Agenda

Advisory Committee on Rules of Civil Procedure

September 22, 2004
4:00 to 6:00 p.m.

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

Approval of minutes.	Fran Wikstrom
Rule 62. Cap on supersedeas bond.	Keith Teel
Rule 9. Naming persons for allocation of fault.	Tim Shea
Rule 47. Peremptory challenges for multiple parties.	Frank Carney
Rule 7. Motions to reconsider.	Cullen Battle

Meeting Schedule

October 27, 2004
November 17, 2004
January 26, 2005
February 23, 2005
March 23, 2005
April 27, 2005
May 25, 2005
July 27, 2005
September 28, 2005
October 26, 2005
November 16, 2005

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, July 28, 2004
Administrative Office of the Courts

Tim Shea, Presiding

PRESENT: Francis J. Carney, Cullen Battle, Terrie T. McIntosh, Leslie W. Slaugh, Paula Carr, Virginia S. Smith, Honorable Anthony W. Schofield, Honorable Lyle R. Anderson, Honorable David Nuffer, James T. Blanch

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Francis M. Wikstrom, David W. Scofield, Thomas R. Karrenberg, Janet H. Smith, R. Scott Waterfall, Honorable Anthony B. Quinn, Todd M. Shaughnessy, Glenn C. Hanni, Debora Threedy, Lance Long

GUESTS: Matty Branch
Rep. Greg Curtis
Gary Thorup
Ray Hintze
Jim Olson
Esther Chelsea-McCarty

I. APPROVAL OF MINUTES.

In the absence of Committee Chairman Francis M. Wikstrom, Tim Shea called the meeting to order at 4:00 p.m. The minutes of the May 26, 2004 meeting were reviewed, and an error in Leslie W. Slaugh's middle initial was pointed out. Mr. Slaugh moved that the Minutes be approved as amended. The Motion was seconded by Paula Carr, and approved unanimously.

II. RULE 62; HJR 16. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

During the 2004 General Session, the Utah Legislature enacted HJR 16, which amended URCP 62. HJR 16 passed by two-thirds majority of both houses. On May 12, 2004, the Supreme Court entered an order pursuant to its emergency rules that changed URCP 62 back to its form prior to HJR 16. The court then asked this Committee to consider the merits of the HJR 16 amendments and make recommendations. Prior to this meeting, Rule 62 as amended by HJR 16 was published for comment. One comment was received prior to the close of the comment period on July 21, 2004.

Mr. Shea introduced the following guests who attended the meeting to either address the Committee regarding HJR 16 or to observe: (1) Rep. Greg Curtis, House Majority Leader and sponsor of HJR 16; (2) Gary Thorup, attorney with Holme Roberts & Owens; (3) Ray Hintze, Chief Deputy to Utah Attorney General Mark Shurtliff; (4) Jim Olson, executive director and president of Utah Food Association; (5) Esther Chelsea-McCarty, Office of Legislative Research and General Council, drafter of HJR 16. Prior to the meeting, Committee members received a printout with a summary of each state's supersedeas bond requirements.

Rep. Curtis presented a brief history of HJR 16. He stated that he was approached by the Utah food industry with a request that monetary limits be set for supersedeas bonds. Their concern was that if a party has a judgment against them so large that it hinders their ability to even file a bond, does the amount of the bond required amount to a denial of access to the courts? The amendment would limit bond amounts where judgments are $5 million or greater.

Mr. Slaugh expressed concern that limiting the bond amount seems to assume the trial judge or jury was wrong in cases where a judgment is over $5 million. He pointed out that there is no requirement that a bond be posted in order to appeal; a bond is required only to stop execution on the judgment. Mr. Slaugh asked Rep. Curtis why $5 million is the point where limits would begin. Judge Lyle Anderson also questioned why $5 million was made the limit, and commented that it makes more sense to devise a rule where there is a relationship between the judgment amount, defendant's assets, and amount of bond. Responding to these comments, Rep. Curtis explained that the amendment was an attempt to draft a rule that would set some standards for limitation, and that there is concern that defendants, particularly businesses, may be forced into bankruptcy if they are required to post an extremely large supersedeas bond.

