Agenda
Advisory Committee on Rules of Civil Procedure

March 4, 2009
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
Reintroduction of Committee members*		Fran Wikstrom
Rule 35. Physical and mental examination of persons	Tab 2	Ed Havas Alan Mortensen Paul Simmons Pete Summerill
Simplified Civil Procedures		Fran Wikstrom
Audio record and transcript of hearings; Rule 52. Correction of the record	Tab 3	Tim Shea
Rules 50, 52, 59, 60	Tab 4	Frank Carney
Rule 58B. Satisfaction of judgment	Tab 5	Tim Shea

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

Meeting Schedule
March 25, 2009
April 22, 2009
May 27, 2009
September 23, 2009
October 28, 2009
November 18, 2009
January 27, 2010

* For those who missed the January meeting: Rule 11-101(4): "At the first meeting of a committee in any calendar year, and at every meeting at which a new member of the committee first attends, each committee member shall briefly disclose the general nature of his or her legal practice."

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, January 28, 2009
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Honorable Lyle R. Anderson, Lincoln Davies, Jonathan Hafen, Cullen Battle, Honorable Anthony B. Quinn, Leslie W. Slaugh, Lori Woffinden, Steven Marsden, Honorable Derek Pullan, James T. Blanch, Francis J. Carney

EXCUSED: Todd M. Shaughnessy, Janet H. Smith, Honorable David O. Nuffer, Anthony W. Schofield, Barbara Townsend, Thomas R. Lee, David W. Scofield

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

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the November 19, 2008 minutes. Judge Quinn noted a change to the committee's meeting minutes concerning Rule 26, where the committee would await a recommendation from the Family law section before addressing concerns regarding practitioners engaging in discovery in domestic cases without an attorney planning meeting. With that change, Judge Quinn moved to adopt the November 19, 2008 minutes. The motion was seconded, and unanimously approved.

II. REINTRODUCTION OF COMMITTEE MEMBERS.

Mr. Wikstrom addressed Rule 11-101(4), which requires each committee member to briefly disclose the general nature of his/her legal practice at the first committee meeting of the calendar year. The committee members present described the nature of their respective practices, and Mr. Wikstrom noted that those committee members not present would be asked to comply with the rule at the next meeting.

III. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom discussed his meeting with the Supreme Court and his discussions regarding the committee's concerns and principles for simplified rules. The Supreme Court indicated its approval for the committee to further explore drafting a set of simplified rules.

After discussion, the committee agreed to approach Becky Kourlis and the Institute for the Advancement of the American Legal System to draft a set of proposed simplified rules for the committee to examine.

IV. RENEWAL OF JUDGMENT BY MOTION.

Mr. Shea approached the committee with a proposal to allow the renewal of a judgment by motion instead of an independent action. Currently, Utah Code Ann. § 78B-2-311 allows a party eight (8) years to renew a judgment claiming non-payment through a new cause of action. A yet unknown member of the Legislature asked that the committee examine the idea of renewing judgments by motion.

The committee discussed extending the 8-year statute of limitations or abolishing the statute of limitations. The committee also discussed how notice would be given to the debtor, and whether notice should be given under Rule 4 or Rule 5.

After discussion, the committee asked Mr. Shea to invite the legislator who suggested the change to discuss the matter with the committee.

V. RULE 50. MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Mr. Carney noted his concern about the meaning of "move" under Rule 50(b), motions for judgment notwithstanding the verdict, and whether it required a party to file the motion or serve the motion within ten days after entry of judgment. Mr. Carney suggested replacing "move" with "serve a motion."

Mr. Wikstrom asked Mr. Carney to review the rules and examine all the references to "move" and "file" under Rules 50 and 59, compare the language to the federal rules, and report back to the committee.

VI. CHANGES TO FRCP 26 & 56.

Mr. Carney shared with the committee proposed changes to federal rules 26 and 56. The committee discussed the proposed changes to the rules, but noted it did not want to address changes to Rule 26 in light of its current consideration of simplified discovery rules.

Mr. Blanch and Mr. Hafen agreed to study the proposed changes to Rule 56 and report back to the committee concerning their observations.

VII. RULE 76. NOTICE OF CONTACT INFORMATION CHANGE.

Mr. Shea suggested the committee adopt a new rule requiring an attorney and a party to notify the court in writing of any change in that person's address, e-mail address, phone number, or fax number. The committee unanimously agreed to adopt the rule, but limit the notification requirements to an attorney and an unrepresented party. Rule 76 shall state, "An attorney and

unrepresented party must promptly notify the court in writing of any change in that person's address, e-mail address, phone number or fax number."

VIII. RULE 3. COMMENCEMENT OF ACTION.

The committee revisited Rule 3(a)(2) and concerns regarding the 10-day summons.

After discussing possibilities of enlarging the time frame or abolishing the rule altogether, the committee agreed to revisit its discussions concerning the 10-day summons at the next meeting.

IX. ADJOURNMENT.

The meeting adjourned at 5:40 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday, March 4, 2009, at the Administrative Office of the Courts.

Tab 2

Main Identity

From: "Edward B. Havas" <EHAVAS@dkolaw.com>
To: "Frank Carney" <fcarney@aklawfirm.com>
Cc: "Alan Mortensen" <amort@dkolaw.com>; "Paul Simmons" <PSIMM@dkolaw.com>; "Pete Summerill" <psummerill@gmail.com>
Sent: Monday, January 19, 2009 3:39 PM
Attach: Rule 35 proposal.wpd
Subject: R. 35 suggested revision

Dear Frank,

Attached in WordPerfect format is our proposed R. 35 revision. I did not have the luxury (or ability) to do it in good "tracked changes" form, so this does not show the additions/subtractions/changes. I'm happy to review or elaborate on any of the provisions with you if that would be helpful. If you need it in Word or another format, let me know.

A few comments: we believe that the advisory committee notes will be immensely valuable, indeed essential, to the proper interpretation and implementation of this rule. There is just so much precision that can be put into the rule language itself and still have it be flexible enough to apply to many, and at times unforeseeable, circumstances. Expounding upon the intent and "philosophy" behind the rule and its new language will go a long way toward helping to educate and guide both the courts and practitioners. If we can offer input into the advisory note, we are more than happy to do so.

Our approach to the rule is that it should be used only when less intrusive means are not capable of giving equivalent (not necessarily identical) information to the party seeking the examination. Too often both the courts and defense counsel feel that a R. 35 exam is a matter of right in ***any*** P.I. claim. Our view is that the exam should be reserved for when good cause exists for it (good cause being more than just filing a PI claim). When a record review, reading treating MD's depositions, etc. can give the defense the same ability to refute/respond to the claims, there is no entitlement to an exam.

Likewise, the exam - if allowed - should be tailored to the claims/defenses that are "central" to the case (we debated "material" v. "relevant" or some other descriptor; none was ideal. The essence is that what is at the core of the claim may properly be the subject of a R. 35 exam; tangential conditions are not). Thus e.g., in an orthopedic, obstetric or other purely physical injury case, just because the typical claim for emotional distress from the injury is included doesn't make a full psychiatric work-up appropriate.

We also sought to protect the person being examined as much as possible within the parameters of allowing the defendant to reasonably prepare a defense (we recognize that in rare cases R. 35 may be used against a defendant, too, but far and away the vast majority of them are applied to plaintiffs; to the extent a R. 35 exam is used with a defendant, our concerns are legitimate then, too). Thus, we included provisions that allow the party examined to have someone with them and/or to record the examination, unless the examining party establishes to the court's satisfaction good reasons not to. Likewise, we

include the presumption that the examination will be conducted at a location where it is not unreasonable to expect the person to be examined to appear - that person's county of residence or where the action is pending (and therefore where the party has conceded to appear). If that is not feasible, the logistics of the examination should still protect the party from unreasonable travel times, expense, and other hardship. The party examined should receive not only the report but all related materials as a matter of course, and not only through discovery requests and not just at the examiner's deposition, as often happens.

Finally, we included the provision for other reports to be provided by frequent examiners, and at least a list of cases in which less frequent examiners have been involved. As you have seen from the comments of others, there are valid reasons for requiring those who do a lot of examinations to present their other reports. This helps establish the "cookie cutter" report that otherwise has potential to have undue influence on a jury if viewed as an isolated, separate document. If the requirement does not discourage the cottage industry examiner, it at least helps to expose them. It is not unduly onerous to require these reports, especially in today's computer age, and the concept of tracking cases in which an "expert" has acted is already firmly ensconced in R. 26. (It is ironic and not a little bit telling that the same defense counsel who object to the onerous nature of requiring professional R 35 experts to track their other cases have no qualms about demanding to impose equally onerous requirements on treating physicians by insisting they be considered "retained experts" under R. 26).

The ten reports in the prior year cut-off is an arbitrary, but reasonably fair, one designed to include the frequently seen experts without imposing too great a burden on the occasional one. It could just as easily be 8 or 12 reports, but 10's a nice round number (and one I think you suggested, if I'm not mistaken).

I - or any of the others of my sub-group - would be happy to respond to any questions or provide other input if you think it helpful. I/we would be happy to appear at a meeting of your advisory committee to offer comments or answer questions about this proposal if you think that would be of interest and useful. Likewise, you have received comments about the prior report requirement that you can provide the committee. If you think it helpful to have some of those folks at a meeting of your committee, I'm sure they would be willing to do so.

Thank you for allowing us to offer this input.
Ed

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Rule 35. Physical and mental examination of persons.

(a) Order for examination.

(a)(1) When the mental or physical condition ~~(including the blood group), or an~~ aspect thereof, 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~~ and, unless the party is unable to do so, require a party to produce for examination the person in ~~the~~ that party's custody or legal control~~, unless the party is unable to produce the person for examination~~. The ~~order may be made~~ mental or physical condition is "in controversy" when, and only ~~on motion for good cause shown and upon notice~~ to the extent that, the condition or an aspect thereof is central to the ~~person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made~~ claims or defenses raised in an action.

(a)(2) The order may be made only on motion for good cause shown. The motion shall propose in detail, and the notice to the person to be examined and to all parties resulting from the entry of an order on the motion shall specify, the time, place, manner, conditions, and scope of the examination, and the person or persons by whom it is to be made. "Good cause" requires more than just that the physical or mental condition of the party or person to be examined has been placed at issue, and must include a finding that there is no less intrusive means by which the same or substantially similar information can be obtained by the party seeking the examination, that the examination will not cause undue hardship to the party or person to be examined, and if more than one examination or more than one examiner is sought, that multiple examinations or examiners are justified by the particular circumstances and will not be repetitive, redundant or unduly burdensome.

(a)(3) The examination shall, unless ordered otherwise for good cause shown by the party seeking the examination, be conducted in the county where the party or person to be examined resides, or where the action is pending. If the court for good cause orders the examination to take place at a location other than the county of residence of the party to be examined or where the action is pending, the order shall include such

provisions as are appropriate regarding the place and time of the examination, payment of the expense of travel and accommodations related to the examination, and otherwise regarding the logistics of the party or person to be examined arriving at the place of examination. Special consideration shall be given to the convenience of the person to be examined and should include consideration of the examiner traveling to the examination instead of the party or person to be examined.

(a)(4)(A) The party or person being examined shall have the right, at that party or person's expense, to record the examination by videotape or other means absent a showing that the recording will adversely affect the outcome of the examination. The presence of recording equipment shall not unduly interfere with the examination.

(a)(4)(B) The party or person being examined shall have the right, at that party or person's own expense, to have a representative present during the examination, absent a showing that the presence of a representative will adversely affect the outcome of the examination. The representative shall not unduly interfere with the examination.

(a)(5) The party or person to be examined may object to the designated examiner for lack of qualification, bias, or other grounds which would prevent the examination from being reasonably useful to the finder of fact. If the court sustains reasonable objection to the examiner designated to make the examination, and if the parties shall fail to agree as to who shall perform the examination, the court may designate a physician to conduct the examination.

