Agenda
Advisory Committee on Rules of Civil Procedure

April 24, 2013
4: 00 to 6:00 p.m.

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

Approval of minutes	Tab 1	Fran Wikstrom
Rule 26. General provisions governing disclosure and discovery. Rule 81. Applicability of rules in general.	Tab 2	Mike Jensen
Rule 13. Counterclaim and cross-claim.	Tab 3	Nathan Whittaker
Post-trial motions: Rules 6, 50, 52, 59, 60.	Tab 4	Frank Carney
Rule 7. Pleadings allowed; motions, memoranda, hearings, orders. Combine memorandum and motion. Lines 7-71 and lines 141-146. Expedited procedures for discovery motions. Lines 103-120. Finality of orders under Rule 7(f). Lines 92-100. Service of motions to renew a judgment. Rule 58A. Entry of judgment; abstract of judgment.	Tab 5	Tim Shea
Certificates of service for e-filed documents		Leslie Slaugh
Rule 54. Statement of post judgment interest rate in final judgment.		Judge Todd Shaughnessy
FAQs	Tab 6	Fran Wikstrom

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

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

May 22, 2013
September 25, 2013
October 23, 2013
November 20, 2013

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

MARCH 27, 2013

PRESENT:	Francis M. Wikstrom, Chair, Trystan B. Smith, Terrie T. McIntosh, Barbara L. Townsend, Jonathan O. Hafen, Francis J. Carney, Honorable John L. Baxter, Honorable Kate Toomey, Professor Lincoln Davies, Honorable James T. Blanch
TELEPHONE:	Honorable Lyle R. Anderson, Honorable Derek Pullan, David W. Scofield, Lori Woffinden
STAFF:	Tim Shea, Sammi Anderson, Diane Abegglen
EXCUSED:	Honorable Todd M. Shaughnessy, Leslie W. Slaugh, Janet H. Smith, W. Cullen Battle
GUESTS:	Nathan Whittaker, Michael Jensen

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the February 27, 2013 minutes. The committee unanimously approved the minutes.

II. PROPOSED AMENDMENT TO RULE 13.

Nathan Whittaker joined the committee to request a revision to Rule 13, specifically Rule 13(e). Mr. Whittaker explained that Rule 3(e) is redundant of Rule 15(a) and presents the possibility for conflict. Mr. Carney wondered if the same logic would apply to Rule 13(d). The committee generally discussed the possibility of unintended consequences that could arise from deleting Rule 13(e). Mr. Whittaker noted that a conservative alternative could leave the Rule 13(e) provision, but strike the language that sets up an inconsistent standard with Rule 15. Mr. Smith noted that the concept set forth in Rule 13(e) appeared to track the language in Rule 60(b) and may therefore intentionally contemplate a different standard than that set forth in Rule 15. Mr. Wikstrom expressed a desire to table the issue for further review and discussion. The committee agreed and the proposed revision was tabled for further review and discussion.

III. POTENTIAL CONFLICTS BETWEEN RULE 106 AND SECTION 78B-12-201(8).

Mr. Whittaker discussed the conflict between Rule 106(a) and Section 78B-12-210(8) with respect to the procedural mechanism necessary to initiate a proceeding to modify child support orders. Mr. Whittaker took the committee through the legislative history on 78B-12- 210(8), showing what appears to be a clear legislative intent to use the words "move" and "motion", as opposed to the "petition" required under Rule 106. Mr. Whittaker explained that the earlier version of subsection 210(8) had used the word "petition", but was later changed by SB 182 to "move." Mr. Whittaker explained that the Office of Recovery Services ("ORS") frequently uses a "motion" to modify child support orders. The Board of District Court judges has also made available a form for these types of motions. The form contains some procedural safeguards, but not all. For example, it is not clear whether motions have to be served under Rule 4 or, since it is unclear what type of motion it is, what is the time period and evidentiary standard for responding. Mr. Wikstrom discussed the history behind changing Rule 106 to require "petitions". Mr. Wikstrom recalled that practitioners and parties were using Orders to Show Cause to modify child support orders and the judges did not appreciate this practice. Mr. Shea recalled that the primary use of the word "petition" was to ensure that the pleading was served under Rule 4.

Mr. Smith asked the judges on the committee whether responses to a Petition and Motion are treated the same conceptually. Judge Anderson opined that motions may push the tribunal away from evidence and toward a ruling on a legal motion as a matter of law. Judge Pullan expressed concerns as to service. Whatever the mechanism is called, it must be served under Rule 4. Judge Pullan explained that a great deal of time often passes between the divorce decree and these types of petitions/motions. Judge Pullan and Judge Anderson also both opined that these requests typically require courts to receive evidence. The committee agreed that personal service should be required. Previously, the evidence had shown that attorneys routinely withdraw once the divorce decree and initial final child support order are entered. Without an attorney of record, there is a real risk that service will not be effected by mail on the party at their last known address.

Mr. Wikstrom inquired whether changing Rule 106 to make it clear that Rule 4 service is required would be sufficient. Mr. Whittaker agreed, but stated that further guidance is required as to a time frame for responding, *e.g.*, 20 days for Petition or 10 days for Motion? Rule 7 or Rule 12 time limits? Mr. Whittaker opined that further guidance should also be given as to what type of motion it is, *e.g.*, Rule 12(b)(6) motion on the pleadings or a Rule 56 evidence-based motion? Plus, Mr. Whittaker stated, there must be some evidentiary disclosures required before a motion is heard so that parties can see whether there is any contested issue of fact. Judge Pullan opined that a motion to modify child support order should be a Rule 56-type motion because at least some evidentiary basis must be shown to grant the relief.

Mr. Wikstrom stated that we may need a procedure for addressing these statutory requests in the rules and suggested a subcommittee to work with Mr.

Whittaker to propose a procedure and some language addressing these issues. Mr. Leslie Slaugh was suggested as a person with the requisite expertise to chair the subcommittee. Judge Pullan suggested that the family law section may be interested in making a proposal and Mr. Carney suggested that ORS should be consulted as well. The committee will revisit the issue with the subcommittee next month.

IV. EFFECT OF DISCOVERY RULE CHANGES ON PROBATE PRACTICE.

Mr. Michael Jensen joined the committee to discuss the effects of the rule changes on probate practice. Mr. Jensen explained that the new discovery rules do not always make sense considering the procedure by which most probate matters are resolved. Mr. Jensen explained that probate matters are typically initiated by a Petition of some sort, which is generally filed with all the supporting documents attached, rendering the Initial Disclosures unnecessary, at least with respect to the initiating party. Probate cases are heard on a screening calendar on a weekly basis where the court asks if anyone objects to the particular relief sought. If a person enters any kind of objection, the matter is sent to a mediation and then to an assigning judge if necessary. The unique procedures raise several potential questions as to the practical applicability of the new discovery rules to probate practice. For example, it is often difficult to ascertain which of the parties is the plaintiff or the defendant, and whether initial disclosures are really necessary where the list of potential beneficiaries is typically established and provided in the initial petition. Moreover, the tier system may not be particularly helpful because most proceedings don't involve a dollar amount.

The committee and Mr. Jensen acknowledged that perhaps it would be appropriate to have a separate rule to define the procedures in this unique area of the law, either a separate practice-specific disclosure requirement or a completely separate series of rules. Mr. Wikstrom encouraged Mr. Jensen to look at the practice-specific disclosures in Rule 26.1 and 26.2, and to consult with his probate colleagues to see whether a proposal can be made as to a practice-specific disclosure or a new set of rules. Mr. Wikstrom explained that the proposal should be consistent with the philosophy of the rule changes, but that, otherwise, the committee will review and consider a proposal that is grounded in the probate practitioners' needs.

V. EFFECT OF DISCOVERY AND DISCLOSURE CHANGES ON FAMILY LAW PRACTICE.

Judge Pullan provided some feedback regarding the discovery rule changes from the family law practitioners. Judge Pullan explained that many family law practitioners take retainers on a staged basis, *eg*, a retainer to file a complaint, a new retainer to start discovery, etc. The waiting period allows parties to come up with the money to pursue their actions. The new system requiring immediate disclosures and significant case preparation up front has made the prior model employed by some family law practitioners untenable. Judge Pullan said he is

merely passing along the complaint, not making a recommendation for change. The committee discussed how this reported issue comports with the goal of the new rules to reduce discovery, speed up resolution of cases and increase access to the judicial system. The committee tabled the topic for future discussion after sufficient time for practitioners and parties to adjust to the changes required by the new rules.

VI. PROPOSED REVISIONS TO RULE 7.

Mr. Shea led a discussion concerning proposed revisions to Rule 7. The proposed changes include incorporating the expedited procedure for resolving discovery disputes, a request from the Supreme Court to consider finality of judgments, a suggestion from Judge Anderson that a motion to amend a judgment be served, a suggestion from Judge Shaughnessy to require a combined motion and memorandum, and a proposal by Judge West to eliminate the filing of proposed orders with a motion.

