Agenda
Advisory Committee on Rules of Civil Procedure

January 23, 2008
4:00 to 6:00 p.m.

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

Approval of minutes	Tab 1	Fran Wikstrom
Uniform fax policy	Tab 2	Kim Colton
Comments to Rules 7, 40, 41, 101 and Small Claims Rule 3 and Rules 1, 5, 10, 11, 64D	Tab 3	Tim Shea
Rule 35. Physical and mental examination of persons.	Tab 4	Frank Carney Tom Lee
Rule 6, et al. Time	Tab 5	Tony Schofield Frank Carney Jon Hafen Cullen Battle Tom Lee David Scofield James Blanch Steve Marsden Leslie Slaugh
Overall evaluation of URCP	Tab 6	Fran Wikstrom

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

Meeting Schedule

February 27, 2008
March 26, 2008
April 23, 2008
May 28, 2008
September 24, 2008
October 22, 2008
November 19, 2008 (3d Wednesday)

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, November 28, 2007
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, James T. Blanch, Francis J. Carney, Leslie W. Slaugh, Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Jonathan Hafen, Thomas R. Lee, Honorable R. Scott Waterfall, David W. Scofield, Cullen Battle, Steven Marsden, Anthony W. Schofield, Debora Threedy, Lori Woffinden

EXCUSED: Barbara Townsend, Janet H. Smith, Todd M. Shaughnessy, Honorable Anthony B. Quinn, Honorable Derek Pullan

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

GUEST: Ron Bowmaster

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the October 24, 2007 minutes. No comments were made and Mr. Wikstrom asked for a motion that the October 24, 2007 minutes be approved. The motion was duly made and seconded, and unanimously approved.

II. E-FILING RULES.

Mr. Shea brought the e-filing rules back to the committee.

Mr. Slaugh noted his concern regarding effectuating service for e-filing under Rule 5(b)(1)(B). The committee discussed revising subsection (b)(1)(B) to state, "Service by mail, email or fax is complete upon sending, but service by *electronic means* is not effective if the party making service learns that the attempted service did not reach the person to be served."

Mr. Shea introduced Ron Bowmaster, and asked him to entertain questions from the committee. Mr. Bowmaster is a member of the Administrative Office of the Court's ("AOC") technology committee.

Mr. Bowmaster explained the framework of the AOC's e-filing system is designed to allow an individual e-filers' internet service provider to communicate with the court's electronic database. The AOC plans to establish a certification procedure for service providers. The

committee asked that the contract between the AOC and the service provider require the provider to provide notice to the court that it delivered the filing to the anticipated recipient. Mr. Wikstrom asked that the committee re-address the e-filing system after the system comes on-line.

Mr. Lee expressed concern about the meaning of the language, "most likely to give actual notice," in Rule 5 (b)(1)(A). The committee discussed whether actual notice should be required. The committee also discussed revising the language to state, "most likely to give *prompt* actual notice."

After further discussion, Mr. Wikstrom entertained a motion to approve the proposed changes to subsections (b)(1)(A) and (B). Mr. Slaugh seconded the motion, and the committee unanimously approved the revisions.

III. RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

Mr. Carney and Mr. Lee brought Rule 35 back to the committee.

Mr. Carney expressed his concerns regarding the language in subsections (c)(1) and (2). He indicated the purpose of the proposed revision was to explicitly allow the party examined to receive copies of reports created by physicians who regularly conducted examinations for purposes of litigation. He further noted he thought it was unwise to allow the examining physician or the requesting party to determine whether prior reports involved the same condition, and thus cautioned against including this language.

The committee revised subsection (c)(1) inserting the phrase, "for litigation purposes" and removing the phrase, "of the same condition." The committee further agreed to remove the phrases, "upon motion showing good cause" and "of the same condition" in subsection (c)(2). Finally, the committee agreed the subsections should describe the person conducting the examination as the "examiner" instead of the "proposed examiner."

Mr. Lee suggested the second sentence in subsection (b)(3), addressing the discovery of an examiner's report or deposing an examiner, should be included in a separate subsection.

Mr. Battle suggested subsection (c) (3) should be revised to state, "The *examiner* producing the reports *shall* redact any personal identifying information."

The committee agreed to adopt the above suggested revisions.

IV. RULE 6, ET AL. TIME.

Mr. Shea brought Rule 6 back to the committee.

Mr. Shea revised Rule 6 to conform to the approach taken by the federal rules. Rule 6 would now contemplate the "days-are-days" approach for computing elapsed time. All days except the trigger days are counted. No extended time is provided if notice is served by mail, and no counting intervening weekends.

Mr. Shea submitted a table of the existing rules with proposed changes for the applicable time periods. For several of the rules, the proposal is to enlarge the time periods from 5 days to 7 days, 10 days to 14 days, and 15 days to 21 days.

Mr. Wikstrom assigned specific committee members a designated set of rules to examine in light of the proposed time period changes, and report back to the committee with any concerns.

V. ENCOURAGING COMMENTS TO RULES

Mr. Wikstrom expressed concern about the lack of comments from the Bar concerning proposed changes to the rules. The committee discussed ways to encourage further comments, and the effectiveness of sending notice of proposed changes by e-mail.

Mr. Schofield suggested limiting the times in which requests for comment are published to designated times of year when practitioners are on notice to analyze the changes.

After discussion, Mr. Wikstrom asked that the committee re-address the issue at a later meeting.

VI. OVERALL EVALUATION OF URCP.

Mr. Wikstrom asked that the committee discuss this topic at a later meeting.

VII. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting of the committee will be held at 4:00 p.m., on Wednesday, January 23, 2008, at the Administrative Office of the Courts.

I:\My Documents\Committees\Civil Pro\Minutes\2007-11-28.wpd

Tab 2

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: December 28, 2007
Re: Fax filing

Kim Colton has requested that Utah adopt a uniform rule governing filing documents by fax. I have attached his request of the Bar, which has been referred to this committee.

Currently, there is no written policy except in the Third and Eighth Districts, which prohibit filing by fax except for stay reports, revocation requests, and presentence reports. CJA 10-1-302 and CJA 10-1-801.

This committee has considered a uniform fax filing policy before. It came on a referral from the Judicial Council. I have attached an excerpt of the October 2004 Council minutes, the materials considered by this committee, and an excerpt of the February 2005 committee minutes.

According to the minutes, this committee was split, and as I recall, the proposal, at first endorsed by the clerks of court and the district court judges, was eventually opposed by them.

outh State Street / POB 140241 / Salt Lake City, Utah 84114-0241 / 801-578-3808 / Fax: 801-578-3843 / email: tims@email.utcourts.gov

Utah State Bar

645 South 200 East, Suite 310 • Salt Lake City, Utah 84111-3834
Telephone: 801-531-9077 • Fax: 801-531-0660

John C. Baldwin
Executive Director

November 15, 2007

Francis M. Wikstrom
Parsons Behle & Latimer
201 S. Main Street, Suite 1800
P.O. Box 45898
Salt Lake City, UT 84145-0898

Re: Proposed Amendments to Utah Rules of Civil Procedure and the Utah Rules of Judicial Administration Related to the Filing of Documents

Dear Fran:

Pursuant to a recent telephone conversation with Matty Branch, please find attached a copy of an e-mail to the Bar Commission from the chair of the Bar's Court and Judges Committee, Kim Colton. (Mr. Colton's contact information is 36 South State Street, Suite 1900, Salt Lake City, UT 84111; 801-532-3333.) At its November 9, 2007 meeting, via the consent calendar, the Bar Commission approved the Courts and Judges Committee's recommendation that policies governing the filing of documents via facsimile be standardized throughout the state courts. As the attachment shows, the Committee has suggested revisions to the applicable rules. Rather than the Bar handling this in our typical fashion by filing a petition for rule changes with the Court, Matty advised me that the appropriate entities through which to route this issue would be the Court's Advisory Committee on the Rules of Civil Procedure and the Judicial Council.

Please feel free to contact Mr. Colton with any questions you may have regarding this matter. Thanks for your assistance.

Very truly yours,

Katherine A. Fox
General Counsel

KAF/dlg

Enclosures

cc: Matty Branch, Appellate Court Administrator
John C. Baldwin, Utah State Bar Executive Director

From: Kim Colton [mailto:KColton@vancott.com]
Sent: Thursday, October 11, 2007 2:51 PM
To: Curtis Jensen; Lowry Snow
Cc: richard.dibblee@utahbar.org
Subject: Recommendation from Courts and Judges Committee

For the past year, the Bar's Courts and Judges Committee has discussed issues related to filing documents via facsimile in Utah State Courts. Inconsistent policies apparently adopted by various District and Juvenile Courts make it difficult for practitioners throughout the state.

We recommend the Utah State Bar Commission propose to the Judicial Council and the Utah Supreme Court's Advisory Committee on Civil Procedure adoption of a consistent rule for fax filing.

We have attached proposed language for such a rule that would require an amendment to Utah R. Civ. P. 5(e) and the elimination of Utah R. Jud. Admin. 10-1-302 and 10-1-801. This language is based upon Idaho R. Civ. P. 5(e).

Please place this item on the Commission's agenda at your earliest convenience. We will be happy to provide any additional information that the Commission may request.

Best regards,

Kim S Colton
Chair, Courts and Judge Committee

Rule 5(e).

(e) **Filing with the court defined.** The filing of pleading and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.

(e)(1) **Filing by Facsimile.**

Any pleading or document except those documents requiring a filing fee or filed as proof of incarceration of a party to the action may be transmitted to the court for filing by a facsimile machine process. The clerk shall file stamp the facsimile copy as an original and the signature, court seal, and notary seal on the copy shall constitute the required signature and be considered as originals under Rule 11(a). Filings may be made any time, provided that filings received outside normal working hours or on any non-business day will be file stamped at 9:00 a.m. on the next business day. After a document is filed by facsimile, there is no need to mail that document to the court. Documents of any length may be faxed.

(e)(2) **Other use of facsimile copies.**

Any facsimile machine process copy that is not transmitted directly to the court may be filed with the court. The clerk shall file stamp the facsimile copy as an original and the signature on the copy shall constitute the required signature under Rule 11(a). There shall be no limit as to the number of pages of a facsimile copy.

JUDICIAL COUNCIL MEETING MINUTES

Monday, October 25, 2004
Council Room, Matheson Courthouse
450 South State Street
Salt Lake City, Utah
Chief Justice Christine M. Durham, Presiding

….