(b) Report of ~~examining physician~~ examination and related materials.

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

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

(b)(1) In addition to the materials required by subsection (c), the examiner must, within a reasonable time following the examination and at no expense to the party or person examined, provide to the party or person examined:

(b)(1)(A) the examiner's report, which must be in writing and state in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests; and

(b)(1)(B) legible copies of all materials obtained, created or reviewed by the examiner in conjunction with or related to the examination.

(b)(2) At no time in the report or during the proceedings may the examiner or the examination be referred to as "independent" unless the court appointed the physician without input from the parties.

(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 year preceding the examination for litigation, claims for insurance benefits by reason of physical or mental injury, workers compensation, social security or other similar judicial or

administrative purposes in this state or under a comparable rule of another jurisdiction, the party requesting the examination shall, at its own expense, along with the report and materials required by subsection (b), provide to the party or person examined copies of the reports of all examinations conducted by the examiner in the four years preceding the examination, along with a list of all cases (including the case heading, the court or agency where the case was brought and the case number) in which the examiner has testified at trial, administrative hearing or by deposition within the four years preceding the examination.

(c)(2) If the examiner does not come within the requirements of subsection (c)(1), the examiner shall provide a list of all cases (including the case heading, the court or agency where the case was brought and the case number) in which the examiner has testified at trial, administrative hearing or by deposition within the four years preceding the examination. The court may, upon request, order the party requesting the examination to provide copies of the reports of examinations conducted by the examiner within the four years preceding the examination upon payment of reasonable costs by the party or person being examined and upon such other conditions as the court deems appropriate in the circumstances.

(c)(3) The examiner shall redact personal identifying information from reports provided pursuant to this subsection.

~~(d) 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 (c), the court on motion may take any action authorized by Rule 37(b)(2).~~

Comments from Plaintiffs' Attorneys About Need for Prior Reports

Note- In November 2008, FJC asked the UAJ attorneys to provide comments on whether getting prior reports was important or not, and whether it was really worth the controversy and hassle. These are the responses received. A copy of the March 2008 "trial balloon" was circulated with the request.

Dan Wilson

I've found Rule 35(c) to be an inexpensive and very effective tool to uncover bias and sometimes fraud by the professional examiner who runs an assembly line selling canned "opinions." The Rule helps expose the experts who don't really conduct an honest examination at all, but instead, find a formula that they use to paint all plaintiffs with the same brush. When you hold up a half dozen or more reports that use the same language to come to the same exact conclusion for virtually every plaintiff that the professional witness is called upon to examine, it's pretty good evidence that the expert is not to be taken seriously.

I don't ever remember actually having to use the reports at trial, but that was because once we had the evidence in hand, the defense knew that the paid examiner's testimony wasn't going to be very effective and the case settled. Other times, the defense stopped using the expert once we had collected enough of their duplicative reports. The fact that we don't use it at trial very often just shows how well it works. We don't see Rule 11 used very often either, but that's no reason to get rid of it. It's more likely a testament to how effective it is.

And I'd like to see the rule kick in if the expert does more than three reports a year. Rule 26 doesn't contain any exceptions, so why should Rule 35 (c)? It's really not that much work for the experts to maintain a redacted copy of all reports they do.

Eric Nielson

I write to comment on my experience with Rule 35 IME examinations and the way in which the Rule is currently interpreted by some defense lawyers.

I have over 20 years of experience representing plaintiffs in the State of Utah. In my experience, some defense lawyers attempt to abuse the true purpose of Rule 35 by hiring “professional” defense medical examiners to evaluate my clients in anticipation of trial. These “experts” are not objective. They have no interest in truthfully educating the jury. They are advocates for the defense.

- Some of these witnesses give so many defense medical examinations per year that they earn the majority of their income from this process. Some defense medical examiners have admitted in trial, when forced to do so, that they earn over $200,000 a year doing examinations. (One expert reputedly makes over $700,000 per year doing IME work. It is almost all he does.)
- I have frequently encountered the situation of a defense medical examiner contradicting my client at trial – claiming that my client volunteered or admitted something in the examination which my client flatly contradicts.

- I also have experience with the boilerplate language which certain medical examiners use in almost every report they render.
- One expert, for example, typically renders a report which is 12 to 16 pages in length on every case. The report looks impressive. A naïve juror might conclude from the report that the examiner spent 4 or 5 hours performing the examination. In reality, the actual examination often takes less than 30 minutes. The 16-page report which seems so impressive is, in actuality, virtually the same report which the examiner renders in five other IMEs he conducted that day. There is a 90 or 95% overlap in content with other reports prepared by the examiner.
- For this reason, I have found it extremely helpful to obtain all prior reports for the past 4 or 5 years created by the examiner. One of my cases settled after the trial court ordered the examiner to produce 800 prior reports rendered over the past five years. The court steadfastly resisted the defense effort to force me to pay several thousand dollars to have this material gathered. After this order was entered, the defense lawyer mysteriously developed a new interest in settling the case and never complied with the order.

To summarize my views, I believe the following measures are quite useful to keep defense medical examiners honest:

- Allow the ME to be videotaped as a matter of right. I do not find defense arguments that videotaping the examination "will interfere with the process" to be at all persuasive. A videotape tends to keep people honest. Indeed, a videotape will protect the medical examiner himself against any charge of improper conduct or commentary. There are benefits to both sides from a tape.
- Force "professional" IME doctors, individuals who do more than five or ten IMEs a year, to turn over all of the prior reports they have done for the last 4 or 5 years. The 16-page report won't seem nearly as impressive when the jury understands that the doctor says the same thing in every report. Do not force plaintiffs to pay for the cost of gathering these reports. Professional witnesses make a great deal of money from creating these reports. The cost of producing them in litigation should be a cost of doing business. The compilation cost is a "one time only" phenomenon.

I give consent for the dissemination of this email to the entire Rule 35 Committee.

In conclusion, I don't believe that the harm which a biased professional medical examiner can do to a plaintiff's case can be overstated. I do not believe that the harm can be neutralized simply by having the plaintiff's lawyer cross examine the examiner regarding his motives. The standard plaintiff's cross examination, without the benefit of a videotape, and several years of prior reports, is inadequate to undo the harm which a professional witness (many of these individuals appear in court more often than the typical plaintiff's lawyer) can do.

Juries tend to trust doctors. Insurance companies, which have unlimited resources, are very interested in making the litigation of even small cases so expensive and time

consuming that many plaintiff's lawyers simply won't take small cases anymore. I believe the Committee can "level the playing field" considerably if defense lawyers know, before trying to obtain an IME, that the examination will be recorded and that the professional witness will be revealed as such by virtue of having to produce several years of prior reports.

Mark Flickinger

- Copies of all prior reports for 4 years helps reveal the amount of income the expert receives, something the usual suspects often allege they "don't know" and "can't find out" without oh, say, $3,000 of time we should pay to get the answer;

- Discovering the number of reports produced in a 4 year time period would show how much time a physician spends working as a hired gun vs. treating people, and would show trends in expert work

- A high proportion of reports for one particular insurer or firm can reveal a potential bias toward one particular firm or insurer (I've heard some experts note "State Farm won't hire me," so you bet experts are cognizant of who is feeding them, and it is more than naive to argue this does not effect results)

- 4 years of reports would reveal "cookie cutter" reports which say the same thing virtually every time, e.g.. "secondary gain" allegations in every case, chiropractic care is never useful beyond 15 visits, etc.

- A review of reports can demonstrate inconsistencies in reports: how many times do these doctors say injuries shouldn't last longer than "X" number of weeks, yet in another case will say an injury from 3 years before the tort is the real cause of plaintiff's treatment and pain?

- As suggested above, I think this most intrusive violation of a person's privacy is offset and balanced a bit with safeguards and checks on the physician's honesty and integrity

- If this information is required, these expert physicians will prepare copies with names redacted routinely as a part of the process, and the now often heard objection of the expense and burden in providing copies of reports with names redacted will become moot

If the physician is examining and evaluating patients honestly, some sunlight on the past work done should not be objectionable.

Mark Flickinger

I wish to provide some comments on the proposed changes to Rule 35 of the Utah Rulesof Civil Procedure. I would first like to applaud the proposed amendments providing a presumptive right of a plaintiff to have a Rule 35 examination recorded. I believe recording Rule 35 exams protects both the patient and the physician. I also believe providing an undisputed record of what happens in an exam can save considerable time for the court and the parties, avoiding factual disputes concerning what may have been said or done in an exam. Although I have had many cases where my clients have disputed whether tests reported in an exam were actually taken, or whether statements repeated in a report were actually said, I have been reluctant to

request recordings out of concern that doing so will offend the physician and therefore yield a more negative result for my client. I believe a perception exists that recordings are only appropriate in extraordinary circumstances, such as where the integrity of the physician is in question. Making a recording a presumptive right that can be challenged only for good cause, instead of the other way around, should eliminate this concern, and make this built in protection (for both the physician and patient) commonplace.

I primarily wish to address the need for disclosing prior reports of physicians who routinely perform Rule 35 exams. I understand the current draft of Rule 35 includes a requirement that all exams from 4 years prior shall be disclosed by examiners who perform 10 or more exams in a 12 month period. I would request the number of prior exams be reduced to 5, as I have sought and received such exams by motion, and I have found these prior reports particularly useful.

By examining prior reports obtained through court order (or from our own files where we have retained prior reports of old clients by the same examiner), I have found many of the most frequently used examiners will say nearly the same thing in exam after exam, and will reach the same conclusion in almost every case, even where factual circumstances vary widely. Many times I have used this well known fact about certain examiners to my advantage in arbitration, telling arbitrators “we all knew what Dr. X was going to say before he even saw the patient, and we all could have written his report for him.” While such facts are known to litigants and experienced arbitrators, they cannot be revealed to juries without examining prior reports. Information that an examiner makes the same conclusions time and again under varying circumstances is highly probative and should be known to the jury.

Reviewing prior exams also affords an opportunity to discover inconsistencies in opinions. Through reviewing multiple reports I have seen examiners who will routinely state an injury’s duration would not normally be expected to last beyond 12 weeks, yet in other cases the examiner will challenge causation and attribute current symptoms to injuries sustained years before the tort. I have also seen examiners testify injuries could not have been sustained in an auto wreck due to allegedly minor forces sustained in a collision, while in another case testify stepping out of an unmodified Jeep months after the tort was the cause of a disk herniation and neck surgery. This type of inconsistent testimony typically can only be explained by the bias of the examiner, but cannot easily be discovered (if at all) without the benefit of examining prior reports.

Financial bias and incentive is a major concern of any litigant when faced with an expert witness who testifies frequently. Often efforts to discover how much a physician makes annually performing Rule 35 exams are met with claims of ignorance, and any information obtained is frequently scant, intended to obfuscate rather than enlighten a party. Requiring 4 years of prior exams will at the very least show the number of exams performed annually and will go a long way in establishing annual income from Rule 35 exams. This information is also useful in discovering the proportion of time an examiner spends as an expert witness instead of treating patients, which again is information rarely revealed without significant discovery efforts and/or court motions.

Another critical issue revealed in 4 years of prior exams is the percentage of work an examiner receives from one insurer or firm. Performing Rule 35 exams in litigation can

be extremely lucrative for an examiner. If an examiner makes $500,000 per year doing exams, and 75% of such exams come from one insurer, or 50% from one firm, one cannot deny the incentive an examiner would have to find results favorable to that insurer or firm who accounts for such a substantial source of income. This information again is extremely difficult to find absent reviewing all prior reports.