The committee agreed with Judge West's proposal to eliminate proposed orders at the time of filing motions. There was a motion to eliminate the sentence found on line 27, p. 20 of the materials. Mr. Hafen suggested making the language mandatory, as opposed to eliminating the sentence. Judge Pullan expressed a preference to indicate that a party "shall not" attach a proposed order to its initial memorandum. This substitute motion was seconded and approved by the committee.

The committee generally agreed with Judge Shaughnessy's proposal that Rule 7 should be changed to require a combined motion and memorandum. The committee also discussed reworking this entire section to set forth the core requirements of a motion and supporting memorandum. Mr. Hafen agreed to work with Mr. Shea to re-work the motion and memorandum requirements for presentation to the committee at the next meeting.

The Supreme Court issued an opinion in *Central Utah Water Conservancy District v. King*, which directed the committee to re-examine the issue of the finality of judgments. Mr. Shea observed that the Court has essentially asked the committee to review Rule 7(f)(2) and address the possibility of endlessly hanging appeals because no final judgment has been entered. There was much discussion regarding which change(s) should be imposed and which committee, this one or the Appellate Rules committee, should spearhead that revision(s). The committee tabled the issue for further review of the case and further consideration and discussion at the next meeting.

The committee discussed the incorporation of the expedited procedures for discovery motions in Rule 7. Mr. Shea emphasized that the procedure is not a prerequisite to a motion. The expedited procedure replaces the motion. Time frames are shorter. Written materials are shorter. Decisions should issue promptly. This is the full extent of the parties' relief. No further motion is allowed. The

committee discussed imposing a time requirement by which the motion would have to be decided. The committee decided to leave the wording that judges should decide the motions "promptly," as opposed to within a certain number of days. There was a motion to approve the revisions as proposed at ll. 87-123, p. 22-24 of the materials. The motion was seconded and approved by the full committee.

Remaining issues as to Rule 7 will be discussed at the next meeting.

VII. ADJOURNMENT.

The meeting adjourned at 6:03 pm. The next meeting will be held on April 24, 2013 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

Rule 26. General provisions governing disclosure and discovery.

(a) **Disclosure.** This rule applies unless changed or supplemented by a rule governing disclosure and discovery in a practice area.

(a)(1) **Initial disclosures.** Except in cases exempt under paragraph (a)(3), a party shall, without waiting for a discovery request, serve on the other parties:

(a)(1)(A) the name and, if known, the address and telephone number of:

(a)(1)(A)(i) each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and

(a)(1)(A)(ii) each fact witness the party may call in its case-in-chief and, except for an adverse party, a summary of the expected testimony;

(a)(1)(B) a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5);

(a)(1)(C) a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered;

(a)(1)(D) a copy of any agreement under which any person may be liable to satisfy part or all of a judgment or to indemnify or reimburse for payments made to satisfy the judgment; and

(a)(1)(E) a copy of all documents to which a party refers in its pleadings.

(a)(2) **Timing of initial disclosures.** The disclosures required by paragraph (a)(1) shall be served on the other parties:

(a)(2)(A) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(a)(2)(B) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant’s appearance, whichever is later.

(a)(3) **Exemptions.**

(a)(3)(A) Unless otherwise ordered by the court or agreed to by the parties, the requirements of paragraph (a)(1) do not apply to actions:

(a)(3)(A)(i) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(a)(3)(A)(ii) governed by Rule 65B or Rule 65C;

(a)(3)(A)(iii) to enforce an arbitration award;

(a)(3)(A)(iv) for water rights general adjudication under Title 73, Chapter 4, Determination of Water Rights;

(a)(3)(A)(v) commenced under Title 75 or under CJA Rule 6-501.

(a)(3)(B) In an exempt action, the matters subject to disclosure under paragraph (a)(1) are subject to discovery under paragraph (b).

(a)(4) **Expert testimony.**

(a)(4)(A) **Disclosure of expert testimony.** A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony: (i) the expert's name and qualifications, including a list of all publications authored within the preceding 10 years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony.

(a)(4)(B) **Limits on expert discovery.** Further discovery may be obtained from an expert witness either by deposition or by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall be signed by the expert and shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. Such an expert may not

testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

(a)(4)(C) **Timing for expert discovery.**

(a)(4)(C)(i) The party who bears the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election isserved on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(ii) The party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition pursuant to paragraph (a)(4)(C)(i). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(C)(iii) If the party who bears the burden of proof on an issue wants to designate rebuttal expert witnesses it shall serve on the other parties the information required by paragraph (a)(4)(A) within seven days after the later of (A) the date on which the election under paragraph (a)(4)(C)(ii) is due, or (B) receipt of the written report or the taking of the expert's deposition

pursuant to paragraph (a)(4)(C)(ii). Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant to paragraph (a)(4)(B) and Rule 30, or a written report pursuant to paragraph (a)(4)(B). The deposition shall occur, or the report shall be served on the other parties, within 28 days after the election is served on the other parties. If no election is served on the other parties, then no further discovery of the expert shall be permitted.

(a)(4)(D) **Multiparty actions.** In multiparty actions, all parties opposing the expert must agree on either a report or a deposition. If all parties opposing the expert do not agree, then further discovery of the expert may be obtained only by deposition pursuant to paragraph (a)(4)(B) and Rule 30.

(a)(4)(E) **Summary of non-retained expert testimony.** If a party intends to present evidence at trial under Rule 702 of the Utah Rules of Evidence from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must serve on the other parties a written summary of the facts and opinions to which the witness is expected to testify in accordance with the deadlines set forth in paragraph (a)(4)(C). A deposition of such a witness may not exceed four hours.

(a)(5) **Pretrial disclosures.**

(a)(5)(A) A party shall, without waiting for a discovery request, serve on the other parties:

(a)(5)(A)(i) the name and, if not previously provided, the address and telephone number of each witness, unless solely for impeachment, separately identifying witnesses the party will call and witnesses the party may call;

(a)(5)(A)(ii) the name of witnesses whose testimony is expected to be presented by transcript of a deposition and a copy of the transcript with the proposed testimony designated; and

(a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.

(a)(5)(B) Disclosure required by paragraph (a)(5) shall be served on the other parties at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.

(b) **Discovery scope.**

(b)(1) **In general.** Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

(b)(2) **Proportionality.** Discovery and discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

(b)(3) **Burden.** The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

(b)(4) **Electronically stored information.** A party claiming that electronically stored information is not reasonably accessible because of undue burden or cost shall describe the source of the electronically stored information, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to evaluate the claim.

(b)(5) **Trial preparation materials.** A party may obtain otherwise discoverable documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials and that the party is unable without undue hardship to obtain substantially equivalent materials by other means. In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(b)(6) **Statement previously made about the action.** A party may obtain without the showing required in paragraph (b)(5) a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement about the action or its subject matter previously made by that person. If the request is refused, the person may

move for a court order under Rule 37. A statement previously made is (A) a written statement signed or approved by the person making it, or (B) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(b)(7) **Trial preparation; experts.**

(b)(7)(A) **Trial-preparation protection for draft reports or disclosures.** Paragraph (b)(5) protects drafts of any report or disclosure required under paragraph (a)(4), regardless of the form in which the draft is recorded.

(b)(7)(B) **Trial-preparation protection for communications between a party's attorney and expert witnesses.** Paragraph (b)(5) protects communications between the party's attorney and any witness required to provide disclosures under paragraph (a)(4), regardless of the form of the communications, except to the extent that the communications:

(b)(7)(B)(i) relate to compensation for the expert's study or testimony;

(b)(7)(B)(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(b)(7)(B)(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(b)(7)(C) **Expert employed only for trial preparation.** Ordinarily, a party may not, by interrogatories or otherwise, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may do so only:

(b)(7)(C)(i) as provided in Rule 35(b); or

(b)(7)(C)(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(b)(8) **Claims of privilege or protection of trial preparation materials.**

(b)(8)(A) **Information withheld.** If a party withholds discoverable information by claiming that it is privileged or prepared in anticipation of litigation or for trial, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing the information itself, will enable other parties to evaluate the claim.

(b)(8)(B) **Information produced.** If a party produces information that the party claims is privileged or prepared in anticipation of litigation or for trial, the producing party may notify any receiving party of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) **Methods, sequence and timing of discovery; tiers; limits on standard discovery; extraordinary discovery.**

(c)(1) **Methods of discovery.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; requests for admission; and subpoenas other than for a court hearing or trial.

(c)(2) **Sequence and timing of discovery.** Methods of discovery may be used in any sequence, and the fact that a party is conducting discovery shall not delay any other party's discovery. Except for cases exempt under paragraph (a)(3), a party may not seek discovery from any source before that party’s initial disclosure obligations are satisfied.