Judge Anthony Schofield observed that if the issue is due process there is no reason to distinguish between a judgment of $150,000 and a judgment of $5 million, since a $150,000 judgment may force a mom and pop business into bankruptcy as readily as a $5 million judgment may force a larger company into bankruptcy. Mr. Slaugh agreed and commented that although the rule likely needs adjustment, he is concerned that HJR 16 appears designed to protect only large companies.

Rep. Curtis was asked whether any defendant had actually been forced into bankruptcy by the requirement of posting a bond, and he admitted that he did not know of any such instances. He commented that the amendment is an attempt to preclude such an occurance and that it is not good policy to essentially tell big companies that they will have to file bankruptcy if they wish to appeal. Judge Schofield again commented that it is not treating everyone equally when a large company with a $5 million judgment against it receives a break whereas a mom and pop business with a $150,000 judgment against it does not. The Committee further questioned Rep. Curtis as to the impetus for HJR 16, and asked whether the Legislature believed that there was a problem with large tort judgments. Rep. Curtis commented that the Legislature is concerned with both large tort judgments and class actions.

Judge Schofield stated that carving punitive damages and class action judgments out of the supersedeas bond requirements might be a satisfactory solution. He observed that there is a difference in punitive damages and compensatory damages, and if compensatory damages truly compensate the plaintiff as they should, the plaintiff would take no risk if the bond requirement for punitive damages were to be eliminated.

Mr. Shea then introduced Jim Olson who spoke on behalf of the Utah Food Association, which is the organization that had approached Rep. Curtis with the request for a change in Rule 62. Mr. Olson gave the following reasons for the request: (1) thirty states have adopted similar legislation and five states have no supersedeas bond requirement; (2) extremely large judgments and large punitive damages awards are a recent phenomenon; and (3) defendants should not have to file bankruptcy in order to appeal.

Judge David Nuffer stated that his concern with HJR 16 is that there should be a point when the plaintiff can feel secure in a judgment, even though there may be an appeal. Cullen Battle asked Mr. Olson whether he had considered the effect this limitation might have on Association members' ability to collect large debts, since a reduced bond might allow dissipation of assets during the appeal period. Judge Anderson noted that although dissipation is not a concern when a plaintiff's judgment is against a defendant who has acted in good faith, there may be defendants who would deliberately dissipate assets. Gary Thorup pointed out that there is a provision in HJR 16 that deals with dissipation of assets.

Francis Carney and Judge Nuffer asked the meaning of "other things" that can used to post a bond. Mr. Thorup commented that this simply means that there can be other ways of giving security, such as a property bond.

Mr. Shea introduced Ray Hintze, Chief Deputy for Utah Attorney General Mark Shurtliff. Mr. Hintze stated that it has been a long-term goal of the Attorney General's office to oppose supersedeas bonds, which it sees as an issue of equal access to the courts. The Attorney General's office therefore supports HJR 16. Mr. Hintze pointed out that no one from the plaintiff's bar opposed HJR 16 during the comment period. He also commented that the Attorney General believes that juries are more likely to impose large monetary judgments on large businesses than they are to impose large monetary judgments on other types of defendants.

The Committee discussed at length various solutions to the concerns expressed. Mr. Shea summarized the possible changes suggested: (1) set bond at a percentage of the defendant's net worth; (2) do away with the bond requirement entirely; (3) establish factors to guide the trial court in setting bond; (4) eliminate the bond requirement for punitive damages and/or class actions; (5) increase the limit in HJR 16 from $5 million to $100 million; (6) impose HJR 16 limits only to judgments for punitive damages and/or in class actions.