On a somewhat related note, by making this disclosure mandatory of examiners who do so much of this type of work, these examiners will of necessity plan and prepare for these disclosures by keeping copies readily accessible. As a result the cost (and efforts) of providing this information will become virtual nil. I have personally had a frequently used and well known examiner inform me he was the only person who possessed the necessary knowledge to print out prior reports as ordered by the court, and I would therefore have to pay his physician's hourly rate for him to operate a printer and copy machine on a weekend—a cost which he estimated to be at about $3,000. This was almost certainly done solely to hinder the court's order from taking effect. Should the rule be amended to require disclosure of prior reports, examiners who wish to continue this highly lucrative work will likely place all reports in an electronic format with private information redacted as a matter of routine, all to be easily copied to disk each time a Rule 35 exam is produced.

Thank you for the Committee's decision to look into revising this rule. A Rule 35 examination of one's body by an opposing party's expert can be one of the most uncomfortable and invasive aspects of the legal process. Parties deserve the right to full disclosure of such examiners' past practices, opinions, potential biases, and financial incentives to protect both the patient and the integrity of the Rule 35 examination process as a whole.

Paul Simmons

I'm fighting this right now with Dave Lund at Farmers over our request to have a neuropsychexam by David Weight audio recorded. Bob Sykes has some briefs in the UAJ brief bank in caseswhere he asked to have Dr. Weight's exams recorded because of things Dr. Weight said in hisreports that the plaintiff never said in the exam. Maybe having a third person present in aneuropsych exam is obtrusive, but I don't see any harm (and some prophylactic benefit) in beingable to record neuropsych exams, particularly when the examiner has a history of misstatingthings.

Elizabeth Bowman

I think prior reports are useful. In one of my cases, the same examiner (neuropsych) gave similar tests to two of my clients, and despite scores showing more problems on one client, concluded that that client was perhaps out for secondary gain. Had I not (by accident, really) had her other report, I could not have impeached her for different conclusions from similar scores. The defense elected not to call her at trial after her deposition in the case she concluded secondary gains were the best explanation for the client's problems. She had not testified for a plaintiff in years.

Kay Burningham

The prior report rule is needed and so is the video provision. While working as defense counsel in San Diego, with our two largest clients being Allstate and State

Farm, the firm had a list of orthopedic surgeons who had boiler-plate reports (this is back before the internet and widespread us of PCs--in the late 80's and early 90's) and who only spent about 5-10 minutes in their examinations and then would fill in the blanks on the "IME" report.

David Lambert

Please let me offer some thoughts about the need for and usefulness of the reports from Rule 35 examiners:

1. The defense always refers to the exams as "independent." At trial, they even make a big show in direct examination to use the term "independent" and claim that the doctor had no ties to either side. They use the Karl Rove tactic of taking what should be a major weakness, i.e., that the examiner had only a very brief contact with the patient, and try to turn the tables by making a big point that the doctor did not know the patient and is not biased like a treating physician who is too close to the patient to be independent. Without the prior reports showing that the Rule 35 examiner cranks out a virtually identical report for each case he/she works on, it is difficult to show the examiner's bias as a professional defense witness.

2. A case in point concerns Dr. Barbuto. Some time ago Bob Henderson told me of a very effective presentation that Marshall Witt made at an arbitration hearing regarding a Barbuto report. Marshall entitled his presentation "The Barbuto Triangle." He took prior Barbuto reports and color coded them to demonstrate that the Barbuto reports are "canned." I am copying Marshall on this email and will ask him to give you the details.

3. Without the prior reports, about the only way you can show bias is to talk about how much money the doctor makes from doing defense exams. Getting into the tax returns and financial bias to produce defense reports has much more potential to be invasive and burdensome to the Rule 35 examiner. It also injects an ugly element into the case which isn't good for either party or the court system. The prior reports deal with substantive bias instead of financial bias and are the best way to reveal the biased defense medical examiner who produces canned reports.

These are just off the cuff thoughts. I will discuss the issues further in our office and will try to give you some further input.

Clark Newhall, MD

I can testify that (as an independent medical examiner myself and boarded as such), it is common to use a template to create one's reports. i daresay that those who do this as an occupation invariably use a template. the virtue is speed. the vice is that the template will include assertions that some portion of the examination is normal when in fact that portion of the examination was never done, or done improperly. similarly, the videotape is important because (to the skilled or experienced eye) a videotape can reveal deficiencies in the actual physical exam that would never be discovered in any other way. as an instance, i had a recent experience with an IME where he asserted that my client had "stocking hypesthesia" (slight numbness in the distribution covered by a sock).

His examination had only tested the sensation on the front of the shin, which entirely missed the fact that the numbness extended up the side of the leg in the S1 nerve root

distribution and NOT in a stocking distribution. I could uncover this because I know the medicine, but it would have been obvious with a videotape. He found only what he was looking for, and did not find something that was there because he did not look for it.

Steve Russell

Among the many reasons prior IME reports would be helpful would be to: -Identify Professional Witnesses

-Weed out bias

-Identify docs who reach the same conclusions time after time despite highly variable patients

And perhaps most important, to "keep IME doc honest." If they know their practice is going to be closely scrutinized they will be more likely to play straight w/ their examinations and reports.

Nelson Abbott

Need to videotape. I would like to think that all physicians are honorable people. My experience has shown that most are but some are not. Further, it appears that some litigants gravitate toward those physicians that are not honest. When a client tells me that a physician has lied in his report, I always take it with a grain of salt. There are, however, a few physicians that my clients tell me over and over again have misrepresented what was said and what happened during the exam. When I hear it from several different clients regarding the same physician, I have to believe it is true.

I've always wondered why we insist on a court reporter to be present during a deposition (why can't we just rely on opposing counsel to accurately summarize what was said in a deposition) but then allow doctors to do the exact same thing. Are doctors more honest than attorneys? I don't think so. It is naive to think that in the context of litigation, some litigants won't seek out unethical doctors and use those doctors to attempt to fabricate evidence.

Just as having a court reporter during a deposition is the default position, we should make having a video recording during a Rule 35 exam be the default position.

Production of prior reports. Although difficult, I have been able to obtain prior reports from a few Rule 35 experts and use those at trial for impeachment. One such expert is Dr. David Weight. I used prior reports that he had prepared to show that he was biased. The judge allowed me to use those reports and jury members told me after trial that they found the information I used from the prior reports persuasive.

Several Rule 35 examiners in Utah frequently find that injured parties have "somatoform" disorders and are liars. When the jury knows about only one such finding, the case at issue, that opinion is given much more weight than when the jury is told that the examiner has made such a finding on an almost daily basis. In the case of Dr. Weight, the jury found it disturbing that in a previous case he had opined that an eight year old with a serious head injury was making up all of this symptoms.

Travel out of County. We don't require litigants to travel outside their county to be deposed, why should we require them to travel outside their county to be examined by a

doctor? We shouldn't. The default rule should be that all Rule 35 exams be conducted in the county where the examinee resides where the case is filed. Some may argue that some counties in Utah are so rural that there are no doctors willing to do Rule 35 exams. Upon a showing for good cause, the rule should allow exceptions to be made. I know for a fact that there are numerous doctors in Utah County willing to do such exams. Allstate and State Farm don't like to use them because they don't opine that people are faking in essentially every case (in the words of an Allstate adjuster, no doctors in Utah County meet the ethical standards of Allstate insurance). Such a reason is bogus and should not constitute good cause. If a doctor is available and willing to do the exam in the county where the action is pending or where the examinee resides and the opposing party still chooses to use an out of county doctor, the opposing party should be allowed to do so, but should be required to bring the doctor to the county where the action is pending or where the examinee resides.

Herm Olsen

I have a matter which didn't involve a medical doctor, but Dell Felix. I don't recall if he is a physical therapist or what, but he agreed to a videotape, screwed up the machine he was using, admitted that the machine wasn't giving fair readings, and the proceeded to ignore the faulty data produced by the machine and use it to diminish my clients' ability. I have another therapist who reviewed the tape and critiqued Felix, and found multiple deficiencies which wouldn't have been apparent without the tape. You're welcome to the tape, the report, and the critique if it will help.

RULE 35

At the request of the Advisory Committee on Civil Rules of Procedure, Tom Lee and Frank Carney have collected comments and information from attorneys in an attempt to answer the question of whether Rule 35 on medical examinations should be amended and, if so, in what way. This is a summary of the information provided to us.

MEETING WITH PLAINTIFF ATTORNEYS

On May 23, 2007, Tom Lee and I met with eight attorneys that primarily do plaintiff work: Ed Wells, Todd Wahlquist, Tom Seiler, Derek Coulter, Ed Havas, Clark Newhall, Paul Simmons, Doug Mortensen. These were their comments and concerns:

1. The present rule is the subject of an undue amount of motion practice, primarily over defining the meaning of the "prior report" requirement of 35(c), but also over the number of examinations allowed, the place of examination, and who bears the cost of prior report production.

2. We started off the meeting with a discussion about the purpose of the rule: is it to have a truly "independent" examination or is it designed to be something else; that is, an examination done at the behest of the defendant, with the defendant's interests in mind.

    a. There has a arisen a subclass of physicians and others who make a great deal of "easy money" from doing so-called "independent" medical examinations, nearly always for the defense. In some cases, these exams generate income to the examiners in excess of $250,000/year.

    b. If the purpose of the rule is to have a truly "independent" medical examination– and note that the rule nowhere uses that term– then these "professional" examiners should be excluded for obvious bias.

    c. On the other hand, if the purpose of the rule is to have a knowingly one-sided examination (as seems to be the case now), then we need to take steps to protect the patient-plaintiff from the worst excesses and allow cross examination to deal with the rest.

3. Some examiners use the occasion to conduct what amounts to another deposition of the plaintiff, but this time without the benefit of counsel. The rule– or the judges- need to address this overreaching.

4. The rule already states that the defendant must show "good cause" in order to have a medical examination ordered, yet many judges seem to think that they should be granted as a matter of course with no showing of need whatsoever. There should be a better definition of "good cause"– *why* is an examination

necessary if there are extensive medical records and X-rays, for example?

5. The rule needs to be clarified on the number of examinations allowed, as repetitive examinations by providers of different specialities are becoming more common.

6. There is a wide disparity among the trial judges on the meaning of the "prior reports" language of Rule 35(c), and the rule should be clarified:

   a. From how far back must reports be provided? (The consensus was that four years is reasonable.)

   b. What does "employed directly or indirectly" mean? Does that mean all reports prepared only for this particular defendant? Or this particular defendant's insurance company? Or this particular defendant's defense firm?

   c. Rule 35(c) suggests that *all* prior reports mad*e b*y an examiner who is "directly or indirectly employed" by the defendant must be provided, as to any type of medical condition. Yet Rule 35(b) seems to cover the same ground and limits the production to "like reports of all earlier examinations of the same condition." How are these reconciled?

7. Who has to pay for finding and producing the prior reports? Some judges order the defense to bear this cost; others have ordered plaintiffs to pay several thousands in "research and copying charges" order to get the prior reports. The attorneys felt that these professional examiners would easily be able to produce prior reports without undue expense or time, once it became a requirement, just as experts were suddenly able to produce records of prior depositions once it became a requirement of Rule 26.

8. Several of the attorneys mentioned that some of the professional examiners are openly dishonest, and will testify that a plaintiff was able to perform some maneuver that he wasn't, or say something that he did not. Therefore, a universal request is that the examinations be allowed to be videotaped if the plaintiff so wishes. (This is already suggested in the Advisory Committee note, but the attorneys want it the default in the rule, unless good cause can be shown why an examination should not be videotaped.)

9. Who gets to be present? Can the attorney be present to protect the client from a "free deposition"? Why not? What about someone else? Should the rule be clarified on this? (It is a not uncommon subject of motions)

10. Mandatory disclosure of information on the examiner should be required, as under Rule 26 for expert witnesses. (Presumably, the thought here would be to get this

information *before* the examination, not after the defense has decided to use the expert as an expert witness.)