(c)(3) **Definition of tiers for standard discovery.** Actions claiming $50,000 or less in damages are permitted standard discovery as described for Tier 1. Actions claiming more than $50,000 and less than $300,000 in damages are permitted

standard discovery as described for Tier 2. Actions claiming $300,000 or more in damages are permitted standard discovery as described for Tier 3. Absent an accompanying damage claim for more than $300,000, actions claiming non-monetary relief are permitted standard discovery as described for Tier 2.

(c)(4) **Definition of damages.** For purposes of determining standard discovery, the amount of damages includes the total of all monetary damages sought (without duplication for alternative theories) by all parties in all claims for relief in the original pleadings.

(c)(5) **Limits on standard fact discovery.** Standard fact discovery per side (plaintiffs collectively, defendants collectively, and third-party defendants collectively) in each tier is as follows. The days to complete standard fact discovery are calculated from the date the first defendant's first disclosure is due and do not include expert discovery under paragraphs(a)(4)(C) and (D).

Tier	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to Complete Standard Fact Discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

(c)(6) **Extraordinary discovery.** To obtain discovery beyond the limits established in paragraph (c)(5), a party shall file:

(c)(6)(A) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a stipulated statement that extraordinary discovery is necessary and proportional under paragraph (b)(2) and that each party has reviewed and approved a discovery budget; or

(c)(6)(B) before the close of standard discovery and after reaching the limits of standard discovery imposed by these rules, a motion for extraordinary discovery setting forth the reasons why the extraordinary discovery is necessary and proportional under paragraph (b)(2) and certifying that the party has reviewed and approved a discovery budget and certifying that the party has in good faith conferred or attempted to confer with the other party in an effort to achieve a stipulation.

(d) **Requirements for disclosure or response; disclosure or response by an organization; failure to disclose; initial and supplemental disclosures and responses.**

(d)(1) A party shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(2) If the party providing disclosure or responding to discovery is a corporation, partnership, association, or governmental agency, the party shall act through one or more officers, directors, managing agents, or other persons, who shall make disclosures and responses to discovery based on the information then known or reasonably available to the party.

(d)(3) A party is not excused from making disclosures or responses because the party has not completed investigating the case or because the party challenges the sufficiency of another party's disclosures or responses or because another party has not made disclosures or responses.

(d)(4) If a party fails to disclose or to supplement timely a disclosure or response to discovery, that party may not use the undisclosed witness, document or material

at any hearing or trial unless the failure is harmless or the party shows good cause for the failure.

(d)(5) If a party learns that a disclosure or response is incomplete or incorrect in some important way, the party must timely serve on the other parties the additional or correct information if it has not been made known to the other parties. The supplemental disclosure or response must state why the additional or correct information was not previously provided.

(e) **Signing discovery requests, responses, and objections.** Every disclosure, request for discovery, response to a request for discovery and objection to a request for discovery shall be in writing and signed by at least one attorney of record or by the party if the party is not represented. The signature of the attorney or party is a certification under Rule 11. If a request or response is not signed, the receiving party does not need to take any action with respect to it. If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, may take any action authorized by Rule 11 or Rule 37(e).

(f) **Filing.** Except as required by these rules or ordered by the court, a party shall not file with the court a disclosure, a request for discovery or a response to a request for discovery, but shall file only the certificate of service stating that the disclosure, request for discovery or response has been served on the other parties and the date of service.

Advisory Committee Notes

Legislative Note

Rule 81. Applicability of rules in general.

(a) **Special statutory proceedings.** These rules shall apply to all special statutory proceedings, except insofar as such rules are by their nature clearly inapplicable. Where a statute provides for procedure by reference to any part of the former Code of Civil Procedure, such procedure shall be in accordance with these rules.

(b) ~~**Probate and guardianship**~~ **Title 75 and CJA Rule 6-501.** These rules shall not apply to uncontested proceedings ~~in uncontested probate and guardianship matters~~ under Title 75 or under CJA Rule 6-501, but shall apply ~~to all proceedings subsequent to the joinder of issue therein~~ once the proceeding becomes contested, including the enforcement of any judgment or order entered.

(c) **Application to small claims.** These rules shall not apply to small claims proceedings except as expressly incorporated in the Small Claims Rules.

(d) **On appeal from or review of a ruling or order of an administrative board or agency.** These rules shall apply to the practice and procedure in appealing from or obtaining a review of any order, ruling or other action of an administrative board or agency, except insofar as the specific statutory procedure in connection with any such appeal or review is in conflict or inconsistent with these rules.

(e) **Application in criminal proceedings.** These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement.

Tab 3

MEMORANDUM

To: Advisory Committee on Civil Procedure
From: Nathan Whittaker
Date: April 15, 2013
Re: Rule 13(e)—options for amendment

Based on the discussion at the last meeting, I have put together three approaches for the Committee to consider in amending Rule 13(e).

I. DELETION

The first option is just to delete Rule 13(e), just as was done in the federal rules. This has the advantages of being simple and clean, but there may be a risk of misunderstanding the Committee's intent in deleting this section—rather than making it clear that an amendment to state a counterclaim should be treated like other amendments, there is a danger that parties and courts would conclude that the deletion of Rule 13(e) was intended to bar amendment of pleadings to state a counterclaim. The Committee must decide if an Advisory Committee Note would be sufficient to clarify the purpose of the deletion.

If the Committee chooses deletion, it should probably choose to follow the federal practice and indicate that the paragraph has been abrogated, rather than changing the numbering of Paragraphs (f) through (j).[1] The Committee should also explain the purpose behind the deletion in an Advisory Committee Note, such as:

1. *See* BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES § 3.2(D) ("If redrafting results in new subparts, ensure that the numbering of oft-cited rules . . . does not change.").

> Rule 13(e) has been deleted as largely redundant and potentially misleading. An amendment to add a counterclaim is governed by Rule 15.[2]

II. AMENDMENT

If the Committee would rather keep the substance of Rule 13(e) in the rules, it must decide how to style the amendment. URCP 13 is essentially the 1938 federal rule verbatim; it is in dire need of restyling to make it clearer and more readable. As I am unaware of the Committee's plans on restyling the rules, I have put together two versions: one that matches the current wording of URCP 13, and one that would be more at home in the restyled federal rules.[3]

Traditional wording

> When a pleader fails to state a counterclaim, the pleader may add a counterclaim by amendment.

Modern wording

> A party may amend a pleading to add a counterclaim under if it was omitted in an earlier pleading.

I would also suggest that an Advisory Committee Note be added that says something like—

> Rule 13(e) has been amended to clarify that amending a pleading to add a counterclaim is governed by Rule 15(a).

2. This language is essentially the first two sentences of the Committee Note to the 2009 amendment of FRCP 13.

3. I have attached a copy of FRCP to give the Committee an idea of what the rule might look like once restyled.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 13.
COUNTERCLAIM AND CROSSCLAIM.

(a) Compulsory Counterclaim.

(1) In General. A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(2) Exceptions. The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) Permissive Counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) Relief Sought in a Counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim Against the United States. These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.

(e) Counterclaim Maturing or Acquired After Pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(f) [Abrogated.][1]

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1. Before deletion, the rule read:

(Cont.)

(g) Crossclaim Against a Coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) Joining Additional Parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(i) Separate Trials; Separate Judgments. If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

Committee Notes on Rules—2009 Amendment

Rule 13(f) is deleted as largely redundant and potentially misleading. An amendment to add a counterclaim will be governed by Rule 15. Rule 15(a)(1) permits some amendments to be made as a matter of course or with the opposing party's written consent. When the court's leave is required, the reasons described in Rule 13(f) for permitting amendment of a pleading to add an omitted counterclaim sound different from the general amendment standard in Rule 15(a)(2), but seem to be administered—as they should be—according to the same standard directing that leave should be freely given when justice so requires. The independent existence of Rule 13(f) has, however, created some uncertainty as to the availability of relation back of the amendment under Rule 15(c). *See* 6 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D, § 1430 (1990). Deletion of Rule 13(f) ensures that relation back is governed by the tests that apply to all other pleading amendments.

(f) Omitted Counterclaim. The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

Tab 4

Trial and Post-Trial Motions

Francis J. Carney

I wish the Advisory Committee to consider several aspects of our rules on trial and post-trial motions. Short papers on each of these issues follow.

1. Names- do we want to update the names of the motion "for directed verdict" and motion "JNOV" as the federal rules did some years ago?

2. Timing- all the federal rules are to be **filed** on a certain date; our state rules have a confusing mix of events: served or "made" or "move."

