_____(time)
_____(place)

[ ] to testify at a trial or hearing
[ ] to testify at a deposition
[ ] to permit inspection of the premises
[ ] to produce the following documents or tangible things:

_____
_____
_____

(2) [ ] You are commanded to copy the following documents and to mail or deliver the copies to the person at the address at the top of this page. You must comply no later than _____(date).

(3) A form entitled "Notice to Persons Served with a Subpoena" must be served with this subpoena. The form explains your rights and obligations. If you are commanded to appear at a trial, hearing or deposition, a one-day witness fee must be served with this subpoena. A one-day witness fee is $18.50 plus $1.00 for each 4 miles you have to travel over 50 miles (one direction).

(4) You may object to this subpoena for one of the reasons listed in paragraph 6 of the Notice by serving a written objection upon the attorney listed at the top of this subpoena. You must comply with any part of the subpoena to which you do not object.

Date

Signature
[ ] Court clerk
[ ] Attorney for the plaintiff
[ ] Attorney for the defendant

NOTICE TO PERSONS SERVED WITH A SUBPOENA

(1) Rights and responsibilities in general. A subpoena is a court order whether it is issued by the court clerk or by an attorney as an officer of the court. You must comply or file an objection, or you may face penalties for contempt of court. If you are commanded to produce documents or tangible things, the subpoena must be served on you at least 14 days before the date designated for compliance. If you are commanded to appear at a trial, hearing, deposition, or other place, a one-day witness fee must be served with this subpoena. A one-day witness fee is $18.50 plus $1.00 for each 4 miles you have to travel over 50 miles (one direction). When the subpoena is issued on behalf of the United States or Utah, fees and mileage need not be tendered in advance. The witness fee for each subsequent day is $49.00 plus $1.00 for each 4 miles you have to travel over 50 miles (one direction).

(2) Subpoena to copy and mail documents. If the subpoena commands you to copy documents and mail the copies to the attorney or party issuing the subpoena, you must organize the copies as you keep them in the ordinary course of business or organize and label them to correspond with the categories in the subpoena. The party issuing the subpoena must pay the reasonable cost of copying the documents. If you request it, the party issuing the subpoena must pay the reasonable cost in advance. You must mail with the copies a declaration under penalty of perjury stating in substance:

(A) that you have knowledge of the facts contained in the declaration;
(B) that the documents produced are a full and complete response to the subpoena;
(C) that originals or true copies of the original documents have been produced; and
(D) the reasonable cost of copying the documents.

A form declaration is part of this Notice; you may need to modify it to fit your circumstances.

(3) Subpoena to appear. If the subpoena commands you to appear at a trial, hearing, deposition, or for inspection of premises, you must appear at the date, time, and place designated in the subpoena. The trial or hearing will be at the courthouse in which the case is pending. For a deposition or inspection of premises, you can be commanded to appear in only the following counties:

(A) If you are a resident of Utah, the subpoena may command you to appear in the county:
in which you reside;

in which you are employed;
in which you transact business in person; or
in which the court orders.

(B) If you are not a resident of Utah, the subpoena may command you to appear in the county in Utah:
in which you are served with the subpoena; or
in which the court orders.

(4) Subpoena to permit inspection of premises. If the subpoena commands you to appear and to permit the inspection of premises, you must appear at the date, time, and place designated in the subpoena and do what is necessary to permit the premises to be inspected.

(5) Subpoena to produce documents or tangible things. If the subpoena commands you to produce designated documents or tangible things, you must produce the documents or tangible things as you keep them in the ordinary course of business or organize and label them to correspond with the categories in the subpoena. The subpoena may require you to produce the documents at the trial, hearing, or deposition or to mail them to the issuing party or attorney. You need not make copies. The party issuing the subpoena must pay the reasonable cost of copying and producing the documents or tangible things. If you request it, the party issuing the subpoena must pay the reasonable cost in advance. You must produce with the documents or tangible things a declaration under penalty of perjury stating in substance:

(A) that you have knowledge of the facts contained in the declaration;
(B) that the documents or tangible things produced are a full and complete response to the subpoena;
(C) that the documents are the originals or that a copy is a true copy of the original; and
(D) the reasonable cost of copying or producing the documents or tangible things.