MEETING WITH DEFENSE ATTORNEYS

On June 21, 2007, Tom Lee and I met with four attorneys that primarily do defense work: Elliott Williams, Kara Petit, Mark Dunn, and Cathy Larson. These were their comments and concerns:

1. There ought to be some "equity" or "parity" in the rule. Plaintiffs seek the right to videotape defense medical examinations and to require production of reports of prior examinations. Yet the defense does not get the same rights as to plaintiffs' treating physicians, some of whom may be seen on the direct recommendation of the plaintiff's counsel. They cannot require treating physicians to produce prior reports of similar examination, even if the physician was seen on the specific recommendation of the lawyer. Nor could they ever videotape the examination(s) of the treating physicians.

2. We discussed the sheer impracticality of videotaping each of what may be dozens of separate examinations by a treating physician.

3. The sense I got from the defense lawyers was that videotaping in itself was not such a big deal anymore; many allowed it routinely.

4. Limiting medical examinations to the county in which the plaintiff filed suit (as for depositions) would be severely limiting for cases filed in rural counties, as most of the medical examination doctors are in Salt Lake County.

5. Some of the defense lawyers noted that there is substantial difficulty and time involved in producing prior reports because of the perceived need to eliminate identifying information.

SUMMARY

Tom and I both think that the trial judges should be surveyed to see if they feel any changes should be made to Rule 35. We both agree that this will be a hotly-debated rule change no matter how we approach it. On the other hand, it seems clear that the present rule is poorly-written, internally inconsistent, and generating repetitive motion practice over matters that might be better defined. We'd like to hear what the judges think, and then get back to the Committee with our recommendations.

Frank Carney
September 9, 2007

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. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of examining physician.

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

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

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

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

Advisory Committee Notes

Rule 35(a) has been amended to correspond to Rule 35(a) of the Federal Rules of Civil Procedure. (See notes of Federal Advisory Committee on Civil Procedure 1991 Amendment.) All changes in paragraphs (b) and (c) are technical changes to correspond with the amendment to paragraph (a). In the order establishing the conditions of the examination pursuant to paragraph (a), the court may also, for good cause shown, order that the examination be recorded or that a representative of the party or person to be examined be allowed to attend the examination

Notes on Utah Defense Lawyers Annual Meeting Presentation
5 September 2008

Tom Lee and I presented on the subject of possible changes to rule 35 at the annual meeting of the Utah Defense Lawyers Association. My speaking notes are attached, and these indicate the general points of discussion.

Also on the panel with us was Edward Havas (representing the plaintiffs' position) and Lynn Davies (representing the defense position). There was a lively discussion with some very useful comments from the audience members.

I wanted to summarize the points that were made:

1. Lynn Davies spoke of the extensive satellite litigation by plaintiffs' counsel challenging medical examiners, typically on whether other persons can be present and what prior reports need to be disclosed. I think that most, if not all, of the defense lawyers agreed with the proposition that there is too much satellite litigation over Rule 35.

2. All of the defense lawyers also seemed to agree that the rule is poorly written and should be clarified.

3. There doesn't seem to be any reason to keep subsection (b)(1) of the present rule; neither Tom nor I understand why it is necessary, and the defense lawyers seem to agree on this. In nearly all cases, the use of subpoenas eliminates the need for the defense to rely upon the plaintiff to produce prior reports of treatment for the same condition.

4. Mr. Davies stated that he did not see an overwhelming problem with the present Rule 35 other than 35(c) requiring reports on prior examinations done by the medical examiner. It can be fairly said that the defense lawyers would like the requirement to produce prior reports to be eliminated.

5. We discussed the claim made by the representatives of the defense bar before the Advisory Committee on Rules that only one or two other states allow for recording or videotaping of the examination. My own research shows that this is true, as to court rules addressing the subject, but that many state appellate courts have decided that videotaping, audio recording, having other persons present, or some combination of the above, are permissible in Rule 35 examinations, if not required. So the argument made "why are we doing this if no one else is?" is unpersuasive to me; we are doing it by rule so as to eliminate the need for constant judicial interpretation at the trial court level.

6. Lynn Davies generally objected to the idea of videotaping medical examinations on the grounds that they were "unduly prejudicial," by which he means:

a. The mere fact of videotaping makes the medical examiner seem "suspect," and cast aspersions on the whole process. We don't videotape the examinations done by treating doctors. The medical examiners who do this are performing a "public service," and should be treated with some more respect.

b. There is no way to make the videotaping process bilateral because treating physicians have usually already performed their examinations.

c. Videotaping makes the examination and a form of "theater," and claimants will exaggerate or act out if there's a camera there.

d. Videotaping could be manipulated unless we require a certified videographer. And that would be much more expensive for the process.

e. Videotaping would require a third party to be present. That would be disruptive to the process, not only by having someone there who shouldn't be there, but by the necessary time wasted in setting up the equipment.

f. What happens with the tape once it is made? Is it shown to the jury? Is it shown to other treating MDs?

7. Edward Havas spoke in rebuttal on most of these points.

a. He pointed out the treating physician is, in fact, quite different than someone retained to give opinions by the defense. He has a physician-patient relationship; the medical examiner does not. He has an ongoing relationship with the patient; the medical examiner does not. He does not derive a substantial portion of his income from examining claimants in return for compensation from insurance companies.

b. It would of course be impossible to record all examinations by treating doctors of all patients who are involved in a personal injury litigation.

c. Mr. Havas has no problem with the concept of the treating physician retained by plaintiff's counsel to perform an examination being held same standard of videotaping and production of reports as an insurance company's retained physician.

8. We spent some time talking about the concept of a dual-tier of production for production reports; that is, "professionals" versus "nonprofessionals." Some of the defense lawyers felt it was too burdensome for a physician to keep track of how many examinations had been performed.

9. There was also much discussion about whether prior reports were worth the trouble that they entail, both for the litigation system and for the medical examiners. The defense lawyers claimed that prior reports don't accomplish much at trial and waste time.

10. There were interesting comments on whether "personally identifiable information" could be redacted simply by removing the patient's name and address. I asked the person who raised those questions to contact me personally, and educate me on why HIPAA might require more than simply removing names. However, I never heard back from them.

11. Tom and I discussed the general idea that we would like to get more physicians involved in the medical examination process. Lynn Davies said that this is unlikely, as few want to be involved, or have the time to be involved.

12. Mr. Havas pointed out that he would be an easy matter for prior reports to be produced if we set a date in the future after which all examination reports would have be to be saved. The reports, with the names redacted, could be simply copied to a separate directory or folder on the examiner's computer, and then copied to a CD for production when requested.

13. Mr. Havas also thinks that production prior reports should be automatic, as under Rule 26 for experts, and should not require any request from counsel for the plaintiff.

14. Lynn Davies again commented that he did not see the value of prior reports, and that it would create a "huge logistical problem" if they have to be produced.

I think this is the gist of the comments, although I was not able to get all of them down. Basically, the defense bar doesn't want the rule to change, doesn't want videotaping or recording of exams, and doesn't want prior reports to have to be produced.

FJC

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: Judicial Council
From: Tim Shea
Date: February 6, 2009
Re: Audio record and transcript of hearings

The Policy and Planning Committee recommends the attached amendments to implement the Council's decision that the courts record hearings electronically, without court reporters. The legislation would be proposed in the 2010 general session. The Supreme Court and Judicial Council rules would be effective July 1. During the interim, the statutes would continue to recognize the office of official court reporter, but the statutes do not require hearings to be recorded by an official court reporter.

The report and draft statutes and rules have been reviewed by the Board of District Court Judges, the Board of Juvenile Court Judges, the Trial Court Executives and the Clerks of Court. Their suggestions have already been incorporated.

The primary issues appear to be:

- Adequacy of the equipment (The IT Department has surveyed each site to determine what needs can be met within the current budget.)
- Equipment failure (The IT Department has developed a contingency plan.)
- Training for judges and clerks on keeping a good audio record (The committee recommends that best practices be included on the agenda for the 2009 annual conference and as part of new-judge orientation.)
- Allocation of money to pay for a transcript requested by a judge. The options are: hold the money at the AOC; or allocate the money, on some pro-rated basis, to each TCE. The decision does not need to be incorporated into a rule.

We need to write and publish an RFP to qualify court reporters for capital cases.

We need to write and publish a form to request permission to bring in a court reporter at a party's expense.

Encl. Report with recommended rule and statute amendments

Transcript Committee

Report and Recommendations

December 15, 2008

Committee

Matty Branch, Chair, Appellate Court Administrator
Kim Allard, Director, Information Services
Ron Bowmaster, Director, Information Technology
Joe Derring, Court Executive, First Judicial District
Debra Moore, District Court Administrator
Tim Shea, Sr. Staff Attorney, Administrative Office of the Courts
Paul Vance, Court Executive, Fourth Judicial District Court

The Transcript Committee was charged with recommending how best to organize and administer transcript production beginning July 1, 2009, when the Utah State Courts rely primarily on digital recording systems to make the verbatim record.

(1) Current and Interim Procedures

Prior to November 24, 2008, the Code of Judicial Administration prohibited electronically recording a hearing if a court reporter reported the hearing. On that date, the Judicial Council amended Rule 4-201 on an expedited basis to record hearings by digital recording system even if a court reporter reports the proceedings. Recording all proceedings digitally, particularly between now and June 30, 2009, enables a transcript to be prepared even if the reporter who reported the proceeding is not available.

Currently, transcripts of court proceedings are prepared by a combination of in-house court reporters, private reporters, and official court transcribers.

(2) Recommended Procedures Beginning July 1, 2009

(a) Mechanisms for maintaining the record of court proceedings

Digital recording systems will maintain the verbatim record of all court proceedings with all audio and video files stored on the court's computer network.

We recommend that in capital cases, in addition to the digital recording, the court be permitted to contract with a licensed certified court reporter to report proceedings.

The AOC should issue a non-exclusive RFP and identify successful bidders on state contract. In addition to licensure by the Division of Occupational and Professional Licensing, the RFP should require that court reporters be CAT (computer-aided transcription) qualified, agree to the statutory transcript rate, and agree to produce transcripts for appeal within 30 days. There might be other requirements. The AOC should develop a standard contract. Then the TCE would contract with a court reporter as needed for a capital felony just like any other professional service. If a capital complaint is reduced, the reporter should not report the balance of the proceedings.

In addition to the digital recording, a party should be able arrange for a licensed certified court reporter to report a court proceeding, if approved by the court.

(b) Official transcripts

We recommend not distinguishing between the court reporter's notes and the digital recording as the official record. Both are court records. Neither is more official than the other. However, a transcript prepared as described below should be considered an official transcript. That is, it can be used for any court purpose. Transcripts prepared by other means could not be used for court purposes. An official transcript would not displace the other two records of the hearing, but would add a third.

Official transcripts would include the transcript prepared by the reporter in a capital felony or by a reporter arranged for by a party and the transcript prepared by an official court transcriber as described below.

The reporter or transcriber should submit the digital text file and the printed, certified transcript to the clerk of trial court and they would become the property of the court.

(c) Requesting an official transcript

An official transcript could be used in any court proceeding. All transcripts for official purposes will be requested through a transcript coordinator located in the appellate clerks' office. A web-based transcript ordering system will be built by the IT Department. A centralized transcript ordering system is estimated to require 1 FTE, but this might need to be revisited because our estimate of the workload is very rough.

(d) Assignment of transcript preparation

If a court reporter reported the proceeding, the transcript coordinator will transmit the request to that reporter. If no reporter was present, the coordinator will assign an official court transcriber to prepare the transcript, transmit the digital file to the transcriber, and notify the party of the transcriber's name. The party is responsible for making arrangements to pay the transcriber or reporter.

(e) Official Court Transcriber List

Renumber and amend Rule 3-305 to to improve the regulation of court transcribers. The proposed amendments give the appellate court administrator responsibility for certifying official court transcribers, for maintaining the list of official transcribers, and for sanctioning transcribers for poor performance.

To be certified as an official court transcriber, an individual must be licensed in Utah as a certified court reporter or work under the direction of one who is. Additionally, the individual must have appropriate transcription experience and equipment, comply with all statutes and rules regulating transcripts, have no conflict of interest in the matters transcribed, and attend training required by the appellate court administrator.