3. All of our post-trial motions (except Rule 60) motions are to be made within 10 days of entry of judgment. The federal rules were amended in 2009 to allow a more realistic 28 days. (Note that these deadlines are jurisdictional and *cannot* be extended by stipulation or order.) Do we want to do likewise?

4. We have a procedural trap in our state rule 50(b); namely, that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence. The federal rules have eliminated this trap, and we should consider doing so as well.

5. In general terms, the rewrite of the federal trial and post-trial motions rules make them clearer than our state rules. We may want to consider adopting the federal versions.

Names of Trial Motions

Rule 50 describes the motions for a "directed verdict" and for "judgment notwithstanding the verdict."

Do we want to revise the antiquated and anachronistic names of these motions-- as the federal courts did more than twenty years ago-- to motions "for judgment as a matter of law" and "renewal of motion for judgment as a matter of law."

The note to the 1991 federal rule amendment is useful:

> *The revision abandons the familiar terminology of "direction of verdict" for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding*.

I wonder if we want to revamp Rule 50 to modernize and simplify the language.

Timing for Post-Trial Motions: Filed/Served/Move/Made

State	Federal
Rule 50: Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict. Rule 50(b)- . . . Not later than ten days after the entry of judgment, a party who has moved for a directed verdict may **move** to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for directed verdict.	Rule 50- Judgment as a Matter of Law (b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may **file** a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.
Rule 59 New trials; amendments of judgment. (b) Time for motion. A motion for a new trial shall be **served** not later than 10 days after the entry of the judgment. (e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be **served** not later than 10 days after entry of the judgment.	Rule 50(d)- Time for Rule 59 New Trial Motion (d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be **filed** no later than 10 days after the entry of the judgment.
	Rule 59. New Trial; Altering or Amending a Judgment (b) Time to File a Motion for a New Trial. A motion for a new trial must be **filed** no later than 10 days after the entry of judgment.
	Rule 59 (e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be **filed** no later than 10 days after the entry of the judgment.

Rule 60. Relief from judgment or order. The motion shall be **made** within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken.	Rule 60. Relief from Judgment or Order (c)(1) Timing. A motion under Rule 60(b) must be **made** within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
Rule 52. Findings by the court. (b) Amendment. Upon motion of a party **made** not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly.	Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings (b) Amended or Additional Findings. On a party's motion **filed** no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly.

Note:

U.R.Civ.P 6(b) Enlargement: *When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;* ***but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.***

Timing for Post-Trial Motions: 10 or 28 days?

All post-trial motions (with the exception of Rule 60 motions to alter or amend judgment) must be "made/moved/served" within **10 days** of entry of the judgment.

The federal rules were changed in 2009 to allow **28 days** on all such motions. This is the federal Advisory Committee Note:

> *Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.*

Do we want to similarly extend the deadline for these motions in state practice? The considerations are the same for state practice as they are for federal.

The Trap in Rule 50 on JNOV

It is the rule that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence.

The theory behind the requirement was to permit the party subject to the motion a chance to produce what is needed to fix the "gap" in the sufficiency of the evidence. Failure to renew it at the close of all the evidence barred the party from making a motion for JNOV on "lack of legal sufficiency" grounds. Wright & Miller has a good discussion of this point:

> *Prior to the 2006 amendment of the Federal Rule, it was long established that a post-verdict motion under Rule 50(b) for judgment as a matter of law could not be made unless a previous Rule 50(a) motion for judgment as a matter of law was made by the moving party at the close of all the evidence. The purpose of requiring a renewed motion for judgment as a matter of law at that time was to give the opposing party an opportunity to cure the defects in proof that otherwise might preclude the party from taking the case to the jury. A large sample of illustrative and relatively recent cases is set out in the note below.*
>
> *Because this requirement was a potential trap for the unwary, the federal courts fortunately took a liberal view of what constituted a motion for judgment as a matter of law at the close of all the evidence in deciding whether there was a sufficient foundation for the later motion under Rule 50(b). The note below contains numerous examples of the mechanisms used by the courts to employ the liberal view of what constitutes an end of trial motion for judgment as a matter of law. Other courts, however, were less willing to excuse noncompliance with the requirement of the rule and applied it in a more demanding fashion.*
>
> . . .
>
> *Before the rule was amended in 2006, when the movant failed inexcusably to raise an objection to the sufficiency of evidence in a motion for judgment as a matter of law at the close of all the evidence, some courts denied all review, although others reviewed, but only for clear error. . . This review was exceedingly narrow, and only unusual circumstances justified allowing a motion at the close of the plaintiff's case to stand in place of a motion at the close of all the evidence.*
>
> *The 2006 amendments were designed to render all of this confusion and technicality*

moot. The amendments revised Rule 50(b) to permit renewal after verdict of any Rule 50(a) motion for judgment as a matter of law. This abolished the earlier requirement that a motion for judgment as matter of law had to be made at the close of all the evidence. However, the district court only can grant the Rule 50(b) motion on the grounds advanced in the preverdict motion, because the former is conceived of as only a renewal of the latter . . . .

9B Fed. Prac. & Proc. Civ.3d § 2537.

The federal Advisory Committee Note to the 2006 amendments makes clear that removing this procedural trap was the intent of the amendments:

> ***Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence.*** *Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. . . .*
>
> *This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.*
>
> *Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.*
>
> . . .

(Emphasis added.)

So federal Rule 50(b) now reads:

> *If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.*

But our Utah Rule 50(b) still requires the motion to be renewed at the close of all the evidence:

> *Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict* ***made at the close of all the evidence*** *is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict . . . .*

(Emphasis added.)

I know of no Utah case on point, but there are plenty of federal cases (pre-amendment) that dinged an appellant on this[1], and the rule seems clear that the motion must be renewed at the close of all the evidence.

Do we want to change this?

[1] *See, e.g., Davoll v. Webb,* 194 F.3d 1116, 1136 (10th Cir. 1999).

major life activity, and with respect to the issue of their qualifications, that the plaintiffs have not established as a matter of law that any of the plaintiffs have met all of the qualifications and requirements of the employer." *Id.* at 3665. Denver then put on its defense, which included calling numerous witnesses. At the close of all the evidence, plaintiffs moved for judgment as a matter of law but Denver did not.

***1136** [28] A failure to move for a directed verdict on a particular issue will bar appellate review of that issue. *See FDIC v. United Pac. Ins. Co.*, 20 F.3d 1070, 1076 (10th Cir.1994) ("Defendant's failure to raise the bond coverage issue in its directed verdict motion precludes us from reviewing the sufficiency of the evidence to support the jury's bond coverage finding"); *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1551 (10th Cir.1989) ("Failure to move for a directed verdict on this ground ... precludes Defendant from challenging the sufficiency of the evidence of crashworthiness negligence on appeal."); *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1478 (10th Cir.1985). Similarly, "[a]s a general rule, a defendant's motion for directed verdict made at the close of the plaintiff's evidence is deemed waived if not renewed at the close of all the evidence; failure to renew that motion bars consideration of a later motion for judgment n.o.v."*Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1455 (10th Cir.1987) (citing cases). "Failure to renew the motion thus prevents a defendant from challenging the sufficiency of the evidence on appeal." *Id.; see also* 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2536 (2d ed. 1994) ("It is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court. Indeed a motion at the close of plaintiff's case will not do unless it is renewed at the close of all the evidence.").

Denver did not move for judgment as a matter of law on whether plaintiffs were qualified for vacant positions at the close of the evidence, and never moved for judgment as a matter of law on the undue hardship issue. Denver does not contend otherwise, nor does it claim that it should be excepted from the general rule precluding appellate review. We therefore decline to consider its sufficiency of evidence claims.

C. Evidentiary Issues

[29][30] Denver asserts the district court erred in four of its evidentiary and discovery rulings. Specifically, Denver contests (1) the district court's prohibition of the term "affirmative action" and like phrases at trial; (2) the introduction of one of Denver's responses to a request for an admission; (3) the admission of Dr. Kleen's testimony; and (4) the denial of Denver's motion to extend expert witness discovery and for examination of plaintiffs pursuant to Fed.R.Civ.P. 35. We review a district court's evidentiary rulings and rulings on motions in limine for an abuse of discretion. *See McCue v. Kansas Dept. of Human Resources*, 165 F.3d 784, 788 (10th Cir.1999); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1092 (10th Cir.1997). We review de novo a district court's interpretation of the Federal Rules of Evidence. *See Reeder v. American Econ. Ins. Co.*, 88 F.3d 892, 894 (10th Cir.1996).

