# Agenda

## Advisory Committee on Rules of Civil Procedure

May 28, 2014

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

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| Recognition of Cullen Battle and Frank Carney | | Jonathan Hafen |
| Welcome and approval of minutes | Tab 1 | Jonathan Hafen |
| Meeting with Supreme Court | | Jonathan Hafen<br>Judge Derek Pullan |
| Observations from judges' focus group about disclosure and discovery changes | | Judge Derek Pullan |
| Case management pilot program | Tab 2 | Judge Derek Pullan |
| Rule 7A. Motion for order to show cause. | Tab 3 | Tim Shea |
| Rule 68. Settlement offers. | Tab 4 | Tim Shea |
| Small Claims Rule 14. Settlement offers. | Tab 5 | Tim Shea |
| Rule 15. Amended and supplemental pleadings. Wright v. P.K. Transport, 2014 UT App 93. (¶¶ 18-22, Voros concurring) | Tab 6 | Judge Todd Shaughnessy |

**Committee Webpage:** http://www.utcourts.gov/committees/civproc/

**Meeting Schedule:**

September 24, 2014

October 22, 2014

November 19, 2014

# Tab 1

# MINUTES

# UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

## APRIL 30, 2014

PRESENT: Jonathan Hafen, Chair, W. Cullen Battle, Hon. John L. Baxter, Scott S. Bell, Hon. James T. Blanch, Steven Marsden, Terrie T. McIntosh, Leslie W. Slaugh, Trystan B. Smith, Hon. Kate Toomey, Barbara L. Townsend

TELEPHONE: Hon. Evelyn J. Furse, Hon. Derek Pullan, David W. Scofield, Hon. Todd M. Shaughnessy, Lori Woffinden

STAFF: Timothy M. Shea, Nathan Whittaker

EXCUSED: Hon. Lyle R. Anderson, Sammi V. Anderson, Frank Carney, Prof. Lincoln Davies, David H. Moore

## I. APPROVAL OF MINUTES

Mr. Hafen opened the meeting and entertained comments from the committee concerning the March 26, 2014 minutes. It was moved and seconded to approve the minutes as drafted in the meeting materials. The motion carried unanimously on voice vote.

## II. RULES 7, 54, & 58A

**Discussion.** Mr. Hafen next invited Mr. Battle to present the Final Judgment Rule Subcommittee's draft revisions of Rules 7(f), 54, and 58A (revisions to other subdivisions of Rule 7 were previously considered and approved by the committee). Mr. Battle summarized the major substantive changes as follows:

- Rule 7(f) (now Rule 7(j)) was revised to provide that an order signed by the judge is presumed to be complete unless there is an express direction for some further action. Express direction on the procedures for submitting proposed orders to the court and parties was also added.

- Rule 54 was revised to clarify and update the language and remove extraneous provisions.

- Rule 58A was revised to substantially adopt the process for entering final judgments in Rule 58 of the Federal Rules of Civil Procedure.

    - Except for the disposition of certain post-judgment motions, the proposal provides that all judgments must be set out in a separate document in order to be considered "entered" for purposes of determining when the time to appeal begins under Rule 4(a) of the Utah Rules of Appellate Procedure.

    - Because the state courts do not have adequate clerical staff to prepare judgments as separate documents as per the practice in federal courts, the proposal has been altered from the federal rule to require the prevailing party to prepare a proposed judgment. The procedures for serving, filing, approving, and objecting to proposed judgments would be the same as with proposed orders under rule 7.

    - If a court makes a final order but no separate order is entered, the time to appeal will not begin until 150 days has elapsed from the date that final order was entered.

Mr. Battle noted that there would likely need to be some explanatory notes drafted and volunteered to do so.

Judge Blanch stated that this would be a welcome change in the rules. He noted that one of the problems with the current procedure was that it makes no distinction between completeness with respect to disposing of a motion and finality for purposes of appeal. He gave the example of an order granting a motion for summary judgment—when the judge states that no further order is required, it is not clear whether the judge means that no further order is required to dispose of the motion or whether no further order is required to dispose of the action. There should be a way to tell not only when an action is finally disposed of, but also when the court believes the action is disposed of. Reversing the presumption with respect to non-final orders and requiring a separate document for a judgment accomplishes this.

Mr. Slaugh raised several points. First, he asked why the language in Rule 58A(b) (lines 21–23), which states that "unless the court prepares a judgment, the prevailing party must prepare and serve a proposed judgment," would not lead to the same result as was directed by the supreme court in *Code v. Utah Dept. of Health*, 2007 UT 43, 162 P.3d 1097, which is what he understood the committee was trying to get away from. He asked why it would not be suffi-

cient to just state that all signed orders were presumptively final. Mr. Marsden and Mr. Battle responded that the point of the separate document requirement was to give parties a clear indication of when an action is finally disposed of for the purposes of appeal. Just stating that an order was presumptively final would not provide adequate certainty. Members also noted that the proposal was different from the procedure in *Code* in several respects. The separate document requirement would not treat attorney-drafted judgments and court-drafted judgments differently—either the court or a party could prepare a judgment and both would have to conform to the same standards. The proposed rule would also not allow the court to skip the separate document requirement by invoking the "magic words" that no further order is necessary.