(f) Miscellaneous Issues

(i) Courtroom and chambers recording equipment

The IT Department should survey each courthouse with the TCE to identify the optimal number and configuration of microphones and other equipment. This should include equipment that may be needed for telephone conferences held in chambers.

There is money available in the Court Reporter Technology Account to pay for additional microphones and any required equipment repairs and upgrades.

(ii) Requests for expedited transcripts

There are practical limits to quickly transcribing a hearing from a digital recording. The court can produce the digital file almost immediately after the hearing. Although we do not yet have the capability, the file can be transmitted to a transcriber in 10-minute segments during the hearing. But transcribing a hearing from a digital recording tends to take longer than the hearing itself, so producing a transcript from a digital recording will be limited by that speed.

If an attorney needs a transcript more quickly than that, the attorney should request the court's approval to hire a court reporter to report the proceedings and to provide whatever transcripts are needed.

(iii) Transcript requests from judges

The committee recommends that judges and staff use the same transcript request service as the parties. The web interface offers a convenient mechanism, and the coordinator can better distribute the workload among transcribers. The transcript will be paid for from funds set aside for that purpose.

(iv) Requesting audio or video records

Requests for digital records for purposes other than preparing an official transcript would be made to the trial court and provided like any other court record. The file may be transcribed, but the transcript would not be recognized as "official," since it is prepared outside the court-regulated process.

(v) Training

Training for judges and in-court staff about how to create a good audio record needs to be developed and presented statewide. The techniques for maintaining a high quality sound recording are not difficult, but they must be learned and followed.

(vi) Preparation of transcripts from proceedings reported by a court reporter when that court reporter is no longer a court employee

If the court reporter who reported the proceeding is available, the transcript coordinator will assign that person to prepare the transcript. If the reporter is not available, the transcript coordinator will assign a transcriber on the list to prepare the transcript either from the court reporter's notes or from the audio file if available.

(3) Statutes and rules

The Court Reporter Act defines "official court reporter" as a court reporter employed by the courts and regulates the position in some regards, but the statutes do not require an official court reporter to report or transcribe any court proceedings except those to which the reporter is assigned. Section 78A-2-405(1) says "The Judicial Council shall by rule provide for the means of maintaining the record of proceedings in the courts of record by official court reporters or by electronic recording devices."

The statutes ultimately will need to eliminate references to official court reporters, but those amendments do not have to be made in the 2009 general session. If the amendments are made in 2010, there will be several months in which the regulation of official court reporters remains on the books but has no practical application.

There are four primary objectives to the amendments:

1) Eliminate regulation of official court reporters.
   a) Repeal sections or subsections of the Utah Code.
   b) Repeal Rule 3-304, Official court reporters.
   c) Repeal Rule 3-304.01, Substitute certified shorthand reporters.
2) Identify the mechanism for maintaining a verbatim record of court proceedings.
   a) Rule 4-201.
3) Identify official transcripts.
   a) Rule 4-201.
4) Describe the process for requesting an official transcript.
   a) URAP 12.
   b) Centralize transcript requests.
   c) If requested, prepared and filed under Rule 12, a transcript prepared initially for a trial court proceeding could eventually be used in an appeal.

There are also secondary objectives to the amendments:

5) Define the standard transcript format.
6) Improve regulation of court transcribers.
7) Describe requirements for filing a transcript.
   a) Require a digital text file as well as a printed transcript.
   b) Ensure that we own the files and documents even if filed by a private reporter.

Encl. Section 78A-2-402.
Section 78A-2-405
Section 78A-2-406 (repeal)
Section 78A-2-407 (repeal)
Section 78A-2-408
Section 78A-2-409
78A-6-115
CJA 4-201
URCP 52
URAP 12
CJA 5-202 (renumbered from CJA 3-305)
CJA 5-203 (renumbered from CJA 3-304)
CJA 3-304.01 (repeal)
URAP 11
URAP 54

78A-2-402. Definitions.

As used in this part:

(1) "Certified court reporter" has the same meaning as in Title 58, Chapter 74, Certified Court Reporters Licensing Act.

(2) "Folio" means 100 words. A number expressed as a numeral counts as one word; however, any portion of the last folio is not counted.

~~(3) "Official court reporter" means a certified court reporter employed by the courts.~~

~~(4)~~ (3) "Official court transcriber" means a person certified in accordance with rules of the Judicial Council as competent to transcribe into written form an audio or video recording of court proceedings.

78A-2-405. Record of court proceedings~~ -- Duties of court reporter~~.

~~(1)~~ The Judicial Council shall by rule provide for the means of maintaining the record of proceedings in the courts of record~~ by official court reporters or by electronic recording devices~~.

~~(2) The official court reporter assigned to a session of court shall take full verbatim stenographic notes of the session, except when the judge dispenses with the verbatim record.~~

~~(3) The official court reporter shall immediately file with the clerk of the court the original stenographic notes of the court session and the computer disk on which the notes are stored. If not already on file with the clerk of the court, the official court reporter shall file a computer disk containing the reporter's most current dictionary showing the meaning of the reporter's stenographic notes.~~

~~(4) Upon request and the payment of fees established by Section 78A-2-408, the official court reporter shall transcribe the stenographic notes or video or audio recording of the court session and furnish the transcript to the requesting party.~~

~~**78A-2-406. Substitute reporters.**~~

~~A certified court reporter other than an official court reporter may be assigned temporarily to the duties of an official court reporter in accordance with rules of the Judicial Council.~~

~~**78A-2-407. Compensation -- Traveling expenses -- Frequency of payment.**~~

~~The compensation of an official court reporter shall be fixed in accordance with salary schedules for state court employees. The official court reporter shall also be paid for traveling expenses actually and necessarily incurred in the performance of duties in accordance with Judicial Council policy.~~

78A-2-408. Transcripts and copies -- Fees ~~-- Establishment of Court Reporting Technology Account~~.

(1) The Judicial Council shall by rule provide for a standard page format for transcripts of court hearings.

(2)(a) The fee for a transcript of a court session, or any part of a court session, shall be $3.50 per page, which includes the initial preparation of the transcript and one certified copy. The preparer shall deposit the original text file and printed transcript with the clerk of the court and provide the person requesting the transcript with the certified copy. The cost of additional copies shall be as provided in Subsection 78A-2-301(1). The transcript for an appeal shall be prepared within the time period permitted by the rules of Appellate Procedure. The fee for a transcript prepared within three business days of the request shall be 1-1/2 times the base rate. The fee for a transcript prepared within one business day of the request shall be double the base rate.

(b) When a transcript is ordered by the court, the fees shall be paid by the parties to the action in equal proportion or as ordered by the court. The fee for a transcript in a criminal case in which the defendant is found to be impecunious shall be paid pursuant to Section 77-32-305.

(c) There is established within the General Fund a restricted account known as the Court Reporting Technology Account. The clerk of the court shall transfer to the state treasurer for deposit into this account all fees received under this section. The state court administrator may draw upon this account for the purchase, development, and maintenance of court reporting technologies and for other expenses necessary for maintaining a verbatim record of court sessions.

(3) The fee for the preparation of a transcript of a court hearing by an official court transcriber ~~other than an official court reporter~~ and the fee for the preparation of the transcript by a certified ~~shorthand~~ court reporter of a hearing before any court, referee,

master, board, or commission of this state shall be as provided in Subsection (2)(a), and shall be payable to the person preparing the transcript.

78A-2-409. Certified transcripts prima facie correct.

A transcript of ~~an official~~ a certified court reporter's notes, written in longhand or typewritten, certified by the court reporter as being a correct transcript of evidence and proceedings, is prima facie a correct statement of the evidence and proceedings.

78A-6-115. Hearings -- Record -- County attorney or district attorney responsibilities -- Attorney general responsibilities -- Disclosure -- Admissibility of evidence.

(1)(a) A verbatim record of the proceedings shall be taken ~~by an official court reporter or by means of a mechanical recording device~~ in all cases that might result in deprivation of custody as defined in this chapter. In all other cases a verbatim record shall also be made unless dispensed with by the court.

(b)(i) Notwithstanding any other provision, including Title 63G, Chapter 2, Government Records Access and Management Act, a record of a proceeding made under Subsection (1)(a) shall be released by the court to any person upon a finding on the record for good cause.

(ii) Following a petition for a record of a proceeding made under Subsection (1)(a), the court shall:

(A) provide notice to all subjects of the record that a request for release of the record has been made; and

(B) allow sufficient time for the subjects of the record to respond before making a finding on the petition.

(iii) A record of a proceeding may not be released under this Subsection (1)(b) if the court's jurisdiction over the subjects of the proceeding ended more than 12 months prior to the request.

(iv) For purposes of this Subsection (1)(b):

(A) "record of a proceeding" does not include documentary materials of any type submitted to the court as part of the proceeding, including items submitted under Subsection (4)(a); and

(B) "subjects of the record" includes the child's guardian ad litem, the child's legal guardian, the Division of Child and Family Services, and any other party to the proceeding.

(v) This Subsection (1)(b) applies:

(A) to records of proceedings made on or after November 1, 2003 in districts selected by the Judicial Council as pilot districts under Subsection 78A-2-104(15); and

(B) to records of proceedings made on or after July 1, 2004 in all other districts.

(2) (a) Except as provided in Subsection (2)(b), the county attorney or, if within a prosecution district, the district attorney shall represent the state in any proceeding in a minor's case.

(b) The attorney general shall enforce all provisions of Title 62A, Chapter 4a, Child and Family Services, and this chapter, relating to:

(i) protection or custody of an abused, neglected, or dependent child; and

(ii) petitions for termination of parental rights.

(c) The attorney general shall represent the Division of Child and Family Services in actions involving a minor who is not adjudicated as abused or neglected, but who is otherwise committed to the custody of that division by the juvenile court, and who is classified in the division's management information system as having been placed in custody primarily on the basis of delinquent behavior or a status offense. Nothing in this Subsection (2)(c) may be construed to affect the responsibility of the county attorney or district attorney to represent the state in those matters, in accordance with the provisions of Subsection (2)(a).

(3) The board may adopt special rules of procedure to govern proceedings involving violations of traffic laws or ordinances, wildlife laws, and boating laws. However, proceedings involving offenses under Section 78A-6-606 are governed by that section regarding suspension of driving privileges.

(4)(a) For the purposes of determining proper disposition of the minor in dispositional hearings and establishing the fact of abuse, neglect, or dependency in adjudication hearings and in hearings upon petitions for termination of parental rights, written reports and other material relating to the minor's mental, physical, and social history and condition may be received in evidence and may be considered by the court along with

other evidence. The court may require that the person who wrote the report or prepared the material appear as a witness if the person is reasonably available.

(b) For the purpose of determining proper disposition of a minor alleged to be or adjudicated as abused, neglected, or dependent, dispositional reports prepared by Foster Care Citizen Review Boards pursuant to Section 78B-8-103 may be received in evidence and may be considered by the court along with other evidence. The court may require any person who participated in preparing the dispositional report to appear as a witness, if the person is reasonably available.

(5)(a) In an abuse, neglect, or dependency proceeding occurring after the commencement of a shelter hearing under Section 78A-6-306 or the filing of a petition under Section 78A-6-304, each party to the proceeding shall provide in writing to the other parties or their counsel any information which the party:

(i) plans to report to the court at the proceeding; or

(ii) could reasonably expect would be requested of the party by the court at the proceeding.

(b) The disclosure required under Subsection (5)(a) shall be made:

(i) for dispositional hearings under Sections 78A-6-311 and 78A-6-312, no less than five days before the proceeding;

(ii) for proceedings under Title 78A, Chapter 6, Part 5, Termination of Parental Rights Act, in accordance with Utah Rules of Civil Procedure; and

(iii) for all other proceedings, no less than five days before the proceeding.