After additional discussion, including looking at comparable rules from other states, it was agreed that it appears to be wise to amend Rule 62 to grant some kind of relief from bonding

for punitive damages. Judge Nuffer suggested that the Committee consider the Mississippi rule as a place to start, and that the phrase "other form of security" be deleted from any proposed rule. With this in mind, Mr. Shea will work on a proposed rule and forward it to Committee members for comment. He will also send the draft to all guests who attended today's meeting.

III. COMMENTS TO RULES; FINAL RECOMMENDATIONS.

Prior to today's meeting, Committee members received copies of: (1) Thomas Lee's history of proposed Rule 63(c), which includes discussion of the extensive deliberation and debate undertaken by the Committee on Rule 63 over the course of approximately two years; (2) Judge William Barrett's letter written as Chair of the Board of District Court Judges and on behalf of district judges, expressing their unanimous opposition to subpart (c) of Rule 63; (3) all comments received on proposed amendments to or new rules 45, 47, 56, 63, 64, 64A, 64B, 64C, 64D, 64E, 64F, 66, 69, 69A, 69B, 69C. Mr. Shea stated that most issues raised in the comments had already been raised and discussed in previous Committee meetings.

The Committee reviewed all comments submitted on proposed rules and the proposed rules themselves. With regard to proposed Rule 63, Mr. Shea pointed out that district court judges had voted unanimously to opposed subpart (c) of Rule 63. He also suggested that the following provision be added to subpart (c): that a judge's denial of a motion to recuse under subpart (c) is not reviewable under subpart (b). After discussion, Mr. Battle moved that proposed Rule 63 be published for comment as it presently stands and with the amendment suggested by Mr. Shea. Judge Nuffer seconded the motion, which was approved unanimously.

With regard to Rule 64, the Committee found merit in Robert Kariya's (Barnes Bank) comment suggesting a rearrangement of items in subpart (c) in order to make the rule more clear. It was agreed that this will be done. After discussion, the Committee also agreed with Steve Tingey's comment that the proposed rules mandate a "balancing of equities" in actions for replevin and that this is inconsistent with that writ's purpose. The consensus of the Committee is that subpart (c)(10) of Rule 64A, which requires balancing of equities, will be deleted for replevin and that any such requirement for balancing of equities in replevin will be deleted in any other sections where it occurs.

Other minor technical changes were suggested and approved. After extensive discussion, a motion was made that the proposed rules be submitted to the Supreme Court with the additional changes discussed. The motion was seconded and approved unanimously

IV. ADJOURNMENT.

The meeting adjourned at 6:10 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, August 25, 2004, at the Administrative Office of the Courts.

COVINGTON & BURLING

Keith A. Teel

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Keith A. Teel practices in the legislative and litigation areas. He has significant experience in the litigation of complex insurance disputes. He co-chairs the firm's Legislative Practice Group.

Litigation

In the litigation area, Keith has handled commercial, product liability, and insurance matters at the trial and appellate level. He is national coordinating counsel for product liability litigation involving the now-dissolved Tobacco Institute. In addition to insurance litigation, Keith regularly advises policyholder clients concerning insurance coverage issues, particularly with respect to toxic or mass tort claims and other complex insurance disputes.

Matters in which Keith has served as lead or trial counsel include *Traynor v. Turnage*, 485 U.S. 535 (1988) (application of the Rehabilitation Act of 1973 to the Veterans Administration, and the appealability to federal courts of administrative decisions of the Veterans Administration) (briefed and argued); *SmithKline v. TIG Insurance Co., et al.* (E.D. Pa.) (insurance coverage for DES claims); *SmithKline v. Aetna Casualty & Surety Co., et al.* (N.J. Superior Court) (insurance coverage for environmental claims); and *Reynolds Metals Co. v. Consolidated Aluminum Corp.* (M.D. La.) (commercial dispute over liability for pollution at manufacturing facility). He has also handled cases involving false advertising claims under the Lanham Act; toxic tort claims alleging neurological injuries due to the defective design of a metals plan; and numerous Superfund cases.