Mr. Slaugh next asked what the form of the separate judgment was supposed to take. While a simple money judgment may be set out in a separate document, a judgment or decree for equitable relief must be set out in detail. Is the separate document requirement just meant to refer to the relief granted in a separate document? Mr. Whittaker responded that the word "separate" in the separate document requirement refers to the judgment being separate from findings of fact and legal analysis. He referred the committee to *American Interinsurance Exchange v. Occidental Fire and Casualty Co.*, 835 F.2d 157 (7th Cir. 1987), which held that to meet the separate document requirement, a judgment must (1) be docketed as a separate document and not combined with or contained as part of another document; (2) contain ordering clauses stating the relief to which the prevailing party is entitled, and not merely refer to orders made in other documents; and (3) substantially omit recitation of facts, procedural history, and legal analysis. He added that a divorce decree is a good example of how to properly draft a judgment for equitable relief—in all cases there are written findings of fact and conclusions of law and a separate decree containing only ordering clauses.

Finally, Mr. Slaugh asked what would happen if no one drafts a final judgment. Members responded that the proposed revision to Rule 58A provides that if a final order has been made but no separate judgment has been entered, the judgment becomes final for purposes of appeal 150 days after the final order was made.

Judge Shaughnessy and Judge Blanch mentioned that they had spoken with one of Judge Shaughnessy's clerks, who told them that because the Courts Information System (CORIS) requires an action to close a case, it would be a simple matter for the district court to electronically generate a notice that the

case was closed similar to the automatically generated notice of discovery dates. The committee was of the opinion that the idea had promise and should be explored further, but between the separate document requirement and the requirement in 58A for the prevailing party to serve a notice of the entry of judgment on other parties, there was adequate notice of finality for the time being.

Mr. Marsden raised a concern about Rule 58A(b) (lines 21–23), which provides that "a party must prepare and serve a proposed judgment . . . in the same manner as a proposed order under Rule 7(j)." Because Rule 7(j)(1) provides for preparation of a proposed non-final order, just incorporating all of 7(j) might lead to confusion. The committee generally agreed to change the reference to 7(j)(2).

Ms. Townsend noted that the requirement to draft a proposed order within 14 days had been removed from the draft of Rule 7(j). She said that clients often call the state bar complaining that their attorneys have not prepared a proposed order, and it is easier for the bar in responding to those complaints to refer to the deadline set in the rule. Some members pointed out that sometimes the parties trade draft orders back and forth in trying to reach agreement as to the language of an order; this process may last longer than 14 days. Others responded that the only consequence of not serving a proposed order within the 14-day deadline is merely that another party can prepare and serve a proposed order instead of the party assigned to do it. The committee generally agreed that the 14-day deadline should be restored to Rule 7(j).

Mr. Whittaker asked the committee to look at Rule 58A(a) (lines 13–20), which provides that every judgment must be set out in a separate document except for "an order disposing of" certain post-judgment motions. He noted that an order disposing of a post-judgment motion will either (1) grant the motion and order further proceedings, (2) grant the motion and amend the judgment, or (3) deny the motion. Option 1 is not a final judgment, and an amended judgment under option 2 should really be set out in a separate document, as noted by the 2002 Federal Advisory Committee Notes ("If disposition of the motion results in an amended judgment, the amended judgment must be set forth on a separate document."). Therefore, only a denial of a post-judgment motion should be a final judgment exempt from the separate document requirement, and Mr. Whittaker suggested that the word "disposing" in line 15 be replaced by the word "denying." The committee generally agreed with this suggestion.

Judge Pullan observed that under Utah law, a judgment is not final for purposes of appeal until the question of attorney fees has been disposed of. *Pro-Max Development Corp. v. Raile*, 2000 UT 4, ¶ 15, 998 P.2d 254. A "judgment" that did not address attorney fees would be non-final by definition, even if it was set out on a separate document. With that in mind, he asked whether it was proper to include a motion for attorney fees in the list of post-judgment motions that did not require a separate document. Mr. Whittaker responded that while that was true, if a judgment had already been entered on a separate document before the issue of attorney fees had been disposed of, it would probably be better in terms of providing certainty to treat the motion for attorney fees as a post-judgment proceeding. He also mentioned that if the committee wanted to develop a comprehensive solution to the problem, it could look at adopting a version of Federal Rule 54(d)(2), which requires that a motion for attorney fees be brought within 14 days of the entry of judgment. The committee was generally of the opinion to leave (a)(5) as it was for now.