(c) If a party to a proceeding obtains information after the deadline in Subsection (5)(b), the information is exempt from the disclosure required under Subsection (5)(a) if the party certifies to the court that the information was obtained after the deadline.

(d) Subsection (5)(a) does not apply to:

(i) pretrial hearings; and

(ii) the frequent, periodic review hearings held in a dependency drug court case to assess and promote the parent's progress in substance abuse treatment.

(6) For the purpose of establishing the fact of abuse, neglect, or dependency, the court may, in its discretion, consider evidence of statements made by a child under eight years of age to a person in a trust relationship.

Rule 4-201. Record of proceedings.

Intent:

To establish the means of maintaining the ~~official~~ record of court proceedings in all courts of record.

~~To establish the manner of selection and operation of electronic devices.~~

~~To establish the procedure for requesting a transcript for a purpose other than for an appeal.~~

To permit a party to have a court proceeding reported by a certified court reporter if permitted by the court.

To permit a certified court reporter to prepare an official transcript if permitted by the court.

Applicability:

This rule shall apply to all courts of record.

Statement of the Rule:

(1) ~~Guidelines for court reporting methods. The v~~Verbatim record of court proceedings~~. shall be maintained in accordance with the following guidelines:~~

(1)(A) ~~Except as provided in this rule, a~~ A video or audio recording system shall maintain the verbatim record of all court proceedings.

(1)(B) ~~An official~~ If requested by the court, a certified court reporter ~~or approved substitute court reporter~~ licensed in Utah shall maintain ~~the~~ a verbatim record in all trial court proceedings in capital felonies.

(1)(C) If approved by the court, a party may arrange for a certified court reporter licensed in Utah to maintain a verbatim record of a court proceeding.

(1)(D) A certified court reporter licensed in Utah may maintain a verbatim record of a court proceeding if an audio or video recording system is unavailable.

~~(1)(C) At the judge's discretion and subject to availability, an official court reporter or approved substitute court reporter should maintain the verbatim record in:~~

~~(1)(C)(i) all evidentiary hearings after arraignment and all trials in first degree felonies;~~

~~(1)(C)(ii) in cases in which the judge finds that an appeal of the case is likely, regardless of the outcome in the trial court;~~

~~(1)(C)(iii) in cases in which the judge determines there is a substantial likelihood a video or audio recording would jeopardize the right to a fair trial or hearing; or~~

~~(1)(C)(iv) in any other proceeding or portion of a proceeding, upon a showing of good cause.~~

~~(1)(D) If a proceeding is reported by a court reporter, an electronic recording of the proceeding shall not be made, except that electronic recording may be made as part of the judge's or court reporter's notes for personal use.~~

~~(1)(E) Reporters shall be assigned to cover courtroom proceedings as set forth above. In the event of a conflict in the request for an official court reporter, the trial court executive or managing reporter shall confer with the presiding judge, who shall resolve the conflict.~~

~~(1)(F) A recording technology other than the presumed technology may be used if the presumed technology is not available. The use of a technology other than the presumed technology shall not form the basis of an issue on appeal.~~

~~(1)(G)~~ (1)(E) The ~~A~~administrative ~~O~~office of the courts shall periodically study the state of the art of electronic recording technology and technology employed in computer integrated courtrooms and make recommendations to the Judicial Council of systems to be approved.

(2) Record security.

~~(2)(A) If a proceeding is recorded by an analogue video recording system, at least two original recordings shall be made. One original recording and log shall be filed with the clerk of the court. A second original recording shall be kept in a secure, off site storage area.~~

~~(2)(B) If a proceeding is recorded by an analogue audio recording system, one original recording shall be filed with the clerk of the court.~~

~~(2)(C) If a proceeding is reported by a court reporter or recorded by a digital recording system, the~~ The administrative office of the courts shall maintain ~~the~~ digital files, ~~and~~ backup files and archive files. The clerk of the court shall maintain the official transcript.

(3) ~~The official court record.~~ Official transcripts.

~~(3)(A) If the record of a hearing is transcribed by an official court reporter or official court transcriber, the certified transcript is the official record. If the record of a hearing is not transcribed, the court reporter's file, the tape or the digital file is the official record.~~

~~(3)(B) The clerk of the court may release the official court record only to court personnel or the official court transcriber. The clerk shall enter in the docket the name of the recipient and when the official court record was released and returned. Obtaining a copy of the official court record shall be governed by rules regulating access to court records.~~

(3)(A) A transcript prepared and filed by a certified court reporter from the reporter's notes is an official transcript. The court reporter must agree to comply with statutes and rules applicable to transcripts of court proceedings. Records filed by the court reporter with the court are the property of the court.

(3)(B) A transcript of a video or audio recording of a court proceeding prepared and filed by an official court transcriber in accordance with the procedures established in Utah Rule of Appellate Procedure 12 is an official transcript.

(3)(C) An official transcript can be used in any trial court or appellate court proceeding.

~~(4) Requests for transcripts.~~

~~(4)(A)~~ (3)(D) A request for an official transcript for an appeal is governed by Utah ~~R.App.P. 11 and Utah R.App.P. 12~~ Rules of Appellate Procedure 11 and 12. A request for an official transcript for other court proceedings is governed by Rule of Appellate Procedure 12.

~~(4)(B) A request for transcript or expedited transcript shall be accompanied by the fee established by the Utah Code and filed with the court executive or, if one has been appointed, the managing court reporter. The court executive or managing court reporter shall assign the preparation of the transcript in the same manner as Utah R.App.P. 12.~~

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

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

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

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

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

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

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

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

Rule 12. Transmission of the record.

(a) Duty ~~of reporter~~ to prepare and file transcript; request for enlargement of time; notice to appellate court.

(a)(1) Upon receipt of a request for a transcript, the ~~court executive shall file with the clerk of the appellate court an acknowledgment that the request has been received and the date of its receipt. The~~ clerk of the appellate court ~~executive~~ shall assign the preparation of the transcript to ~~an official~~ the court reporter who reported the proceedings or, if recorded on video or audio equipment, to an official court transcriber ~~in accordance with CJA 3-305~~ and notify the requesting party of the assignment. By stipulation of the parties approved by the appellate court, a person other than an official court transcriber may transcribe a recorded hearing.

(a)(2) A party requesting a transcript shall make satisfactory arrangements for paying the fee to the reporter or transcriber and notify the clerk of the appellate court of the date on which satisfactory arrangements were made. The transcript shall be completed and filed within 30 days ~~of the assignment~~ after that date.

~~(a)(2)~~ (a)(3) The reporter or transcriber may request from the clerk of the appellate court an enlargement of time in which to file the transcript. The request for enlargement of time shall be in writing and shall contain the elements stated in CJA 5-201(1). If filed prior to the expiration of the transcript preparation period, the request shall make a showing of good cause. If filed after the expiration of the period, the request shall make a showing of extraordinary circumstances beyond the control of the reporter or transcriber. The reporter or transcriber shall provide a copy of the request to the parties. The clerk of the appellate court shall provide written notice of the disposition of the request for enlargement of time to the ~~court~~ reporter or transcriber~~,~~ and the parties~~, and the court executive. If the reporter fails to file the transcript within the original or extended period of time, the clerk of the appellate court shall notify the court executive~~.

~~(a)(3)~~ (a)(4) Upon completion of the transcript, ~~if prepared by a certified court reporter,~~ the reporter and, if applicable, the transcriber shall certify that the transcript is a true and correct record of the court hearing or of the file provided by the clerk of the appellate court. The reporter or transcriber shall prepare an index of its contents and file the text file, transcript and index with the clerk of the trial court and notify the clerk of the

appellate court that the transcript has been filed. At the request of the person ordering the transcript or at the request of the appellate court, the ~~court~~ reporter or transcriber shall file the transcript in a compressed format that places multiple complete pages of the original transcript upon each page of compressed transcript. The compressed transcript shall retain the page and line numbers of the original transcript. A compressed transcript may be certified as a correct copy of the original.

(b) Transmittal of record on appeal to appellate court; duty of trial court clerk or agency clerk.

(b)(1) Duty of trial court clerk in criminal and postconviction cases. In criminal and postconviction cases, unless otherwise ordered by the appellate court the record will be transmitted by the clerk of the trial court to the clerk of the appellate court upon completion of the transcript under paragraph (a) above or, if there is no transcript, within 20 days of the filing of the notice of appeal. In cases where a party or a party's counsel notifies the court clerk in writing that the presentence investigation report is relevant to an issue on appeal, the clerk shall include the sealed presentence investigation report as part of the record.

(b)(2) Duty of trial court clerk in civil cases. In civil cases other than post-conviction cases, unless otherwise ordered by the appellate court, the record shall remain in the custody of the trial court clerk during the preparation and filing of briefs unless checked out by counsel. During the briefing period, counsel for the parties who are members of the Utah State Bar in good standing may, as officers of the court, check out the record upon written request to the trial court clerk. The record may be mailed by registered mail or other reputable overnight carrier, return receipt requested, provided that the party requesting mailing makes advance arrangements with the clerk, and pays the cost of shipping. The record may be picked up in person by such an officer of the court, or his or her authorized agent. Each attorney shall be responsible for promptly returning the record to the clerk of the trial court not later than when that party's brief is filed.

(b)(2)(A) Transmit index. When the transcript is completed pursuant to paragraph (a) above, the clerk of the trial court shall immediately transmit a certified copy of the index prepared pursuant to Rule 11(b) to the clerk of the appellate court. If there is no transcript requested, the clerk of the trial court shall transmit the index of the record to

the clerk of the appellate court within 20 days, but not sooner than 14 days, after the filing of the notice of appeal.

(b)(2)(B) Transmit record. Within 10 days from the date of notice from the clerk of the appellate court that briefing is complete the clerk of the trial court shall transmit the papers, transcript and exhibits in the appeal to the appellate court.

(b)(3) Duty of court clerk in juvenile court cases. In juvenile court cases, the record will be transmitted by the juvenile court clerk to the clerk of the appellate court upon completion of the transcript under paragraph (a) above or, if there is no transcript, within 20 days of the filing of the notice of appeal.

(b)(4) Duty of clerk in agency cases. In agency cases, unless otherwise ordered by the appellate court, the record shall remain in the custody of the agency during the preparation and filing of briefs.

(b)(4)(A) Transmit index. When the transcript is completed pursuant to paragraph (a) above, the clerk shall immediately transmit a certified copy of the index prepared pursuant to Rule 11(b) to the clerk of the appellate court. If there is no transcript requested, the clerk shall transmit the index of the record to the clerk of the appellate court within 20 days, but not sooner than 14 days, after the filing of the petition for review.

(b)(4)(B) Transmit record. Within 10 days from the date of notice from the clerk of the appellate court that briefing is complete, the clerk shall transmit the papers, transcript and exhibits in the appeal to the appellate court.

(b)(5) Transmission of exhibits. Documents of unusual bulk or weight, and physical exhibits other than documents shall not be transmitted by the clerk of the trial court unless directed to do so by a party or by the clerk of the appellate court. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

(c) Retention of the record in the trial court. If the record or any part of it is required in the trial court beyond the time set forth in paragraph (b) of this rule, the trial court on its own motion or after motion of a party may order the clerk of the trial court to retain the record or parts thereof subject to the request of the appellate court. The clerk of the

trial court shall transmit a copy of the order and of the index and the portion of the record not retained by the trial court to the clerk of the appellate court.

(d) Expedited transmittal of parts of the record. If prior to the time the record is transmitted the record is required in the appellate court, the clerk of the trial court at the request of any party or of the appellate court shall transmit to the appellate court such parts of the original record as designated.

~~Rule 3-305.~~ Rule 5-202. Official court transcribers.

Intent:

~~To establish the means of transcribing the official record of court proceedings, recorded by audio or video electronic recording systems.~~

To establish the criteria and procedure for certification of official court transcribers.