Legislation

In his legislative work, for the last fifteen years Keith has assisted clients in the area of tort and civil justice reform, where he develops and seeks the enactment of legislation that solves significant liability problems. He also works to defeat legislation that expands liability. In the last four years, for example, he has directed efforts that resulted in the enactment of laws in thirty states that cap the size of the appeal bond necessary to stay execution of potentially ruinous compensatory and punitive damages judgments. In total, Keith has drafted and overseen the passage of more than forty pieces of state civil justice legislation, and has participated in dozens of other civil justice legislative efforts. Keith chairs the Agenda Committee of the American Tort Reform Association, which named him one of its Legal Reform Champions in 2003. Representative legislation in which Keith was significantly involved:

Appeal Bond Limitation Statutes -- Coordinated and directed multi-state effort

Hawaii (2004)
Minnesota (2004)

Nebraska (2004)
South Carolina (2004)
Arkansas (2003)
California (2003)
Colorado (2003)
Kansas (2003)
Missouri (2003)
New Jersey (2003)
Oregon (2003)
Pennsylvania (2003)
South Dakota (2003) (court rule)
Tennessee (2003)
Texas (2003)
Wisconsin (2003)
Indiana (2002)
Michigan (2002)
Ohio (2002)
Oklahoma (2001) and (2004)
Louisiana (2001) and (2003)
Mississippi (2001) (court rule)
Nevada (2001)
West Virginia (2001) and (2004)
Florida (2000) and (2003)
Georgia (2000) and (2004)
Kentucky (2000)
North Carolina (2000) and (2003)
Virginia (2000) and (2004)
Maryland Medicaid Liability Statute (1998) (directed opposition)
Vermont Medicaid Liability Statute (1998) (directed opposition)
Repeal of Florida Medicaid Liability Statute (1995) (vetoed and override failed)
Illinois Tort Reform Statute (1995) (part of coalition)
Michigan Tort Reform Statute (1994) (part of coalition)
Texas Product Liability Statute (1993)
North Dakota Product Liability Statute (1993)
Arizona Tort Statute (1993)
Mississippi Product Liability and Punitive Damages Statute (1993)
Federal Omnibus Appropriations Statute, provision limiting stadium overflights (2003)

Personal

Keith received his B.S. in Chemistry from Washington & Lee University, Lexington, Virginia, in 1978. In 1981, he received his J.D. from the University of Virginia School of Law. Among his numerous bar memberships, he is admitted to practice before the United States Supreme Court and the United States Patent and Trademark Office.

Rule 62. Stay of proceedings to enforce a judgment.

(a) Stay upon entry of judgment. Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the final judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

(b) Stay on motion for new trial or for judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) Injunction pending appeal. When an appeal is taken, from an interlocutory order or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d) Stay upon appeal. When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in favor of the state, or agency thereof. When an appeal is taken by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay in quo warranto proceedings. Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(g) Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings or to suspend, modify, restore, or grant an injunction, or extraordinary relief or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of judgment upon multiple claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(i) Form of supersedeas bond; deposit in lieu of bond; waiver of bond; jurisdiction over sureties to be set forth in undertaking.

(i)(1) A supersedeas bond given under Subdivision (d) may be either a commercial bond having a surety authorized to transact insurance business under Title 31A, or a personal bond having one or more sureties who are residents of Utah having a collective net worth of at least twice the amount of the bond, exclusive of property exempt from execution. Sureties on personal bonds shall make and file an affidavit setting forth in reasonable detail the assets and liabilities of the surety.

(i)(2) Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond under Subdivision (d).

(i)(3) The parties may by written stipulation waive the requirement of giving a supersedeas bond under Subdivision (d) or agree to an alternate form of security.

(i)(4) A supersedeas bond given pursuant to Subdivision (d) shall provide that each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served, and that the surety's liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

(j) Amount of supersedeas bond.