Mr. Shea directed the committee's attention to Rule 7(j)(1)(B) (lines 101–102) and suggested that the words "memorialized in writing" be deleted in order to conform to the language in 7(j)(1)(A). The committee generally agreed with Mr. Shea's suggestion.

**Committee Action.** It was moved and seconded that Rules 7, 54, and 58A be revised as proposed in the proposed revision contained in the meeting materials, incorporating the following amendments:

- Rule 7, Line 101: delete the words "memorialized in writing"
- Rule 7, Line 106: insert the words "within 14 days" between "shall" and "prepare"
- Rule 58A, Line 15: replace "disposing" with "denying"
- Rule 58A, Line 23: replace "7(j)" with "7(j)(2)"

The motion carried unanimously on voice vote. The proposed revisions to Rules 7, 54, and 58A were thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)–(3).

## III. REPORT FROM CASE MANAGEMENT SUBCOMMITTEE

Mr. Hafen next asked Judge Pullan to provide an update on the work of the Case Management Subcommittee, which was established at the meeting of March 26, 2014. Judge Pullan referred the committee to the draft proposal in the meeting materials, which was drafted by Mr. Shea. He said that he had not had a chance to submit his revisions to the proposal yet, as he had just taken on a new caseload.

Judge Toomey asked whether there was a proposed start date for the pilot program. Judge Pullan responded that no date had yet been chosen. Judge Toomey suggested that the program begin on July 1st, as it was the beginning of the fiscal year. The committee generally agreed that July 1st would be a good starting date for the pilot program.

Mr. Marsden mentioned that he had attended the spring meeting for the Business Law Section of the American Bar Association. One of the presentations he saw at this meeting dealt with case management and involved a panel of judges from around the country. He said he would be happy to share the meeting materials from this presentation if it would be of interest to the subcommittee. Mr. Hafen responded that this sounded like interesting and valuable content and encouraged Mr. Marsden to forward the information to the subcommittee.

Mr. Smith suggested that the pilot program should focus on those categories of cases within Tier 3 (such as personal injury, medical malpractice, and products liability) that the survey data showed had the longest time to disposition. Judge Pullan agreed that the type of case should definitely inform decisions about complexity, but he thought that at least for purposes of the pilot program, all Tier 3 cases should at least have an initial case management conference. Because the number of Tier 3 cases is relatively small, it would not be unduly burdensome to have the parties appear at least once; if the case at issue is not that complex and does not require much management, that will be apparent at the conference. For purposes of getting uniform data among the judges who will be participating in the pilot program, it was important to have a clear criterion about which cases would be subject to at least an initial conference.

Mr. Hafen asked Judge Pullan whether, since the proposal needed to be presented to the supreme court before the committee's next meeting on the morn-

ing of May 28th, the bullet points of the proposal could not be submitted to committee members by email within a couple of weeks' time for review and comment. Judge Pullan thought the plan would be feasible. The committee generally agreed to move forward with the proposal in that manner.

Judge Pullan also informed the committee that Judge Kay from the Second District had expressed an interest in helping the subcommittee with the project and asked whether there was any objection to adding Judge Kay to the subcommittee. No objections were raised, and Judge Kay was added to the case management subcommittee.

## IV. RULES 26 AND 45

**Discussion.** Mr. Hafen next invited Mr. Shea to present proposed revisions to Rules 26 and 45. Mr. Shea explained that the proposed revisions were changes to the references to discovery motions in the text and comments of the rules. As discovery motions in Rule 37 have been changed to statements of discovery issues, the references to discovery motions in other rules need to be changed as well.

Mr. Slaugh noted that in Rule 37(a), the procedure for obtaining an order regarding discovery was referred to as an "expedited statement of discovery issues" in the heading of the rule and as a "statement of discovery issues" in the body of the rule. He suggested that the name for the procedure be consistent, and stated his preference for the shorter term "statement of discovery issues." Several other members agreed that the word "expedited" was unnecessary. Mr. Hafen said that he liked having the word "expedited" in the heading as it emphasized the nature of the procedure. Mr. Shea suggested deleting the word "expedited" from the proposed revisions to Rules 26 and 45, and that when the comment period for Rule 37 is over, the committee consider deleting the word "expedited" from that rule at that time.

**Committee Action.** It was moved and seconded that Rules 26 and 45 be revised as proposed in the proposed revision contained in the meeting materials, incorporating the following amendments:

- Rule 26, Lines 530, 532, & 556–57: in each instance, replace "an expedited statement" with "a statement"
- Rule 45, Line 168: remove the word "expedited"

The motion carried unanimously on voice vote. The proposed revisions to Rules 26 and 45 were thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)–(3).

## V. RULE 56

**Discussion.** Mr. Hafen next invited Mr. Shea to present the proposed revision to Rule 56. Mr. Shea explained that the draft revision in the meeting materials was essentially the federal rule with the substance of current Rule 7(c)(3) added as the committee had previously recommended.