1. *Prohibition on "Affirmative Action" and Like Terms*

[31] We first address whether the district court erred in granting plaintiffs' motion in limine prohibiting Denver from using terms like "affirmative action," "special rights," and "preferences." In granting that motion, the district court stated, "[w]ith regard to the issues of defendants using language at trial that plaintiffs were seeking preferences or affirmative action or special rights, defendants are precluded from using such language because it would simply muddy the waters and obfuscate the issues, and its prejudicial effect might outweigh its probative value." Aplt.App. at 2767. On appeal,

50(a), "[a] motion for a directed verdict shall state the specific grounds therefor." A motion for judgment n.o.v. cannot assert new matters not presented in the motion for directed verdict. *Dow Chemical Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 486 (10th Cir.1990); *United States v. Fenix & Scisson, Inc.*, 360 F.2d 260, 265 (10th Cir.1966), *cert. denied*,386 U.S. 1036, 87 S.Ct. 1474, 18 L.Ed.2d 599 (1967).

[4] This court has recognized that in satisfying the requirements of Rule 50, technical precision is unnecessary. *Fenix & Scisson*, 360 F.2d at 266. Because the requirement of Rule 50 that a directed verdict motion must precede a motion for judgment n.o.v. is " 'harsh in any circumstance [ ],' " a directed verdict motion should not be reviewed narrowly but rather in light of the purpose of the rules to secure a just, speedy, and inexpensive determination of a case. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2537, at 597 n. 32 (1971) (quoting *Mosley v. Cia. Mar. Adra S.A.*, 362 F.2d 118, 121-22 (2d Cir.1966), *cert. denied*,385 U.S. 933, 87 S.Ct. 292, 17 L.Ed.2d 213, 385 U.S. 933, 87 S.Ct. 296, 17 L.Ed.2d 213 (1966)); *see also National Indus., Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1549 (11th Cir.1986) (taking liberal view because "rule is a harsh one"). As the Fourth Circuit has noted, "rigid application of this rule is inappropriate ... where such application serves neither of the rule's rationales-protecting the Seventh Amendment right to trial by jury, and ensuring that the opposing party has enough notice of the alleged error to permit an attempt to cure it before resting." *FSLIC v. Reeves*, 816 F.2d 130, 138 (4th Cir.1987); *see also McCarty v. Pheasant Run, Inc.* 826 F.2d 1554, 1556 (7th Cir.1987) (modern rationale of rule is opposing party should have opportunity to rectify deficiencies in evidence presented to jury before it is too late); *Miller v. Rowan Cos.*, 815 F.2d 1021, 1024 n. 4, 1025 (5th Cir.1987) (aims of rule include avoiding trapping plaintiff after submittal to jury because he cannot then cure defects in proof and securing fair trial); *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1429 (9th Cir.1986) (purpose of directed verdict motion is to provide notice of claimed evidentiary insufficiencies and preserve issue of sufficiency of evidence as question of law); *Sharon Steel Corp.*, 781 F.2d at 1549 (purpose of directed verdict requirement is to avoid ambushing court and opposing party after the verdict so that only remedy is completely new trial) (citing *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018, 1025 (5th Cir.1979)); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 831-32 (3d Cir.1983) (same) (citing *Wall v. United States*, 592 F.2d 154 (3d Cir.1979)).

Here, UTC moved for a directed verdict on the blacklisting claim after Anderson had presented his case at trial. At the close of all the evidence, UTC again moved for a directed verdict on the blacklisting claim. In this directed verdict motion, UTC specifically argued there was insufficient ***1504** evidence to support a claim for civil blacklisting under section 44-119. Following the jury verdict, UTC filed a motion for judgment n.o.v. and a motion for new trial on the grounds the evidence was insufficient to support the civil blacklisting claim. Because UTC raised insufficiency of the evidence on the blacklisting claim as specific grounds for both the motion for directed verdict and the motion for judgment n.o.v., we hold UTC has complied with the requirements of Rule 50.

Anderson argues Rule 50 demands that UTC must have stated in the directed verdict motion the evidence is insufficient to prove the element of a criminal blacklisting conviction. Although Rule 50(a) requires a motion for directed verdict to state the "specific grounds," the rule does not define how specific the grounds must be. We are convinced that UTC's directed verdict motion satisfies the rule's requirement. To be sure, a more specific motion may be upheld. *See, e.g., Acosta*, 717 F.2d at 832; *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 179 n. 2 (5th Cir.1983), *cert. denied*,464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984). However, a significant number of the cases interpreting Rule 50's specificity requirement have accepted less specificity in directed verdict motions. *See, e.g., Sharon Steel*, 781 F.2d at 1548-49

From Anderson v United Tel.

Rules on Trial and Post-Trial Motions

UTAH RULES OF CIVIL PROCEDURE[1]

Rule 6. Time

(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; **but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.**

Rule 41. Dismissal of actions.

(b) Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) Motion for directed verdict; when made; effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict **made at the close of all the evidence** is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than **ten days** after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within **ten days** after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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[1]All added emphasis is mine.

(c) Same: conditional rulings on grant of motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than **ten days** after entry of the judgment notwithstanding the verdict.

(d) Same: denial of motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 52. Findings by the court; correction of the record.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than **10 days** after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(c)(1) by default or by failing to appear at the trial;

(c)(2) by consent in writing, filed in the cause;

(c)(3) by oral consent in open court, entered in the minutes.

(d) . . .

Rule 59. New trials; amendments of judgment.

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) **Insufficiency of the evidence to justify the verdict** or other decision, or that it is against law.

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than **10 days** after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than **10 days** after entry of the judgment.

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within **a reasonable time** and for reasons (1), (2), or (3), not more than **3 months** after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 6(B) EXTENDING TIME.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions. **A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)**.

RULE 50. JUDGMENT AS A MATTER OF LAW IN A JURY TRIAL; RELATED MOTION FOR A NEW TRIAL; CONDITIONAL RULING

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than **28 days** after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than **28 days** after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than **28 days** after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

RULE 52. FINDINGS AND CONCLUSIONS BY THE COURT; JUDGMENT ON PARTIAL FINDINGS

(a) Findings and Conclusions.

(1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) For an Interlocutory Injunction. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) For a Motion. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) Effect of a Master's Findings. A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Findings of fact, whether based on oral or other evidence, must not be set aside unless Setting Aside the Findings. clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than **28 days** after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).[2]

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[2]This is the equivalent to Utah Rule of Civil Procedure 41(b) ("The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to

RULE 59. NEW TRIAL; ALTERING OR AMENDING A JUDGMENT

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than **28 days** after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than **28 days** after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than **28 days** after the entry of the judgment.

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

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render any judgment until the close of all the evidence").

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within **a reasonable time**—and for reasons (1), (2), and (3) no more than **a year** after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) . . .

Rule 6. Time.

~~(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.~~

~~(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.~~

~~(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action that has been pending before it.~~

~~(d) Notice of hearings. Notice of a hearing shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.~~

~~(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him~~

~~by mail, 3 days shall be added to the end of the prescribed period as calculated under subsection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.~~

(a) **Computing time**. The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(a)(1) When the period is stated in days or a longer unit of time:

(a)(1)(A) exclude the day of the event that triggers the period;

(a)(1)(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(a)(1)(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(a)(2) When the period is stated in hours:

(a)(2)(A) begin counting immediately on the occurrence of the event that triggers the period;

(a)(2)(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(a)(2)(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(a)(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

(a)(3)(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(a)(3)(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(a)(4) Unless a different time is set by a statute, local rule, or court order, filing on the last day means:

(a)(4)(A) for electronic filing, at midnight; and

(a)(4)(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

(a)(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(a)(6) "Legal holiday" means the day for observing:

(a)(6)(A) New Year's Day;

(a)(6)(B) Dr. Martin Luther King, Jr. Day;

(a)(6)(C) Washington and Lincoln Day;

(a)(6)(D) Memorial Day;

(a)(6)(E) Independence Day;

(a)(6)(F) Pioneer Day;

(a)(6)(G) Labor Day;

(a)(6)(H) Columbus Day;

(a)(6)(I) Veterans' Day;

(a)(6)(J) Thanksgiving Day;

(a)(6)(K) Christmas; and

(a)(6)(L) any day designated by the Governor or Legislature as a state holiday.

(b) **Extending time.**

(b)(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(b)(1)(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b)(1)(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(b)(2) A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(c), (d), and (f), and 60(b).

~~(c) **Motions, notices of hearing, and affidavits.**~~

~~(c)(1) A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:~~

~~(c)(1)(A) when the motion may be heard ex parte;~~

~~(c)(1)(B) when these rules set a different time; or~~

~~(c)(1)(C) when a court order – which a party may, for good cause, apply for ex parte – sets a different time.~~

~~(c)(2) Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time.~~

(c) **Additional time after certain kinds of service.** When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

Federal Rule 5(b)(2)

(C) mail

(D) leaving it with the court clerk (not recognized in state rule)

(E) sending it by electronic means (email and e-filing?)

(F) delivering it by any other means that the person consented to in writing (email and fax, otherwise not recognized in state rule)

Rule 50. Motion for ~~a directed verdict and for judgment notwithstanding the verdict~~ judgment as a matter of law.