12. FAX FILING POLICY: (Tim Shea)

Tim Shea reported that several months ago, the Council referred to Policy and Planning the issue of a uniform policy on filing papers by fax. The committee developed a working draft, which was shared with the Trial Court Executives, the Clerks of Court, Board of Justice Court Judges, and the Board of District Court Judges. It was reported that the committee has incorporated several suggestions from those groups and recommends amending Utah Rule of Civil Procedure 5. Mr. Shea reported that the committee recommends that there be no fee for filing a paper by fax. It was mentioned that since the amendment will affect how parties and lawyers process their cases, the committee recommends using the rules of procedure, rather than the Code of Judicial Administration, as the vehicle for the change. After discussion took place, the following motion was made.

Motion: David Bird made a motion to forward the rule to the Supreme Court with a recommendation that it be adopted. Judge Hilder seconded the motion. The motion carried unanimously.

….

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: January 19, 2005
Re: Rule 5. Fax filing.

It's downright embarrassing to propose a rule to regulate filing documents by fax 20 years after the technology was introduced. We will be discussing Rule 5 in the context of electronic filing as well, but the Supreme Court and Judicial Council have asked the rules committees to consider a uniform fax filing policy. Or counterparts for the criminal, juvenile and appellate rules will be reviewing the proposal presented here as part of URCP 5.

At this point, I recommend keeping the fax and e-filing issues separate, so I have prepared two sets of amendments to Rule 5: one to regulate filing by fax; the other to regulate electronic filing. Electronic filing will also require amendments to Rules 10 and 11.

The proposed amendment to Rule 5 for fax filing has been the rounds within the judiciary and has met with mixed opinion, but general acceptance. The provisions are relatively straightforward. The one that draws the most interest is the requirement that the filer keep rather than file the original. The purpose for this is two-fold: first that the court file not be ballooned more than necessary; second there is a Court of Appeals decision treating the later filed (and out of time) original as the operative document over the on-time fax. We want to avoid that result.

Rule 5. Service and filing of pleadings and other papers.

(a) Service: When required.

(a)(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(a)(2) No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2)(default proceedings). Pleadings asserting new or additional claims for relief against a party in default shall be served in the manner provided for service of summons in Rule 4.

(a)(3) In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made and by whom.

(b)(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.

(b)(1)(A) Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or, if consented to in writing by the person to be served, delivering a copy by electronic or other means.

(b)(1)(B) Service by mail is complete upon mailing. If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of service, service shall be by delivery or other method of actual notice. Service by electronic means is complete on

transmission if transmission is completed during normal business hours at the place receiving the service; otherwise, service is complete on the next business day.

(b)(2) Unless otherwise directed by the court:

(b)(2)(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(b)(2)(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(b)(2)(C) an order or judgment prepared by the court shall be served by the court.

(c) Service: Numerous defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service. Rule 26(i) governs the filing of papers related to discovery.

(e) Filing with the court defined.

(e)(1) The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.

(e)(2) A party may transmit by fax a pleading or other paper intended for filing. Fax transmissions are limited to 10 pages, excluding the cover page, unless otherwise permitted by the clerk of the court. A document transmitted by fax is the equivalent of the original document, including a signed original, for all purposes under these rules. Courtesy copies may not be transmitted by fax unless permitted by the judge. Transmitting a document by fax is not filing; filing is complete upon acceptance by the clerk of the court. If the clerk determines that there has been an error in transmission or failure to comply with this rule or that the fax is of poor quality,

the clerk shall notify the sender of the error as soon as practical. The clerk shall issue a receipt for fees paid, but is not required to notify a party of receipt of a fax or acceptance for filing. A party transmitting a document by fax:

(e)(2)(A) shall keep the original document safe, in good condition and available for production until completion of all appeals or until the time to appeal has expired;

(e)(2)(B) shall send the document to the fax number designated by the clerk of the court;

(e)(2)(C) shall include on a fax cover page the information required by Rule 10(a), the sender's fax number, the credit card number to be billed if there is a fee for filing the pleading or other paper, and the number of pages being faxed; and

(e)(2)(D) assumes all risk of failure of the transmission.

(e)(3) The clerk shall destroy the fax cover page after charging the fees and recording the transaction.

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, February 23, 2005
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Glenn C. Hanni, Francis J. Carney, Cullen Battle, Thomas R. Karrenberg, Paula Carr, Terrie T. McIntosh, Virginia S. Smith, R. Scott Waterfall, Leslie W. Slaugh, James T. Blanch, Lance Long, Honorable Anthony B. Quinn, Honorable Lyle R. Anderson, Honorable David Nuffer

EXCUSED: Honorable Anthony W. Schofield, David W. Scofield, Janet H. Smith, Todd M. Shaughnessy, Debora Threedy

STAFF: Tim Shea, Judith Wolferts, Trystan Smith

I. APPROVAL OF MINUTES.

Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the January 26, 2005 meeting were reviewed, and R. Scott Waterfall moved that they be approved as submitted. The motion was seconded by Francis J. Carney, and approved unanimously.

II. STAFF CHANGE.

Mr. Wikstrom introduced Trystan Smith, who will take Judith Wolferts' place as secretary to the Committee effective March 1, 2005. Mr. Wikstrom expressed his appreciation to Ms. Wolferts for her past service to the Committee.

III. RULE 7. PLEADINGS ALLOWED; MOTIONS, MEMORANDA, HEARINGS, ORDERS, OBJECTION TO COMMISSIONER'S ORDER.

Tim Shea introduced an amendment that would add the following language to Rule 7: "All orders shall be prepared as separate documents and shall not include any matter by reference unless permitted by the court." This amendment would require that all orders be separate documents, complete in and of themselves. Mr. Shea stated that the proposed amendment was prompted by complaints from judges that it is becoming common for attorneys to simply place a proposed order for the judge's signature at the end of a motion, rather than submitting a separate order. For example, an attorney might include a signature line and language at the end of a motion stating "based on the foregoing, the motion is granted."

Cullen Battle and Leslie Slaugh asked whether this amendment would mean that orders could not incorporate by reference the arguments in motions. Thomas Karrenberg pointed out that the amendment would also apply to judgments. The Committee also discussed whether the proposed amendment would prohibit exhibits such as a property description from being attached to an order, and agreed that a judge could still allow this. A change in language was suggested to state "unless otherwise ordered by the court."

After discussion, Mr. Blanch moved that the amendment be adopted with the language changes suggested by Committee members. The motion was seconded and approved, with one member voting no.

IV. FAX FILING.

Mr. Shea introduced a proposed amendment to Rule 5 that would specifically allow filing by fax. He stated that there seems to be agreement that state courts are presently permitting filing by fax, and there is a need to devise a rule that will assure uniformity. Mr. Wikstrom asked whether the amendment was requested by the Supreme Court. Mr. Shea responded that the district court in St. George has started to allow fax filing, and that this has come to the Supreme Court's attention with the result that the Court asked the Committee to address the issue. According to Mr. Shea, the proposed amendment has met with mixed opinion but general approval by the judiciary. There would be no fee for fax filing, and any fees presently required for a pleading or other document would have to be paid for by credit card at the time of filing.

Mr. Carney asked the meaning of the term "acceptance by the clerk" as used in the amendment. Mr. Shea explained that "acceptance" is when the clerk actually date-stamps the brief or pleading that has been faxed. Paula Carr commented that this proposed amendment has been discussed at Inns of Court, and that concerns have been expressed that allowing this will create more work for court staff. Mr. Blanch expressed his opinion that the process for allowing e-filing is so far along that fax filing is now obsolete. Some members opposed any rule that would allow filing by fax and believe that it should not be encouraged. Other members suggested that fax filing is practical in some areas of the state and in some situations. One member commented that even though he is not in favor of fax filing, there should be a rule to regulate it if it is presently being allowed.

After considerable discussion, Mr. Wikstrom asked for a show of hands as to those in favor of a rule that would allow fax filing statewide, and those who believe it should be allowed only by local rule in certain parts of the state. The vote was nearly evenly split, with some members in total opposition to a rule that would allow fax filing. In light of this result, Mr. Wikstrom stated that further discussion will be deferred to a later date in order to give the Committee an opportunity to see what kind of reception the concept of fax filing receives in other committees.

V. OFFER OF JUDGMENT.

At the January 2005 Committee meeting, Representative LaVar Christensen appeared and

Tab 3

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: January 16, 2008
Re: Comments to published rules

The comment period for the following rules has closed, and they are ready for your final recommendations.

URCP 007. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order. Amend. Requires motion for the relief sought rather than motion for an order to show cause except to enforce an existing court order.

URCP 040. Scheduling and postponing a trial. Amend and Rename. Deletes obsolete requirement for a local rule to govern trial settings. Simplify text.

URCP 041. Dismissal of actions. Amend. Deletes obsolete reference to Rule 66.

URCP 101. Motion practice before court commissioners. Amend. Requires motion for the relief sought rather than motion for an order to show cause except to enforce an existing court order.

URSCP 03. Service of the affidavit. Amend. Dismisses the action if service is not timely.

The comment period for the following rules closes the day before the meeting. I have attached the comments received to date, and I will bring to the meeting any received during the week.

URCP 001. General provisions. Amend. Removes electronic filing from the pilot project phase.

URCP 005. Service and filing of pleadings and other papers. Amend. Recognizes electronic service, as well as traditional methods. Permits the judge to require electronic filing.

URCP 010. Form of pleadings and other papers. Amend. Prohibits redundant, immaterial, impertinent or scandalous matter. Makes upper-left corner of document uniform for represented and self-represented parties. Permits but does not require a

450 South State Street / POB 140241 / Salt Lake City, Utah 84114-0241 / 801-578-3808 / Fax: 801-578-3843 / email: tims@email.utcourts.gov

graphic signature if a document is electronically filed. Includes electronic records within the scope of the rules.

URCP 011. Signing of pleadings, motions, and other papers; representations to court; sanctions. Amend. Permits a self-authenticated statement instead of an affidavit in accordance with Section 46-5-101. Recognizes electronic signatures.

URCP 064D. Writ of garnishment. Amend. To accommodate electronic filing, the amendment allows the creditor to pledge to serve the garnishee's fee rather than attach it to the filing.

Just before publishing the e-filing rules for comment, I proposed a process by which personal identifying information would be transmitted in a coversheet that is either destroyed or classified as private, rather than on the face of an otherwise public document. The personal identifying information has legitimate uses, but we should be able to process it in a more discreet manner. Since then, the Policy and Planning Committee of the Judicial Council has favored a rule, similar to the federal rule, that would require a filer to redact personal identifying information from a public document or substitute partial information. Because of that development, I again recommend to the committee these further amendments to the Rules of Civil Procedure:

- URCP 4. Delete attorney/party address from summons.
- URCP 10. Delete address, phone, email from upper-left corner of the document.
- Rules 64A, 64D, 64E. Delete the requirement that address, phone number, account number, social security number and driver license number be included on the face of the application for a writ.
- Develop a cover sheet or "sensitive information transmittal sheet" that is used to pass information from the filer to the court. Serve the cover sheet on the other parties if they need the information it contains. Classify the cover sheet as private or destroy it.
- If someone outside the litigation needs to confirm the identity of a party, provide several partial pieces of information to confirm a match.