Mr. Whittaker indicated that he had a number of suggestions for amendments. Mr. Hafen invited him to present them to the committee. First, Mr. Whittaker suggested changing "must" to "shall" on line 4 to be consistent with the federal rule for the reasons explained in the 2010 Advisory Committee Notes in the federal rule. The committee generally agreed to the change.

Mr. Whittaker next pointed out that line 5 replaces the old language of "if the pleadings, the discovery and disclosure materials on file, and any affidavits show" with "if the moving party shows." He asked the committee whether, given the Utah Supreme Court's rejection of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), one of these lines better expressed the standard required by a moving party than the other. The committee was generally of the opinion that the new language was consistent with Utah law.

Mr. Whittaker suggested adding the words "unless the court orders otherwise" to line 25 to be consistent with the federal rule. Mr. Shea agreed and said that it looked like it was just a typo on his part. The committee generally agreed to the change.

Mr. Whittaker suggested restoring the requirement that a motion for summary judgment could not be filed until at least 20 days after the commencement of the action. He noted that the federal rule had deleted this requirement, stating in the 2009 Advisory Committee Notes that "the new rule allows a party to move for summary judgment at any time, even as early as the commencement of the action." As the time for response to a motion in Rule 7 is 14 days, this could lead to a scenario in which a party would be required to respond to a motion before summary judgment before it was required to file an answer. Judge Shaughnessy suggested changing 20 days to "21 days," as well as changing the 30-day deadline on line 26 to "28 days," to be consistent with

the other deadlines of 30 days or less. The committee agreed to the changes with Judge Shaughnessy's amendments.

Finally, Mr. Whittaker suggested deleting lines 34–36, as it appeared they explicitly adopted the standards of *Celotex*. Judge Shaughnessy replied that the first half of the sentence in question was consistent with Utah law; only the second half of the sentence adopted *Celotex*. He suggested deleting the rest of the sentence after the word "dispute" in line 35. Mr. Whittaker endorsed that amendment to his suggestion and the committee generally agreed to the change.

Mr. Smith asked the committee to look at paragraph (a)(2) (lines 16–18), which allows a nonmoving party to include in its response memorandum a "separate statement of additional facts in dispute," which corresponds to language in the current Rule 7(c)(3)(B). Mr. Smith noted that some practitioners had taken this provision to require all additional facts in dispute rather than just ones that were material to the motion. He suggested making it clear that the separate statement should be of "additional ***material*** facts in dispute." The committee generally agreed to the change.

Judge Pullan raised a concern about paragraph (a)(3) (lines 19–22), which allows a party to include in its motion or memorandum "a concise statement of facts and allegations for the limited purpose of providing background and context for the case, dispute, and motion." He worried that this provision would lead to situations where the key facts for the motion were contained in the statement of background facts. Mr. Slaugh responded that allowing the parties to put background facts in a separate statement where it was clear that they were not viewed as material facts and did not need to be rigorously supported by record evidence, it would reduce the length and complexity of summary judgment motions. Judge Blanch agreed and argued that this provision was necessary to prevent the practice of a movant's filing of banker's boxes full of evidence in order to support every conceivable fact, whether material to the motion or not, and of a nonmovant's disputation of every single fact, whether material or not. He added that the provision reflects what practitioners were doing in their motions in various different ways—adding the provision would provide uniformity in how the motions would be formatted. He suggested that the solution to Judge Pullan's hypothetical would just be to deny the motion for failure to follow the rule. Judge Furse noted that a nonmovant arguing that a fact listed in the background section is actually material is substantively identical to a nonmovant identifying an additional disputed material fact not

mentioned in the motion, which is a common scenario currently provided for under Rule 7(c)(3)(B).

Mr. Battle pointed out an additional problem caused by loading up the statement of undisputed facts with background facts: paragraph (a)(4) provides that each fact that is set forth that is not disputed is deemed admitted for purposes of the motion, and subdivision (g) allows a court to declare facts as established in the case. This provides an incentive for a nonmovant to dispute facts whether or not they are material.

Mr. Shea noted that paragraph (a)(3) was based on Rule 56-1(b) of the District of Utah Local Civil Rules of Practice, which states:

> The motion may, but need not, include a separate background section that contains a concise statement of facts, whether disputed or not, for the limited purpose of providing background and context for the case, dispute, and motion. This section may follow the introduction and may, but need not, cite to evidentiary support.

Mr. Bell suggested taking out the last sentence in the paragraph, which allows a party to cite evidence in support of the background facts. Judge Shaughnessy agreed and said that removing it would not prohibit citing evidence, but taking it out would de-emphasize the perceived need for citing evidence. Judge Shaughnessy also suggested adding the clause "whether disputed or undisputed" after the phrase "statement of facts and allegations." He said that adding that clause would communicate that the background facts may be disputed and that there was no need to contest the facts with the same degree of rigor as facts contained in the material facts section. The committee generally agreed to these changes.

Mr. Shea suggested adding the phrase "other than in the background section" after the phrase "opposing the motion" in lines 23–24. The committee agreed that the change would be consistent with the purpose of a separate background section.