~~(a) **Motion for directed verdict; when made; effect.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.~~

~~(b) **Motion for judgment notwithstanding the verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.~~

~~(c) **Same: conditional rulings on grant of motion.**~~

~~(c)(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted,~~

~~the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.~~

~~(c)(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.~~

~~(d) **Same: denial of motion.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.~~

(a) **Motion for judgment as a matter of law.** A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the moving party to the judgment. If the non-moving party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the non-moving party on an issue, the court may resolve that issue against the non-moving party and grant the motion against the party on any claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(b) **Renewing the motion after trial; alternative motion for a new trial.** If the court does not grant a motion for judgment as a matter of law, the court is considered to have submitted the action to the jury subject to later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment a party who has moved for judgment as a matter of law may file a renewed motion for judgment as a matter of law.

If a verdict was not returned, the party may file a renewed motion for judgment as a matter of law no later than 28 days after the jury has been discharged. A renewed motion for judgment as a matter of law may include a motion for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(b)(1) allow judgment on the verdict, if the jury returned a verdict;

(b)(2) order a new trial; or

(b)(3) direct the entry of judgment as a matter of law.

(c) **Granting the renewed motion; conditional ruling on a motion for a new trial.**

(c)(1) If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(c)(2) Conditionally granting the motion for a new trial does not affect the judgment's finality. If the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial. If the judgment is reversed, the case must proceed as the appellate court orders.

(d) **Time for a losing party's new-trial motion.** Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) **Denying the motion for judgment as a matter of law; reversal on appeal.** If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Advisory Committee Notes

The 2013 amendment to Rule 50 adopts the changes previously adopted by the Federal Rules of Civil Procedure. As noted in the 1991 federal Advisory Committee Note,

The revision abandons the familiar terminology of "direction of verdict" for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.

The standards for granting the motion remain unchanged. The time for making the motion has been extended to 28 days after entry of judgment. Finally, in accordance with the 2006 federal rules amendment, the amended rule removes the technical requirement that the motion be renewed at the literal close of all the evidence, a requirement that the Committee determined was an unnecessary trap for the unwary.

Rule 52. ~~Findings by the court; correction of the record.~~

~~(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.~~

~~(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.~~

~~(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:~~

~~(c)(1) by default or by failing to appear at the trial;~~

~~(c)(2) by consent in writing, filed in the cause;~~

~~(c)(3) by oral consent in open court, entered in the minutes.~~

~~(d) **Correction of the record.** If anything material is omitted from or misstated in the transcript of an audio or video record of a hearing or trial, or if a disagreement arises as to whether the record accurately discloses what occurred in the proceeding, a party may move to correct the record. The motion must be filed within 10 days after the transcript of the hearing is filed, unless good cause is shown. The omission, misstatement or disagreement shall be resolved by the court and the record made to accurately reflect the proceeding.~~

Findings and conclusions by the court; judgment on partial findings.

(a) **Findings and conclusions.**

(a)(1) In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(a)(2) In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(a)(3) The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(a)(4) A master's findings, to the extent adopted by the court, must be considered the court's findings.

(a)(5) A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(a)(6) Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) **Amended or additional findings.** On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional

findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) **Judgment on partial findings.** If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by paragraph (a).

Rule 59. New trials; amendments of judgment.

(a) **Grounds**. Subject to ~~the provisions of~~ Rule 61, a new trial may be granted to ~~all or any of the parties and on all or part of the issues,~~ any party on any issue for any of the following ~~causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment~~ reasons:

(a)(1) ~~I~~irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which ~~either~~ a party was prevented from having a fair trial~~.~~;

(a)(2) ~~M~~misconduct of the jury~~; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct~~, which may be proved by the affidavit of any ~~one of the~~ juror~~s.~~;

(a)(3) ~~A~~accident or surprise, which ordinary prudence could not have guarded against~~.~~;

(a)(4) ~~N~~newly discovered material evidence, ~~material for the party making the application,~~ which ~~he~~ could not, with reasonable diligence, have been discovered and produced at the trial~~.~~;

(a)(5) ~~E~~excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice~~.~~;

(a)(6) ~~I~~insufficiency of the evidence to justify the verdict ~~or other decision~~, or a verdict that ~~it~~ is against law~~.~~;

(a)(7) ~~E~~error in law.

(b) **Alternative in action tried without a jury.** On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

~~(b)~~ (c) **Time for motion**. A motion for a new trial shall be ~~served~~ filed no~~t~~ later than ~~10~~ 28 days after the entry of the judgment.

~~(c) **Affidavits; time for filing.**~~ When the ~~application~~ motion for a new trial is made under ~~Subdivision~~ paragraph (a)(1), (2), (3), or (4), it shall be supported by affidavit~~. Whenever a motion for a new trial is based upon affidavits they~~, which shall be ~~served~~ filed with the motion. ~~The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.~~

(d) **New trial ~~O~~on initiative of court or for reasons not in the motion**. No~~t~~ later than ~~10~~ 28 days after entry of the judgment the court of its own ~~initiative~~ may order a new trial for any reason ~~for which it might have granted~~ that would justify a new trial on motion of a party~~, and in t~~. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion.

(e) **Order.** The order granting a motion for a new trial shall specify the ~~grounds therefor~~ reasons for the new trial.

~~(e)~~ (f) **Motion to ~~alter or~~ amend a judgment**. A motion to ~~alter or~~ amend the judgment shall be ~~served~~ filed no~~t~~ later than ~~10~~ 28 days after entry of the judgment.

FEDERAL RULE 59. NEW TRIAL; ALTERING OR AMENDING A JUDGMENT

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony,

amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Rule 60. Relief from judgment or order.

~~(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.~~

~~(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.~~

~~Advisory Committee Notes~~

(a) **Corrections based on clerical mistakes; oversights and omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been

docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) **Grounds for relief from a final judgment, order, or proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(b)(1) mistake, inadvertence, surprise, or excusable neglect;

(b)(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(b)(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(b)(4) the judgment is void;

(b)(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(b)(6) any other reason that justifies relief.

(c) **Timing and effect of the motion.**

(c)(1) A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(c)(2) The motion does not affect the judgment's finality or suspend its operation.

(d) **Other powers to grant relief.** This rule does not limit a court's power to:

(d)(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(d)(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(d)(3) set aside a judgment for fraud on the court.

~~(e) Bills and writs abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.~~

Tab 5

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: April 17, 2013
Re: Finality under Rule 7(f)(2)

Central Utah Water Conservancy District v. King, 2013 UT 13 is the latest of three Utah Supreme Court opinions that use URCP 7(f)(2) to determine whether the order on which an appeal is based is an appealable order. The others, cited in the King opinion, are:

- Giusti v. Sterling Wentworth Corp., 2009 UT 2; and
- Code v. Utah Dept of Health, 2007 UT 43.

The King opinion states: "Rule 7(f)(2) of the Utah Rules of Civil Procedure specifies the point at which a district court's decision becomes final, triggering the appeal period." ¶9. The court goes on to say:

> The plain language of rule 7(f)(2) makes clear that the rule is a mandatory prerequisite to appellate jurisdiction. Under rule 7(f)(2), the default provision is that the "prevailing party shall ... serve upon the other parties a proposed order in conformity with the court's decision." This default provision applies "unless" the district court approves the proposed order submitted with a party's initial memorandum or when the district court explicitly directs that no additional order is required. Rule 7(f)(2) therefore provides district courts with the flexibility to finalize their decisions depending on the cases before them. ¶10.

Finally, the court directs:

> To address this potential for undue delay when the parties fail to comply with rule 7(f)(2), we hereby request that our advisory committee review rule 7(f)(2) and address the possibility of endlessly hanging appeals. For example, the Federal Rules of Civil Procedure contain provisions designed to address this issue. See FED.R.APP.P. 4(a)(7); FED.R.CIV.P. 58(c). These provisions set a maximum time of 150 days for filing an appeal in cases where the district court's judgment has not otherwise been finalized. ¶27

With three opinions in six years, the law is firmly set that, under Rule 7(f)(2), the record must show that either:

> (1) the court approves an order submitted with an initial memorandum;

> (2) the court enters an order prepared by counsel and served on opposing counsel pursuant to rule 7(f)(2); or
>
> (3) the court explicitly directs that no additional order is necessary. ¶15.

Regarding the first scenario, the committee is considering an amendment to prohibit a proposed order with a party's motion or response. Judges report that they are seldom signed. The second scenario includes orders prepared by the non-prevailing party, even if the judge does not direct the non-prevailing party to prepare an order. Both Code and Giusti involved final, appealable orders prepared by the non-prevailing party.

