Agenda
Advisory Committee on Rules of Civil Procedure

January 25, 2012
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
Re-introduction of members		Fran Wikstrom
Consideration of comments to Rule 83, Vexatious litigants.	Tab 2	Tim Shea
Rule 58A(d).	Tab 3	Tim Shea
Rule 37 sanctions for denial of motion	Tab 4	Frank Carney
Conflict between Rule 11(d) and Rule 26(e)	Tab 5	Tim Shea
Rule 5. Service and filing of pleadings and other papers.	Tab 6	Judge Todd Shaughnessy

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

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

February 22, 2012
March 28, 2012
April 25, 2012
May 23, 2012
September 26, 2012
October 24, 2012
November 28, 2012

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

November 30, 2011

PRESENT: Francis M. Wikstrom, Chair, Honorable Lyle Anderson, Francis J. Carney, Terrie T. McIntosh, Honorable David O. Nuffer, Honorable Kate Toomey, Trystan B. Smith, W. Cullen Battle, Honorable Todd M. Shaughnessy, Jonathan O. Hafen, Honorable Derek P. Pullan, Janet H. Smith, Leslie W. Slaugh, Robert J. Shelby

PHONE: David W. Scofield

EXCUSED: Barbara L. Townsend

STAFF: Timothy Shea, Sammi V. Anderson, Diane Abegglen

I. CROSS-REFERENCES BETWEEN REVISED RULES 37 AND 26.

Judge Shaughnessy and Tim Shea led a discussion regarding cross-referencing issues resulting from revisions to Rules 37 and 26. The committee discussed potential redundancy between Rules 37(h) and 26 disclosure requirements. There was a motion to eliminate reference to Rule 26 subparagraphs and to instead simply refer to Rule 26 as the standard for disclosure. The motion was seconded and approved. Notice will be sent to the Supreme Court indicating the committee's view that these changes are technical in nature.

II. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the October 26, 2011 minutes. The committee unanimously approved the minutes.

III. AWARD OF CERTIFICATES.

Diane Abegglen presented awards to committee members on behalf of the Utah Supreme Court for their participation in designing and proposing for the Supreme Court's approval the simplified rules of discovery recently enacted by the Supreme Court.

IV. COMMENTS ON PROPOSED RULE 26.2.

The committee turned to comments from the Bar regarding proposed Rule 26.2. Mr. Carney moved that the committee amend the operative deadline to be "the event giving rise to the claim" throughout Rule 26.2, including b(2), b(5), b(7), b(8), c(3), c(4), and c(5). Mr. Carney's motion was seconded and approved by the committee.

The committee next discussed how to treat extremely sensitive, but unrelated medical treatment, which would require disclosure under the plain language of the rule as drafted. Mr. Carney raised the example of sensitive medical treatment that is completely unrelated to the event giving rise to the suit. The committee discussed the possibility of including language in the note to address this tension and/or including language in the rule indicating that protective orders may be an option under these circumstances. Judge Pullan noted the potentially chilling effect of requiring disclosure for "any reason" where the treatment is sensitive and clearly unrelated to the injury, e.g., rape trauma counseling where the plaintiff has sued for a whiplash injury. A motion was made to insert the words "except to the extent Plaintiff moves for a protective order", at the outset of the disclosure requirements, which flags for parties and the court that extremely sensitive, unrelated topics are outside the scope of the mandatory disclosures if a protective order is sought. This motion was approved. A motion was then made to include language in the committee note acknowledging the possibility that situations may arise, in rare circumstances, where a party has been treated for a highly sensitive, private condition, which is wholly unrelated to the claim at issue in the case, and that those situations may warrant further protection and exception from the disclosure requirements. The committee approved this language for the note.

The next issue raised was the disclosure of social security numbers by plaintiffs. The committee discussed whether and when social security numbers and other sensitive information should be disclosed and, if so, whether confidentiality protections should be built into the rule. The committee discussed including a provision expressly mandating that the information disclosed under this part of the rule shall be used only for purposes of the litigation, etc. The committee generally discussed whether making these disclosures mandatory warrants the imposition of confidentiality protections under the rule. A motion was made to include a provision stating that all non-public information disclosed under these rules may only be used for purposes of the litigation absent a court order to the contrary. This motion was seconded and approved by the committee.

Mr. Carney suggested adding language similar to that contained in existing Rule 9(l), requiring disclosure of persons/entities to whom/which a party may seek to allocate fault and a basis for that allocation. After significant discussion on this point, the committee decided to add language specifically referencing the information required by 9(l) in 26.2(c)(5).

A motion to approve Rule 26.2 as amended was approved.

The committee voted in favor of a motion to recommend that the Supreme Court approve the rule immediately.

V. RULE 83 – VEXATIOUS LITIGANTS.

The committee tabled discussion on these proposed amendments to the next meeting.

VI. FREQUENTLY ASKED QUESTIONS REGARDING THE NEW RULES.

A frequently asked question and proposed response prepared by Judges Pullan and Shaughnessy were circulated to the committee prior to the meeting. The proposed question and answer addressed the showing necessary to have an undisclosed witness or evidence excluded under the revised rules. The committee adopted this Question and Answer to be posted on the committee's web page. This will be the first entry. Mr. Wikstrom requested volunteers from the committee to address the remaining questions that have been compiled by committee members after presentations to the Bar. Judge Pullan volunteered to do Questions 5 and 8 on Mr. Carney's list. Mr. Battle then discussed the questions he has identified and the draft answers he has prepared.

VII. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting will be held on January 25, 2012 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: January 18, 2012
Re: Rule 83. Vexatious litigants.

There have been several comments to proposed Rule 83. Some suggesting that it does not go far enough; others that it goes too far. Some suggesting that such a rule is unconstitutional.

One commentator suggests that the rule is being proposed by an anonymous author, and that whether it has merit cannot be determined without knowing the author. The Board of District Court Judges has never made a secret of the fact that they are proposing this rule.

Several states have such provisions, California, Florida, Ohio, Texas and Hawaii. The laws from those jurisdictions share some common themes:

- A self-represented person who meets stated criteria can be found to be a vexatious litigant.
- A defendant can file a motion to require a vexatious litigant to furnish security.
- The action is dismissed if the party fails to furnish the security.
- If the defendant prevails in the litigation, the defendant can apply the security toward their costs and attorney fees.
- A judge can prohibit a vexatious litigant from filing an action unless the filing is first reviewed and approved by a judge,

In Ohio, a person can file an action against another to have the other person declared to be a vexatious litigant. In all of the states other than Ohio, a pre-filing review order is limited to filing new actions. In Ohio, the vexatious litigant must obtain approval to maintain already-filed actions.

(1) Constitutional claims

The claims that the rule is unconstitutional were evaluated even before the Board made its recommendations.

Utah courts have imposed pre-filing restrictions in select circumstances and these have been upheld. *Lundahl v. Quinn*, 2003 UT 11 (Utah 2003), *Thomas v. Sibbett*, 925 P.2d 1286 (Utah Ct. App. 1996), *Werner v. Utah*, 32 F.3d 1446 (10th Cir. 1994). Further, the laws in the other states have been in place for many years, and they have been upheld. The California law has been in place for decades and has been upheld time and time again against a variety of challenges. Proposed Rule 83 follows the California model, which yields a rule that can withstand challenge on any number of theories, with one possible exception.

California does not appear to have an "open courts" provision that is the equivalent of ours. Consequently, we might not be able to look to caselaw from that state on this point. Under the "open courts" guarantee of Utah Canst. Art. I, § 11:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

This section places "a limitation upon the Legislature to prevent that branch of the state government from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy." *Brown v. Wightman*, 47 Utah 31,151 P. 366 (1915). The prohibition on the Legislature is a circumstance of the case, since it is typically the Legislature that enacts laws restricting legal rights and remedies. Presumably the same limitation attaches to court rules.

Ohio has an open courts provision in its constitution which is essentially the same as the first clause of ours. Oh. Const. Art. I, § 16. The Ohio rule has been in place since 1997 and also has been upheld as constitutional, but I cannot find Ohio caselaw in which the open courts provision has been expressly addressed.

Florida has an open courts provision, but, like Ohio, it includes only the equivalent of our first clause. Fla. Const. Art. I, § 21. The Florida vexatious litigant law, which is similar to the California law, has been upheld as valid under their open courts section. *Smith v. Fisher*, 965 So. 2d 205, (Fla. 4th DCA 2007), review denied 980 So. 2d 490 (Fla. 2008).

It appears, then, that a vexatious litigant rule has not yet been tested against the second clause of Art I, § 11, "no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party."