Mr. Smith suggested changing the deadline for filing a motion for summary judgment from 28 days after the close of discovery to a certain number of days before trial. He argued that there are legal issues on the eve of trial that are better addressed as a motion for partial summary judgment, and the rule should allow for those types of motions. Judge Blanch responded that if the date for filing the motion is too close to trial, the time for briefing and oral ar-

gument would necessitate a continuance of the trial in most cases. Mr. Whittaker pointed out that this would be a default rule, and that the addition of the words "unless the court orders otherwise" make it clear that the judge has the authority to hear motions for summary judgment that are beyond the default deadline. The type of motion that Mr. Smith raises would be one the court may consider hearing along with motions in limine, but it may be best left up to the court's discretion. The committee generally agreed to leave the deadline as 28 days after the close of all discovery.

**Committee Action.** It was moved and seconded that Rule 56 be revised as proposed in the proposed revision contained in the meeting materials, incorporating the following amendments:

- Line 4: remove the underlined word "must" and restore the word "shall"
- Line 17: insert the word "material" between the words "additional" and "facts"
- Line 20: after the words "concise statement of facts and allegations" insert the underlined text as follows: "concise statement of facts and allegations, whether disputed or undisputed, for the limited purpose"
- Lines 20–21: delete the sentence "The statement of facts or allegations may cite supporting evidence."
- Line 24: insert the phrase "other than in the background section" between the words "motion" and "that is not disputed"
- Line 25: insert the clause "Unless the court orders otherwise," before the words "a party may file"
- Line 26: insert the phrase "after 21 days have passed from commencement of the action" after the words "at any time"
- Line 26: replace "30" with "28"
- Lines 35–36: delete the clause "or that an adverse party cannot produce admissible evidence to support the fact"

The motion carried unanimously on voice vote. The proposed revision to Rule 56 was thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)–(3).

## VI. ADJOURNMENT

The meeting was adjourned at 6:02 p.m. The next meeting will be held on May 28, 2014 at 4:00 p.m. at the Administrative Office of the Courts.

# Tab 2

## TIER 3 CASE MANAGEMENT PROGRAM

### (1) SCREENING

All tier 3 cases filed on or after July 1, 2014 assigned to a participating judge:

Second District

- Thomas Kay
- Brent West

Third District

- Todd Shaughnessy
- Kate Toomey

Fourth District

- David Mortensen
- Derek Pullan

Notify parties that the case is being assigned to the pilot program; that the default discovery limits apply, but that the judge will schedule a Rule 16 conference for the purpose of entering a case management order, including discovery limits. The conference will be held soon after the date the defendant's initial disclosures are due.

As used in this outline, "lawyer" means "party" if the party is self-represented.

### (2) RULE 16 CONFERENCE

**Date.** Schedule the conference when the first answer is filed for a date soon after the date the defendant's initial disclosures are due. Disclosures are due 42 days after the first answer is filed.

**Lead counsel.** Require lead counsel to participate in person. Limit participation by telephone or video conference to exceptional circumstances.

**Detailed statement.** Require lawyers to file a written, detailed statement of the case, including the factual claims and legal theories. Use them and the other papers to try to narrow the disputed issues.

**Prepare for the conference.** Gather as much information about the case as the papers will provide.

**Explore settlement.** Explore settlement early and periodically throughout the pretrial process.

**Proportional discovery.** Encourage the lawyers to show that the amount, methods and duration of discovery are proportional to the case, and, if they are, allow what the lawyers request. Do not allow the lawyers to dictate the pace at which a case will move; encourage them to reasonably and accurately inform you of what they need, and proceed based on that information. Recognize the value of their judgment in establishing discovery and other due dates.

**Prioritize discovery.** Focus on where to begin discovery:

- What are the core issues?
- What information about those issues is needed (not just wanted)?
- What information is needed to make intelligent settlement negotiations possible?
- What are the best sources for that information? Who are the critical witnesses?
- What are the critical documents?
- What is a reasonable timeline for obtaining that information?

- Phased discovery. If the initial discovery does not produce settlement, proceed with further discovery, but continue to focus on priorities and proportionality. Be open to structuring discovery in a way that makes sense.

**Discovery disputes.** Assist the lawyers with their discovery disputes. Permit the lawyers quick and easy access to you when the case begins to deviate from the management order.

#### (3) CASE MANAGEMENT ORDER

##### (a) DISCOVERY

Memorialize the agreements and decisions from the case management conference.

##### (b) SCHEDULE DUE DATES FOR VARIOUS STAGES IN THE CASE

**Status conferences.** Schedule a periodic status conference (monthly, bi-monthly, quarterly, semi-annually) as needed. Keep it short and simple. By telephone is fine. Recognize that, if the case is progressing smoothly under the management order, "hands-off" is a legitimate management tool. The call itself will remind the lawyers that you are managing the case. The primary purpose of the call is to reassure yourself that the management plan is on track. A secondary purpose is to remove excuses for requests for continuances.