(j)(1) A court shall set the supersedeas bond in an amount that adequately protects the judgment creditor against loss or damage occasioned by the appeal and assures payment in the event the judgment is affirmed. In setting the amount, the court may consider any relevant factor, including:

(j)(1)(A) the debtor’s ability to pay the judgment;

(j)(1)(B) the debtor’s opportunity to dissipate assets;

(j)(1)(C) the debtor’s likelihood of success on appeal; and

(j)(1)(D) the respective harm to the parties from setting a higher or lower amount.

(j)(2) The presumed limit on the amount of the supersedeas bond for compensatory damages is the amount of the compensatory damages plus costs and attorney fees, as applicable, plus 3 years of interest at the applicable interest rate. The presumed limit on the amount of the supersedeas bond for punitive damages is the lesser of:

(j)(2)(A) 10% of the defendant's net worth;

(j)(2)(B) 50% of the punitive damages; or

(j)(2)(C) $25,000,000.

(j)(3) If the court permits a supersedeas bond that is less than the total amount of the judgment, the order may be conditioned on one or more of the following during the pendency of the appeal:

(j)(3)(A) an order prohibiting payment of dividends;

(j)(3)(B) an order prohibiting transfer or disposition of assets other than in the ordinary course of business;

(j)(3)(C) an order prohibiting loans other than in the ordinary course of business;

(j)(3)(D) an order requiring defendant to abstract the judgment to all jurisdictions in which it has significant assets; and

(j)(3)(E) an order requiring defendant and all corporate officers to personally acknowledge receiving the order and to consent to personal jurisdiction for purposes of enforcing the order.

~~(j)~~ (k) Objecting to sufficiency or amount of security. Any party whose judgment is stayed or sought to be stayed pursuant to Subdivision (d) may object to the sufficiency of the sureties on the supersedeas bond or the amount thereof, or to the sufficiency or amount of other security given to stay the judgment by filing and giving notice of such objection. The party so objecting shall be entitled to a hearing thereon upon five days notice or such shorter time as the court may order. The burden of justifying the sufficiency of the sureties or other security and the amount of the bond or other security, shall be borne by the party seeking the stay, unless the objecting party seeks a bond greater than the presumptive limits of this rule. The fact that a supersedeas bond, its surety or other security is generally permitted under this rule shall not be conclusive as to its sufficiency or amount.

LIABILITY REFORM ACT AMENDMENTS

2005 GENERAL SESSION

STATE OF UTAH

LONG TITLE

General Description:

This bill limits the addition of parties to a lawsuit to within 90 days of the answer to a complaint.

Highlighted Provisions:

This bill:

- provides for a 90-day time period to add defendants to a lawsuit;
- requires that a party who makes a request to the court to add additional parties also provide specific information about the additional parties; and
- allows the court to deny the request simply because it was not filed timely.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78-27-38, as last amended by Chapter 95, Laws of Utah 1999

78-27-41, as last amended by Chapter 95, Laws of Utah 1999

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78-27-38** is amended to read:

78-27-38. Comparative negligence.

(1) The fault of a person seeking recovery shall not alone bar recovery by that person.

(2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78-27-39(2).

(3) No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39.

(4) (a) In determining the proportionate fault attributable to each defendant, the fact finder may, and when requested by a party shall, in accordance with the provisions of Section 78-27-41, consider the conduct of any person [~~who~~] alleged to have contributed to the alleged injury regardless of whether the person is a person immune from suit or a defendant in the action and may allocate fault to each person seeking recovery, to each defendant, and to any other person whether joined as a party to the action or not and whose identity is known or unknown to the parties to the action, including a person immune from suit who contributed to the alleged injury. In the case of a motor vehicle accident involving an unidentified motor vehicle, the existence of the vehicle shall be proven by clear and convincing evidence which may consist solely of one person's testimony.

(b) Any fault allocated to a person immune from suit is considered only to accurately determine the fault of the person seeking recovery and a defendant and may not subject the person immune from suit to any liability, based on the allocation of fault, in this or any other action.

Section 2. Section **78-27-41** is amended to read:

78-27-41. Joinder of defendants.