Encl: Draft rules
Comments

Rule 3. Service of the affidavit.

(a) After filing the affidavit and receiving a trial date, plaintiff must serve the affidavit and summons on defendant. To serve the affidavit, plaintiff must either:

(a)(1) have the affidavit served on defendant by a sheriff's department, constable, or person regularly engaged in the business of serving process and pay for that service; or

(a)(2) have the affidavit delivered to defendant by a method of mail or commercial courier service that requires defendant to sign a receipt and provides for return of that receipt to plaintiff.

(b) The affidavit must be served at least 30 calendar days before the trial date. Service by mail or commercial courier service is complete on the date the receipt is signed by defendant. If the affidavit is not served within 120 days after the affidavit is filed, the action is deemed dismissed without prejudice.

(c) Proof of service of the affidavit must be filed with the court no later than 10 business days after service. If service is by mail or commercial courier service, plaintiff must file a proof of service. If service is by a sheriff, constable, or person regularly engaged in the business of serving process, proof of service must be filed by the person completing the service.

(d) Each party shall serve on all other parties a copy of all documents filed with the court other than the counter affidavit. Each party shall serve on all other parties all documents as ordered by the court. Service of all papers other than the affidavit and counter affidavit may be by first class mail to the other party's last known address. The party mailing the papers shall file proof of mailing with the court no later than 10 business days after service. If the papers are returned to the party serving them as undeliverable, the party shall file the returned envelope with the court.

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

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

(b)(1) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

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

(c) Memoranda.

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

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

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue

exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

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

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

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

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

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

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be

enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

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

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

Rule 40. Scheduling and postponing a trial.

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

(b) Postponement. The court may postpone a trial for good cause upon such terms as are just, including the payment of costs.

(c) Preserving testimony of witnesses. If requested, the court may conduct a hearing to examine and cross-examine any witness present, and the testimony may be read at the trial with the same effect as and subject to the same objections to a deposition under Rule 32.

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof.

(a)(1) By plaintiff. Subject to the provisions of Rule 23(e)~~, of Rule 66(i),~~ and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(a)(2) By order of court. Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(a)(2)(i) a stipulation of all of the parties who have appeared in the action; or

(a)(2)(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

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

for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) Dismissal of counterclaim, cross-claim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of previously-dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Bond or undertaking to be delivered to adverse party. Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

Rule 101. Motion practice before court commissioners.

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

(b) Time to file and serve. The moving party shall file the motion and attachments with the clerk of the court and obtain a hearing date and time. The moving party shall serve the responding party with the motion and attachments and notice of the hearing at least 14 calendar days before the hearing. A party may file and serve with the motion a memorandum supporting the motion. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) Response; reply. The responding party shall file and serve the moving party with a response and attachments at least 5 business days before the hearing. A party may file and serve with the response a memorandum opposing the motion. The moving party may file and serve the responding party with a reply and attachments at least 3 business days before the hearing. The reply is limited to responding to matters raised in the response.

(d) Attachments; objection to failure to attach.

(d)(1) As used in this rule “attachments” includes all records, forms, information and affidavits necessary to support the party’s position. Attachments for motions and responses regarding alimony shall include income verification and a financial declaration. Attachments for motions and responses regarding child support and child custody shall include income verification, a financial declaration and a child support worksheet. A financial declaration shall be verified.

(d)(2) If attachments necessary to support the moving party’s position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If attachments necessary to support the responding party’s position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect shall be cured within 2 business days after notice of the defect or at least 2 business days before the hearing, whichever is earlier.

(e) Courtesy copy. Parties shall deliver to the court commissioner a courtesy copy of all papers filed with the clerk of the court within the time required for filing with the clerk. The courtesy copy shall state the name of the court commissioner and the date and time of the hearing.

(f) Late filings; sanctions. If a party files or serves papers beyond the time required in subsections (b) or (c), the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

(g) Counter motion. Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion. This rule applies to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served no later than the reply. The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing. A separate notice of hearing on counter motions is not required.

(h) Limit on hearing. The court commissioner shall not hold a hearing on a motion before the deadline for an appearance by the respondent under Rule 12.

(i) Limit on order to show cause. ~~The court shall issue an order to show cause only upon motion~~ An application to the court for an order to show cause shall be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by affidavit or other evidence sufficient to show ~~probable~~ cause to believe a party has violated a court order. ~~The court commissioner shall proceed in accordance with Utah Code Title 78, Chapter 32, Contempt.~~

(j) Motions to judge. The following motions shall be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be to the judge.

Rule 1. General provisions.

(a) Scope of rules. These rules shall govern the procedure in the courts of the state of Utah in all actions, suits, and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as governed by other rules promulgated by this court or enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action.

(b) Effective date. These rules shall take effect on January 1, 1950; and thereafter all laws in conflict therewith shall be of no further force or effect. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

~~(c) Electronic filing. Notwithstanding these rules, the court may permit electronic transactions among the parties and with the court in court-supervised pilot projects approved by the Judicial Council.~~

Rule 5. Service and filing of pleadings and other papers.

(a) Service: When required.

(a)(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(a)(2) No service need be made on parties in default except that:

(a)(2)(A) a party in default shall be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers;

(a)(2)(C) a party in default for any reason shall be served with notice of any hearing necessary to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) pleadings asserting new or additional claims for relief against a party in default for any reason shall be served in the manner provided for service of summons in Rule 4.

(a)(3) In an action begun by seizure of property, ~~whether through arrest, attachment, garnishment or similar process,~~ in which no person ~~need be or~~ is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made ~~and by whom~~.

(b)(1) ~~Whenever under these rules service is required or permitted to be made upon~~ If a party is represented by an attorney, ~~the~~ service shall be made upon the attorney unless service upon the party is ordered by the court. If an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice, service shall be made upon the attorney and the party. ~~Service upon the attorney or upon a party shall be made by delivering a copy or by~~

~~mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.~~

(b)(1)(A) ~~Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or, if consented to in writing by the person to be served, delivering a copy by electronic or other means.~~ If a hearing is scheduled 5 days or less from the date of service, the party shall use the method most likely to give prompt actual notice of the hearing. Otherwise, a party shall serve a paper under this rule:

(b)(1)(A)(i) upon any person with an electronic filing account who is a party or attorney in the case by submitting the paper for electronic filing;

(b)(1)(A)(ii) by sending it by email to the person's last known email address if that person has agreed to accept service by email;

(b)(1)(A)(iii) by faxing it to the person's last known fax number if that person has agreed to accept service by fax;

(b)(1)(A)(iv) by mailing it to the person's last known address;

(b)(1)(A)(v) by handing it to the person;

(b)(1)(A)(vi) by leaving it at the person's office with a person in charge or leaving it in a receptacle intended for receiving deliveries or in a conspicuous place; or

(b)(1)(A)(vii) by leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.

(b)(1)(B) Service by mail, email or fax is complete upon ~~mailing~~ sending. Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served. ~~If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of service, service shall be by delivery or other method of actual notice. Service by electronic means is complete on transmission if transmission is completed during normal business hours at the place receiving the service; otherwise, service is complete on the next business day.~~

(b)(2) Unless otherwise directed by the court:

(b)(2)(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(b)(2)(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(b)(2)(C) an order or judgment prepared by the court shall be served by the court.

(c) Service: Numerous defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes ~~due~~ notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service. Rule 26(i) governs the filing of papers related to discovery.

(e) Filing with the court defined. ~~The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.~~ A party may file with the clerk of court using any means of delivery permitted by the court. The court may require parties to file electronically with an electronic filing account. Filing is complete upon acceptance by the clerk of court. The clerk shall note the date of acceptance on the paper. The judge may accept papers, shall note the date of acceptance on the papers, and shall transmit them to the clerk of court.

Rule 10. Form of pleadings and other papers.

(a)(1) Caption; names of parties; other necessary information. All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned.

(a)(2) In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action."

(a)(3) Every pleading and other paper filed with the court shall ~~also~~ state in the top left hand corner of the first page the name, address, email address, telephone number and bar number of ~~any~~ the attorney ~~representing the~~ or party filing the paper, ~~which information shall appear in the top left-hand corner of the first page. Every pleading shall state~~ and, if filed by an attorney, the ~~name and address of the~~ party for whom it is filed~~; this information shall appear in the lower left-hand corner of the last page of the pleading~~. The plaintiff shall file ~~together~~ and serve with the complaint a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council. The clerk shall destroy the coversheet after recording the information it contains.

(b) Paragraphs; separate statements. All ~~averments~~ statements of claim or defense shall be made in numbered paragraphs~~, the contents of each of which~~. Each paragraph shall be limited as far as practicable to ~~a statement of~~ a single set of circumstances; and a paragraph may be ~~referred to by number~~ adopted by reference in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by reference; exhibits. Statements in a ~~pleading~~ paper may be adopted by reference in a different part of the same ~~pleading~~ or ~~in~~ another ~~pleading, or in any motion~~ paper. An exhibit to a ~~pleading~~ paper is a part thereof for all purposes.

(d) ~~Paper quality, size, style and printing. All pleadings and other papers filed with the court, except printed documents or other exhibits, shall be typewritten, printed or photocopied in black type on good, white, unglazed paper of letter size (8 1/2" x 11"), with a top margin of not less than 2 inches above any typed material, a left-hand margin of not less than 1 inch, a right-hand margin of not less than one-half inch, and a bottom margin of not less than one-half inch. All typing or printing shall be clearly legible, shall be double-spaced, except for matters customarily single-spaced or indented, and shall not be smaller than 12-point size. Typing or printing shall appear on one side of the page only.~~ Paper format. All pleadings and other papers, other than exhibits and court-approved forms, shall be 8½ inches wide x 11 inches long, on white background, with a top margin of not less than 2 inches, a right and left margin of not less than 1 inch and a bottom margin of not less than one-half inch, with text or images only on one side. All text or images shall be clearly legible, shall be double spaced, except for matters customarily single spaced, and shall not be smaller than 12-point size.

(e) Signature line. ~~Names~~ The name of the person signing shall be typed or printed under ~~all signature lines, and all signatures shall be made in permanent black or blue ink~~ that person's signature. If a paper is electronically signed, the paper shall contain the typed or printed name of the signer with or without a graphic signature.