The third scenario is not expressly stated in the rule[1] but has been repeatedly stated by the court. The requirement that an order include a representation that no additional order is necessary is effectively limited to orders, however they may be titled, prepared by the judge. In King, the judge prepared the order.

My understanding of Rule 7(f)(2) is that it was not intended to be the litmus test for appeals that it has become. Rule 54, not Rule 7, governs finality and whether a particular order can be appealed. Rule 7(f)(2) provides flexibility for the judge to say who will prepare the order ("Non-prevailing party will prepare the order because the prevailing party does not have a lawyer; I'll do this one myself; the clerk's minute entry will be good enough; the AOC has prepared this handy-dandy form that I can use."), but preserving a default in the event that the judge is silent. The court recognizes this purpose of flexibility in its opinion, but the rule apparently carries an unintended consequence as well. I believe that it was not the committee's intent to prevent an order from being an appealable order merely by virtue of it being prepared by the judge.

If the committee deletes the opportunity for the parties to submit proposed orders with their memorandums, one of the three scenarios that now satisfies the Rule 7(f)(2) finality test will go away. (It was seldom used in any event.) What will be left is:

- one of the parties prepares the order; or
- the court prepares the order and includes language to the effect that "no additional order is necessary."

The court did not invite the committee to codify the "magic words" nor to amend Rule 7 to eliminate the basis for them, but both options have been raised. Before proceeding the committee should discuss whether either direction is preferable to simply leaving the rule to its evolution through caselaw.

If the committee wants to recommend codifying a phrase to show that the judge is satisfied with the document s/he has prepared, I recommend using the phrase quoted by the court "no additional order is necessary." This conveys the message "this is my

[1] The language of Rule 7(f)(2) is different: "… unless otherwise directed by the court, the prevailing party shall … serve upon the other parties a proposed order in conformity with the court's decision."

final word on the matter" without influencing the question of whether the order is appealable under Rule 54.

Given the consistency of the court's decisions, I recommend not trying to remove the basis on which this finality principle is established. The court's focus on special words to indicate finality is based on the phrase: "… unless otherwise directed by the court …." Removing that phrase coupled with a committee note explaining the change, might be enough to change the course of the law, but it would also remove the bright-line test that the court obviously favors.

The court does invite the committee to propose an amendment that would set a maximum time for appealing a case in which a judge-prepared order has not been finalized by use of the phrase "no additional order is necessary." The federal rule[2] cited in the King decision regulates when a judgment is considered "entered." URCP 58A(c) already answers that question:

> A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when it is signed and filed as provided in paragraphs (a) or (b). The clerk shall immediately record the judgment in the register of actions and the register of judgments.

The invitation seems to be to amend the date on which the order is considered "entered." This would be done in Rule 58A(c), not Rule 7(f)(2). Normally, I would not recommend amending the effective date of "entering" an order, because that concept has been fixed for some time. But there is no way to translate the passage of time into judicial intent that no additional order is necessary, and leaving "entry" as is and designating the judge-prepared order as "final" 90 days after signature does not dovetail with URAP 4(a): "[If] an appeal is permitted as a matter of right …, the notice of appeal … shall be filed … within 30 days after the date of entry of the judgment or order appealed from."

I do not know what effect amending Rule 58A(c), dealing with judgments, will have on orders under Rule 7(f)(2) that are not judgments.

[2] FRCP 58(c): For purposes of these rules, judgment is entered at the following times:
(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or
(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:
(A) it is set out in a separate document; or
(B) 150 days have run from the entry in the civil docket.

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

(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)(1) **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.~~ A written motion shall not be accompanied by a separate supporting memorandum.

(b)(2) **Limit on order to show cause.** An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by an affidavit sufficient to show cause to believe a party has violated a court order.

(c) ~~**Memoranda.**~~

~~(c)(1)~~ ~~**Memoranda required, exceptions, f**~~**F**~~**iling 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~~ shall not attach a proposed order to ~~its initial~~ a motion or memorandum.

~~(c)(2)~~ (d) **Length.** The motion shall not exceed ## pages. ~~Initial memoranda~~ The opposing memorandum 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 motion or memorandum upon ex parte application and a showing of good cause.

~~(c)(3)~~ (e) **Content.**

~~(c)(3)(A)~~ (e)(1) The motion shall contain under appropriate headings and in the following order:

(e)(1)(A) A succinct summary statement of the relief sought and the grounds for the relief sought.

(e)(1)(B) A succinct summary statement of the facts as alleged by the party necessary for a decision on the issue.

(e)(1)(C) 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.

(e)(1)(D) A clear, cogent, detailed argument citing authority for the party's position.

~~(c)(3)(B)~~ (e)(2) The opposing memorandum shall contain under appropriate headings and in the following order:

(e)(2)(A) A succinct summary statement of the grounds for opposing the relief sought.

(e)(2)(B) A succinct summary statement of the facts as alleged by the party necessary for a decision on the issue.

(e)(2)(C) 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.

(e)(2)(D) A clear, cogent, detailed argument citing authority for the party's position.

~~(c)(3)(C) A memorandum with more than 10 pages of argument~~ (e)(3) An over-length motion or memorandum shall contain a table of contents and a table of authorities with page references.

~~(c)(3)(D)~~ (e)(4) A party may attach as exhibits to a motion or memorandum relevant portions of documents cited in the motion or memorandum, such as affidavits or discovery materials.

~~(d)~~ (f) **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)~~ (g) **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)~~ (h) **Orders.**

~~(f)(1)~~ (h)(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)~~ (h)(2) 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. If the prevailing party does not timely serve the proposed order, any other party may serve upon the other parties a proposed order in conformity with the court's decision. 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)~~ (h)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(i) **Expedited procedures for discovery motions.** A motion for extraordinary discovery under Rule 26, a motion for a protective order or a motion for an order compelling disclosure or discovery under Rule 37, or a motion to quash a subpoena under Rule 45, shall follow the procedures of this paragraph.

(i)(1) **Length and content.** The motion shall be no more than four pages, not including permitted exhibits and attachments, and shall include:

(i)(1)(A) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action;

(i)(1)(B) a statement regarding proportionality under Rule 26(b)(2);

(i)(1)(C) if the request is a request for extraordinary discovery, a statement complying with Rule 26(c); and

(i)(1)(D) the relief sought and the grounds for the relief sought stated succinctly and with particularity.

(i)(1)(E) an attached copy of the request for discovery, the disclosure, or the response at issue;

(i)(1)(F) an attached proposed order; and

(i)(1)(i) no other exhibits or attachments, unless required by law.

(i)(2) **Response length and content.** No more than seven days after the moving party has served the motion, an opposing party may file a response. The response shall be no more than four pages, not including permitted exhibits and attachments, and shall include:

(i)(2)(A) a statement regarding proportionality under Rule 26(b)(2);

(i)(2)(B) a succinct statement regarding the relief sought and the grounds for the relief sought;

(i)(2)(C) an attached copy of the request for discovery, the disclosure, or the response at issue, to the extent needed and not included among the requesting party's papers;

(i)(2)(D) an attached proposed order; and

(i)(2)(E) no other exhibits or attachments, unless required by law.

(i)(3) **Decision.** Upon filing of the response or expiration of the time to do so, either party may and the moving party shall file a Request to Submit for Decision under paragraph (d). The court will promptly decide the motion. The court may decide the motion on the pleadings and papers unless the court schedules a hearing. The hearing may be by telephone conference or other electronic communication. The court may order additional briefing and establish a briefing schedule.

Advisory Committee Notes

Combining initial written motion with supporting memorandum. To reduce the number of electronic filings and to streamline the briefing process, initial written motions and supporting memoranda are now combined into a single document. As further support for this change, there is no discernible benefit in separating the initial motion and its supporting memorandum. By clarifying the expected content of the motion, the rule encourages brevity.

Rule 58A. Entry of judgment; abstract of judgment.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to Rule 54(b), the clerk shall promptly sign and file the judgment upon the verdict of a jury. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury, the court shall direct the appropriate judgment, which the clerk shall promptly sign and file.

(b) **Judgment in other cases.** Except as provided in paragraphs (a) and (f) and Rule 55(b)(1), all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; recording.** ~~A judgment~~ If the court expressly directs that no order from the parties is necessary, an order, memorandum decision, minute entry or other record of the decision prepared by the court is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when it is signed and filed as provided in paragraphs (a) or (b). If the court does not expressly direct that no order from the parties is necessary, an order, memorandum decision, minute entry or other record of the decision prepared by the court is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, 90 days after it is signed and filed as provided in paragraphs (a) or (b). The clerk shall immediately record the signed and filed judgment in the register of actions and the register of judgments.