There is Utah law that might apply by extension to the requirement to furnish security. In *Jensen v. State Tax Commission*, 835 P.2d 965 (Utah 1992), the court held: "The requirement that [petitioners] deposit [as a condition of seeking judicial review] the full amount of the deficiency assessed by the Commission is, on the facts of this case, an effective bar to judicial review." But the court went on to say that if "a taxpayer is able to

meet the requirement, the deposit must be paid." If this principle is applied to the "security" feature of a vexatious litigant rule, it would require an "ability to pay" provision similar to partial filing fees paid by prisoners.

I could not find any Utah open courts analysis that might apply to the requirement to obtain leave to file. In *Gardiner v. York*, 2010 UT App 108, ¶23 (Utah Ct. App. 2010), the court spoke favorably of pre-filing orders:

> Where litigants demonstrate disregard for the judicial process by filing frivolous or disrespectful papers, they increase the costs of litigation, waste precious judicial resources, and insert an uncivil and unproductive tone into the proceedings. To address repeated violations of decorum, the trial court may impose sanctions on the litigant that go beyond simply striking the most recent offensive submission. These sanctions are intended to ensure that materials filed with the court in the future are meritorious and free from scandalous content.

However, the Gardiner court considered the pre-filing order in that case only in the context of a due process challenge. A due process challenge can easily be avoided by providing the process that is due. An open courts challenge will challenge the authority of the court to impose pre-filing requirements.

I believe that if Rule 83 is challenged on due process grounds, the courts will find that the rule, in conjunction with Rule 7, provides appropriate protections and procedures. If Rule 83 is challenged on open courts grounds, the courts will find that the rule does not close the court to someone who has a legal, enforceable right.

(2) Features

Classifying someone as a "vexatious litigant" should not be a routine reaction to a party who zealously uses established procedures. With or without the rule, the Gardiner case requires that "the order imposing the restrictions should set forth 'the litigant's abusive and lengthy history.'" *Tripati v. Beaman*, 878 F.2d 351 (10th Cir 1989) requires that "The conditions cannot be so burdensome ... as to deny a litigant meaningful access to the courts."

In the other states, the laws are written so that only a defendant can obtain a security order against a plaintiff, but some of the conduct that qualifies a person as a vexatious litigant might be engaged in by defendants. In the proposed rule, either party could seek security from the other, although, in practice, the procedure probably will be invoked most often by defendants against plaintiffs.

The rule uses "claim for relief," as that term is defined in URCP 8, instead of the terms "litigation" or "action," which are used in the other states. When the term “action” is used, it is intended to include those actions within the scope of Rule 2. One

commentator suggests that the rule include disputes outside the Utah state courts, but I believe that a Supreme Court rule of procedure could not reach so far.

The laws of the other states include in more detail than proposed Rule 83 the process for obtaining an order. This was the fatal flaw in the Gardiner case: there was no record of due process. Rule 83 presumes that the procedures described in URCP 7 will be followed for this motion as for any other—including if court raises the issue on its own. Following Rule 7 should satisfy the requirements of Gardiner.

Rule 83 includes a mechanism by which a vexatious litigant can have the pre-filing order vacated. The other states do not.

The other states provide for an elaborate post-filing review if the vexatious litigant disobeys the pre-filing order. Rule 83 says simply that the claim be dismissed.

(3) Comments

Some of the comments asked repeatedly “Why this; why not that?” implying that the rule is arbitrary. As mentioned, Rule 83, like the laws of many of the other states, follows the California law at least in part because the features of that law have been thoroughly tested.

One commentator suggests that the courts have inherent authority to impose restrictions and obligations similar to those proposed in Rule 83. That is true, but the rule tries to impose some regularity by describing the minimum requirements and the possible outcomes.

One commentator suggests that if a pro se litigant has at least as many winning cases as losing cases that the restrictions of the rule not be imposed. He suggests adding the further amendment to the end of line 7:

> and has not in the immediately preceding seven years filed an equal or greater number of claims, other than small claim actions, that have been finally determined in favor of the person.

This suggestion has merit. As he points out, many individual property rental managers, pay day lenders, pawn shops, collection agencies, or others who must frequently litigate may have lost five cases in seven years, but on the whole they are filing meritorious actions. But even a “winning” party might be found to be vexatious under one of the other paragraphs.

Encl. Rule 83. Vexatious litigants
Comments

Rule 83. Vexatious litigants.

(a) Definitions.

(a)(1) "Vexatious litigant" means a person, including an attorney acting pro se, who, without legal representation, does any of the following.

(a)(1)(A) In the immediately preceding seven years, the person has filed at least five claims for relief, other than small claims actions, that have been finally determined against the person.

(a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

(a)(1)(D) The person purports to represent or to use the procedures of a court other than a court of the United States, a court created by the Constitution of the United States or by Congress under the authority of the Constitution of the United States, a tribal court recognized by the United States, a court created by a state or territory of the United States, or a court created by a foreign nation recognized by the United States.

(a)(1)(E) The person has been found to be a vexatious litigant within the preceding seven years.

(a)(2) “Claim” and “claim for relief” mean a petition, complaint, counterclaim, cross claim or third-party complaint.

(b) Vexatious litigant orders. The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to:

(b)(1) furnish security to assure payment of the moving party’s reasonable expenses, costs and, if authorized, attorney fees incurred in a pending action;

(b)(2) obtain legal counsel before proceeding in a pending action;

(b)(3) obtain legal counsel before filing any future claim for relief;

(b)(4) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any paper, pleading, or motion in a pending action;

(b)(5) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any future claim for relief; or

(b)(6) take any other action reasonably necessary to curb the vexatious litigant’s abusive conduct.

(c) Necessary findings and security.

(c)(1) Before entering an order under subparagraph (b), the court must find by clear and convincing evidence that:

(c)(1)(A) the party subject to the order is a vexatious litigant; and

(c)(1)(B) there is no reasonable probability that the vexatious litigant will prevail on the claim.

(c)(2) A preliminary finding that there is no reasonable probability that the vexatious litigant will prevail is not a decision on the ultimate merits of the vexatious litigant’s claim.

(c)(3) The court shall identify the amount of the security and the time within which it is to be furnished. If the security is not furnished as ordered, the court shall dismiss the vexatious litigants claim with prejudice.

(d) Prefiling orders in a pending action.

(d)(1) If a vexatious litigant is subject to a prefiling order in a pending action requiring leave of the court to file any paper, pleading, or motion, the vexatious

litigant shall submit any proposed paper, pleading, or motion to the judge assigned to the case and must:

(d)(1)(A) demonstrate that the paper, pleading, or motion is based on a good faith dispute of the facts;

(d)(1)(B) demonstrate that the paper, pleading, or motion is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(d)(1)(C) include an oath, affirmation or declaration under criminal penalty that the proposed paper, pleading or motion is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(d)(2) A prefiling order in a pending action shall be effective until a final determination of the action on appeal, unless otherwise ordered by the court.

(d)(3) After a prefiling order has been effective in a pending action for one year, the person subject to the prefiling order may move to have the order vacated. The motion shall be decided by the judge to whom the pending action is assigned. In granting the motion, the judge may impose any other vexatious litigant orders permitted in paragraph (b).

(d)(4) All papers, pleadings, and motions filed by a vexatious litigant subject to a prefiling order under this paragraph (d) shall include a judicial order authorizing the filing and any required security. If the order or security is not included, the clerk or court shall reject the paper, pleading, or motion.

(e) Prefiling orders as to future claims.

(e)(1) A vexatious litigant subject to a prefiling order restricting the filing of future claims shall, before filing, obtain an order authorizing the vexatious litigant to file the claim. The presiding judge of the judicial district in which the claim is to be filed shall decide the application. In granting an application, the presiding judge may impose in the pending action any of the vexatious litigant orders permitted under paragraph (b).

(e)(2) To obtain an order under paragraph (e)(1), the vexatious litigant's application must:

(e)(2)(A) demonstrate that the claim is based on a good faith dispute of the facts;

(e)(2)(B) demonstrate that the claim is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(e)(2)(C) include an oath, affirmation, or declaration under criminal penalty that the proposed claim is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(e)(2)(D) include a copy of the proposed petition, complaint, counterclaim, cross-claim, or third party complaint; and

(e)(2)(E) include the court name and case number of all claims that the applicant has filed against each party within the preceding seven years and the disposition of each claim.

(e)(3) A prefiling order limiting the filing of future claims is effective indefinitely unless the court orders a shorter period.

(e)(4) After five years a person subject to a pre-filing order limiting the filing of future claims may file a motion to vacate the order. The motion shall be filed in the same judicial district from which the order entered and be decided by the presiding judge of that district.

(e)(5) A claim filed by a vexatious litigant subject to a prefiling order under this paragraph (e) shall include an order authorizing the filing and any required security. If the order or security is not included, the clerk of court shall reject the filing.

(f) Notice of vexatious litigant orders.