(f) ~~Enforcement by clerk; waiver for pro se parties.~~ Non-conforming papers. The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with ~~this rule~~ subdivisions (a) – (e), the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) Replacing lost pleadings or papers. If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(h) No improper content. The court may strike and disregard all or any part of a pleading or other paper that contains redundant, immaterial, impertinent or scandalous matter.

(i) Electronic papers.

(i)(1) Any reference in these rules to a writing, recording or image includes the electronic version thereof.

(i)(2) A paper electronically signed and filed is the original.

(i)(3) An electronic copy of a paper, recording or image may be filed as though it were the original. Proof of the original, if necessary, is governed by the Utah Rules of Evidence.

(i)(4) An electronic copy of a paper shall conform to the format of the original.

(i)(5) An electronically filed paper may contain links to other papers filed simultaneously or already on file with the court and to electronically published authority.

Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.

(a) Signature.

(a)(1) Every pleading, written motion, and other paper shall be signed by at least one attorney of record ~~in the attorney's individual name~~, or, if the party is not represented ~~by an attorney, shall be signed~~ by the party. ~~Each paper shall state the signer's address and telephone number, if any.~~

(a)(2) A person may sign a paper using any form of signature recognized by law as binding.

~~Except when otherwise specifically provided~~ Unless required by ~~rule or~~ statute, ~~pleadings~~ a paper need not be ~~verified or~~ accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit a declaration pursuant to Utah Code Section 46-5-101. If a statute requires an affidavit or a notarized, verified or acknowledged signature and the party electronically files the paper, the signature shall be notarized pursuant to Utah Code Section 46-1-16.

(a)(4) An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or ~~later~~ advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions ~~therein~~ are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(c)(1) How initiated.

(c)(1)(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(c)(1)(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(c)(2) Nature of sanction; limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(c)(2)(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(c)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(c)(2)(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

Rule 64D. Writ of garnishment.

(a) Availability. A writ of garnishment is available to seize property of the defendant in the possession or under the control of a person other than the defendant. A writ of garnishment is available after final judgment or after the claim has been filed and prior to judgment. The maximum portion of disposable earnings of an individual subject to seizure is the lesser of:

(a)(1) 50% of the defendant's disposable earnings for a writ to enforce payment of a judgment for failure to support dependent children or 25% of the defendant's disposable earnings for any other judgment; or

(a)(2) the amount by which the defendant's disposable earnings for a pay period exceeds the number of weeks in that pay period multiplied by thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act in effect at the time the earnings are payable.

(b) Grounds for writ before judgment. In addition to the grounds required in Rule 64A, the grounds for a writ of garnishment before judgment require all of the following:

(b)(1) that the defendant is indebted to the plaintiff;

(b)(2) that the action is upon a contract or is against a defendant who is not a resident of this state or is against a foreign corporation not qualified to do business in this state;

(b)(3) that payment of the claim has not been secured by a lien upon property in this state;

(b)(4) that the garnishee possesses or controls property of the defendant; and

(b)(5) that the plaintiff has attached the garnishee fee established by Utah Code Section 78-7-44.

(c) Statement. The application for a post-judgment writ of garnishment shall state:

(c)(1) if known, the nature, location, account number and estimated value of the property and the name, address and phone number of the person holding the property;

(c)(2) whether any of the property consists of earnings;

(c)(3) the amount of the judgment and the amount due on the judgment;

(c)(4) the name, address and phone number of any person known to the plaintiff to claim an interest in the property; and

(c)(5) that the plaintiff has attached or will serve the garnishee fee established by Utah Code Section 78-7-44.

(d) Defendant identification. The plaintiff shall submit with the affidavit or application a copy of the judgment information statement described in Utah Code Section 78-22-1.5 or the defendant's name and address and, if known, the defendant's social security number and driver license number and state of issuance.

(e) Interrogatories. The plaintiff shall submit with the affidavit or application interrogatories to the garnishee inquiring:

(e)(1) whether the garnishee is indebted to the defendant and the nature of the indebtedness;

(e)(2) whether the garnishee possesses or controls any property of the defendant and, if so, the nature, location and estimated value of the property;

(e)(3) whether the garnishee knows of any property of the defendant in the possession or under the control of another, and, if so, the nature, location and estimated value of the property and the name, address and phone number of the person with possession or control;

(e)(4) whether the garnishee is deducting a liquidated amount in satisfaction of a claim against the plaintiff or the defendant, a designation as to whom the claim relates, and the amount deducted;

(e)(5) the date and manner of the garnishee's service of papers upon the defendant and any third persons;

(e)(6) the dates on which previously served writs of continuing garnishment were served; and

(e)(7) any other relevant information plaintiff may desire, including the defendant's position, rate and method of compensation, pay period, and the computation of the amount of defendant's disposable earnings.

(f) Content of writ; priority. The writ shall instruct the garnishee to complete the steps in subsection (g) and instruct the garnishee how to deliver the property. Several writs may be issued at the same time so long as only one garnishee is named in a writ. Priority among writs of garnishment is in order of service. A writ of garnishment of

earnings applies to the earnings accruing during the pay period in which the writ is effective.

(g) Garnishee's responsibilities. The writ shall direct the garnishee to complete the following within seven business days of service of the writ upon the garnishee:

(g)(1) answer the interrogatories under oath or affirmation;

(g)(2) serve the answers on the plaintiff;

(g)(3) serve the writ, answers, notice of exemptions and two copies of the reply form upon the defendant and any other person shown by the records of the garnishee to have an interest in the property; and

(g)(4) file the answers with the clerk of the court.

The garnishee may amend answers to interrogatories to correct errors or to reflect a change in circumstances by serving and filing the amended answers in the same manner as the original answers.

(h) Reply to answers; request for hearing.

(h)(1) The plaintiff or defendant may file and serve upon the garnishee a reply to the answers and request a hearing. The reply shall be filed and served within 10 days after service of the answers or amended answers, but the court may deem the reply timely if filed before notice of sale of the property or before the property is delivered to the plaintiff. The reply may:

(h)(1)(A) challenge the issuance of the writ;

(h)(1)(B) challenge the accuracy of the answers;

(h)(1)(C) claim the property or a portion of the property is exempt; or

(h)(1)(D) claim a set off.

(h)(2) The reply is deemed denied, and the court shall conduct an evidentiary hearing.

(h)(3) If a person served by the garnishee fails to reply, as to that person:

(h)(3)(A) the garnishee's answers are deemed correct; and

(h)(3)(B) the property is not exempt, except as reflected in the answers.

(i) Delivery of property. A garnishee shall not deliver property until the property is due the defendant. Unless otherwise directed in the writ, the garnishee shall retain the property until 20 days after service by the garnishee under subsection (g). If the

garnishee is served with a reply within that time, the garnishee shall retain the property and comply with the order of the court entered after the hearing on the reply. Otherwise, the garnishee shall deliver the property as provided in the writ.

(j) Liability of garnishee.

(j)(1) A garnishee who acts in accordance with this rule, the writ or an order of the court is released from liability, unless answers to interrogatories are successfully controverted.

(j)(2) If the garnishee fails to comply with this rule, the writ or an order of the court, the court may order the garnishee to appear and show cause why the garnishee should not be ordered to pay such amounts as are just, including the value of the property or the balance of the judgment, whichever is less, and reasonable costs and attorney fees incurred by parties as a result of the garnishee's failure. If the garnishee shows that the steps taken to secure the property were reasonable, the court may excuse the garnishee's liability in whole or in part.

(j)(3) No person is liable as garnishee by reason of having drawn, accepted, made or endorsed any negotiable instrument that is not in the possession or control of the garnishee at the time of service of the writ.

(j)(4) Any person indebted to the defendant may pay to the officer the amount of the debt or so much as is necessary to satisfy the writ, and the officer's receipt discharges the debtor for the amount paid.

(j)(5) A garnishee may deduct from the property any liquidated claim against the plaintiff or defendant.

(k) Property as security.

(k)(1) If property secures payment of a debt to the garnishee, the property need not be applied at that time but the writ remains in effect, and the property remains subject to being applied upon payment of the debt. If property secures payment of a debt to the garnishee, the plaintiff may obtain an order authorizing the plaintiff to buy the debt and requiring the garnishee to deliver the property.

(k)(2) If property secures an obligation that does not require the personal performance of the defendant and that can be performed by a third person, the plaintiff may obtain an order authorizing the plaintiff or a third person to perform the obligation

and requiring the garnishee to deliver the property upon completion of performance or upon tender of performance that is refused.

(l) Writ of continuing garnishment.

(l)(1) After final judgment, the plaintiff may obtain a writ of continuing garnishment against any non exempt periodic payment. All provisions of this rule apply to this subsection, but this subsection governs over a contrary provision.

(l)(2) A writ of continuing garnishment applies to payments to the defendant from the effective date of the writ until the earlier of the following:

(l)(2)(A) 120 days;

(l)(2)(B) the last periodic payment;

(l)(2)(C) the judgment is stayed, vacated or satisfied in full; or

(l)(2)(D) the writ is discharged.

(l)(3) Within seven days after the end of each payment period, the garnishee shall with respect to that period:

(l)(3)(A) answer the interrogatories under oath or affirmation;

(l)(3)(B) serve the answers to the interrogatories on the plaintiff, the defendant and any other person shown by the records of the garnishee to have an interest in the property;

(l)(3)(C) file the answers to the interrogatories with the clerk of the court; and

(l)(3)(D) deliver the property as provided in the writ.

(l)(4) Any person served by the garnishee may reply as in subsection (g), but whether to grant a hearing is within the judge’s discretion.

(l)(5) A writ of continuing garnishment issued in favor of the Office of Recovery Services or the Department of Workforce Services of the state of Utah to recover overpayments:

(l)(5)(A) is not limited to 120 days;

(l)(5)(B) has priority over other writs of continuing garnishment; and

(l)(5)(C) if served during the term of another writ of continuing garnishment, tolls that term and preserves all priorities until the expiration of the state’s writ.

Comments: Rules of Small Claims Procedure

The way this amendment is worded, the amendment appears to be drafted solely for the purpose of helping small claims court judges clear court dockets of small claim cases where service has not been completed, to the prejudice of the rights of small claims plaintiffs who have filed such cases. Even though the dismissal is without prejudice, there is no provision in the amendment that explains how it will be applied to existing lawsuits. If it is applied retroactively to a case that has been pending for more than one year and 120 days, and if the statute of limitations has passed for the filing of such lawsuit, the unintended, practical effect of such a dismissal without prejudice will be exactly the same as a dismissal with prejudice, because the one year window to refile a case dismissed other than on the merits, pursuant to §UCA 78-12-40 will have expired. Also, there is no provision in the statute to inform a plaintiff of the dismissal of the case (this is one of the problems with the language of the current Rule 4 of the Utah Rules of Civil Procedure--some courts dismiss cases for failure to serve the complaint timely without notifying the plaintiff of such dismissal. In a small claims case, where the litigants are often lay persons, there is a strong likelihood that many plaintiffs 1) will have their cases "deemed" to be dismissed, 2) will not understand what this means, 3) will be given no formal notice of the dismissal, and 4) will ultimately be denied access to the courts by the expiration of the statute of limitations, because they were unaware of the court's dismissal of their case.