A form declaration is part of this Notice; you may need to modify it to fit your circumstances.

(6) Objection to a subpoena. You must comply with those parts of the subpoena to which you do not object. You may object to all or part of the subpoena if it:

(A) fails to allow you a reasonable time for compliance (If you are commanded to produce documents or tangible things, the subpoena must be served on you at least 14 days before the date designated for compliance.);
(B) requires you, as a resident of Utah, to appear at a deposition in a county in which you do not reside, are not employed, or do not transact business in person;
(C) requires you, as a non-resident of Utah, to appear at a deposition in a county other than the county in which you were served, unless the judge orders otherwise;
(D) requires you to disclose privileged or other protected matter and no exception or waiver applies;
(E) requires you to disclose a trade secret or other confidential research, development, or commercial information;
(F) subjects you to an undue burden; or
(G) requires you to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

(7) How to object. To object to the subpoena, serve the objection upon the party or attorney issuing the subpoena. The name and address of that person should appear in the upper left corner of the subpoena. You must do this before the date for compliance. A form objection is part of this Notice; you may need to modify it to fit your circumstances. Once you have filed the objection, do not comply with the subpoena unless ordered to do so by the court.

(8) Motion to compel. After you make a timely written objection, the party or attorney issuing the subpoena might serve you with a motion for an order to compel you to comply and notice of a court hearing. That motion will be reviewed by a judge. You have the right to file a response to the motion, to attend the hearing, and to be heard. You may be represented by a lawyer. If the judge grants the motion, you may ask the judge to impose conditions to protect you.

(9) Organizations. An organization that is not a party to the suit and is subpoenaed to appear at a deposition must designate one or more persons to testify on its behalf. The organization may set forth the matters on which each person will testify. Utah Rule of Civil Procedure 30(b)(6).

In the District Court of the State of Utah
_____ Judicial District
_____ County
_____
(Address)

_____, Plaintiff, v. _____, Defendant.	Objection to subpoena Case Number: _____ Judge : _____

Instructions: URCP 45 limits the grounds for an objection. For each of the grounds other than (2) or (3) please provide a full explanation. Attach additional sheets as necessary.

I have been served with a subpoena in this case and I object because the subpoena:

[ ] (1) Fails to allow me a reasonable time in which to comply.

[ ] (2) Requires me, as a resident of Utah, to appear at a deposition in a county in which I do not reside, am not employed, and do not transact business in person.

[ ] (3) Requires me, as a non-resident of Utah, to appear at a deposition in a county other than the county in which I was served.

[ ] (4) Requires me to disclose privileged or other protected matter and no exception or waiver applies.

Instructions for (4): If you object to the subpoena for these grounds, you must describe the nature of the document or thing with sufficient specificity to enable the party or attorney to contest your objection.

[ ] (5) Requires me to disclose a trade secret or other confidential research, development, or commercial information.

_____

_____

_____

Instructions for (5): If you object to the subpoena for these grounds, you must describe the nature of the document or thing with sufficient specificity to enable the party or attorney to contest your objection.

[ ] (6) Subjects me to an undue burden.

_____

_____

_____

[ ] (7) Requires me to disclose an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study that was not made at the request of a party.

_____

_____

_____

[ ] (8) Other.

_____

_____

_____

On _____(date) I mailed this objection to the party or attorney issuing the subpoena at the following address:

_____

_____

_____

_____ _____

Date

Signature
[ ] Person subject to subpoena
[ ] Attorney for person subject to subpoena

In the District Court of the State of Utah
_____ Judicial District
_____ County
_____
(Address)

_____, Plaintiff, v. _____, Defendant.	Declaration of compliance with subpoena Case Number: _____ Judge : _____

Under penalty of perjury, I declare as follows:

(1) I have knowledge of the facts contained in this declaration.

(2) The documents or tangible things copied or produced are a full and complete response to the subpoena.

(3) The documents or tangible things are
[ ] the originals.
[ ] copies that are true copies of the originals.