(d) **Notice of judgment.** ~~A~~ The party preparing the judgment shall promptly serve a copy of the signed judgment ~~shall be promptly served by the party preparing it~~ on the other parties in the manner provided in Rule 5 and promptly file proof of service with the court. ~~The time for filing a notice of appeal is not affected by this requirement.~~

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be entered.

(f) **Judgment by confession.** If a judgment by confession is authorized by statute, the party seeking the judgment must file with the clerk a statement, verified by the defendant, to the following effect:

(f)(1) If the judgment is for money due or to become due, it shall concisely state the claim and that the specified sum is due or to become due.

(f)(2) If the judgment is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the specified sum does not exceed the liability.

(f)(3) It must authorize the entry of judgment for the specified sum.

The clerk shall sign and file the judgment for the specified sum, with costs of entry, if any, and record it in the register of actions and the register of judgments.

(g) **Abstract of judgment.** The clerk may abstract a judgment by a signed writing under seal of the court that:

(g)(1) identifies the court, the case name, the case number, the judge or clerk that signed the judgment, the date the judgment was signed, and the date the judgment was recorded in the registry of actions and the registry of judgments;

(g)(2) states whether the time for appeal has passed and whether an appeal has been filed;

(g)(3) states whether the judgment has been stayed and when the stay will expire; and

(g)(4) if the language of the judgment is known to the clerk, quotes verbatim the operative language of the judgment or attaches a copy of the judgment.

Tab 6

FAQs

(1) Electronic filing — "3-day mailing" rule.

Question: Does the party responding to a motion or other filing have three extra days in which to respond if the motion or other filing is served by the electronic filing system?

Answer: No. Rule 6(e) allows the responding party three extra days in which to respond only if the motion or other filing is served by mail. The rule does not allow that additional time when service is by any other method, including hand delivery, fax, email or by the electronic filing system.

Neither does the e-filer have to take the extra step of mailing the filing to any lawyer in the case who has an e-filing account. The e-filing system will automatically notify the other lawyers of the filing, so electronically filing the document satisfies the service requirement. Rule 5(b)(1)(A)(i).

The filer must still complete a certificate of service designating "e-filing" as the method by which the other parties were served. And the filer must still notify parties, usually self represented, who do not have an e-filing account in one of the traditional ways.

(2) Discovery tiers — Effect of not designating a discovery tier

Already published:

Question: What if a party fails to designate a specified tier as required by Rule 26(c)(3), but pleads a claim for specified damages and unspecified damages in an amount to be determined at trial? For example, what if a party pleads $20,000 in economic damages and for such non-economic damages in an amount to be determined at trial?

Answer: Parties should anticipate the value of all their claims for relief and damage calculations, and ~~plead in to~~ designate the appropriate tier in the caption and in the cover sheet. Designating the appropriate tier is required by Rule 8(a) and by Rule 10(a). Failure to do so might be appropriate grounds for the clerk to require conforming pleadings under Rule 10(f) or for a motion for a more definite statement under Rule 12(e).

In the above example, if a party claims specified economic damages and unspecified non-economic damages ~~and seeks an award of $50,000 or more~~, she should "plead that … damages are such as to qualify for a specified tier" and designate ~~an appropriate~~ that tier ~~or specify the damages sought for economic and non-economic damages~~ in the caption of the pleading.

(3) Expert discovery — Data relied upon by an expert.

Question: Must an expert produce his or her complete file? The Committee Note to Rule 26, under "Expert disclosures and timing," says that the party offering the expert must disclose, among other things, "a complete copy of the expert's file for the case."

The note separately identifies the need to disclose “all of the facts and data that the expert has relied upon in forming the expert’s opinions.” Yet the comparable provision in the rule itself, Rule 26(a)(4)(iii), includes only the latter.

Answer:

(4) Expert discovery — Discovery among aligned parties.

Question: Rule 26(a)(4)(C) says “If no election [requiring a report from or deposition of an opposing party’s expert] is made, then no further discovery of the expert shall be permitted.” What happens if multiple defendants do not file an election? Does the rule default to a deposition as provided in Rule 26(a)(4)(D)?

Answer: No. Rule 26(a)(4)(D) defaults to a deposition only if "competing" elections are served by multiple defendants; i.e. one defendant asks for a report and the other asks for a deposition. In that case, the rule says that the parties will depose the witness. However, if no defendant files an election, then no further discovery is permitted (no report, no deposition) under Rule 26(a)(4)(C).

> Note: The next Q & A raises another reason to restate some fact discovery principles as part of expert discovery.

Question: Expert depositions are limited to 4 hours under Rule 26(a)(4)(B). Does this mean per side or in total? Rule 26(c)(5) calculates discovery limits for “plaintiffs collectively, defendants collectively, and third-party defendants collectively, but this applies to standard discovery, and not expert discovery.

Answer: It is the committee’s intent that the limitation on expert deposition hours apply to each side collectively, as in depositions for fact discovery.

(5) Effect of partial motions to dismiss on deadlines for disclosures and discovery.

Question: If there is a Rule 12 motion to dismiss some claims, but answers are filed on other claims, are the deadlines stayed?

Answer: No. If an answer is filed — absent any order or stipulation otherwise — the time for disclosures and discovery begin to run. If there is no answer, but rather a Rule 12 motion to dismiss all claims for relief, the deadlines are not stayed; they do not begin to run. The Committee Note to Rule 26 states, "the time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would not begin to run until that motion is resolved."

Careful practice requires filing an answer to claims for which no motion to dismiss has been filed, although a stipulation commonly obviates the need for this.

(6) Subpoena for medical examiner's reports.

Question: The former Rule 35(c) provided for the production of prior reports from a medical examiner. That provision has been eliminated. Can a party still get those reports through subpoenas?

Answer: Yes. As the Committee Note to Rule 35 says: "The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. … Medical examiners will be treated as other expert witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition." Discovering the earlier reports is subject to requirements of proportionality and relevance under Rule 26.

(7) Special practice rules — Wrongful death claims.

Question: Rule 26.2 applies to "actions seeking damages arising out of personal physical injuries or physical sickness." Does it apply to actions claiming wrongful death?

Answer: Yes. The Committee used 26 USC § 104(a)(2) as its model and intended that "actions seeking damages arising out of personal physical injuries or physical sickness" be broadly interpreted to include wrongful death claims.

(8) Special practice rules — Effective date.

Question: Rule 26.2 was not part of the group of rules amended on November 1, 2011. Does it apply only to cases filed on or after its effective date, December 22, 2011, to cases filed on or after the effective date of the other disclosure and discovery amendments November 1, 2011, or to all pending cases?

Answer:

All pending cases. The general rule is that amendments to the Rules of Civil Procedure apply to further proceedings in actions pending on the effective date of the amendment (See Rule 1.), and the Supreme Court did not make an exception for Rule 26.2 as it did for the rules amended on November 1, 2011.

(9) Special practice rules — Divorce modification.

(Bob Wilde) **Question:** In a divorce modification seeking to increase child support where assets and net worth are irrelevant, is it necessary to disclose the non-income items in 26.1(c)?

Answer:

(10) Supplementing disclosures

From Todd

Question: How frequently must a party supplement disclosures?

From Frank:

I have a med mal case where specials are under $5,000 however the general damages are substantial, permanent and lifelong. Cases like this have been tried to verdict across the nation as high as 1.2 million but most are in the $300,000 to $600,000 range. I have filed complaint alleging tier 3. Defendant files (after answer) with "Motion for Protective Order & Issuance of an Order that the Claim falls Under Tier 1." I have reread the committee notes of the new rules but really nothing on point regarding tier limits. Do the new rules provide that the Plaintiff can claim what damages they think they are? To hold otherwise would allow the Court to determine damages.

From John Bogart

If I serve an interrogatory on Mr. A and Mr. A's LLC is that one interrogatory or two?

As they are aligned and for practical purposes the same, it could be one. But there are two parties. Does any of that matter? Is it interrogatories directed to a side now, rather to a party? Rule 33 is still by party, but the allocation isn't.

From: John Bogart [mailto:jbogart@telosvg.com]

Sent: Monday, January 21, 2013 3:17 PM

To: Francis M. Wikstrom

Subject: Some Questions re Civil Rules for FAQ

There are a lot of approaches to the Initial and Supplemental Disclosures requirements. Perhaps the Committee would address the following two kinds of reactions:

1) A Plaintiff is required to serve supplemental disclosures identifying documents/witnesses from the disclosures of Defendants that the Plaintiff intends to use in its case in chief.

2) A Defendant in a multiparty case identifies documents in its Initial Disclosure by reference — the documents attached to pleadings of the parties and/or disclosed by any other party.

3) Incorporation of disclosures of other parties by general reference (e.g., 'all witnesses identified by any other party' and 'all documents identified or produced by any other party').

The Committee might consider service by email as all filings will shortly be electronic — or that reliance on the court's notification system is sufficient for service of motions, memoranda, etc.