On the other hand, if the rule were redrafted to contain language similar to URCP Rule 4, and if notice of the dismissal was required to be given to the plaintiff, the above problems could be avoided. This way you would have no dismissal until the court had actually proactively dismissed the case, and notice had been given to the plaintiff.

Posted by Paul H. Johnson November 16, 2007 06:29 AM

Comments: Rules of Civil Procedure

Rule 40

Rule 40 URCP--Suggest taking out the "mutually convenient to the Court and to the parties" and leaving the sentence as "The Court shall schedule the trial." The term "convenience gives the parties a broad and unwarranted standard for objecting to a trial setting and delaying the case since "convenience" can mean many things and create all types of excuses for delaying the trial in the face of opposing counsel's objection. Leaving the term out gives courts flexibility to deal with that circumstance. Courts will almost always accomodate counsel's requests for trial settings and will consult with the parties and counsel before setting a trial date; but there are times an attorney is simply seeking to delay the case for tactical advantage whether at the client's request or due to lack of preparation. We should not create an ambiguous legal standard to aid them in that effort.

Posted by Sam McVey October 3, 2007 10:53 AM

Rule 101

I know much consideration is given when rules are proposed, so I understand my comments may have already been considered.

My comments are regarding the proposed rule to have OSC hearings only for enforcement of current orders. When divorce actions are filed and the couple have children, the issue of who should have temporary custody can be contested. Also children need financial support at the onset of a divorce action. If a hearing is not set immediately, the children can become pawns in a tug of war between the parents. With motion practice, the respondent is allowed 13 days (3 days for mailing) from mailing the motion to respond, then the petitioner is allowed another 8 days (3 days for mailing) to reply. Oftentimes, there is even more time before the motion is set for a hearing. If there are too many delays, I fear the protective order process might be used even more than it is to establish temporary custody with trumped up allegations.

Perhaps a solution would be to have one hearing available at the beginning of a divorce action. Notice of this hearing could be given when serving the petition for divorce upon the respondent. That way, temporary orders could be entered at the beginning of a divorce action. After that, a OSC hearing could be held to enforce orders or motions filed to modify orders.

Brent Bartholomew

I propose that Utah Rules of Civil Procedure, Rule 101, be amended to eliminate the mandatory hearing requirement that all motions before domestic relations commissioners.

This rule seems to serve no necessary purpose and ends up penalizing attorneys (and their clients) who practice before commissioners because every bloody motion, no matter how insignificant the issue may be, must be subject to a hearing, whereas in district courts where there are no commissioners, motions can be submitted for decision without a hearing (and frequently are). Moreover, even an uncontested motion, if before a commissioner, must still receive a hearing, and that makes no sense at all. Technically, a joint, stipulated motion filed by both parties to an action must receive a hearing according to the language of the current Rule 101. Even when counsel on both sides stipulate to submitting a motion on the pleadings without a hearing (and yes, I've had that happen to me), we've been compelled to schedule and hold a hearing. How is it that all motions before commissioners (where 99% of the time everything proceeds by proffer, so it's not as though the hearing serves a vital role as an evidence gathering tool) must receive a hearing, but motions before a judge need not? This mandatory hearing provision wastes time and money and does not apply to all district courts, so it ends up penalizing litigants in commissioner-served districts.

I would wager that no one, not the attorneys, not their clients, not the commissioners, and not the judges favor this mandatory hearing provision.

I have asked judges and commissioners alike to explain the rationale behind the mandatory hearing provision of Rule 101, and I either get "that's the way it is" or "the Supreme Court wants it that way" response. It appears that nobody knows why the

mandatory hearing before commissioners rule was instituted. I, at least, have been unable to find anyone who can tell me the reason why.

I am at a loss to explain what fundamental principle of justice or equity necessitates mandatory hearings for motions before commissioners. Accordingly, since the rule apparenly serves no crucial purpose and in fact often adds a hoop through which one must jump, I propose that the timing provisions of Rule 7 for motion practice apply in motions before commissioners, and that if a motion before a commissioner is uncontested or stipulated, that no hearing be required, and that the motion can be decided on a notice to submit for decision.

Posted by Eric K. Johnson October 19, 2007 08:33 AM

Rule 10(a)(3)

Having had my email address recently hijacked or spoofed by spammers, I am reluctant to have my professional address published or displayed in a manner that could be easily "sucked up" by such people. (Just what every lawyer needs are millions of ads for sexual performance enhancing drugs going out under their email address.) I am assured by our IT people that our firm is about as protected on that issue as is possible. I fear, however, that this assurance is not enough and suspect that many fellow lawyers don't have even that small comfort.

With regard to the change that would require serving a "cover sheet" with the summons and complaint - is there a need for that? Often the names of counsel for many parties is unknown. The complaint itself sets out the parties, amounts sought, jury demand and nature of claims, etc. What does adding this requirement lend itself to. Also it seems somewhat contraindicated in those thousands of collections cases where a 20 day summons is used under Utah R. Civ. P. 3(a)(2). Although the change doesn't say it, it implies the case must be filed and then served.

Also, it is unclear to me why we would require every paper filed with the court to have address information specifically in the upper left hand corner. Given that numerous different groups and agencies may routinely file various reports, evaluations and other papers in a case - e.g. custody evaluations, exhibits, correspondence - it seems the rule would be honored in the breach more than anything else. Perhaps there's something broken here that needs fixing that I haven't encountered.

With reference to Proposed Rule 10(a)(3), I concur with Mr. Cawley's comments. I see no benefit to anyone from the proposed change.

Posted by Steven H. Lybbert December 7, 2007 09:10 AM

Proposed Rule 10(a)(3) provides for a copy of the complaint cover sheet to be served along with the Summons and Complaint. What is the reason for this requirement? All information on that cover sheet is contained in the Summons and/or Complaint. Serving the cover sheet seems to be totally redundant. The ONLY reason

for the cover sheet is to allow the clerk filing the complaint to more easily find the amount of the claim, the type of case it is, and the names of the parties involved. Pro-se defendants, especially, will have no idea what that extra sheet of paper means.

Posted by John E. Cawley December 4, 2007 04:19 PM

In regard to the revisions to Rule 5, which expressly recognize service by fax and email, there may be a need to explicitly address whether Utah R. Civ. P. 6(e) applies to these newly recognized forms of service. More specifically, as the proposed Rule 5 is currently written, the 3-day "mail rule" in Rule 6(e) would seemingly not apply in instances where parties serve by fax or email. If this accurately reflects the intent underlying the revisions to Rule 5, it may be worth addressing in the Advisory Committee Note to the revised Rule 5. Otherwise, there may be confusion concerning whether the 3-day "mail rule" applies where service is by fax or email.

This is particularly true in light of the Administrative Procedures in the United States District Court for the District of Utah, which expressly state: "the three-day mailing rule will apply whenever a document or pleading is served electronically. (Federal Rule of Civil Procedure 6(e))." See District of Utah CM/ECF Administrative Procedures Manual ¶ II.H.5 at 12 (Version 05-17-07) available at http://www.utd.uscourts.gov/documents/utahadminproc.pdf (accessed Dec. 4, 2007).

Posted by Tyson Snow December 4, 2007 03:29 PM

Rule 11(a)(1)

This ties into the preceding paragraph. If I understand this rule change, it deletes the requirement that papers contain the address and phone number of the filer. I think requiring such information be put in the upper left hand corner (/supra/. Rule 10 comment), seems contrived and almost controlling in some instances, but not requiring the information itself in Rule 11 is ill advised. This rule has been gutted to a great extent by putting a pleading workload on the "victim" of improper filings. But like real estate, location is important - I at least want the rule that /might/ impose sanctions to require the name, address and phone number of the responsible players.

Richard R. Golden

Tab 4

Rule 35. Physical and mental examination of persons.

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

(b) Reports of examining physicians.

~~(b)(1) If requested by a party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the person examined and/or the other party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the report cannot be obtained. The court on motion may order delivery of a report on such terms as are just. If an examiner fails or refuses to make a report, the court on motion may take any action authorized by Rule 37(b)(2).~~

(b)(1) The party examined may request and obtain the examiner's report. The examiner's report must be in writing and must state in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(b)(2) By requesting and obtaining ~~a report of the examination so ordered~~ the examiner's report or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same

controversy, ~~regarding the testimony of every other person who has examined or may thereafter examine the party in respect~~ about testimony of the same ~~mental or physical~~ condition.

~~(b)(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of any other examiner or the taking of a deposition of an examiner in accordance with the provisions of any other rule.~~

(c) Right of party examined to other medical reports. ~~At the time of making an order to submit to an examination under Subdivision (a), the court shall, upon motion of the party to be examined, order the party seeking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any examiner employed directly or indirectly by the party seeking the order for a physical or mental examination, or at whose instance or request such medical examination or treatment has previously been conducted.~~

(c)(1) If the examiner has performed ten or more examinations in the preceding year, for litigation purposes under this rule or under a comparable rule of another jurisdiction, the party requesting the examination shall, at its own expense, provide to the party examined a copy of the reports of all examinations conducted by the examiner in the preceding four years.

(c)(2) If the examiner has performed fewer than ten examinations in the preceding year, for litigation purposes under this rule or under a comparable rule of another jurisdiction, the court may order the party requesting the examination to provide a copy of the reports of examinations conducted by the examiner upon payment of reasonable costs by the requesting party.

(c)(3) The examiner shall redact any personal identifying information from the reports.

(d) Subdivisions (b) and (c) apply also to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. Subdivisions (b) and (c) do not preclude discovery of an examiner's report or deposing an examiner under other rules.

~~(d)~~ (e) Sanctions.

(d)(1) If a party or a person in the custody or under the legal control of a party fails to obey an order entered under Subdivision (a), the court on motion may take any action authorized by Rule 37(b)(2), except that the failure cannot be treated as contempt of court.

(d)(2) If a party fails to obey an order entered under Subdivision (b) or (c), the court on motion may take any action authorized by Rule 37(b)(2).

Tab 5

Rule 6. Time.

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

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

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

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

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

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

(a) This rule applies when computing a time period stated in these rules, a local rule, a court order or a statute that does not specify a method of computing time.