(4) The reasonable cost of copying or producing the documents or tangible things is $_____.

_____ _____
Date Signature
[ ] Custodian of the records
[ ] Attorney for the custodian of the records

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, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. The judge shall take no further action in the case until the motion is decided. 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.

Rule 74. Withdrawal of counsel.

(a) ~~If a motion is not pending and a certificate of readiness for trial has not been filed, an~~ An attorney may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and ~~no certificate of readiness for trial has been filed~~ no hearing or trial has been set. If a motion is pending or a ~~certificate of readiness for trial has been filed~~ hearing or trial has been set, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing or trial.

(b) If an attorney withdraws, dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

(c) Substitution of counsel. An attorney may replace the counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel and the client. Court approval is not required if new counsel certifies in the notice of substitution that counsel will comply with the existing hearing schedule and deadlines.

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: June 19, 2006
Re: Sanctions. Rules 16, 35 and 37.

Our work on the new paragraph for sanctioning spoliation has resulted in some research into sanctions generally. Tom Lee's research shows some reasons for keeping the limits on sanctions for failing to undergo an examination. Tom's email is attached. The current rules are not a model of clarity, and they contain at least one inconsistency. Trying to parse what is permitted and what is prohibited and in what circumstances leads me to the following conclusions.

If you violate a discovery order, you are subject to:

1. the matter being taken as established;
2. not being able to offer evidence about the matter;
3. having the pleadings struck;
4. contempt;
5. attorney fees; and
6. such other orders as are just.

If you violate an order to submit for an examination, you are subject to all of the above except contempt.

If you are able to produce a person for an examination and don't, you are subject to all of the above except contempt. But, if you are unable to produce the person, then you are not subject to the first 3. Presumably because it's not just. You are still subject to attorney fees, unless you convince the judge that the failure to produce is substantially justified. Presumably the failure is substantially justified, since you cannot do it.

If you violate a scheduling order entered under Rule 16, we have a conflict in the rules. Rule 37 says you are subject to all of the above. Rule 16(d) says the judge cannot order that the matter be taken as established.

In Rule 35(a), there is no express sanction for failing to submit for an exam or for failing to produce a person for an exam, so Rule 37 sanctions and their limits apply. In Rule 35(c), the express sanctions for failing to produce the previous examination results and treatment by an examiner employed by a party are exclusion of the examiner's testimony and other sanctions under Rule 37. In Rule 35(b)(1) the express sanction for failing to produce the results of any previous exams performed on the examined person is exclusion of the examiner's testimony, but there is no reference to the other sanctions of Rule 37. So there is not a direct conflict, but a bit of confusion since the later paragraph, 35(c), does have the cross reference.

The amendments, which include the spoliation paragraph, are intended to treat sanctions in a more uniform manner. To that end, Rule 16 would be amended simply to refer to the sanctions in Rule 37. Rule 35 also would be amended to refer to Rule 37. The prohibition on contempt for failing to submit to an examination and for failing to produce someone for an examination would be moved from Rule 37 to Rule 35, which regulates the only circumstances in which the prohibition applies. The list of sanctions is delineated, I hope in a more straightforward manner, in Rule 37.

Encl. Email from Tom Lee
Rules 16, 35 and 37

From: Tom Lee
To: Fran Wikstrom, Tim Shea
Date: 5/11/06 12:29PM
Subject: Re: Rule 37

Tim & Fran:

My research assignment was to look at the evolution of Rule 37 in order to determine whether there is a good reason to treat physical examination orders different from other discovery orders. The current structure of the rule provides (in what is now (b)(2)(D)) that contempt cannot be used as a sanction for failure to comply with a Rule 35 physical examination order, and (in what is now (b)(2)(E)) that sanctions are not appropriate where the party is unable to produce a person for physical examination. In our last meeting, I raised the question whether there was any need for carving out Rule 35 physical examination orders at all--i.e., whether it might make more sense to leave it up to the court's discretion whether and how to sanction a party for failing to comply with any kind of discovery order (including a Rule 35 physical examination order).