(f)(1) The clerks of court shall notify the Judicial Council that a pre-filing order has been entered or vacated.

(f)(2) The Judicial Council shall disseminate to the clerks of court a list of vexatious litigants subject to a prefiling order.

(g) Statute of limitations or time for filing tolled. Any applicable statute of limitations or time in which the person is required to take any action is tolled until 7 days after notice of the decision on the motion or application for authorization to file.

(h) Contempt sanctions. Disobedience by a vexatious litigant of a pre-filing order may be punished as contempt of court.

(i) Other authority. This rule does not affect the authority of the court under other statutes and rules or the inherent authority of the court.

Rule 83. Vexatious litigants. Comments

The vexatious litigant is, in my experience, pro se. My concern with the proposed rule is that it is too cumbersome, and provides too many loopholes, to offer any meaningful relief to those defendants who have to deal with such litigants. Those vexatious litigants with whom I have had to deal do not care what the rules say. Judges are often reluctant to take decisive action against them, both because they rarely know the history of the litigant, and because they feel constrained by the somewhat contradictory rulings from the appellate courts regarding the degree of flexibility with which they arenrequired to treat the pro se litigant. I think judges are legitimately concerned with the constitutional implications of limiting a party's access to the courts, even though the vexatious litigant does not seem to share that same concern for the rights of their unfortunate opponents.

I suggest that the rule be a short, plain statement that vexatious litigants will be liable for sanctions. Armed with that kind of authority, the trial court can then make a determination of how best to deal with the vacations litigant on a case by case basis. The various provisions of the proposed rule would certainly be considerations that would inform a a decision, but putting them all into a rule just makes the rule impractical and, in the end, of little value.

I am mildly concerned that "disproportionate" discovery can be a basis for a conclusion that one is a vexatious litigant. The concept of proportionality, while perhaps laudable, is very plastic and it will likely take some time to define it's contours. It has the potential to become a catch-phrase, like "bad faith", that gets tossed around in ways that are not helpful.

Posted by Phil Ferguson November 12, 2011 07:30 AM

As far as URCP 83 goes, it is unconstitutional considering the following section of the Utah Constitution:

"Article I, Section 11. [Courts open -- Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. "

Posted by Steve J. November 1, 2011 01:07 PM

I am against the way URCP 83 is drafted. It is unconstitutionally overly vague and broad.

What is meant by "claims for relief" .. are they different claims. same claims. same federal statutes. same state statutes. What 'claims'.

What is meant by 'finally determined'? Is that 'finally determined' with an evidentiary hearing? In another court of 'proper subject matter or personal jurisidiction'?

What is meant by "in ANY action"? where, in Utah courts or in federal administrative hearings, where? What kind, under what statutes?

What is 'unmeritorious pleadings'? A pleading can be supported by fact and law, but lose. If that is the definition, then half of all Utah attorneys can be so classified if a Judge simply says 'unmeritorious' three times?

Why three times? Why not one time, or five times, or two times? Does this mean a Court cannot use its contempt powers after one time if the damages are great, or must it wait for the magic three times?

What is meant by 'immaterial'? immaterial to whom?

Rule 11 and 10 cover immaterial or redundant materials.

The Court's inherent powers covers its ability to sanction an individual based on all the surrounding circumstances, or NOT to sanction them. Are the rule writers attempting to take away from the Court's their inherent powers?

And, once an attorney, primarily it will always predictably be small firm or solo attorneys is labeled vexatious by one judge in one case, the clerk disseminates that charge to all the Court's clerks, even if no evidentiary hearing was involved in the initial determination, and without any other Due Process in cite.

The way it is written, one judge in one case can completely destroy an attorney's professional future, by using this rule, with or without the OPC's assistance and do so based on subjectivity, and without any evidentiary hearing or other due process protections. It will kill the 1st amendment as there are no clearly defined ways of using it.

It is time the Bar and the Court stopped doing the cost benefit analysis of what it takes to stifle accessibility to the Courts, shorten dockets, particularly for small firm lawyers, solo lawyers, and the medium income citizens or unpopular litigants or those with complex time consuming cases, who have no recourse to poverty firms, and cannot afford high income lawyers.

Constitutional entitlements and open courts entail the only means by which persons can peacefully resolve issues. This rule creates outcasts based on a single judge's personal opinion. Open court's provision is destroyed because due process protections are not in it.

If judges lack the training, maturity, and knowledge of how to maintain order in their cases without this rule, then what makes anyone sure such a judge can maintain order

with it, where so many other rules provide more than ample means of providing Judges with authority to maintain order.

Factually, there are some Court doctrines an attorney may wish to challenge. Are those lacking meritorious substance? Who will challenge judicial doctrines when this rule allows the attorney to lose their license for such a free speech attempt?

This rule is unnecessary, undermines Judge's abilities, is ill defined, overly broad, vague, and conflicts with U.S. Constitutional Due Process and Free Speech standards. It is only going to injure and impair the freedoms and entitlements of the U.S. Constitution for all Utah citizens.

I also agree with Clay Huntsman's perspective below.

Susan Rose Attorney at Law

Posted by susan rose October 12, 2011 05:03 PM

Re Proposed Rule 83:

This is not a problem that can be solved by Rule. It requires legislative action. The import is to limit access to the courts, and so involves the Utah Constitution. Propounding a rule puts the courts in the position of later passing on the Constitutionality of a rule the courts adopted.

Posted by John Bogart October 12, 2011 02:00 PM

Proposed Rule 83 is good start, but does not go far enough. The proposed rule sets up too many loopholes a represented party will have to go through in order to have a pro se litigant declared a vexatious litigant. For example, the requirement of proving how many different times a pro se litigant has filed meaningless motions is too much of a barrier. The district courts should be given greater leeway to determine that a pro se litigant is vexatious and thus be able to impose appropriate sanctions under the circumstances of the case.

Posted by Joseph C. Rust October 11, 2011 02:39 PM

If the Supreme Court insists on chilling the rights of citizens to obtain access to the courts, as guaranteed by the Constitution of Utah, then first it should insist that all secrecy protections afforded to government agencies and corporations be lifted as well--and in full. Do we need more lop-sided legislation from the courts to protect the power structure from full disclosure while penalizing citizen attempts to secure disclosure--a process which often requires several unsuccessful attempts even to find out who the right party is--regarding the withholding of information regarding toxic waste, political contributions, secret investigations of private citizens, and the like?

Posted by Clay Huntsman October 11, 2011 10:53 AM

URCP 083 Vexatious litigants should expand its definition of "Claim for Relief" to include complaints to the Utah Bar about opposing counsel, administrative hearings i.e. consumer protection, PSC, etc. Often times the vexatious litigant just takes his case to another forum and never stops.

Posted by ML Deamer October 11, 2011 10:32 AM

Rule 83 (a)(1)(A) attempts an entirely objetive standard which may result in unfair determinations for persons (or organizations treated as persons) such as banks, property rental managers, "pay day" small lenders, pawn shops, collection agencies, or others who must frequently litigate. Their record may show that perhaps out of hundreds of suits, that they lost only 5 cases in 7 years. This should not result in a determination that these litigants are "vexatious"

The current text reads:

"In the immediately preceding seven years, the person has filed at least five claims for relief, other than small claims actions, that have been finally determined against the person."

I would recommend deleting (a)(1)(A), or perhaps should be edited to include to the effect,

"and has not in the immediately preceding seven years filed an equal or greater number of claims, other than small claim actions, that have been finaly determined in favor of the person.

In other words, a record of 5 wins 5 losses, might still be vexatious, but only if one of the other situations in the remaining clauses exists.

Posted by James Driessen October 10, 2011 10:08 AM

I would like to know where this proposed rule originated. Who is responsible for pushing this rule? Setting a limit of five unsuccessful cases within five years is arbitrary and is very unfair esp. to people who actually have a need to litigate such as builders, lenders and constitutionalists.

These constraints and restrictions are very onerous. Why aren't lawyers subject to the same constraints? Labeling lawyers as vexatious litigants might actually result in a broad public benefit.

What does the phrase "have been finally determined against the person" means? What if they dismiss at the last minute after having run someone through the ringer for two years? Are they off the hook?

I think this is a really bad rule which is poorly drafted and which is designed to force people to hire lawyers instead of exercising their constitutional rights to litigate and have access to the courts.

We all need to know who proposed this rule in order to fairly evaluate whether it has merit. Anonymous rule enactment is dangerous. People and groups seeking to abuse the public through court rules need to be identified.

I think we all know that tax protester types will be the primary victims of this rule.

Posted by robert breeze October 9, 2011 04:24 PM

1. I think the Supreme Court should take a hard look at the constitutionality of the "pre-filing order" concept. We all know people we would like this applied to, but I'm not sure that it would pass the constitutionality test as now written.