(b) When a time period is stated in days or a longer unit of time, exclude the day of the event that triggers the time period, count every day within the time period, including the last day. If the clerk's office is inaccessible on the last day or if the last day is a Saturday, Sunday or legal holiday, the time period continues to the end of the first accessible day that is not a Saturday, Sunday or legal holiday.

(c) When a time period is stated in hours, begin counting immediately on the occurrence of the event that triggers the time period, count every hour within the time period, including the last hour. If the clerk's office is inaccessible on the last hour or if the last hour is on a Saturday, Sunday or legal holiday, the time period continues to the same time on the first accessible day that is not a Saturday, Sunday or legal holiday.

(d) For electronic filing, the last day ends at midnight. For filing by other means, the last day ends when the clerk's office is scheduled to close.

(e) The next day is determined by counting forward when the time period is measured after an event and by counting backward when the time period is measured before an event.

(f) "Legal holiday" means the day for observing:

(1) New Year's Day;

(2) Human Rights Day;

(3) Presidents' Day;

(4) Memorial Day;

(5) Independence Day;

(6) Pioneer Day;

(7) Labor Day;

(8) Columbus Day;

(9) Veterans' Day;

(10) Thanksgiving Day;

(11) Christmas Day; and

(12) any day designated by the Governor as a state holiday.

(g) The court may extend any time period other than those stated in Rules 50(b), 52(b), 59(b), 59(d), 59(e) and 60(b). If the request to extend a time period is made before expiration of the period, as originally prescribed or as extended by a previous order, the order may be entered upon an ex parte application and a showing of good cause. If the request to extend the time period is made after expiration of the period, the request shall be made by motion and may be granted upon a showing of excusable neglect.

(h) Notice of a hearing shall be served not less than 7 days before the day of the hearing, unless a different period is stated by these rules or by order of the court. An order to shorten the time period may be entered upon an ex parte application and a showing of good cause.

Rule	Change	To
Tony Schofield		
3(a)	10	14
4(c)(2)	13	14
4(f)(1)	20	21
5(b)(1)(B)	5	7
7(c)(1)	5	7
7(c)(1)	10	14
12(a)	20	21
12(a)(1)	10	14
12(a)(2)	10	14
12(e)	10	14
12(f)	20	21
Frank Carney		
14(a)	10	14
15(a)	20	21
15(a)	10	14
17(c)(2)	20	21
17(c)(3)	20	21
27(a)(2)	20	21
31(a)(4)	7	14
38(b)	10	14
38(c)	10	14
Jon Hafen		
50(b)	10	14
50(c)(2)	10	14
52(b)	10	14
53(d)(1)	20	21
53(e)(2)	10	14
54(d)(2)	5	7
54(d)(2)	7	14

Rule	Change	To
54(e)	2	48 hrs
56(a)	20	21
Cullen Battle		
59(b)	10	14
59(c)	10	14
59(c)	20	21
59(d)	10	14
59(e)	10	14
60(b)	3 months	90
Tom Lee		
62(a)	10	14
63(b)(1)(B)	20	21
63(b)(1)(B)(iii)	20	21
64(d)(3)(C)	10	14
64(d)(3)(D)(ii)	10	14
64(e)(2)	10	14
64(f)(1)	5	7
64A(g)	24 hrs	24 hrs
64A(i)(5)	10	14
David Scofield		
64D(g)	7	14
64D(h)	10	14
64D(i)	20	21
64(D)(l)(3)	7	14
64E(d)(1)	10	14
65A(b)(2)	10	14
65A(b)(4)	2	48 hrs

James Blanch		
65C(g)(3)	20	21
65C(i)	Delete “plus time …”	
65C(m)(1)	5	7
66(f)	10	14
68(c)(3)	10	14
68(c)(4)	10	14
69B(b)(2)	7	14
69B(b)(2)	1	24 hrs
69B(c)	72 hrs	72 hrs
Steve Marsden		
69C(f)	20	21
69C(f)	7	14
69C(i)(2)	5	7
69C(i)(2)	15	21
74(c)	20	21
Leslie Slaugh		
101(b)	Delete “calendar”	
101(c)	5	7
101(c)	3	72 hrs
101(d)(2)	2	48 hrs
101(g)	2	48 hrs

Tab 6

Rule 26. General provisions governing discovery.

....

(a)(2) Exemptions.

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

....

(a)(2)(A)(v) which qualify for fast-track discovery as set forth in this rule.

....

(j)(1) Fast-track Discovery. In cases where the total amount in controversy of all claims, counter-claims, and crossclaims does not exceed $120,000.00, the following discovery rules shall apply:

(j)(1)(A) Fast-Track Discovery and Scheduling Conference. Within 30 days after the first answer is filed, the parties shall:

(i) meet in person or by telephone and confirm that the combined amount in controversy of all claims, counterclaims, or cross claims does not exceed $120,000.00;

(ii) disclose a computation of any category of damages claimed, and identify the documents or other evidentiary material on which such computation is based;

(iii) disclose to each other the names, and if known, the addresses and telephone number of each person that party expects to call as a witness at trial;

(iv) plan how to preserve, disclose, and discover electronically stored information; and

(v) file with the Court a Fast-Track Discovery scheduling order.

(j)(1)(B) Fast-Track Discovery Schedule and Limits. Unless otherwise ordered by the court, in Fast-Track Discovery cases, the following discovery schedule and limitations shall apply:

(i) Fact discovery shall be completed within 90 days after the first answer is filed.

(ii) Expert discovery shall be completed within 60 days after the close of fact discovery.

(iii) Amending pleadings and joining additional parties shall occur no later than 60 days after the first answer is filed. If joinder of an additional party or amendment to the pleadings will cause the total amount of all claims, counterclaims, and cross-claims to exceed $120,000.00, the case shall be removed from fast-track discovery. As soon as practicable, the parties shall notify the Court and conduct a discovery and scheduling conference pursuant to section (f) of this rule.

(iv) Each side shall be limited to 3 depositions of no more than 4 hours each, 10 interrogatories (including discreet subparts), 10 requests for admission, and 10 requests for production of documents.

(v) No dispositive motions shall be filed later than 180 days after the first answer is filed.

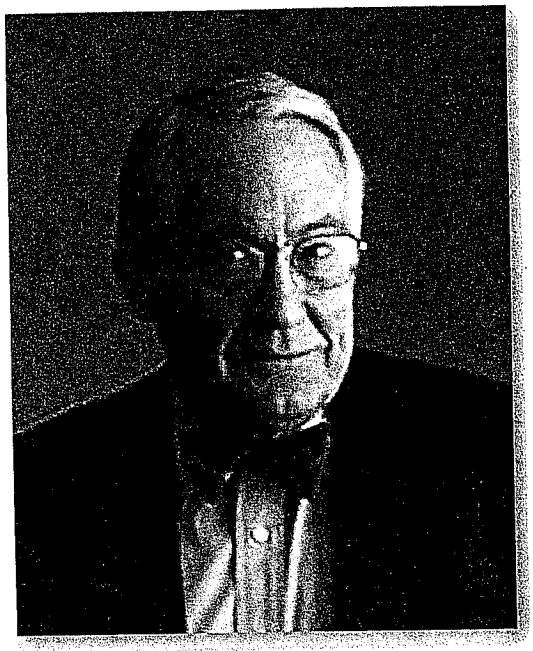
(vi) The parties shall schedule a final pre-trial conference with the court no later than 180 days after the first answer is filed. Final pre-trial disclosures shall be provided by each party on the date of the pre-trial conference.

(vii) Unless a party shows good cause for a longer trial, trials in Fast-Track Discovery

cases shall not exceed 2 days.

OPINION:

BEFORE WE JUMP ON OUR HORSE *and* RIDE OFF IN ALL DIRECTIONS



E. Osborne Ayscue, Jr.

Mention the "vanishing civil trial syndrome" to a group of lawyers and each will have his or her own theory about its nature and its cause. And each will have his or her own solution.

Scratch beneath the surface, however, and each will define the problem differently. Each will attribute it to a different cause. Each will have a different solution.

The addresses of Wisconsin Law Professor Marc Galanter, National Center for State Courts President Mary McQueen and Institute for the Advancement of the American Legal System Director Justice Rebecca Love Kourlis at the College's Spring meeting raised many questions. The Civil Justice Reform Summit that Kourlis' Institute subsequently hosted raised even more.

Those questions did not necessarily conform to commonly accepted wisdom on the subject. Indeed, some of them produced an uncomfortable suspicion that many of our preconceived notions may not hold water.

THE CONVENIENT CULPRIT: THE RULES OF CIVIL PROCEDURE

Many blame the vanishing trial syndrome on the cost and delay inherent in the present Civil Rules. Drafted in 1938, before the Information Age, principally to address problems that by and large no longer exist, they were intended to facilitate the "just, speedy, and inexpensive determination of every action." They were intended to prevent litigants from hiding the ball. They were also intended to become a model

for procedural uniformity.

Today they accomplish none of these things. They lead to delay, expense and unjust resolutions, resolutions that are driven by the cost of litigation as often as by objective merit. They do not always produce the truth. They have been Balkanized–every judge wants to have his or her own rules.

And electronic discovery now threatens to swamp the system.

In response, we have subjected the Rules to band-aid therapy. No one has undertaken to review them systematically, to examine whether the balance between the low threshold set by Rule 8 and the reliance on broad discovery to develop, or to determine whether one even has, a case remains appropriate seventy years after the Rules were adopted.

We seem to have lost sight of the admonition of Justice Oliver Wendell Holmes that, "The rule of relevance is a concession to the shortness of life."

WHAT ELSE IS OUT THERE?

Clearly the Rules need to be reexamined, but can we really assume that they are the whole problem? Or even that they are really the problem? Can we safely address them in a vacuum without examining what else is out there?

We talk about the vanishing jury trial, and then Professor Galanter tells us that in the federal courts, non-jury trials have disappeared twice as fast as jury trials.

We go to the Civil Justice Reform Summit and hear about jurisdictions where cases get tried regardless of what procedural rules they use. We find that not every state has a problem. We find that not even every Federal district has a problem.

WHAT THEN SHOULD WE BE ASKING OURSELVES?

Of course, we should look at jurisdictions whose rules require more specificity in pleading. Do they really foreclose just claims? And if they do, is the cost too great? And if they do not, why not?

And of course we should be asking whether higher pleading standards tend to shift identification of meritless cases to the Rule 12(b)(6) stage–before the expense of discovery–and away from post-discovery summary judgment, a procedural device which has progressively become an expensive trial by judge in advance of, or in avoidance of, trial by jury.

Of course, we should look at the results in jurisdictions whose rules limit discovery. And we should look at the results in those types of cases, including criminal cases, in which only limited discovery is available. And we should ask ourselves whether the results they produce are any less just.