Having looked at the history of the rule, I'm no longer in favor of a revision. Although I think that the change we contemplated might not change the practice much (given that the general standard of reasonableness would usually foreclose the imposition of a contempt order for failure to comply with a Rule 35 order), there may be good reasons to leave the rule alone. Physical examinations have long been treated as different, and I'm not sure I want to open up the can of worms involved in taking a different course.

My research shows that the (b)(2)(D) exception, carving out contempt as a sanction for failure to comply with a Rule 35 order, appeared in the first draft of the 1937 federal rules (available at <http://www.uscourts.gov/rules/reports.htm> by clicking on April 1937 under Advisory Committee on Rules of Civil Procedure). No substantive changes have been made to this exception since the original draft. Although I haven't found much support for this, I suspect that this provision stemmed from a concern that physical examination orders involve an invasion of privacy and bodily integrity that is different from other kinds of discovery orders such as the mere production of documents. There may be a quasi-substantive basis for refusing to accord judicial authority to impose contempt sanctions in support of a Rule 35 order, and I'm not sure I'm comfortable making a snap decision to overturn the longstanding practice on this point.

The (b)(2)(E) exception seems to be aimed at precluding the imposition of sanctions for failure to produce a third person for examination where it is impossible to produce the third person. This provision was added in 1970. The Advisory Committee Notes for the 1970 revision state that the change was designed to follow the change in Rule 35 that allowed court orders requiring a physical examination of a third party over whom a party has some legal control (a parent or guardian, for example). Section (E) simply provided for sanctions for failure to comply with this type of order and allowed an exception for inability to produce the third party.

In light of this history, it may also make sense to leave the admittedly confusing language and structure of (b)(2)(E) alone. If we change the rule to omit the language about inability to produce, we may be seen as effecting a substantive change in the rule.

For whatever it's worth, a brief survey of other states reveals that the structure of the federal rules (including the (b)(2)(D) & (E) exceptions) is followed in various states, including California - CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 2032.410-2032.420, Texas - TEXAS RULES OF CIVIL PROCEDURE 215.2(b)(6), Colorado - COLORADO RULES OF CIVIL PROCEDURE 37(b)(2)(D). I am not aware of any state that has opted to omit the (b)(2)(D) OR (b)(2)(E) exceptions, and I'm no longer inclined to move in that direction.

Tom

Rule 16. Pretrial conferences, scheduling, and management conferences.

(a) Pretrial conferences. In any action, the court in its discretion or upon motion of a party, may direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(a)(1) expediting the disposition of the action;

(a)(2) establishing early and continuing control so that the case will not be protracted for lack of management;

(a)(3) discouraging wasteful pretrial activities;

(a)(4) improving the quality of the trial through more thorough preparation;

(a)(5) facilitating the settlement of the case; and

(a)(6) considering all matters as may aid in the disposition of the case.

(b) Scheduling and management conference and orders. In any action, in addition to any other pretrial conferences that may be scheduled, the court, upon its own motion or upon the motion of a party, may conduct a scheduling and management conference. The attorneys and unrepresented parties shall appear at the scheduling and management conference in person or by remote electronic means. Regardless whether a scheduling and management conference is held, on motion of a party the court shall enter a scheduling order that governs the time:

(b)(1) to join other parties and to amend the pleadings;

(b)(2) to file motions; and

(b)(3) to complete discovery.

The scheduling order may also include:

(b)(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(b)(5) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(b)(6) any other matters appropriate in the circumstances of the case.

Unless the order sets the date of trial, any party may and the plaintiff shall, at the close of all discovery, certify to the court that the case is ready for trial. The court shall schedule the trial as soon as mutually convenient to the court and parties. The court shall notify parties of the date of trial and of any pretrial conference.

(c) Final pretrial or settlement conferences. In any action where a final pretrial conference has been ordered, it shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties, and the attorneys attending the pretrial, unless waived by the court, shall have available, either in person or by telephone, the appropriate parties who have authority to make binding decisions regarding settlement.

(d) Sanctions. If a party or a party's attorney fails to obey a scheduling or pretrial order, if no appearance is made on behalf of a party at a scheduling or pretrial conference, if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the court, upon motion or its own initiative, ~~may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanctions, the court shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust~~ may take any action authorized by Rule 37(b)(2).

Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party or person to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control, unless the party is unable to produce the person for examination. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of examining physician.

(b)(1) If requested by a party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the person examined and/or the other party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the report cannot be obtained. The court on motion may order delivery of a report on such terms as are just~~, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial~~.

(b)(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(b)(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude

discovery of a report of any other examiner or the taking of a deposition of an examiner in accordance with the provisions of any other rule.

(c) Right of party examined to other medical reports. At the time of making an order to submit to an examination under Subdivision (a) ~~of this rule~~, the court shall, upon motion of the party to be examined, order the party seeking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any examiner employed directly or indirectly by the party seeking the order for a physical or mental examination, or at whose instance or request such medical examination or treatment has previously been conducted. ~~If the party seeking the examination refuses to deliver such report, the court on motion and notice may make an order requiring delivery on such terms as are just; and if an examiner fails or refuses to make such a report the court may exclude the examiner's testimony if offered at the trial, or may make such other order as is authorized under Rule 37.~~

(d) Sanctions.

(d)(1) If a party fails to obey an order entered under Subdivision (c), the court on motion may take any action authorized by Rule37(b)(2).

(d)(2) If a party or a person in the custody or under the legal control of a party fails to obey an order entered under Subdivision (a), the court on motion may take any action authorized by Rule 37(b)(2), except that the failure cannot be treated as contempt of court.

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 fails to obey an order entered under Rule 16(b) or 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)~~, unless the court finds that the failure was substantially justified, the court in

which the action is pending may ~~make such orders~~ take such action in regard to the failure as are just, ~~and among others~~ including the following:

(b)(2)(A) ~~an order that the matters regarding which the order was made or any other designated facts shall be~~ taken ~~n~~ the matter or any other designated facts 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~~ prohibit the disobedient party ~~to support or oppose~~ from supporting or opposing designated claims or defenses~~,~~ or ~~prohibiting him~~ from introducing designated matters in evidence;

(b)(2)(C) ~~an order striking out~~ strike pleadings or parts thereof, stay~~ing~~ further proceedings until the order is obeyed, dismiss~~ing~~ the action or proceeding or any part thereof, or render~~ing 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.~~

(b)(2)(D) order the party or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure;

(b)(2)(E) treat the failure to obey an order as contempt of court; and

(b)(2)(F) instruct the jury regarding an adverse inference or effect of what the evidence would have shown.

(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~~ on motion may take any action authorized by Subdivision (b)(2).

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~~ on motion may take any action authorized by Subdivision (b)(2).

(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~~ on motion may take any action authorized by Subdivision (b)(2).

(g) Failure to preserve evidence. If a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty, the court on motion may take any action authorized by Subdivision (b)(2).

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: June 19, 2006
Re: Finality of judgments

Introduction.

Because of the severe consequences of failing to file a notice of appeal within 30 days after a judgment, identifying the judgment needs to be clear and unambiguous, the proverbial bright line. I conclude, however, that while we might be able to improve clarity, we cannot write a "failsafe" rule. The ultimate reason for this conclusion is Rule 58A(d): "A copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by the requirement of this provision." Assuming that this policy will not change, I believe that rule amendments can help prevent a minute entry from being treated as a judgment inadvertently, and that they can require the court to notify the parties that a judgment has been entered. But the consequence for failing to follow such a rule will be, as it is now, that the appeal time runs.

Rules of Procedure Unchanged

The rules of procedure are the same today as they were in 1953.[1] "An appeal may be taken … from all final orders and judgments…." URAP 3. "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." URCP 54(a). "A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided." URCP 58A(c). "An order includes every direction of the court, including a minute order entered in writing, not included in a judgment." URCP 7(f)(1).

Even the process for submitting a proposed order (prevailing party files proposed order within 15 days and serves opposing party prior to filing. 5 days to file objections), although it has moved from the Rules of Practice and Procedure to the Code of Judicial Administration to the Rules of Civil Procedure, remains essentially the same today as it did in 1976.