(1) A person seeking recovery, or any defendant who is a party to the litigation, may join as a defendant, in accordance with the Utah Rules of Civil Procedure, any person other than a person immune from suit who [~~may~~] is alleged to have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective proportions of fault.

(2) A person immune from suit may not be named as a defendant, but fault may be allocated to a person immune from suit solely for the purpose of accurately determining the fault of the person seeking recovery and [~~a defendant~~] all defendants. A person immune from suit is not subject to any liability, based on the allocation of fault, in this or any other action.

(3) (a) A person immune from suit may intervene as a party under Rule 24, Utah Rules of Civil Procedure, regardless of whether or not money damages are sought.

(b) A person immune from suit who intervenes in an action may not be held liable for any fault allocated to that person under Section 78-27-38.

(4) A party seeking to allocate fault to another person shall:

(a) identify in its answer those persons then known to that party [~~who may be at fault~~

~~and shall identify within a reasonable time~~] to whom it intends to seek allocation of fault;

(b) identify in a supplemental pleading within 90 days after filing its answer any additional persons later discovered which that party alleges to have been at fault[~~,~~] and to whom it intends to seek allocation of fault; and

(c) include in the pleading in which the person is identified:

(i) all identifying information regarding that person known or reasonably available to the party, including but not limited to the full name, address, telephone number, and employer of the person to whom fault is sought to be allocated; and

(ii) a brief statement setting forth the good faith factual and legal basis for the requested allocation of fault to that person.

(5) In extraordinary cases the court, upon motion and for good cause shown, may permit the filing of a supplemental pleading after the expiration of the 90 day period[~~, but in no event more than 180 days after the filing of the party's answer~~].

(6) A party seeking to allocate fault to another person who fails to comply with the provisions of this section shall be denied the request to allocate fault to that person.

Rule 9. Pleading special matters.

(a)(1) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. A party may raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity by specific negative averment, which shall include facts within the pleader's knowledge. If raised as an issue, the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(a)(2) Designation of unknown defendant. When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(a)(3) Actions to quiet title; description of interest of unknown parties. In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(b) Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) Official document or act. In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be

made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) Time and place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special damage. When items of special damage are claimed, they shall be specifically stated.

(h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) Private statutes; ordinances. In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) Libel and slander.

(j)(1) Pleading defamatory matter. It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(j)(2) Pleading defense. In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(k) Renew judgment. A complaint alleging failure to pay a judgment shall describe the judgment with particularity or attach a copy of the judgment to the complaint.

(l) Allocation of fault.

(l)(1) A party seeking to allocate fault to another shall identify, by name, address, telephone number, employer, and by any other information known or reasonably available to the party, the persons to whom fault is sought to be allocated. A party seeking to allocate fault to another shall, for each person, set forth a good faith factual and legal basis for doing so.

(l)(2) For persons then known, the party shall include the identity and factual and legal basis in the party's answer. For persons later discovered, the party shall include the identity and factual and legal basis in a supplemental answer filed within 90 days after the original answer. The court, upon motion and for good cause, may permit a party to file a supplemental answer after the 90-day period.

(l)(3) A party may not seek to allocate fault to another except by compliance with this rule.

Proposed Amendment to Rule 47

Francis J. Carney

July 27, 2004

There has been some discussion of the confusion as to the meaning of Rule 47(c): *"Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made*."

The case law holds that in a multi-defendant action, the defendants must share in three peremptory challenges; in other words, they do not each get three. *Sutton v. Otis Elevator*, 249 P. 437 (Utah 1926); *Randle v. Allen*, 862 P.2d 1329 (Utah 1993); *State v. Pena*, 869 P.2d 932, 936 (Utah 1994); *Carrier v. Pro-Tech Restoration* ,909 P.2d 271 (Utah Ct. App. 1995) *aff'd* 944 P.2d 346 (Utah 1997). Rule 47(e) and (c) require that there be a "substantial controversy" between defendants, and not merely a derivative cross claim, in order for each defendant to get its own set of peremptory challenges. Otherwise, all defendants are jointly limited to a total of three peremptories.