Of course, we should look at jurisdictions that place limits of expert testimony or on discovery of expert witnesses. Do those legions of professional "have theory, will travel" expert witnesses really produce more just results?

Professor Galanter, however, had some tantalizing statistics, all from Federal courts beginning in 1962, when they began to keep uniform records, through 2005. In 1962, over half of filed civil cases were terminated without "court action," that is without motion practice or formal discovery that showed up on the court's records. Another 20 per cent were terminated after court action, but before pretrial conference. That left 30 per cent to be disposed of at pretrial conference, settlement conferences or trial. And there were as many non-jury trials as jury trials.

Today, only 20 per cent of cases filed are terminated before court action. A whopping 70 per cent are terminated after court action, but before pretrial, that is during discovery and motion practice. Cases terminated during or after pretrial but before trial have decreased only slightly.

The result: the percentage and the actual number of civil cases ending in trial has declined precipitously, as have the number of trials per judge. The number of case terminations has increased by a multiple of more than five, but the number of trials has

decreased by about a third. We have had an explosion of litigation and an implosion of trials. The percentage of civil cases tried has dropped from almost 12 per cent of cases filed to 1½ per cent, the number of civil trials per judge per year from 21 to 6! And the greatest decline has been in non-jury trials: only one percent of filed civil jury cases are now actually tried; only one-half percent of non-jury cases are tried.

Shouldn't we be asking ourselves why this is so? And should we not be looking at comparable figures from state courts?

Shouldn't we be looking at how the role of judges has changed? And at why? Is it because the public is unwilling to provide and pay for enough judges? Or to give them adequate facilities and staff support? If so, the public needs to know that, because ultimately it is the loser if our courts do not dispense justice.

Is it because judges are being taught that their job is to manage dockets, instead of trying cases? And if that is so, is there a relationship between the magnitude of their jobs and the inadequacy of resources we have given them?

Is it because fewer and fewer judges come to the bench with significant civil trial experience? One need only to look at the responses of nominees to the Federal bench in the questionnaire each files with the Senate Judiciary Committee, a public document, to see that over time more and more of them have to stretch to list ten significant litigated matters for which they have been responsible and to see how many have little or no civil trial experience.

In the states that select judges through the election process, should we be looking at the impact of judicial elections on how many experienced trial lawyers are willing to subject themselves to that process to go on the bench? And should we be looking at the adequacy of the compensation that goes with the job in both Federal and state courts and its impact on the level of trial experience it attracts?

Shouldn't we be asking if these factors have led to judges who manage dockets instead of trying cases?

And should we be looking at how judges are trained to do their jobs? Are they trained to be jurists–decision-makers–or managers? And how are their performances evaluated? Are they marked down if they have too many cases go to trial? And what effect does that have on the availability of trial for those cases whose just resolution requires a trial?

And should we also be looking at what happens in those jurisdictions that do provide timely civil trials? Should we be asking whether the procedural rules are really an impediment to trial if a case is given a reasonably prompt, firm trial date before a judge the parties know can–and will–try the case if it is not settled? There is anecdotal data that tends to support the conclusion that they are not. In those courts, Parkinson's Law in the form of unnecessary discovery to fill up the time from filing to trial has no opportunity to take hold.

And should we not be looking to see if compulsory mediation, which in many cases requires completion of discovery and preparation that approaches that of actual trial, is less often resorted to in such courts?

And should we not examine the role of lawyers in the picture? Untrammeled discovery and the billable hour, where the lawyer controls how much he or she does and how long it takes to do it, are a toxic mix. Are we doing enough to sensitize lawyers to the ethical dilemma this creates? Have we created a generation of highly educated, expensive searchers of documents and briefers of motions who live off the present system and will never see a jury?

And are "case-manager" judges who have no personal trial experience and hence no sense

of the economic impact of delay on litigants being educated to its implications?

Should we be looking at the magnitude of the shrinking pool of lawyers and judges who have substantial trial experience, who know how to try cases? And should we be looking at the impact of that shrinkage on the quality of justice our courts dispense?

Should we attempt to quantify in a rough sort of cost-benefit analysis the out-of pocket expenses incurred by litigants who do choose to go to court? Should we also attempt to quantify in some fashion the cost–economic and social–of meritorious claims not pursued and payments made in non-meritorious cases because of the delay and expense attendant to litigation?

We need to ask all these questions and more. We need to look at the variations among Federal districts, among states, among judges. We need to identify those courts that work–that stand ready to try expeditiously those cases that need to be tried–and to find out why they work when others do not, how and why they get more cases to trial.

Professor Galanter's preliminary research ought to be enough to tell us that we do not have all the answers and that some of our preconceived notions of the problem have already been proved wrong.

If, without examining all the facts, we assume that we already understand the problem and already know the solution, we risk emulating the six men of Indostan in John Godfrey Saxe's poem, *The Blind Men and the Elephant,* who from their separate limited observations were variously convinced that the elephant was like: a wall, a spear, a snake, a tree, a fan and a rope. The poem aptly observes that "[E]ach was partly in the right and all were in the wrong!"

Pursuing these inquiries will be a formidable task. Professor Galanter has collected the macro numbers from the Federal system. Justice Kourlis' Institute is extracting data from selected Federal districts, ones that seem to be able to provide trials and ones that do not. Her Institute has already done significant work in developing methodology for objective evaluation of individual judicial performance of state court judges, and a number of states are already making use of these tools. The National Center for State Courts has projects underway. The College itself has more than one project underway.

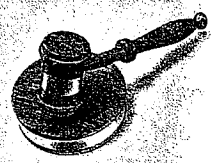
But no one seems to have undertaken to ask or to answer all the questions to which I have alluded, much less to make certain that all of them and all those that may occur to others are being addressed. No one seems to have established a clearinghouse of information that could lead to a rational, comprehensive, non-redundant approach to all facets of the problem.

Every organization addressing this issue needs to ask itself whether we are about to jump on our respective horses and ride off in all directions. And the College needs to ask itself what its role ought to be in all this. As the one national organization composed of experienced lawyers from every segment of the trial bar, it is uniquely equipped both to help coordinate and to contribute to this effort.

If we reach the point where trial lawyers become an anachronism or worse, an extinct species, the College will suffer along with the public it aspires to serve. We do have an interest in both the process and the outcome.

E. Osborne Ayscue, Jr.

[The opinions expressed in this editorial are those of the author, and not necessarily those of the College.]



STOUT, con't from cover

"We often discuss our concern about the vanishing trial from the lawyers' perspective," he said in an interview with *The Bulletin.* "But this should be a concern of all our citizens, not just lawyers. The duty of our citizens to participate in this aspect of the judicial system and to have an opportunity to know how disputes are being resolved is a critical part of the administration of justice. We all have an interest in assuring that participation of our citizens and transparency continue in our justice system in the United States and Canada."

Stout, who will take the gavel as the College's top officer in Denver, points out that arbitration and private alternative dispute resolution often leave the public in the dark. "You go to court to have a trial and everyone knows how the trial comes out," he says. "The public can sit there and watch if they like. In other methods of disposition of legal disputes the public doesn't know how these matters are resolved or what the rules are in those situations."

Stout does not foresee any drastic changes in direction for the College under his leadership. Pledging to continue the path set by President **David Beck** to reverse the vanishing trial trend, he says, "Frankly, it wouldn't affect lawyers much, but it would be a big loss to our citizens not to have the system we've had for the last couple hundred years."

Stout has represented many major businesses in the Wichita area, including Boeing and Coleman. And he has specialized in environmental and employment litigation. He won the first case applying comparative negligence law after it was adopted in Kansas.

Stout was inducted as a Fellow in 1984 at Chicago. "I didn't know much about the College until I was invited to submit a statement of qualifications," he said. "When I saw the names of the Fellows from Kansas I realized for the first time what an honor it was to be included."

The College's mission is just as important now as it was when it was founded in 1950, Stout believes. Under his leadership, he says the College will continue its mission to maintain and improve the standards of trial practice, the administration of justice and the ethics of the profession. "The goals we have will continue to be our responsibility—education and training of trial lawyers, maintaining the judicial system with citizen participation and transparency and high ethical standards. We will continue to pursue these goals and we will do so in the company of Fellows we enjoy and respect."

Stout grew up as a farm boy from near tiny Bazaar, Kansas, (current population 81), about sixty miles northeast of Wichita. The most significant event in the town every year is a commemoration of the 1931 plane crash that killed Notre Dame football coach Knute Rockne and seven others.

Stout had no lawyers in his family and no idea what he would do in life until he took a standardized aptitude test as a young college student. The result pegged him as a future aviator, forest ranger or lawyer. "With mediocre eyesight and, being from Kansas, never having seen a forest, I chose law," he says. For his only orientation, Stout traveled from Bazaar to the county seat in nearby Cottonwood Falls (population 966) and talked to a courthouse lawyer.

After graduating from Kansas State University in 1958, he went on to receive his J.D. in 1961 from Kansas University where he graduated with distinction, Order of the Coif and an editor of the law review. He then spent two years in the Army Judge Advocate General Corps, mostly trying courts martial.

After his discharge, he joined the Foulston Siefkin law firm in Wichita in the fall of 1963 and immediately began trying cases. "No one case stood out," he recalls. "I tried a lot of cases. I remember the ones I lost. I learned that our clients don't expect us to win every time, but they do expect us to care."

His early mentor was **Robert C. Foulston**, a Fellow of the College. Stout remembers, "He was a true professional, a living example of the Code of Trial Conduct, he also believed in making trial work fun."

Stout, who has a son and a daughter who are lawyers, believes the legal profession itself is in good shape. "Lawyers are demonstrating professionalism and providing high quality legal services," he says. "They are continuing their education, maintaining self-imposed disciplinary procedures and ethical requirements in a constantly and rapidly changing environment. We have problems like anybody else, but we solve most of the problems ourselves, which is not typical."

Stout and his wife, **LeAnn**, have

five adult children, two sons and three daughters, two of them twins. He and his family relax by riding horses and taking care of "a couple thousand acres" they own with his brother's family near Bazaar, including the original home place. "I wouldn't call myself a rancher," he says. "We buy cattle, keep them for the summer and then sell them."

He likes to spend his time clearing brush and keeping up with other chores, but swears he doesn't do it to try to keep in shape:

"I have a chainsaw and a woodsplitter so I have done everything I can to mechanize it."

Stout's resume on his firm's website reveals another facet of his personality. In 2001 he was Admiral Windwagon Smith XXVIII in the Wichita River Festival. His explanation: "You dress up in a phony admiral's outfit and preside over the annual Wichita River Festival for 10 days. Pretty silly, but the kids like it. I am not sure it is a career highlight, but it might be."