[1] This includes the text of Rule 7(f)(1): "An order for the payment of money may be enforced in the same manner as if it were a judgment." I therefore recommend that this sentence not be deleted.

Code v. Dept of Health, 2006 UT App 113.

Why is finality no longer clear when the rules have not changed? Judge McHugh's concurring opinion in *Code* concludes that it is because of a phrase added to Rule 7(f)(2) as part of the 2003 recodification.

> Unless the court approves the proposed order submitted with an initial memorandum, or *unless otherwise directed by the court*, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Id at ¶10, emphasis in original.)

Judge McHugh cites this provision as being in conflict with precedent governing finality.

> Thus, while the clear precedent from Utah appellate courts holds that a decision of the trial court is final for purposes of appeal unless the written decision expressly requires further action, rule 7(f) contemplates that a subsequent order will be entered after every decision unless the court directs otherwise. Id at ¶11, citations omitted.[2]

Analysis

The earlier versions of Rule 7(f)(2) required the prevailing party to submit a proposed order within 15 days of the judge's ruling. The judge could direct the party to submit the proposed order in less than 15 days, but there was no provision to exempt the prevailing party from the requirement. "In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen (15) days, or within such shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling." Rules of Practice and Procedure for the District and Circuit Courts. Rule 2.9(a) (1976). CJA Rule 4-504(1) was substantially the same.

If Rule 7(f)(2) is to play a role in the logical analysis, it should weigh against finality in the circumstances of the *Code* case: The minute entry is silent about whether anyone should prepare a proposed order; the rule says the prevailing party will prepare a proposed order; therefore, further action is required; therefore the minute entry is not final. The Court of Appeals chooses not to include Rule 7 in its analysis of what constitutes a judgment. Basically, the *Code* decision holds that if the minute entry satisfies all of the requirements of a judgment, it is a judgment. Rule 7 will not be used to create the requirement for further action; that must be done in the minute entry itself. Id at ¶6.

After the *Code* decision, if not before, there is a conflict between the caselaw and the rules.

Surveying the rules and caselaw yields the following summary description of a judgment: A judgment must be written, URCP 7(f); URCP 54(a) signed, and filed with the

[2] Although Judge McHugh highlights the phrase "unless otherwise directed by the court," it does not seem that this phrase creates the conflict. If there is a conflict, it is created rather by the balance of the paragraph that requires a proposed written order even though the ruling – usually recorded as a signed minute entry – does not require one. The balance of the paragraph dates back to 1976, so perhaps the conflict has come to light because the provision was moved from the administrative rules to the more prominent Rules of Civil Procedure.

clerk. URCP 58B(c). It must be entered in the judgment docket, URCP 58B(c), but that is a consequence of it being a judgment rather than a necessary feature. *Glacier Land Co. v. Klawe*, 2006 UT App 209, ¶3. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative, URCP 54(a), but I could find no caselaw on the consequence of a purported judgment that failed to do so. An order is final where "the effect of the order is to determine substantial rights and to terminate finally the litigation," or where "it [is] unlikely that any subsequent judgment would be entered from which an appeal could be taken." *Harris v. IES Assocs*., 2003 UT App 112, P53 (Utah Ct. App. 2003), citations omitted. It must terminate the litigation as to all parties. *Attorney General of Utah v. Pomeroy et al.*, 93 Utah 426; 73 P.2d 1277 (1937). The judgment must be susceptible of enforcement. *State v. Leatherbury*, 2003 UT 2, ¶9 (Utah 2003). It must leave nothing left to do. *Swenson Assocs. Architects, P.C. v. State by & Through Division of Facilities Constr. & Management*, 889 P.2d 415, 417 (Utah 1994). In the mid-1980s, the Supreme Court recognized that minute entries that meet these requirements are judgments. *Dove v. Cude*, 710 P.2d 170, 171 (Utah 1985).