**Amended pleadings.**

**Joinder.**

**Fact discovery.** Schedule a status conference at the close of fact discovery in order to schedule a trial and a pretrial conference.

**Expert discovery.**

**Dispositive motions.** A deadline for dispositive motions can be as effective as a firm trial date at motivating the lawyers to keep the case moving forward. And a motion deadline has the advantage of not tying up trial days.

**Standards for continuances.** Advise in the order that the scheduled dates are firm and that continuances—even if stipulated—will be not be granted, except for exceptional and unanticipated circumstances.

##### (c) PROFESSIONALISM AND CIVILITY

Professionalism among lawyers has been shown to help move the case forward and to help settlement. Advise in the order and verbally that you expect professionalism, courtesy and respect at all times. If lawyers become contentious, consider:

- an off-the-record discussion with counsel;
- an on-the-record discussion with counsel; and
- sanctions, if all else fails.

#### (4) SETTLEMENT

Explore settlement early and periodically throughout the pretrial process. Periodically discussing settlement gives lawyers the cover needed, with clients and opposing counsel, to avoid the appearance of negotiating from a position of weakness. Ask: "What are the prospects of settlement?" "What do you need to know in order to consider settlement?" Partner with another judge for a mediated settlement conference.

**(5) DISCOVERY DISPUTES**

Require lead counsel to participate.

Follow Rule 37, expedited statement of discovery issues.

Consider using a technique in which a party does not file any papers, but rather meets with the judge and other parties, in person or by phone, to resolve the dispute. At the conference the judge is part mediator, part decision maker: encouraging the lawyers toward an agreement where possible; but imposing a decision as needed. Consider using this technique for motions beyond discovery disputes.

Rule on the dispute promptly. Avoid taking the matter under advisement.

**(6) MOTIONS**

**Lead counsel.** Require lead counsel to participate.

**Motions in limine.** Permit the motion to be filed no sooner than 56 days before the pretrial conference and no later than 42 days before. Encourage the lawyers, instead of filing a motion, to confer and discuss how any issues might be raised and resolved during the pretrial conference. Rule on motions in limine at the pretrial conference to leave the lawyers time during which they can determine how their case is going to unfold at trial.

**Motion for summary judgment.** Encourage the lawyers not to file a motion for summary judgment unless the lawyer has a good faith belief that there are no relevant facts in dispute and that the moving party is entitled to judgment as a matter of law.

Permit no more than one motion per party. Require a joint statement of undisputed facts.

Permit the motion to be filed no sooner than completion of expert discovery (not including rebuttal experts) and no later than 14 days after completion of expert discovery (not including rebuttal experts). Keep the beginning and end date reasonably close together because there are likely to be cross-motions, and it is best to resolve as much as possible in a single order.

Otherwise follow Rule 56.

**(7) PRETRIAL AND TRIAL**

The best case management technique is a firm trial date and a ready judge. Knowing a case will go to trial will result in resolution, whether or not it is by trial.

Schedule a status conference at the close of fact discovery, and schedule a firm trial date, pretrial conference date and dispositive motion deadline.

If you need to set more than one case for trial on a particular date, partner with another judge to try the case that you cannot.

**(8) TRACKING CASES**

- Tickler for status conferences and other deadlines
- List of issues pending for judge's decision

**(9) MEASURES OF SUCCESS**

- Party satisfaction
- Lawyer satisfaction
- Judge satisfaction
- Reduced cost to reach disposition
- Reduced time to reach disposition

### (10) TRANSITION TO SCALE

Observe cases for indicators showing a need for case management. Consider using these indicators to screen cases for case management. For example:

- multiple parties
- multiple claims
- case type (commercial litigation, tortious injury, etc.)
- lawyers or parties known to be contentious
- self-represented parties

Observe what role staff (law clerk, case manager) can play.

Observe how well the program works for self-represented parties.

# Tab 3

**Rule 7A. Motion for order to show cause.**

**(a) Motion.** ~~A party who seeks to~~ To enforce an order or a judgment ~~of a court against an opposing~~ a party may file an ex parte motion for an order to show cause following the procedures of this rule. ~~The motion must be filed with the same court and in the same case in which that order or judgment was entered. The motion shall be made only on an ex parte basis, and the procedures of Rule 7 of the Utah Rules of Civil Procedure shall not apply.~~

**(b) Affidavit.** The motion ~~for an order to show cause~~ must be accompanied by at least one ~~supporting~~ affidavit or declaration under Utah Code Section 78B-5-705. ~~Each supporting affidavit must be~~ based on personal knowledge and ~~must~~ setting forth admissible facts and not mere conclusions sufficient to show cause to believe a party has violated an order or a judgment. At least one ~~supporting~~ affidavit or declaration must state the title and date of entry of the order or judgment which the ~~moving party~~ movant seeks to enforce.