2. The term "prefiling order" should be defined in section (a). I had to read the whole rule before I could figure out what it was.

Posted by Neil Crist October 9, 2011 01:20 PM

Tab 3

Supreme Court of Utah

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Diane Abegglen
Appellate Court Administrator

Pat M. Bartholomew
Clerk of Court

Christine M. Durham
Chief Justice

Matthew B. Durrant
Associate Chief Justice

Jill N. Parrish
Justice

Ronald E. Nehring
Justice

Thomas R. Lee
Justice

January 11, 2012

Francis M. Wikstrom
Parsons, Behle & Latimer
PO Box 45898
Salt Lake City, UT 84145-0898

Re: Rule 58A(d)

Dear Fran:

The Court requests that the Advisory Committee on the Rules of Civil Procedure review the due process implications of Rule 58A(d), which provides "[a] copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by this requirement." The Committee may wish to address the interplay between this provision and Rule 4 of the Rules of Appellate Procedure, as well as the question of whether Rule 60(b) (or other provisions) may provide mechanisms for vindicating due process in circumstances when notice of entry of judgment is not provided.

Sincerely,

Christine M. Durham
Chief Justice

cc: Tim Shea, Joan Watt

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

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

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

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

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

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

Advisory Committee Note. — Paragraph (d) is intended to remedy the difficulties suggested by *Thompson v. Ford Motor Co.*, 14 Utah 2d 334, 384 P.2d 109 (1963).

Compiler's Notes. — The subject matter of this rule is dealt with in Rules 58 and 79(a), F.R.C.P.

Cross-References. — Judgment against person dying after verdict or decision, not a lien on realty, § 78-22-1.1.

Judgment by confession authorized, § 78-22-3.

NOTES TO DECISIONS

ANALYSIS

Death of party.

—During appeal.

Where jury returned verdict for plaintiff but judge entered judgment notwithstanding the verdict for defendant, death of plaintiff during appeal did not abate appeal since court, under Subdivision (e) of this rule, could still enter judgment on verdict if judgment notwithstanding verdict were reversed. Bates v. Burns, 2 Utah 2d 362, 274 P.2d 569 (1954).

Other cases.

—Unsigned minute entry.

An appeal from a summary judgment was dismissed where the record showed only an unsigned minute entry and no judgment or order signed by the judge. Wisden v. City of Salina, 696 P.2d 1205 (Utah 1985).

When entered.

—Completion.

——Formal judgment.

Whether plaintiff had right to have action dismissed upon payment of costs presented judicial question to be determined by court, so that where court ordered case dismissed and clerk entered "case dismissed" in register of actions but formal judgment had not been entered, action was still pending between parties. Yusky v. Chief Consol. Mining Co., 65 Utah 269, 236 P. 452 (1925).

——Notice to parties.

Under this rule, a judgment is complete and

is deemed entered for al
signed and filed, and n
ceived by the parties. In r
Utah 299, 241 P.2d 462

Where a losing party n
judgment against her w
after learning that the ju
tered, and her ignorance
that time was due in pa
that the prevailing party
vide pursuant to this ru
timely under Rule 60(b).
Constr., Inc., 802 P.2d
1990).

Plaintiffs' failure to ma
fault judgment to defendar
the default judgment w
ceived the notice of de
seven weeks after the cour
judgment, in time to move
ment. Lincoln Benefit Li
Southern Properties, 838
App. 1992).

Utah Law Review. —
and Mitchell: A Confusing
Prejudgment Remedies, 1
536.

Am. Jur. 2d. — 46 Am.
§§ 91 to 105, 152 to 166; 47
ments §§ 1098 to 1151.

C.J.S. — 49 C.J.S. Judgn
116, 134 et seq.

A.L.R. — Requirements
ing, and attestation in warr
confess judgment, 3 A.L.R.

Enforceability of warrant
fess judgment against assig

Rule 58B. Satisfa

(a) **Satisfaction by**
whole or in part, as to a
or by the attorney of re
the judgment has beer
within eight years afte
(1) by written instrume
(2) by acknowledgment
and entered on the dock
with the date affixed ar
of the judgment, or as t
amount paid thereon o

(b) **Satisfaction by**
fully paid and not satis
shall have been lost, th
upon motion and satisfa
creditor to satisfy the se
fied and direct satisfac

(c) **Entry by clerk.** U
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case, and enter it on the
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the judgment docket, w

(d) **Effect of satisfac**
whole or in part, or as to

Rule 58A. Entry.

(a) Judgment upon the verdict of a jury. Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

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

(c) When judgment entered; notation in register of actions and judgment docket. A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) Notice of signing or entry of judgment. [~~The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court.~~] A copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. [~~However, the~~] The time for filing a notice of appeal is not affected by the [~~notice~~] requirement of this provision.

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

(f) Judgment by confession. Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

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

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

[~~Advisory Committee Note. — Paragraph (d) is intended to remedy the difficulties suggested by Thompson v. Ford Motor Co., 14 Utah 2d 334, 384 P.2d 109 (1963).~~]

September 27, 1995

V. RULE 58A ON ENTRY OF JUDGMENT & RULE 77 ON NOTICE OF ORDERS AND JUDGMENT: AMENDMENT PROPOSED BY LESLIE SLAUGH

Mr. Shea indicated that Leslie Slaugh, an attorney from Provo, had proposed amendments to Rules 68A and 77 for two reasons: 1) to create a uniform procedure, and 2) to remove the responsibility of providing notice from the attorney and place it on the clerk of the court to protect the appellant's right of appeal because the time to appeal runs from entry of a judgment, rather than notice of entry of a judgment.

Magistrate Boyce suggested changing Rules 68A and 77 so that appeal time runs from the time notice of the entry of a judgment is given to counsel. Mr. Karrenberg indicated that an existing rule of judicial conduct, rule 504-4, requires counsel to provide court clerks with copies of proposed orders and stamped, addressed envelopes so that court clerks can send notice, but that some court clerks were not aware of this procedure. Judge Stirba indicated that she often gets proposed orders with certificates of mailing attached, but prefers that counsel mail a proposed order to opposing counsel to approve as to form, and then submit it to the court.

Mr. Kogan asked how often a proposed order is executed by the court when an objection to the order has been filed or is filed shortly thereafter, but within the allotted time for objecting. Judge Stirba indicated that the potential for Mr. Kogan's hypothetical was a few times a day, but that it only happens sometimes.

Mr. Karrenberg voiced concern about putting an additional burden on court clerks by requiring them to mail notice to parties that an order had been entered and indicated the burden to notify should be the prevailing party's. Mr. Battle indicated that information regarding whether an order has been entered is equally available to both parties so that neither should have an additional burden to notify the other. Mr. Soper indicated that regardless of whose burden it was to notify a party of an appeal, it was unenforceable because appeal time runs regardless of whether notice has been given. Mr. Boyce suggested that an article be published in the Utah Bar Journal to educate the local bar about the issues being discussed.

Mr. Shea asked the Committee whether the two different procedures for submitting an order outlined in Rules 58A and 77 should be streamlined. Mr. Karrenberg suggested that Rule 58A and 77 be left alone because although the procedures are different, they are both effective. Mr. Soper asked what was really gained by the additional provision in Rule 77 requiring counsel to submit copies of proposed orders with stamped, addressed envelopes. Ms. Smith responded that it can be the only form of notice that a pro se litigant gets.

Mr. Kogan asked whether rule 504-4 put too big a burden on court clerks. Magistrate Boyce indicated that the rules of judicial conduct were outside of the Committee's jurisdiction. Judge Stirba volunteered to ask the third district court clerks whether rule 504-4 was burdensome.

Mr. Shea suggested that the Committee table their discussion of Rules 58A and 77 until Judge Stirba had a chance to talk with the third district court clerks. Mr. Kogan suggested that the Committee also contact legal services to see whether pro se clients had lost appeal rights because they never received notice that an order had been entered.

VI: RULE 69(o): COMMENT AND SUGGESTION FROM UTAH LEGAL SERVICES

Mr. Shea began discussion of supplemental proceedings under Rule 69(o) by referencing a letter submitted to the Committee by David G. Chalid from Utah Legal Services on the abuse of supplemental proceedings in the case of an eight-four year old man. Mr. Shea solicited comments from the Committee on whether the Committee should amend Rule 69(o) to deal with the situation presented by Mr. Chalid

Magistrate Boyce indicated that the situation presented by Mr. Chalid was unusual and did not constitute good cause to take away the flexibility that exists under Rule 69(o). Ms. Smith agreed with Magistrate Boyce. She indicated that creditor's attorneys needed flexibility in supplemental proceedings and that taking away that flexibility would produce a chilling effect that was not warranted by Mr. Chalid's unusual situation. Mr. Karrenberg responded that he would want to know that abuses under Rule 69(o) were a bigger problem before he was willing to toy with Rule 69(o). Judge Stirba suggested that the Committee respond to Mr. Chalid by saying that the Committee's experience is that abuse under Rule 69(o) of the kind indicated in Mr. Chalid's letter is not pervasive and that other justifications exist to allow a party flexibility in supplemental proceedings.