In addition to recognizing as a judgment a minute entry that conforms to the requirements of a judgment, there may also be a growing willingness to treat a conforming minute entry as a judgment. Compare two much earlier cases with the recent *Code* decision. In *Hartford Accident & Indem. Co. v. Clegg*, 103 Utah 414, 135 P.2d 919, 922 (1943), the trial court minute entry, as quoted by the Supreme Court, read "the court rendered its decision that judgment be entered against plaintiff and in favor of defendant," yet the Court concluded that this was not a final judgment. In *Utah State Bldg. Bd. v. Walsh Plumbing Co.*, 16 Utah 2d 249, 399 P.2d 141 (1965), cited in *Code*, the Supreme Court stated: "While the February 24 pretrial order did recite that the action was dismissed with prejudice as to Industrial Indemnity Company, it did not purport to be a judgment, and no judgment was entered thereon until the one on April 2, 1964, referred to above."

The little text of the minute entries from *Clegg* and *Code* that are quoted are equivalent, yet the former is held not to be final and the latter is.[3] In *Walsh* the fact that a party later prepared an order – even though not required to do so by the minute entry – was taken as evidence that the minute entry was not intended to be final. In *Code*, the fact that the party prepared an order after the minute entry was given no effect.

Proposed Rule Amendments

The law regarding finality is of longstanding, and we should do nothing to disturb it. We might gather the various elements into a single provision, (They are now spread among Rule 54, Rule 58A and caselaw.) but even that carries with it the problem of misstating something, as I likely have done in my "survey" above.

In the *Code* decision, the Court of Appeals chose not to include Rule 7(f)(2) in its analysis of whether further action is required after a minute entry. Further action, if there is to be any, must be reflected in the minute entry itself. I recommend, therefore, that we amend the rules to: (1) require the clerk to serve the minute entry on the parties; and (2)

[3] Compare the minute entry in *Code*: "For the reasons stated above, the Court dismisses Plaintiff's claim." with that in *Clegg*: "the court rendered its decision that judgment be entered against plaintiff and in favor of defendant."

require the judge in the minute entry to direct a party to prepare a traditional judgment in conformity with the ruling or declare that the minute entry is the order. Some judges and clerks do this now, at least for some cases. Undoubtedly, this will place a burden on clerks, but we may eventually face a stark choice between the additional workload and uncertainty in the finality of a minute entry.

By serving the minute entry, the parties will be aware whether further action is required or whether the minute entry is itself the order. They can then be expected to act accordingly. Directing a party to prepare an order is sufficient for requiring further action. *Swenson Assocs. Architects, P.C. v. State by & Through Division of Facilities Constr. & Management*, 889 P.2d 415, 417 (Utah 1994). Directing a party to prepare a proposed order or declaring that the minute entry is the order should prevent a minute entry from inadvertently being a judgment. Declaring that the minute entry is the order probably will not necessarily control the result, (The minute entry will still have to meet the requirements of a judgment.) but at least the court's intent will be clear.

This will, in essence, reverse the presumption now contained in Rule 7(f)(2). The current presumption is that a party will prepare a proposed order absent a directive not to. After *Code*, that presumption is insufficient to prevent a minute entry from being treated as a judgment if the minute entry conforms to the requirements of a judgment. By reversing the presumption, the rule will require that the judge decide and state in the minute entry whether the minute entry is sufficient as a judgment or whether a party should prepare a proposed order. Since we cannot draft a failsafe rule, it seems best to leave the decision to judicial discretion.

There is no failsafe for protecting the time to appeal because our policy, as expressed in Rule 58A(d), is that failure to serve a judgment does not toll the time to appeal. "A copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by the requirement of this provision." Assuming that a similar policy will attach to anything required of the court, the default in the face of the court's failure in any of the particulars – to direct preparation of a proposed order, to declare that the minute entry is the order, or to serve the minute entry – will be that the appeal time runs.

Encl. URCP 7

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) ~~Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party~~ A court may rule on a matter in open court or by minute entry, memorandum decision, or other writing served on all parties. In a written ruling, the court shall expressly state whether a party is to prepare a proposed written order or whether the ruling is itself the order. The party directed by the court shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. If the party directed by the court fails to timely serve a proposed order, any party may serve upon the other parties a proposed order in conformity with the court's ruling. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(g) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.