~~To describe the procedure for preparation of and payment for official court transcripts.~~

~~To prescribe the procedure for assignment of official court transcribers.~~

Applicability:

This rule shall apply to ~~the record of court proceedings recorded by audio or video electronic recording systems in any court of record~~ official court transcribers.

Statement of the Rule:

(1) Definitions. An "official court transcriber" is a person authorized under this rule to transcribe into typewritten form the audio and video ~~tape~~ recordings of court proceedings for purposes of appeal or other ~~official~~ court purposes.

(2) ~~Requirements for q~~Qualifications~~ as official court transcriber~~. In order to serve as an official court transcriber, an individual must meet the criteria and fulfill the responsibilities ~~as~~ stated below, and must be approved by the ~~administrative office of the courts~~ appellate court administrator.

(2)(A) An official court transcriber shall be licensed in ~~the state of~~ Utah as a certified ~~shorthand~~ court reporter or work under the direction of one who is.

(2)(B) An official court transcriber shall ~~have~~:

(2)(B)(i) have experience or training satisfactory to the ~~administrative office of the courts~~ appellate court administrator in transcription of audio and video ~~tapes~~ records;

(2)(B)(ii) have equipment and support staff sufficient to provide the transcript ~~of the audio and video tapes~~ in an accurate and timely manner; ~~and~~

(2)(B)(iii) have no conflict of interest in the matters transcribed;

(2)(B)(iv) comply with statutes and rules regulating transcripts; and

(2)(B)(v) attend training required by the appellate court administrator.

(2)(C) Persons desiring to be certified as official court transcribers shall ~~submit a written proposal~~ apply to the ~~administrative office of the courts~~ appellate court

administratorsetting forth their qualifications and ability to comply with the criteria set forth.

(3) Preparation of transcript.

(3)(A) An official court transcriber shall prepare and file a transcript when assigned to do so by the court executive in conformance with the time standards established by the rules of the appellate courts unless an extension of time is granted in accordance with the rules.

(3)(B) If an official court transcriber encounters a portion of the audio or video tape recording which is inaudible or incomplete, and which, in the opinion of the transcriber, is likely to significantly affect the accuracy and clarity of the transcript, the official court transcriber shall report that fact to the court executive appellate court administrator and set forth the court, the date and time of the proceeding, and the perceived problem with the recording.

(3)(C) On each transcript, the official court transcriber shall take and subscribe to an oath affirming that the audio or video tape recording has been transcribed accurately to the best of the transcriber's ability.

(4) List of official court transcribers. The administrative office of the courts appellate court administrator shall compile and distribute to the court executive publish a list of official court transcribers. When an additional transcriber is certified, an updated list shall be distributed.

(5) Assignment of transcript preparation. The court executive shall assign the preparation of a court transcript to an official court transcriber when no official court reporter is available to prepare it.

(6) (5) Complaints and sanctions. The administrative office of the courts appellate court administrator may investigate any complaints made concerning the performance of an official court transcriber, and may, for good cause, rescind the certification of any official court transcriber. Failure to prepare and file an assigned transcript within in accordance with the time and notification standards established by the rules of the appellate courts constitutes good cause for rescission of an official court transcriber's certification.

Rule ~~3-304. Official court reporters.~~5-203. Transcript format.

Intent:

To establish a uniform~~ administrative policies governing the appointment, assignment, supervision, evaluation, tenure, duties, responsibilities and benefits of official court reporters serving in the trial courts of record of the state~~ transcript format as required by the Utah Code.

Applicability:

This rule shall apply to all~~ official court reporters employed by the State of Utah serving in the trial courts of record~~ transcripts of a court proceeding.

Statement of the Rule:

~~(1) Career status. All official court reporters of the trial courts of record are career service professional employees of the judicial branch of state government subject to the human resource policies and procedures adopted by the Judicial Council.~~

~~(2) Qualifications. Official court reporters shall:~~

~~(2)(A) be licensed in the State of Utah as certified shorthand reporters by the Division of Occupational and Professional Licensing of the Department of Commerce;~~

~~(2)(B) comply with the continuing education program established by the Administrative Office of the Courts under subsection (9); and~~

~~(2)(C) obtain prior to their hireproficiency in the skills of computer aided transcription and computer integrated courtroom technology; and~~

~~(2)(D) successfully complete testing for certified real-time reporter (CRR) as a requirement for career ladder advancement.~~

~~(3) Duties. All official court reporters shall comply with applicable statutes, court rules, human resource policies and procedures, and this Code.~~

~~(3)(A) Maintain the record. The official court reporter assigned to a session of the court shall take verbatim stenographic notes of the session, unless the judge dispenses with the verbatim record.~~

~~(3)(B) Transcribe proceedings.~~

~~(3)(B)(i) Pursuant to Utah R. App. P. 11 and 12, upon receipt of a signed notice of transcript order, official court reporters shall furnish the requesting party a transcript of the court sessions as requested.~~

~~(3)(B)(ii) Official court reporters shall transcribe into typewritten form the audio and video tape recordings of court proceedings when assigned to do so by the court executive.~~

~~(3)(B)(iii) Official court reporters shall complete and file transcripts with the clerk of the court in conformance with the time standards established by the rules of the appellate courts unless an extension of time is granted in accordance with the rules.~~

~~(3)(B)(iv) Official court reporters shall provide information to the court executive concerning the reporter's activities, including time in court sessions taking the record, number and length of transcripts pending, compliance with time standards for preparation of transcripts and requests for extension of time for preparation of transcripts.~~

~~(3)(C) Attendance at court. Official court reporters shall report for duty as scheduled, attend sessions of court as assigned, and notify the court executive as promptly as possible of any illness or other reason preventing the performance of duties.~~

~~(4) Appointment. The court executive with input from the managing court reporter shall recruit and select qualified official court reporters in accordance with the human resource policies and procedures adopted by the Judicial Council.~~

~~(5) Supervision and discipline.~~

~~(5)(A) The in-court supervision of individual official court reporters is the responsibility of the judge to whom the reporter is assigned.~~

~~(5)(B) Pursuant to this Code and under the direction of the presiding judge, the court executive shall supervise and discipline official court reporters in accordance with the human resource policies and procedures adopted by the Judicial Council.~~

~~(5)(C) An official court reporter shall be subject to disciplinary action by the court executive with input from the managing court reporter for failure to file an appellate transcript timely. Such discipline may include, but shall not be limited to, reprimand, censure, suspension without pay, reduction of salary, or removal from office.~~

~~(6) Compensation and Benefits. The state court administrator shall establish a pay plan for official court reporters that shall include a career ladder advancement system based upon professional qualifications and prior experience in the profession. Official court reporters are entitled to the same benefits as other full time career service state~~

~~court employees provided for in the human resource policies and procedure adopted by the Judicial Council. Official court reporters shall be credited with unused annual leave credited at the start of the calendar year in which amendments to this section are approved by the Judicial Council.~~

~~(7) Court executive duties and responsibilities. In addition to the duties, responsibilities and authority as otherwise set forth in this rule and the human resource policies and procedures adopted by the Judicial Council, the court executive shall:~~

~~(7)(A) assign court reporters to attend sessions of court in accordance with Rule 4-201;~~

~~(7)(B) coordinate and provide coverage for excused absences of reporters;~~

~~(7)(C) monitor activities of reporters including, if necessary, time in court sessions taking the record, number and length of transcripts pending, compliance with time periods for preparation of transcripts and requests for extension of time for preparation of transcripts; and~~

~~(7)(D) interact with clerks of the appellate courts regarding timely preparation of transcripts and take corrective action as necessary to avoid undue delay in submission of transcripts.~~

~~(8) Managing Court Reporter. Subject to approval of the state court administrator and availability of funds, the court executive may appoint a managing court reporter in a district who shall assume the duties, responsibilities and authority of the court executive excepting the imposition of disciplinary action. The managing court reporter shall be accountable to the court executive for the performance of those duties.~~

~~(9) General provisions.~~

~~(9)(A) Standard workday. Work hours for official court reporters shall be governed by the human resource policies and procedures adopted by the Judicial Council. Judges are encouraged to accommodate official court reporters by avoiding court sessions of excessive length whenever possible.~~

~~(9)(B) Extra reporting activities. No official court reporter may engage in outside reporting activities and shall conform to the secondary employment and conflict of interest provisions of the human resource policies and procedures adopted by the Judicial Council.~~

~~(9)(C) Furniture and equipment. The administrative office of the courts shall provide each official court reporter with all necessary equipment and supplies for the performance of official duties.~~

~~(9)(D) Education. The state court administrator shall be responsible for the judicial employees education program which shall incorporate the official court reporters, and which shall include the National Court Reporter Association guidelines or their equivalent. Court executives will coordinate schedules to ensure the ability of official court reporters to meet required education standards.~~

~~(10) Transcript format.~~ A transcript ~~produced by official court reporters and official court transcribers from~~ of proceedings ~~occurring~~ in Utah courts shall be formatted as follows:

~~(10)(A)~~ (1) Paper size: 8 ½ inches x 11 inches.

~~(10)(B)~~ (2) Paper weight: At least 13 pounds for original and copies.

~~(10)(C)~~ (3) The transcript shall consist of the title page, index pages, transcript pages and certificate pages.

~~(10)(D)~~ (4) Lines of text on transcript pages shall be double spaced and numbered.

~~(10)(E)~~ (5) All pages shall be numbered at the bottom right corner of the page.

~~(10)(F)~~ (6) Each transcript shall contain 25 lines of text except the final transcript page, which may contain fewer lines.

~~(10)(G)~~ (7) Each line of text shall contain 63 characters or columns, filled or unfilled.

~~(10)(H)~~ (8) Text shall be 12-point plain font text except for words normally italicized or underlined.

~~(10)(I)~~ (9) Indentations shall be as follows:

~~(10)(I)(i)~~ (9)(A) "Q" and "A" designations. All "Q" and "A" designations shall begin at the fifth column. A period following the "Q" and "A" designation is optional. The statement following the "Q" or "A" designation shall begin at the tenth column. Subsequent lines shall begin at the left margin.

~~(10)(I)(ii)~~ (9)(B) Colloquy. Speaker identification shall begin at the tenth column followed directly by a colon. The statement shall begin on the third column after the colon. Subsequent lines shall begin at the left margin.

~~(10)(I)(iii)~~ (9)(C) Quotations. Quoted material shall begin at the tenth column, with additional quoted lines beginning at the tenth column, with appropriate quotation marks used.

~~(10)(I)(iv)~~ (9)(D) Parentheses. Parenthetical notations shall begin with an open parenthesis at the tenth column with the remark beginning on the eleventh column. Parentheses are used for customary statements such as recesses, adjournments and admission of exhibits. Subsequent lines contained in parenthetical notations shall begin at the tenth column.

~~**Rule 3-304.01. Substitute certified shorthand reporters.**~~

~~Intent:~~

~~To establish the authority for the appointment of substitute certified shorthand reports.~~

~~Applicability:~~

~~This rule shall apply to the courts of record and the administrative office of the courts.~~

~~Statement of the Rule:~~

~~(1) All substitute shorthand reporters serving in the trial courts of record shall be licensed by the Division of Occupational and Professional Licensing as a certified shorthand reporter.~~

~~(2) Only the state court administrator can approve the temporary appointment of a certified shorthand reporter under this rule.~~

~~(3) The administrative office of the courts may contract with a certified shorthand reporter or a private shorthand reporting firm for the purpose of maintaining the official verbatim record of court proceedings. The contract shall require the vendor to furnish a certified shorthand reporter on an as needed basis upon notification by the court executive of the need for such services and for the terms of payment.~~

Rule 11. The record on appeal.

(a) Composition of the record on appeal. The original papers and exhibits filed in the trial court, including the presentence report in criminal matters, the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and the docket sheet, shall constitute the record on appeal in all cases. A copy of the record certified by the clerk of the trial court to conform to the original may be substituted for the original as the record on appeal. Only those papers prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.