VII: CONCLUSION

Mr. Shea thanked Committee members for their time and reminded the Committee that two articles had been distributed for their consideration, one discussing discovery reform and one discussing various "loser pays" proposals.

Mr. Wikstrom asked Magistrate Boyce what the response had been to the new federal discovery rules. Magistrate Boyce indicated that a final decision would be reached regarding the federal discovery rules in March of 1996. An informal anecdotal discussion of the federal discovery rules ensued and Mr. Shea indicated that he would put a formal discussion of the federal discovery rules on the agenda for the Committee's next meeting.

There being no further business, Mr. Shea adjourned the Committee until the next meeting.

III. RULE 65B: PROPOSAL FROM LORENZO MILLER

Rule 65B(e). Lorenzo Miller reported that, because of legislation proposed by the Attorney General and the October 12 Supreme Court opinion in David Renn v. Board of Pardons, the AG requests that the committee table consideration of the proposed amendments to Rule 65B(e).

Rule 65B(b). Christine Soltis summarized the post conviction relief process. She reported that the Attorney General will propose legislation in the 1996 General Session that will provide for compensation of counsel appointed in capital post conviction cases in order to take advantage of federal legislation. The federal legislation enacts time restrictions and issue restrictions in post conviction cases in the federal courts if the state provides compensation for appointed counsel in capital post conviction cases in the state courts.

Ms. Soltis reported that the AG is not satisfied with the procedures of Rule 65B(b), nor with the application of Rule 65B(b). She stated that the courts are not uniform in their application of the rule; there is a problem with the provisions for service; some courts proceed immediately to an evidentiary hearing without considering whether there may be a procedural bar to the action; there is no uniform form for the petitions; inmates mix petitions regarding the conditions of confinement with petitions challenging the conviction or sentence. Ms. Soltis stated that the legislation tries to clarify the provisions of Rule 65B(b) rather than substantially alter them. The legislation provides for the payment of fees and costs. The legislation establishes time limits for the courts and provides for compensation for court appointed attorneys in capital cases.

Ms. Soltis stated that the AG was seeking legislation rather than a rule change because the federal government, the uniform act, and many states have statutes in this area.

Mr. Sullivan stated that the committee is always available to consider any proposal by the AG. Ms. Soltis will return on December 6.

IV. RULE 77: PROPOSAL FROM LESLIE SLAUGH October 26, 1995

Rule 58A and Rule 77. Judge Stirba reported that the clerks in the Third District are mailing orders to those parties for whom they have received envelopes. The clerks are concerned that proposed changes may impose a burden on them. The clerks should not have to try to determine which parties to the case remain in the litigation at the time of distributing the order. Judge Bunnell pointed out that many times the order or judgment is filed with the judge rather than the clerk. Judge Stirba observed that there are no sanctions against a lawyer for non-compliance.

Mr. Sullivan suggested that the rules of appellate procedure be amended to provide that the time in which to file an appeal runs from the date of notice of the judgment rather than the date of entry of the judgment. Mr. Kogan suggested that Rule 60 be amended to provide that failure of a party to follow Rule 58A or Rule 77 is grounds to set aside the judgment. Judge Stirba suggested that the party submitting the order or judgment certify that copies of the order and envelopes were filed with the clerk. Mr. Karrenberg suggested that the party

submitting the order be required to include a fully prepared mailing certificate for the clerk to sign upon distribution.

Mr. Sullivan directed Mr. Shea to draft amendments to URCP 58A, 60, and 77, URAP 4, and CJA 4-504 as suggested by the members. The committee will consider the amendments and any suggestions by the clerks of court at its next meeting.

V. PRO HAC VICE: SHOULD THE COMMITTEE RECOMMEND ADOPTION?

Rule for appearance pro hac vice. Judge Bunnell pointed out that the URCP 5(b)(2) contains a provision similar to a pro hac vice rule. Committee members suggested that a rule should be more detailed, similar to the local federal rule 103-1. Mr. Shea was directed to compare provisions of other states and the federal rule and to propose a draft rule for the committee.

VI. CONCLUSION

There being no further business, Mr. Sullivan adjourned the Committee until the next meeting.

hope that we can bring this rule change to a conclusion and send it to the Supreme Court before the legislative session begins in January.

2. For your information, I enclose a new draft of our changes to Rule 11 which we approved at our meeting on October 26. One of our members asked that we circulate a copy of the revised draft in advance of the rule's going out for comment. I do not anticipate the need to take any additional action on this rule at our December meeting.

3. Please find enclosed proposed revisions to Rule 77, Rule 58A, and Rule 4 of the Utah Rules of Appellate Procedure, the total effect of which is to require the prevailing party to present a certificate with a proposed form of judgment that he/she has provided to the court sufficient copies of the judgment and stamped, self-addressed envelopes to go to all parties of record who should receive copies. Failure of the prevailing party to file either the certificate or to have done the things that are certified as having been completed will result in modification of the judgment pursuant to Rule 60(d) or extension of time, in appropriate cases, within which to file a notice of appeal. Our thanks to Tim Shea for drafting this rule following our discussion on October 26.

4. We will have a report from Tim Shea on his progress in preparing a rule relating to appearances *pro hac vice*. At our meeting in October, we agreed that the starting point of a rule on this topic should be the local rule for the federal courts. Tim has also looked at other state jurisdictions to determine how they approach this issue.

5. We will discuss any changes that should be made to Rule 4 on service of process. As you may recall, this is something we have debated on and off for more than a year. The differences between federal Rule 4(d), which provides specifically for a waiver of service, and state Rule 4, which does not specifically so provide, was the springboard of our discussion. Since then, we have discussed a number of significant differences between the state and federal rules on service. Please find enclosed a memorandum from Perrin Love to the committee, dated last February, which summarizes the issues. In advance of our meeting in December, compare state Rule 4 with federal Rules 4 and 4.1 so that we may decide which direction we want to head on this issue.

Administrative Office of the Courts

Chief Justice Michael D. Zimmerman
Chair Utah Judicial Council

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

MEMORANDUM

To: Civil Procedures Committee
From: Timothy M. Shea
Date: February 21, 1996
Re: Mailing orders and judgments

The committee requested that I meet with the clerks of court to discuss with them the proposed changes regarding responsibility for mailing signed orders and judgments. That meeting occurred in November 1995.

The clerks observe that the current law requiring attorneys to provide copies of orders for the clerk to distribute is followed about 15% of the time. If the current law were followed all of the time, the clerks could not keep up with the additional work. Further, the proposed amendment will require the clerk to review submitted orders for compliance. This is a necessary step for the rule to be effective, but it represents yet more addiitonal work.

The clerks have recommended an alternative, which has not yet been incorporated into the draft rules. Rather than delete the requirement that the prevailing party give notice of the order to rely exclusively upon the clerks, delete the requirement that the clerks give notice of the order and rely exclusively upon the prevailing party. Amend Rule 60 as suggested with appropriate further changes to show this recommended change in responsibility between the prevailing party and the clerks.

230 South 500 East / Suite 300 / Salt Lake City, Utah 84102 / 801-578-3808 / Fax: 801-578-3843 / E-mail: timmys@courtlink.utcourts.gov

Rule 58A. Entry.

(a) Judgment upon the verdict of a jury. Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

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

(c) When judgment entered; notation in register of actions and judgment docket. A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

~~[(d) Notice of signing or entry of judgment. The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.]~~

[~~(e)~~] (d) Judgment after death of a party. If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

[~~(f)~~] (e) Judgment by confession. Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

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

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

~~[Advisory Committee Note. Paragraph (d) is intended to remedy the difficulties suggested by Thompson v. Ford Motor Co., 14 Utah 2d 334, 384 P.2d 109 (1963).]~~

Rule 60. Relief from judgment or order.

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

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a

party or his legal representative from a final judgment, order, or proceeding for the following reasons:

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

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;

(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action;

(5) the judgment is void;

(6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(7) any other reason justifying relief from the operation of the judgment.

(c)(1) If a party fails to receive an order or judgment and if:

(A) the party responsible to do so failed to comply with Rule 77(d); or

(B) the clerk failed to mail the copy of the order provided, then the party without notice may file a motion to vacate and reenter the judgment.

(2) Upon finding the conditions of this subdivision to have been met, the court shall vacate the order or judgment. The court shall enter a new order or judgment upon the same terms as the vacated order or judgment. Any act required to be done within a time after entry of the order or judgment or after notice thereof shall be calculated from entry of the new order or judgment.