MIKEL L. STOUT

Born 1937.
B.S. in Animal Husbandry, Kansas State University, 1958;
J.D. with distinction, University of Kansas, 1961.
Order of the Coif; Editor, Kansas Law Review, 1960-61.
Captain, U.S. Army Judge Advocate General Corps, 1961-63;
Foulston Siefkin, LLP, Wichita, Kansas, 1963-present.
Member, American Bar Association. President, Kansas Association of Defense Counsel, 1983-84;
President, Wichita Bar Association, 1987-88;
President, Kansas Bar Foundation, 1991-93.
Civil Justice Reform Act Advisory Group, United States District Court, District of Kansas, 1991-95;
Kansas Commission on Judicial Qualifications, 1984-present, Chair 1994-95.
Trustee, U. S. Supreme Court Historical Society;
Kansas Bar Association Professionalism Award, 1997;
William Kahrs Lifetime Achievement Award, Kansas Association of Defense Counsel, 2005;
Robert K. Weary Award, Kansas Bar Foundation, 2006.
Community involvement: President, Wichita Festivals, Inc., 1978-79;
Captain, Wichita Wagonmasters, 1982-83;
Admiral Windwagon Smith XXVII, Wichita River Festival, 2001;
Board of Directors, Livestock & Meat Industry Council, 1999-present;
Kansas Park Trust, 2005-present.
Inducted into American College of Trial Lawyers, 1984;
Kansas State Chair, 1994-96; Board of Regents, 2000-present; Secretary, 2004-05; Treasurer, 2005-06; President-elect, 2006-07.
Business litigation lawyer.
Listed in: Best Lawyers in America (Personal Injury Litigation, Commercial Litigation and Bet-the-Company Litigation);
Chambers USA (General Commercial Litigation);
MO/KS Super Lawyer (Business Litigation);
Lawdragon 500 Leading Lawyers in America.

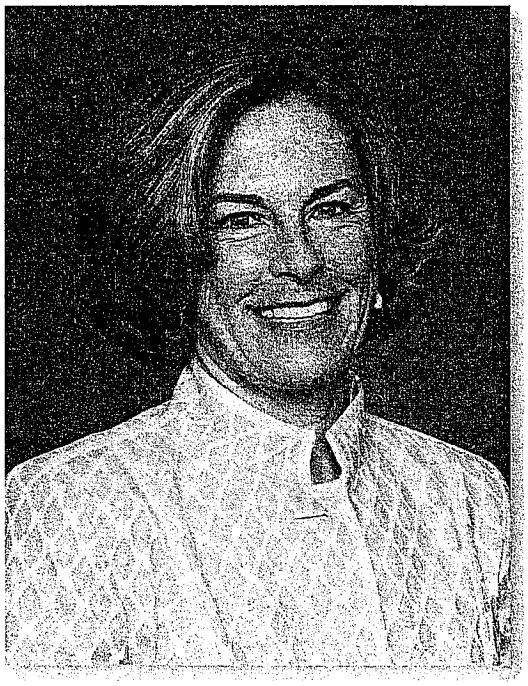
Email to the President:

Dave [Beck]. [O]n the recently received Bulletin from the College, with all the good stuff about the Spring meeting, is it true that this publication is now being written by Comedy Central? I made the mistake of taking it home for Leah to read, and I couldn't pull it from her grasp, while she doubled up with laughter. . . . I read with pleasure several articles and inserts that were hilarious! (Some of the stories might even be true.) . . . [C]ommunications such as the Bulletin . . .—laced with humor—are quite welcome. Leah was so impressed that she insisted that we register for the Denver meeting . . . and show that we are still kicking. **Hubert [Green, former Regent]**

Editors' note: We don't make this stuff up. . . . Come and see for yourselves.

INSTITUTE DIRECTOR CALLS *for* CIVIL JUSTICE SYSTEM REFORM

"We live in a society with a promise of justice for all. We count on our right to go to court to resolve our differences as well as prosecute crimes. It is a foundation of our way of life, even for those who do not end up in court, and the foundation is cracking."



Colorado Supreme Court Justice Rebecca Love Kourlis

"I believe," continued former Colorado Supreme Court Justice **Rebecca Love Kourlis**, "our civil justice system is being crippled under too much process and, unfortunately, paralysis is spreading throughout the system at a time when Americans are counting on their courts more than ever."

Executive Director of the Denver-based Institute for the Advancement of the American Legal System which she created, she was introduced by Fellow **James M. Lyons** of Denver thus: "From time to time, . . people come into our society and our lives with extraordinary talent. Some of those are born to public service, others are called to public service. [Becky Kourlis] is a rare combination in that she is both born and called into public service."

Daughter of a three-term governor of Colorado, a graduate of Stanford University and of its law school, the wife of rancher and former Colorado Commissioner of Agriculture Tom Kourlis and the mother of three children, she practiced law in Denver and in Craig, Colorado. Joining the state trial bench in 1987, she quickly built a statewide reputation for her skill, fairness and intellect. Appointed to the Colorado Supreme Court in 1995, she authored over 200 opinions and dissents and led significant reforms in several aspects of the Colorado court system.

In January 2006, Kourlis, whom Lyons described as "a crusader for judicial excellence and independence of our judicial system," left the bench to establish the Institute, believing that she could best serve the courts by working to rebuild the system from the outside. Its first product, *Shared Expectations:*

Judicial Accountability in Context, and a follow-up publication, *Transparent Courthouse: A Blueprint for Judicial Performance Evaluation,* have received national recognition.

COST AND DELAY

"There is a growing body of people," Kourlis observed, "who are dissatisfied with the service of the courts and the legal system, a growing body of people who think the system is too expensive, too costly, too inconsistent. Indeed, the most recent evidence to support the claim that Americans are losing faith in their courts can be seen . . . in the number of initiatives and amendments on ballots around the country in the last election that sought to address court dysfunction, or perceived dysfunction, by punishing judges."

"People settle cases under the hammer of time and money considerations because they don't trust the system. . . . You can probably think of dozens, if not hundreds, of other examples from your own experience," she told the audience, "cases where there were continuances, delays in resolution of motions, unnecessary discovery disputes, changing judges at the last moment, battles over minutia, and enormous expenditures of money. The picture isn't pretty."

INTENT OF RULES THWARTED

Calling for a "long, hard look in the mirror," she suggested that change could take many forms. She pointed, for instance, to how far we have come from the stated purpose of the 1938 Federal Rules of Civil Procedure, the "just, speedy and inexpensive determination" of disputes, noting that, "The Rules have never been reviewed as a whole to determine how far they have veered from the stated objective."

"Rather," she continued, "we have continued to append and amend–most recently with the rule on electronic discovery–to the point where the Rococo obscures the sound construction of the system. . . . Indeed, one attorney analogized it [the rule on E-discovery] . . .as 'tuning the violins on the Titanic'."

"Addressing details of implementation, assuming that more process is a good thing," she observed, "is much easier than stepping back and really thinking about what we want our system to achieve and at what cost. We engage, not in trial by jury, but trial by discovery. Only a small fraction of cases go to trial. . . . And litigants settle cases because they can't afford the time, the delay and the uncertainty."

Contrasting the criminal justice system where liberty, life and death are at issue, where pleading with particularity is required, at least for the prosecution, where there are no depositions except in truly extraordinary circumstances, no interrogatories, no requests for admission, but instead, disclosure requirements for the prosecution and to some limited extent for the defense, she asked the rhetorical question, "So why is the civil system so much more complex?"

She went on to cite as an example to consider, Oregon, where pleading with specificity is required in civil cases and discovery, particularly of experts, is limited. "Astonishingly," she reported, "our feedback on that system would indicate that plaintiff's attorneys, defense attorneys, judges, and clients are not just supportive, they're downright ebullient about that approach. It's much less expensive for all concerned. It allows parties to settle cases under the threat of a trial but with an eye to the facts and the law, not the relative marketability of experts to a jury. . . . It allows for more trials and the consequent benefits associated with jury resolution and appellate law. And maybe most interestingly, the lawyers with whom we met love the practice of law."

SYSTEMIC REFORM

Moving to the broader topic of systemic reform, she cited the "reinvention" in the 1990s of England's civil justice system under the direction of Honorary Fellow Lord Harry Woolf, asking, "Does that mean that they have a capacity to respond to changing times and we do not?"

"What would reform look like?" she asked. "First," she answered, "we must remake our system with a new commitment to openness and public service, . . a philosophy that our Institute describes as 'building a transparent courthouse.'. . . We must hold judges and the system

accountable for doing what they are supposed to do, applying the law, doing it fairly, economically and courteously."

She went on to define that part of the process as a mixture of five steps: "Selection and retention of judges based on merit, training of judges, evaluation of judges against clear performance criteria, pay sufficient to draw the best and the brightest into the judiciary and staffing appropriate to caseload."

Noting that there is a hunger out there for real solutions to these problems, she continued, "There's a seismic shift afoot . . . in the way that we look at our courts and at our judiciary. That shift can be harnessed for constructive, sustainable change or it can swing the pendulum clear out of the clock cabinet in one direction or another. At the Institute, we believe that our court system is essential to our way of life. It is not fulfilling its critical function. And the best way to defend it is to advocate for real change, change designed to serve all litigants, change designed to make the courts accountable for providing a fair, effective and efficient process for the resolution of disputes."

A CHALLENGE

Challenging the College, she concluded, "All of you are uniquely situated to make a difference. You are lawyers and judges who have your collective fingers on the pulse of the justice system at every level in the United States and Canada. You have access to the rules committees in your home states or to the legislative committees in state where the legislature has a role in rule-making. You have access to the Judicial Conference. You have the expertise and the credibility and the experience to know whereof you speak.

"I challenge you to have the courage to eschew labels that divide us, such as plaintiff's counsel, defense counsel, liberals, conservatives, and commit yourself to the passion that unites us, the passion for our system of justice. I challenge you to join us in the vital work of rebuilding trust in America's courts by supporting bold and innovative measures to transform our system."

"Of course," she cautioned, "you have to be willing to transcend the inertia associated with opposition to change. And you have to contend with the financial realities of a profession that is built on the status quo. We as lawyers do not intend to be motivated by these realities. We're sometimes even unaware of their presence, but they're there. But if you can overcome them, you can initiate the kind of change I'm suggesting."

"In return, we at the Institute commit ourselves to working tirelessly to prod, mediate, innovate or aggravate in ways designed to remake the system into one that serves all users."

[Editors' note: The College has subsequently created an ad hoc committee to cooperate with the Institute for the Advancement of the American Legal System in examining the state of the civil justice system.]

"[T]he volunteer lawyers representing the Guantanamo detainees are a tribute to our profession. They deserve our respect and gratitude."

ABA PRESIDENT KAREN J. MATHIS