**(c) Order to show cause.** The motion ~~for an order to show cause~~ must be accompanied by ~~the~~ a proposed order to show cause, which ~~shall~~ must:

(c)(1) state the title and date of entry of the order or judgment which the ~~moving party~~ movant seeks to enforce;

(c)(2) ~~specify~~ state the relief sought by the ~~moving party~~movant;

(c)(3) state whether the ~~moving party~~ movant has requested that the ~~opposing party~~ nonmovant be held in contempt and, if ~~such a request has been made~~ so, ~~recite~~ state that the ~~sanctions~~ penalties for contempt may include, but are not limited to, a fine of up to $1000 ~~or less~~ and ~~a~~ confinement in jail ~~commitment of~~ for up to 30 days ~~or less~~.

(c)(4) order the ~~opposing party~~ nonmovant to ~~make a first appearance in court~~ appear personally or through counsel at a ~~specific~~ stated date, time and place ~~and, then and there,~~ to explain ~~why or~~ whether the ~~opposing party~~ nonmovant acted or failed to act in compliance with ~~such~~ the order or judgment;

~~(c)(4) order the opposing party to appear personally or through legal counsel at the first appearance;~~

(c)(5) state that no written response ~~to the motion and order to show cause~~ is required;

(c)(6) state that the ~~first appearance shall not be the~~ hearing is not an evidentiary hearing, but ~~shall be~~ is for the purpose of determining:

(c)(6)(A) whether the ~~opposing party~~ nonmovant ~~contests~~ denies the ~~allegations~~ claims made by the ~~moving party~~movant;

(c)(6)(B) whether an evidentiary hearing is ~~necessary~~ needed;

(c)(6)(C) the ~~specific~~ issues ~~to be resolved through an evidentiary hearing~~ on which evidence may be submitted; and

(c)(6)(D) the estimated length of ~~any such~~ an evidentiary hearing.

**(d) Service.** If the court ~~grants the motion and issues~~ enters an order to show cause, the ~~moving party~~ movant must have the order, the motion and all ~~supporting~~ affidavits and declarations served upon the ~~opposing party. Service shall be made~~ nonmovant in the manner ~~prescribed~~ for service of a summons and complaint at least 7 days before the hearing.~~, unless the moving party shows~~ For good cause ~~for~~ the court may order that service ~~to~~ be made ~~by mailing or delivery to the opposing party's~~ on the nonmovant's counsel of record ~~and the court so orders~~. The ~~date of the opposing party's first appearance on the order to show cause may not be sooner than five days after service thereof, unless~~ court may order less than 7 days notice of the hearing if:

(d)(1) the motion requests an earlier ~~first appearance~~ date; and

(d)(2) it clearly appears from ~~specific~~ facts shown by the affidavits or declarations that immediate and irreparable ~~injury, loss, or damage~~ harm will result to the ~~moving party~~ movant if the ~~first appearance~~ hearing is not held sooner ~~than five days after service of the order to show cause; and~~

~~(d)(3) the court agrees to an earlier first appearance date~~.

**(e) First ~~appearance~~ hearing.** ~~The opposing party's first appearance on the order to show cause, at the date, time and place stated therein, shall not be the evidentiary hearing.~~ At the ~~first appearance~~ hearing, the court ~~shall~~ will determine:

(e)(1) whether the ~~opposing party~~ nonmovant ~~contests~~ denies the ~~allegations~~ claims made by the ~~moving party~~movant;

(e)(2) whether an evidentiary hearing is ~~necessary~~ needed;

(e)(3) the ~~specific~~ issues ~~to be resolved through an evidentiary hearing~~ on which evidence may be submitted; and

(e)(4) the estimated length of ~~any such~~ an evidentiary hearing.

The court may enter an order regarding any claim that the nonmovant does not deny. The court may order the parties to file memoranda on legal issues before the evidentiary hearing. Memoranda must follow the requirements of Rule 7. ~~If the opposing party does not contest the allegations made by the moving party, the court may proceed at the first appearance as the circumstances require.~~

**(f) Evidentiary hearing.** ~~At the evidentiary hearing on a contested order to show cause, the moving party shall~~ The movant bears the burden of proof on all ~~allegations which are~~ claims made in ~~support of~~ the ~~order~~ motion.

**(g) Limitations.** ~~An~~ A motion for an order to show cause may not be ~~requested in order to obtain an original order or judgment; for example, an order to show cause may not be~~ used to obtain a temporary restraining order or ~~to establish~~ a temporary order~~s~~ in a divorce case or any other original order or judgment. ~~This rule shall apply only in civil actions, and shall not be applied to orders to show cause in criminal actions.~~ This rule does not apply to an order to show cause issued by ~~a~~ the court on its own initiative. This rule does not apply to a motion for an order to show cause from a court commissioner.