(d) The motion shall be made within a reasonable time [~~and for reasons~~]. Motions under (b) (1), (2), (3), or (4)[~~,~~] and motions under (c) shall be made not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under [~~this~~] Subdivision (b) does not affect the finality of a judgment or suspend its operation.

(e) This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court.

(f) The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

Advisory Committee Note. Subdivision (c) is intended to give relief to a party who is left without adequate relief, usually loss of the right to appeal or petition for review, because the party did not receive the order or judgment as contemplated by Rule 77(d). The issues that would be presented to the court in a motion under subdivision (c) are straightforward: Did the party filing the motion get a copy of the order or judgment? Did the party responsible for complying with Rule 77(d) do so? Did the clerk mail the copy as required? The certificates provided for in Rule 77(d) should be presumptive proof, subject to the moving party presenting sufficient evidence to the contrary. The relief permitted in subdivision (c) is automatic but limited. The party cannot, under subdivision (c), modify the content of the order, only the effective date. The moving party need not present a defense to the action because there can be no relief from the provisions of the order or judgment. Relief from the provision of the order or judgment must be obtained under some other subdivision.

A false certificate of compliance as required by Rule 77 should be analyzed under Rule 60(b)(3).

Rule 77. District courts and clerks.

(a) District courts always open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and hearings; orders in chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers without the attendance of the clerk or other court officials and at any place within the state, either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the county wherein the matter is pending without the consent of all the parties to the action affected thereby.

(c) Clerk's office and orders by clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d)(1) Notice of orders or judgments. At the time of [~~presenting~~] filing any written order or judgment [~~to the court~~] for signing, the party seeking such order or judgment shall deposit with the clerk [~~sufficient copies thereof for mailing as hereinafter required~~]:

(A) a copy for each party not in default for failure to appear, counsel for that party, and any other person to whom the order or judgment is to be mailed;

(B) for each copy, a preaddressed envelope with sufficient postage prepaid;

(C) a fully prepared certificate of mailing for the signature of the clerk listing the persons to whom the order or judgment is to be mailed; and

(D) a certificate of compliance with this rule.

(2) The clerk shall not accept a written order or judgment for signing unless the items required by this subdivision are included.

(3) If the order or judgment is filed with the judge, as permitted under Rule 5(e), the party shall deposit the items required by this rule with the clerk and present the certificate of compliance to the judge with the order or judgment.

(4) Immediately upon the entry of an order or judgment the clerk shall [~~serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and,~~] conform the copies provided under subsection (d)(1) and mail a conformed copy to each person for whom the clerk has a preaddressed, postage prepaid envelope. The clerk shall sign and file the certificate of mailing and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. [~~Lack of notice of the~~

~~entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed.~~]

(e) No fee where copies furnished. In every case where a copy of the pleadings[~~,~~] or other papers is to be certified, neither the sheriff, constable nor clerk shall charge or receive any fee for making such copy when the same is furnished to the officer by the party.

Rule 4-504. Written orders, judgments and decrees.

Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.

Applicability:

This rule shall apply to all civil proceedings in courts of record except small claims.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

[~~(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre paid postage.~~]

(5) (4) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) (5) Except where otherwise ordered, all judgments and decrees shall contain, if known, the judgment debtor's address or last known address and social security number.

(7) (6) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

(8) (7) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) (8) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or

plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

(10) (9) Nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.

Harvey THOMPSON, Plaintiff and Appellant,
vs.
FORD MOTOR COMPANY, Defendant and Respondent

No. 9807
SUPREME COURT OF UTAH
384 P.2d 109, 14 Utah 2d 334
August 13, 1963

COUNSEL

Barton & Klemm, Salt Lake City, for appellant.
Christensen & Jensen, Salt Lake City, for respondent.

JUDGES

HENRIOD, C. J., and CROCKETT, McDONOUGH and WADE, JJ., concur.
AUTHOR: CALLISTER

OPINION

CALLISTER, Justice. Personal injury action. Plaintiff appeals from a summary judgment in favor of defendant, Ford Motor Company, and against the plaintiff, no cause of action, for the reason that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff, on this appeal, contends the lower court erred because there existed genuine issues of fact as to his negligence and, if any, whether or not it was the proximate cause of the accident.

We find ourselves unable to determine this appeal upon its merits. The depositions of the plaintiff and two other persons were taken (upon whose behalf we do not know). These depositions reach us in sealed envelopes -- the notary public's seal still intact. Thus, it is apparent that they were never marked and introduced into evidence nor read by the trial judge.

Both parties quote extensively from these depositions in their briefs. Probably they each had copies[1] and probably these were used at the hearing upon the motion for summary judgment. However, this we cannot assume. In fact, we must assume that the testimony contained in the deposition was not presented to or considered by the lower court.[2]

This court cannot, of course, break into the sealed envelopes and read these depositions and there is nothing in the record proper which would enable us to determine the issues presented.

For the reasons indicated above we do not reach the merit of the question as to whether the ruling that plaintiff was guilty of contributory negligence as a matter of law was correct. Nevertheless, in view of the fact that this case is remanded for further proceedings, we deem it appropriate to observe that, upon the basis of the facts which seem to have been assumed, it appears to us that there is such lack of certainty as to plaintiff's attention to the truck, and whether he was close enough to control it, that a jury question exists as to whether the truck was left 'unattended' within the meaning of our statute.[3]

Summary judgment set aside and case remanded for proceedings not inconsistent with this opinion. No costs awarded.

OPINION FOOTNOTES

1. The correctness of which copies is not known.-

2. Rosander v. Larsen, 14 Utah 2d 1, 376 P.2d 146; Reliable Furniture v. Fidelity and Guaranty Insurance Underwriters, Inc., 14 Utah 2d 169, 380 P.2d 135.

3. 41-6-105, U.C.A.1953.

Mr. Sullivan asked whether the Committee had any other suggestions for the proposed pro hac vice rule. Mr. Karrenberg indicated that he had never had a problem with the federal pro hac vice rule. Mr. Sullivan indicated that if any Committee member was interested in a specific aspect of the proposed pro hac vice rule that they present a draft of their idea to Mr. Shea.

Mr. Sullivan asked Mr. Shea to compose another draft of the proposed pro hac vice rule. He suggested that: 1) the draft begin with a statement that unless out of state counsel complies with the provisions of the rule and is granted admission to practice before the court pro hac vice, the attorney cannot practice before the court; 2) Mr. Shea attempt to formulate a standard by which a judge's discretion to admit counsel pro hac vice is measured; and 3) the draft incorporate Judge Stirba's comments in proposed subparagraph (d) by inserting "unless otherwise ordered for cause, Utah counsel shall do the following". Mr. Sullivan also asked Mr. Shea to investigate the real costs of administering a pro hac vice rule to determine whether $100 was an exorbitant amount to charge for admission.

VI. MAILING ORDERS AND JUDGMENTS February 28, 1996

Mr. Shea began discussion by pointing out that Rule 77 is inconsistent with the Rules of Judicial Administration. He indicated that unlike the federal system, the state system has no routine mechanism to ensure that orders are circulated to parties. Mr. Shea had been advised that because of the volume of cases in state court such a mechanism would be cost prohibitive. Mr. Shea indicated that rule 4-504 of the Rules of Judicial Administration was being followed 15% of the time and that if it were being followed 100% of the time, court clerks could do nothing else.

Mr. Shea indicated that Rule 77(d) had been amended to require a prevailing party to present the clerk with a copies of an order submitted for signature, a certificate of mailing, and addressed stamped envelopes. Mr. Shea indicated that Rule 60 had been amended to provide that the failure of a party to comply with proposed Rule 77(d) was grounds for setting aside a judgment and re-entering it to give a party thirty days to appeal. Mr. Shea indicated that these amendments were a cumbersome way to solve the problem of a party's appeal time running without that party's knowledge. Mr. Shea also advised the Committee that the proposed procedure was unworkable because there were not enough court clerks to implement it.

Mr. Shea suggested placing the burden of notice on the prevailing party, rather than the clerk of the court. Mr. Karrenberg suggested that proposed Rule 60 incorporate a final cutoff date so that the possibility of appeal was not infinite. Mr. Battle asked how long the prevailing party would have to send out notice of the entry of judgment and asked whether a prevailing party who missed the deadline could petition the court to vacate and re-enter the order.

Mr. Sullivan asked Mr. Shea to draft a proposed rule taking the Committee's comments into account.

V. CONCLUSION

Mr. Sullivan asked Committee members to let he or Mr. Shea know of issues that needed to be put on the agenda for discussion at future Committee meetings. There being no further business, Mr. Sullivan adjourned the Committee until the next meeting scheduled for 4:00 p.m., Wednesday, March 27, 1996 at the Administrative Office of the Courts.