Federal Rule 47(b) simply refers one to 28 USC §1870. It provides:

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

This seems more straightforward than our state rule and my suggestion is that we amend Rule 47 to clarify it, and to incorporate the "substantial controversy" test set down by the case law.

Rule 47. Jurors.

(a) Examination of jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper. Prior to examining the jurors, the court may make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify the parties in advance of trial.

(b) Alternate jurors. The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, and privileges as principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict unless the parties stipulate otherwise and the court approves the stipulation. The court may withhold from the jurors the identity of the alternate jurors until the jurors begin deliberations. ~~If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed~~.

(c) Challenge defined; by whom made. A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror. ~~Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.~~

(d) Challenge to panel; time and manner of taking; proceedings. A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be stated on the record, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(e) Challenges to individual jurors; number of peremptory challenges. The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three

peremptory challenges, except as provided under Subdivisions (b) and (c) of this rule. Several defendants or several plaintiffs shall be considered as a single party for the purposes of making peremptory challenges unless there is a substantial controversy between them, in which case the court shall allow as many additional peremptory challenges as is just. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed.

(f) Challenges for cause. A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(f)(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(f)(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(f)(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water, power, light or other services rendered to such resident.

(f)(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(f)(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except interest as a member or citizen of a municipal corporation.

(f)(6) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(g) Selection of jury. The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following methods for selection are not exclusive.

(g)(1) Strike and replace method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy , and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(g)(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause that may be granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(g)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(h) Oath of jury. As soon as the jury is selected an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

(i) Proceedings when juror discharged. If, after impaneling the jury and before verdict, a juror becomes unable or disqualified to perform the duties of a juror and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) Questions by jurors. A judge may invite jurors to submit written questions to a witness as provided in this section.

(j)(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(j)(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(j)(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(k) View by jury. When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury

are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

(l) Communication with jurors. There shall be no off-the-record communication between jurors and lawyers, parties, witnesses or persons acting on their behalf. Jurors shall not communicate with any person regarding a subject of the trial. Jurors may communicate with court personnel and among themselves about topics other than a subject of the trial. It is the duty of jurors not to form or express an opinion regarding a subject of the trial except during deliberation. The judge shall so admonish the jury at the beginning of trial and remind them as appropriate.

(m) Deliberation of jury. When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having charge of them must not make or allow to be made any communication to them with respect to the action, except to ask them if they have agreed upon their verdict, and the officer must not, before the verdict is rendered, communicate to any person the state of deliberations or the verdict agreed upon.

(n) Exhibits taken by jury; notes. Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits which have been received as evidence in the cause, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(o) Additional instructions of jury. After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or stated on the record.

(p) New trial when no verdict given. If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(q) Court deemed in session pending verdict; verdict may be sealed. While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(r) Declaration of verdict. When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is the juror's verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.

(s) Correction of verdict. If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

Rule 7(h). Motions for reconsideration.

(h)(1) Time for filing; contents; response; oral argument not permitted. Motions for reconsideration are disfavored and shall be filed only under exceptional circumstances and not later than 10 days after the entry of the order or decision for which reconsideration is sought. The motion shall state with particularity the points of law or fact the movant claims the court has overlooked or misapprehended. Counsel for the movant shall certify that the motion is presented in good faith and not for delay. Oral argument will not be permitted. No response to a motion for reconsideration will be received unless requested by the court. A response shall be filed within 14 days after the entry of the order requesting the response. A motion for reconsideration will not be granted in the absence of a request for a response.

(h)(2) Action by court if granted. If a motion for reconsideration is granted, the court may dispose of the matter without reargument, may restore the case to the calendar for reargument or resubmission, or may make such other orders as are appropriate under the circumstances of the case.

(h)(3) Attorneys fees. If the court denies a motion for reconsideration after requesting a response, the court shall award to the responding party reasonable attorneys fees in preparing the response.