# Tab 4

**Rule 68. Settlement offers.**

(a) Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

(b) If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer, and the offereeshall pay the offeror's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(c) An offer made under this rule shall:

(c)(1) be in writing;

(c)(2) expressly refer to this rule;

(c)(3) be made more than 10 days before trial;

(c)(4) remain open for at least 10 days; and

(c)(5) be served on the offeree under Rule 5.

Acceptance of the offer shall be in writing and served on the offeror under Rule 5. Upon acceptance, either party may file the offer and acceptance with a proposed judgment under Rule 58A.

(d) "Adjusted award" means the amount awarded by the finder of fact and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are subject to a contingency fee agreement, the court shall determine a reasonable attorney fee for the period preceding the offer.

**Advisory Committee Note**

For a cause of action for personal injury or wrongful death arising on or after July 1, 2014, a party will not be awarded prejudgment interest on special damages in a Tier 1 case if:

(1) the party does not make a settlement offer;

(2) the settlement offer is tendered less than 60 days before trial; or

(3) the settlement offer is greater than or equal to one and one-third times the judgment awarded at trial.

See Section 78B-5-824. Although the statute does not directly affect settlement offers made under Rule 68, parties should be aware of the limitation a settlement offer has on prejudgment interest in some cases.

# Tab 5

**Rule 14. Settlement offers.**

(a) Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

(b) If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer, and the offeree must pay the offeror's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(c) An offer made under this rule must:

(c)(1) be in writing;

(c)(2) expressly refer to this rule;

(c)(3) be made after the judgment and before the notice of appeal;

(c)(4) remain open for at least 10 days; and

(c)(5) be served on the offeree under Rule 5 of the Rules of Civil Procedure.

(d) Acceptance of the offer must be in writing and served on the offeror under Rule 5 of the Rules of Civil Procedure. Upon acceptance, either party may file the offer and acceptance with a proposed judgment.

(e) "Adjusted award" means the amount awarded by the judge after trial de novo and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are subject to a contingency fee agreement, the court shall determine a reasonable attorney fee for the period preceding the offer.

(f) The offeror’s costs includes the filing fee and other costs for an appeal to a trial de novo.

# Tab 6

VOROS, Judge (concurring):

¶ 18 I concur in the majority opinion. I write only to suggest that the federal approach to the relation-back doctrine with respect to adding parties is both more clear and more rational than the Utah approach. First, the federal doctrine is governed by rule. In contrast, Utah's relation-back doctrine exists only in caselaw. Nothing in the rule itself puts the practitioner on notice that rule 15(c) applies to an exception not mentioned in the rule.

¶ 19 Second, although similar to the Utah approach, the federal approach coexists more comfortably with the principle of fair notice underlying statutes of limitations. *See Russell Packard Dev., Inc. v. Carson,* 2005 UT 14, ¶ 28, 108 P.3d 741 (indicating that the statute of limitations serves "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared" (citation and internal quotation marks omitted)).

¶ 20 For example, under rule 15(c) of the Federal Rules of Civil Procedure, an amended complaint naming an additional party relates back to the original complaint only if—among other requirements—the new defendant both "(i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

¶ 21 And while the federal rule, like Utah's relation-back doctrine, allows a plaintiff to demonstrate notice by showing an identity of interest between the new defendant and an existing defendant, the commonality must relate to the identities of the two entities, and not (as under Utah law) to whether their legal defenses coincide. *Compare Cooper v. United States Postal Serv.,* 471 U.S. 1022, 1025 n. 3, 105 S.Ct. 2034, 85 L.Ed.2d 316 (1985), *and Singletary v. Pennsylvania Dep't of Corr.,* 266 F.3d 186, 197–98 (3d Cir.2001), *with Penrose v. Ross,* 2003 UT App 157, ¶¶ 15–20, 71 P.3d 631. Thus, "[i]n finding an identity of interest, courts usually require substantial shared structural and corporate identity" or that "the business operations of the parties are so closely related that notice to one provides notice to the other." 3 James W. Moore, *Moore's Federal Practice* § 15.19(3)(c) (Daniel R. Coquillette et al. eds., 2013). An identity of interest may also be found "when the two parties are co-executors of an estate" or "share[ ] legal counsel." *Id.* This approach rationally links the concept of identity of interest to the relevant factor, notice. By contrast, that the defenses of two otherwise unrelated entities coincide does little to establish that notice to one provides notice to the other. The federal rule also requires that the notice and knowledge factors "be satisfied within the 120–day period provided for service of process of the original complaint." *Id.* § 15.19(3)(e) (citing Fed.R.Civ.P. 15(c)(1)(C)).

¶ 22 For the foregoing reasons, I urge the Supreme Court Advisory Committee on the Rules of Civil Procedure to consider proposing an amendment to Utah rule 15 along the lines of the federal rule—or at least to conform our existing rule to controlling caselaw.

**RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS**

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) Notice to the United States. When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

**Rule 15. Amended and supplemental pleadings.**

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 21 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 14 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.