Administrative Office of the Courts

Chief Justice Michael D. Zimmerman
Chair Utah Judicial Council

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

MEMORANDUM

To: Civil Procedures Committee
From: Timothy M. Shea
Date: March 15, 1996
Re: Mailing Orders and Judgments

Introduction

Leslie Slaugh has observed that Rules of Civil Procedure 58A and 77 and Code of Judicial Administration 4-504 in large part create duplicative obligations to provide the non-prevailing party with a copy of an order or judgment. The recommendation of the clerks of court, agreed to by the advisory committee at our last meeting, is to place the responsibility with the prevailing party due to the inability to meet the additional workload if the responsibility falls exclusively to the clerks. In the course of the debate on this issue, the committee is looking also at a procedure to protect the right of appeal of the non-prevailing party in the event the order or judgment is not mailed as contemplated.

Enclosed are redrafts of Rules of Civil Procedure 58A and 77 and Code of Judicial Administration Rule 4-504 that focus the responsibility to mail copies of orders and judgments on the prevailing party rather than the clerks. Also enclosed is a redraft of Rule of Civil Procedure 60 designed to protect the right of appeal in the face of a failure by the prevailing party to mail the order or judgment. On this latter issue, I have prepared an alternative approach that amends Rule of Appellate Procedure 4.

Prevailing party to mail orders and judgments

As proposed by the committee at the last meeting, the amendment of URCP 58A expands the obligation of the prevailing party to include mailing orders and judgments. Under current law, the prevailing party has the obligation to mail a copy of judgments. The clerk mails a copy of orders and judgments, but only if the prevailing party provides copies, envelopes,

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etc., to the clerk. The proposed amendments delete the obligation of the clerks, which means placing the responsibility for mailing orders as well as judgments on the prevailing party. The collective effect of the rule changes will be to rely exclusively upon the prevailing party to mail the order or judgment to the non-prevailing party. Clerks will continue to provide a conformed copy of the signed order or judgment to the prevailing party upon request.

Protecting right of appeal upon failure to mail order or judgment

As regards the effort to protect the right of appeal of the non-prevailing party should the prevailing party fail to mail the order or judgment, there are two alternatives from which to choose. The first is the approach suggested at the last meeting: to amend URCP 60 to create a new motion to vacate and reenter the order or judgment. The time to appeal would run from the new entry date. The relief would be available if the prevailing party failed to mail the order as required by URCP 58A and the non-prevailing party had no other notice of the entry of the order. The relief would be limited. The movant could not reopen the provisions of the order or judgment -- at least not under this new procedure -- but could only have a new entry date established.

The alternative is to amend URAP 4 to provide that "excusable neglect" includes the lack of actual notice coupled with the failure of the prevailing party to mail a copy of the order or judgment as required by URCP 58A. URAP 4 currently provides a process by which a party may seek an extension of the time in which to file an appeal. The current limit is an additional 30 days from the original deadline to appeal. The committee should consider what is a reasonable maximum time in which to file a motion under either approach.

Under either approach, compliance of the prevailing party with URCP 58A is the central issue. Rule 58A requires the prevailing party to mail the order or judgment "promptly." This is an imprecise standard and, in the context of a motion under the proposed changes to URCP 60 or URAP 4, may be difficult to apply. Suppose, for example, the mailing occurs 15 days after entry, and the non-prevailing party files a motion, based on noncompliance with Rule 58A, to extend the time for filing the appeal or to vacate and reenter the judgment. Since the non-prevailing party still had 15 days in which to appeal, should the trial court grant the motion? Trial courts can establish parameters for what is "prompt" mailing, but how much prejudice should the appellant suffer before the motion is granted? The alternative is to build a more precise standard, such as to require the mailing no more than 3 business days after receipt of the order by the prevailing party or 7 days after entry, whichever is later.

Expanding time to appeal is limited under case law

Eliminating the duplication of mailing orders and judgments is a relatively straightforward issue capable of resolution by simple amendments to the URCP 58A, URCP 77, and CJA 4-504. Providing a mechanism by which the non-prevailing party can enlarge the time in which to appeal based upon the failure of the prevailing party to mail a copy of the order is more

difficult. There is a line of cases in Utah holding that expansion of the time in which to appeal, being jurisdictional in nature, will be very closely scrutinized. The suggested amendments, either to URCP 60 or to URAP 4, are an attempt to achieve through rule amendments what the courts have been unwilling to do in case law.

In Nielson v. Gurley, 888 P.2d 130 (Utah App. 1994), the court held: "Where a belated entry merely constitutes an amendment or modification not changing the substance or character of the judgment, such entry is merely a nunc pro tunc entry which relates back to the time the original judgment was entered, and does not enlarge the time for appeal; but where the modification or amendment is in some material matter, the time begins to run from the time of the modification or amendment." citing Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947).

In State v. Montoya, 825 P.2d 676 (Utah App. 1991), the Court of Appeals reached the same conclusion as in Nielsen based upon reasoning similar reasoning. The court stated: "It appears the only purpose of the [amended] order was to open the door to an appeal even though the statutory period had long since passed. We find no merit to this procedure and deem such manipulation of the judicial system highly inappropriate."

The proposed amendment of URCP 60 contemplates that no substantive amendment of the judgment would be made and so would not, under caselaw, be effective in expanding the time in which to appeal. The draft rule contains an express provision to the contrary, which I believe would be sufficient to circumvent Nielsen and Montoya, at least within the limited application of the new rule, but the policy of the rule change is contrary to the policy of the case law.

Former URCP 73, the precursor to the current URAP 4, on its face permitted the district court the discretion to enlarge the time to appeal only "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment...." In Anderson v. Anderson, 3 Utah 2d 277, 282 P.2d 845 (1955), the court held inapplicable relief granted under the general "excusable neglect" standard of Rule 6(b) and Rule 60(b). See also Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843 (1970). These cases probably have limited applicability since the limiting language of former URCP 73 has been removed, and the current URAP 4 states that the district court may enlarge the time in which to appeal based upon excusable neglect. The proposed amendment to URAP 4 expressly includes failure of the prevailing party to mail the order or judgment as meeting the test of excusable neglect, but does not exclude other grounds that may exist.

Theoretically, the need expressly to mention the failure to mail the order or judgment as satisfying the excusable neglect standard of URAP 4 is not needed; it is a result that should be within the discretion of the trial court. However, the Utah Supreme Court has held: "When the question of 'excusable neglect' arises in a jurisdictional context ... as opposed to a nonjurisdictional context ..., the standard contemplated thereby is necessarily a strict one."

Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952 (Utah 1984). In Prowswood the Court either held or discussed as being insufficient in the jurisdictional context: counsel too busy; mistaken interpretation of a rule of procedure; death of the partner assigned to the case with the resulting workload increase upon the surviving partner; and change of employment by counsel. If it is important to achieve the result, that is, to ensure the timeliness of the appeal in the face of no mailing or late mailing of the order or judgment, it may be necessary to make the grounds express.

Modifying a line of cases through a legislative enactment -- in this case a rule change -- is a well recognized approach to an issue, but historically the courts of Utah have been very strict in their interpretation of rules that would ostensibly permit the appeal of a case beyond the usual time for appeal.

URCP Rule 58A. Entry.

(a) Judgment upon the verdict of a jury. Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

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

(c) When judgment entered; notation in register of actions and judgment docket. A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) Notice of signing or entry of judgment or order. The prevailing party shall submit with the proposed order or judgment a copy thereof and a preaddessed envelope with postage prepaid. Immediately upon entry of the order or judgment, the clerk shall conform the copy to the original and return the copy to the prevailing party. The prevailing party shall promptly give notice of the [~~signing or~~] entry of a judgment or order to all other parties and shall file proof of service of such notice with the clerk of the court. [~~However~~] Except as provided in [Rule 60(c)] [Utah Rules of Appellate Procedure 4], the time for filing a notice of appeal is not affected by the notice requirement of this provision.

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

(f) Judgment by confession. Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

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

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

[~~Advisory Committee Note. Paragraph (d) is intended to remedy the difficulties suggested by Thompson v. Ford Motor Co., 14 Utah 2d 334, 384 P.2d 109 (1963).~~]

URCP Rule 77. District courts and clerks.

(a) District courts always open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and hearings; orders in chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers without the attendance of the clerk or other court officials and at any place within the state, either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the county wherein the matter is pending without the consent of all the parties to the action affected thereby.