(b) Pagination and indexing of record.

(b)(1) Immediately upon filing of the notice of appeal, the clerk of the trial court shall securely fasten the record in a trial court case file, with collation in the following order:

(b)(1)(A) the index prepared by the clerk;

(b)(1)(B) the docket sheet;

(b)(1)(C) all original papers in chronological order;

(b)(1)(D) all published depositions in chronological order;

(b)(1)(E) all transcripts prepared for appeal in chronological order;

(b)(1)(F) a list of all exhibits offered in the proceeding; and

(b)(1)(G) in criminal cases, the presentence investigation report.

(b)(2)(A) The clerk shall mark the bottom right corner of every page of the collated index, docket sheet, and all original papers as well as the cover page only of all published depositions and the cover page only of each volume of transcripts constituting the record with a sequential number using one series of numerals for the entire record.

(b)(2)(B) If a supplemental record is forwarded to the appellate court, the clerk shall collate the papers, depositions, and transcripts of the supplemental record in the same order as the original record and mark the bottom right corner of each page of the collated original papers as well as the cover page only of all published depositions and the cover page only of each volume of transcripts constituting the supplemental record with a sequential number beginning with the number next following the number of the last page of the original record.

(b)(3) The clerk shall prepare a chronological index of the record. The index shall contain a reference to the date on which the paper, deposition or transcript was filed in

the trial court and the starting page of the record on which the paper, deposition or transcript will be found.

(b)(4) Clerks of the trial and appellate courts shall establish rules and procedures for checking out the record after pagination for use by the parties in preparing briefs for an appeal or in preparing or briefing a petition for writ of certiorari.

(c) Duty of appellant. After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this rule and shall take any other action necessary to enable the clerk of the trial court to assemble and transmit the record. A single record shall be transmitted.

(d) Papers on appeal.

(d)(1) Criminal cases. All of the papers in a criminal case shall be included by the clerk of the trial court as part of the record on appeal.

(d)(2) Civil cases. Unless otherwise directed by the appellate court upon sua sponte motion or motion of a party, the clerk of the trial court shall include all of the papers in a civil case as part of the record on appeal.

(d)(3) Agency cases. Unless otherwise directed by the appellate court upon sua sponte motion or motion of a party, the agency shall include all papers in the agency file as part of the record.

(e) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.

(e)(1) Request for transcript; time for filing. Within 10 days after filing the notice of appeal, the appellant shall file with the clerk of the appellate court a written request ~~from the court executive a transcript of such parts of the proceedings not already on file as the appellant deems necessary. The request shall be in writing and shall state that the transcript is needed for purposes of an appeal~~ for transcript, specifying the entire proceeding or parts of the proceeding to be transcribed that are not already on file. Within the same period, a copy shall be filed with the clerk of the trial court ~~and the clerk of the appellate court~~. If the appellant desires a transcript in a compressed format, appellant shall include the request for a compressed format within the request for transcript. If no such parts of the proceedings are to be requested, within the same

period the appellant shall file a certificate to that effect with the ~~clerk of the trial court and a copy with the~~ clerk of the appellate court and a copy with the clerk of the trial court.

(e)(2) Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

(e)(3) Statement of issues; cross-designation by appellee. Unless the entire transcript is to be included, the appellant shall, within 10 days after filing the notice of appeal, file a statement of the issues that will be presented on appeal and shall serve on the appellee a copy of the request or certificate and a copy of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the request or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has requested such parts and has so notified the appellee, the appellee may within the following 10 days either request the parts or move in the trial court for an order requiring the appellant to do so.

(f) Agreed statement as the record on appeal. In lieu of the record on appeal as defined in paragraph (a) of this rule, the parties may prepare and sign a statement of the case, showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the trial court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court. The clerk of the trial court shall transmit the statement to the clerk of the appellate court within the time prescribed by Rule 12(b)(2). The clerk of the trial court shall transmit the index of the record to the clerk of the appellate court upon approval of the statement by the trial court.

(g) Statement of evidence or proceedings when no report was made or when transcript is unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, or if the appellant is impecunious and unable to afford a transcript in a civil case, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the appellee, who may serve objections or propose amendments within 10 days after service. The statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included by the clerk of the trial court in the record on appeal.

(h) Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted. The moving party, or the court if it is acting on its own initiative, shall serve on the parties a statement of the proposed changes. Within 10 days after service, any party may serve objections to the proposed changes. All other questions as to the form and content of the record shall be presented to the appellate court.

Advisory Committee Notes

The rule is amended to make applicable in the Supreme Court a procedure of the Court of Appeals for preparing a transcript where the record is maintained by an electronic recording device. The rule is modified slightly from the former Court of Appeals rule to make it the appellant's responsibility, not the clerk's responsibility to arrange for the preparation of the transcript.

Rule 54. Transcript of proceedings.

(a) Duty of appellant to request transcript. ~~Within four days after filing the notice of appeal, appellant shall request from the appeals clerk in the juvenile court a transcript of such parts of the proceedings as appellant deems necessary for purposes of the appeal.~~ Within 4 days after filing the notice of appeal, the appellant shall file with the clerk of the appellate court a written request for transcript, specifying the entire proceeding or parts of the proceeding to be transcribed that are not already on file. Within the same period, a copy shall be filed with the clerk of the trial court and served on the parties.

(b) If appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript. ~~Appellant shall serve a copy of the request for transcript on all parties, and file it with the clerks of both the juvenile and appellate court.~~

~~(b)~~ (c) Notice that no transcript needed. If no parts of the proceeding need to be transcribed, within four days after filing the notice of appeal, the appellant shall file a notice to that effect ~~with the clerk of the juvenile court and a copy~~ with the clerk of the Court of Appeals and a copy with the clerk of the juvenile court.

Tab 4

Post-Trial Motions
Francis J. Carney

Issue #1: Please see the attached chart. The state rules provide that post-trial motions may be "made" or "served" within 10 days after the triggering event; the federal rules the post-trial motions must be "filed" (with the exception of 60(b) motions) within 10 days after the triggering event.

A. What does "made" mean in Rule 50(b)– does this mean filed or served? **Do we want to clarify this?**

B. There was discussion in the January meeting of standardizing and changing all "served" and "made" references in the post-trial motion rules to "filed," as is the case in federal court. **Do we want to do this?**

Issue #2: For many years, it was the rule that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence.

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

> Prior to the 2006 amendment of the Federal Rule, it was long established that a post-verdict motion under Rule 50(b) for judgment as a matter of law could not be made unless a previous Rule 50(a) motion for judgment as a matter of law was made by the moving party at the close of all the evidence. The purpose of requiring a renewed motion for judgment as a matter of law at that time was to give the opposing party an opportunity to cure the defects in proof that otherwise might preclude the party from taking the case to the jury. A large sample of illustrative and relatively recent cases is set out in the note below.
>
> Because this requirement was a potential trap for the unwary, the federal courts fortunately took a liberal view of what constituted a motion for judgment as a matter of law at the close of all the evidence in deciding whether there was a sufficient foundation for the later motion under Rule 50(b). The note below contains numerous examples of the mechanisms used by the courts to employ the liberal view of what constitutes an end of trial motion for judgment as a matter of law. Other courts, however, were less willing to excuse noncompliance with the requirement of the rule and applied it in a more demanding fashion.
>
> . . .

> Before the rule was amended in 2006, when the movant failed inexcusably to raise an objection to the sufficiency of evidence in a motion for judgment as a matter of law at the close of all the evidence, some courts denied all review, although others reviewed, but only for clear error. . . This review was exceedingly narrow, and only unusual circumstances justified allowing a motion at the close of the plaintiff's case to stand in place of a motion at the close of all the evidence.
>
> The 2006 amendments were designed to render all of this confusion and technicality moot. The amendments revised Rule 50(b) to permit renewal after verdict of any Rule 50(a) motion for judgment as a matter of law. This abolished the earlier requirement that a motion for judgment as matter of law had to be made at the close of all the evidence. However, the district court only can grant the Rule 50(b) motion on the grounds advanced in the preverdict motion, because the former is conceived of as only a renewal of the latter. . . .

9B Fed. Prac. & Proc. Civ.3d § 2537.

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

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

(Emphasis added.)

So the federal Rule 50(b) now reads:

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

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

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

(Emphasis added.)

Do we want to remove or retain this requirement?

FJC

Timing on Post-Trial Motions

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

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

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

Tab 5

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: February 23, 2009
Re: Satisfaction of judgement

One of my assignments is creating forms and instructions for pro se parties, and I am trying to create them for filing a satisfaction of judgment. That effort has highlighted some oddities and potential ambiguities in Rule 58C. Please compare Rule 58B with my interpretation of it and consider whether that interpretation is correct and whether that policy is the policy we want.

1) If the judgment has not been assigned and the original judgment creditor still owns the judgment, satisfaction of judgment can be filed by the creditor or the creditor's attorney.
2) If the judgment has been assigned, the assignee can file the satisfaction of judgment, but not the assignee's attorney.
3) If the satisfaction is filed by the creditor's attorney, it must be filed within eight years after entry of the judgment. If filed by the person who owns the judgment, there is no time limit.
4) Satisfaction is accomplished by an affidavit of the creditor or attorney. The affidavit can be delivered to the debtor or filed with the court. If filed with the court it must be the court that originally entered the judgment.
5) If the debtor looses the affidavit or if the creditor never files the affidavit with the court that entered the judgment, the debtor can file in the court in which judgment was "recovered" a motion to enter satisfaction on the docket or to "authorize" the creditor to file a satisfaction.

Issues

1) Why do we permit the creditor's attorney to file the satisfaction only if the judgment has not been assigned?
2) Why do we permit the creditor to satisfy the judgment after the statute of limitations for suing on the judgment, but not the creditor's attorney?
3) Why do we direct the creditor to file in the court that entered the judgment, but the debtor to file in the court in which the judgment was recovered? They are potentially different courts.

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4) Why do we not require the creditor to file the satisfaction with the court?
5) Why would the court ever “authorize” the creditor to file a satisfaction? At that point, the most efficient step is to direct the clerk to enter satisfaction in the docket.

Encl. URCP 58B

Rule 58B. Satisfaction of judgment.

(a) Satisfaction by owner or attorney. A judgment may be satisfied, in whole or in part, as to any or all of the judgment debtors, by the owner thereof, or by the attorney of record of the judgment creditor where no assignment of the judgment has been filed and such attorney executes such satisfaction within eight years after the entry of the judgment, in the following manner: (1) by written instrument, duly acknowledged by such owner or attorney; or (2) by acknowledgment of such satisfaction signed by the owner or attorney and entered on the docket of the judgment in the county where first docketed, with the date affixed and witnessed by the clerk. Every satisfaction of a part of the judgment, or as to one or more of the judgment debtors, shall state the amount paid thereon or for the release of such debtors, naming them.

(b) Satisfaction by order of court. When a judgment shall have been fully paid and not satisfied of record, or when the satisfaction of judgment shall have been lost, the court in which such judgment was recovered may, upon motion and satisfactory proof, authorize the attorney of the judgment creditor to satisfy the same, or may enter an order declaring the same satisfied and direct satisfaction to be entered upon the docket.

(c) Entry by clerk. Upon receipt of a satisfaction of judgment, duly executed and acknowledged, the clerk shall file the same with the papers in the case, and enter it on the register of actions. He shall also enter a brief statement of the substance thereof, including the amount paid, on the margin of the judgment docket, with the date of filing of such satisfaction.

(d) Effect of satisfaction. When a judgment shall have been satisfied, in whole or in part, or as to any judgment debtor, and such satisfaction entered upon the docket by the clerk, such judgment shall, to the extent of such satisfaction, be discharged and cease to be a lien. In case of partial satisfaction, if any execution shall thereafter be issued on the judgment, such execution shall be endorsed with a memorandum of such partial satisfaction and shall direct the officer to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(e) Filing transcript of satisfaction in other counties. When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.