(c) Clerk's office and orders by clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

~~[(d) Notice of orders or judgments. At the time of presenting any written order or judgment to the court for signing, the party seeking such order or judgment shall deposit with the clerk sufficient copies thereof for mailing as hereinafter required. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and, shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed.]~~

[~~(e)~~] (d) No fee where copies furnished. In every case where a copy of the pleadings[~~,~~] or other papers is to be certified, neither the sheriff, constable nor clerk shall charge or receive any fee for making such copy when the same is furnished to the officer by the party.

CJA Rule 4-504. Written orders, judgments and decrees.

Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.

Applicability:

This rule shall apply to all civil proceedings in courts of record except small claims.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

[~~(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.~~]

[~~(5)~~] (4) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

[~~(6)~~] (5) Except where otherwise ordered, all judgments and decrees shall contain, if known, the judgment debtor's address or last known address and social security number.

[~~(7)~~] (6) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

[~~(8)~~] (7) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

[~~(9)~~] (8) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

[~~(10)~~] (9) Nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.

URCP Rule 60. Relief from judgment or order.

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

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

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

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;

(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action;

(5) the judgment is void;

(6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(7) any other reason justifying relief from the operation of the judgment.

(c)(1) If the non-prevailing party fails to receive a copy of an order or judgment and if the prevailing party failed to comply with Rule 58A(d), then the non-prevailing party may file a motion to vacate and reenter the judgment.

(2) Upon finding the conditions of this subdivision to have been met, the court shall vacate the order or judgment. The court shall enter a new order or judgment upon the same terms as the vacated order or judgment. Any act required to be done within a time after entry of the order or judgment or after notice thereof shall be calculated from entry of the new order or judgment.

(d) The motion shall be made within a reasonable time [~~and for reasons~~]. Motions under (b) (1), (2), (3), or (4)[~~,~~] and motions under (c) shall be made not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under [~~this~~] Subdivision (b) does not affect the finality of a judgment or suspend its operation.

(e) This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court.

(f) The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

Advisory Committee Note. Subdivision (c) is intended to give relief to a party who is left without adequate relief, usually loss of the right to appeal or petition for review, because the party did not receive the order or judgment as contemplated by Rule 58A(d). The issues that would be presented to the court in a motion under subdivision (c) are straightforward: Did the party filing the motion get a copy of the order or judgment? Did the party responsible for complying with Rule 58A(d) do so? A certificate of mailing provided to the court under Rule 58A should be presumptive proof, subject to the moving party presenting sufficient evidence to the contrary. The relief permitted in subdivision (c) is limited. The party cannot, under subdivision (c), modify the content of the order, only the effective date. The moving party need not present a defense to the action because there can be no relief from the provisions of the order or judgment. Relief from the provisions of the order or judgment must be obtained under some other subdivision or rule.

A certificate of mailing as required by Rule 58A shown to be false can be analyzed under Rule 60(b)(3).

URAP Rule 4. Appeal as of right: when taken.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Motions post judgment or order. If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) Filing prior to entry of judgment or order. Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) Extension of time to appeal. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. Excusable neglect includes the failure of the appealing party to receive a copy of the order or judgment appealed from if the prevailing party failed to comply with Utah Rule of Civil Procedure 58A(d). A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

indicated that the proposed pro hac vice rule gives the court discretion to waive the presence of local counsel.

Mr. Shea volunteered to incorporate the Committee's comments into the proposed pro hac vice rule and indicated he would have a final draft circulated for comment at the next meeting.

III. MAILING ORDERS AND JUDGMENTS April 24, 1996

Mr. Shea began the discussion and introduced proposed rules 58A, 60, 77(d), and CJA 4-504. Judge Bunnell asked why orders are included in proposed rule 58A(d) because rule 5 already states that orders will be served. Judge Bunnell indicated that judges do not enforce orders against parties who have not been served with them. Judge Bunnell was concerned that including "orders" in proposed rule 58A(d) would be too broad because it would require multiple mailings in complicated cases. He suggested deleting references to orders throughout proposed rule 58A so that proposed rule 58A only applies to judgments as defined in the rules.

Mr. Shea responded that "order" was included in proposed rule 58A to ensure that parties were served with the order. However, rule 5 may cover service of orders. Mr. Battle indicated that the existing and proposed rules are unclear as to who is required to mail orders. Mr. Shea suggested eliminating proposed rule 58A(d) and amending rule 5 to specify who is responsible for mailing orders.

Judge Stirba suggested directing people to rule 58A(d) because its more specific. Magistrate Boyce suggested that Mr. Shea look at alternatives for mailing orders and come up with a proposal. Judge Bunnell suggested putting language in proposed rule 58A that would exclude orders mailed by the judge.

Judge Bunnell asked what "prevailing party" means as used in proposed rule 58A(d).

Mr. Battle asked whether the proposed rule should require mailing of routine orders, like discovery orders. Mr. Shea responded that rule 5 only requires the mailing of orders which by their terms are to be served. He indicated that therefore the mailing of orders is controlled by the court.

Mr. Shea volunteered to redraft rule 5 taking into consideration other rules, and the meaning of "prevailing party."

Magistrate Boyce indicated that before an execution is served, the sheriff's office checks to make sure everything, including the judgment and proof of service, is in order.

Mr. Battle suggested hiring a private association to mail orders and charge the cost to the recipient. If the recipient does not pay, he will not receive the order.

Mr. Shea indicated that there was concern about providing a non-prevailing party sufficient time to appeal an order. This problem could be addressed by either: 1) amending rule 60 to change the effective date of the order, or 2) amending appellate rule 4 to expand the definition of "excusable neglect." However, Mr. Shea noted that both alternatives contradict existing case law which rigidly interprets appellate deadlines. He indicated that the Utah Supreme Court may reject these alternatives.

Mr. Shea indicated that any amendments to appellate rules would fall to the appellate rules committee. Magistrate Boyce suggested asking the Utah Supreme Court whether the Committee could amend appellate rule 4.

The Committee agreed that it was preferable to amend appellate rule 4, rather than create a new process under rule 60 and that the appellate rules committee should be approached with this idea.

IV. RULE 4: SERVICE OF PROCESS

Magistrate Boyce reported that recently the sheriff's office mailed 100 letters to defendants requesting that they come to the sheriff's office and sign for complaints. Over one-third of the defendants signed for complaints alleviating the need for personal service.

Magistrate Boyce suggested that the discussion of rule 4 be postponed until more Committee members were present. Those present acquiesced.

V. RULE 64C: AMOUNT OF BOND

No discussion was held.

VI. FORMS

No discussion was held.

VII. NEW MATTERS

Judge Stirba indicated that under rule 41(a)(1)(ii), if a stipulation for dismissal is mailed to the court when no service has been effected, the case will be dismissed pursuant to the stipulation without an order of dismissal. However, the clerks are trained to request an order of dismissal. Judge Stirba indicated that either the training or the rule should be changed so that the two are consistent.

Administrative Office of the Courts

Chief Justice Michael D. Zimmerman
Chair Utah Judicial Council

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

MEMORANDUM

To: Civil Procedures Committee
From: Timothy M. Shea
Date: April 26, 1996
Re: Mailing orders and judgments

The attached draft includes several rule amendments that collectively implement the decisions of the committee thus far.

Protecting the right of appeal upon failure to mail an order or judgment.

The committee decided that the proposed amendments to URCP 60, establishing a new procedure to vacate and reenter an order, created too many uncertainties. The amendments to Rule 60 are eliminated from this draft. The proposed amendment to URAP 4 accomplishes the same result in a much more direct manner.

The provision in URCP 77(d) stating that lack of notice of the entry of judgment "does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed," Page 4, Lines 27 and 28, must be deleted to fully effect this change. The provision in URCP 58A stating that the "time for filing a notice of appeal is not affected by the notice requirement," Page 3, Lines 13 and 14, does not need to be deleted. The former rule eliminates the discretion of the trial court to extend the time in which to appeal, and the committee believes the court should have this discretion. The latter rule is merely a statement of the law that the time for appeal is running even though the appellant may have no notice of the entry of the judgment.

As discussed at the last meeting, this proposal will be contrary to existing caselaw regarding extending the time in which to appeal. The changes to URAP 4, if approved by this Committee, would be presented to the Advisory Committee on the Rules of Appellate Procedure.

Responsibility for mailing orders and judgments.

The Committee has identified four rules governing the responsibility to mail orders or the notice of entry of an order: URCP 5, URCP 58A, URCP 77 and CJA 4-504. With some modest amendments to URCP 5, the mailing provisions of the other rules are superfluous. It appears to me the most reasonable approach to coordinating these rules is as follows:

- ◊ Strike CJA 4-504(4).
- ◊ Strike the notice requirements of URCP 77(d). I have proposed amendments to this paragraph to deal with a different subject matter: the ability of a party to provide pre-addressed envelopes with postage pre-paid if the party submitting an order wants conformed copies returned or if a party corresponds with the court and the correspondence requires a response. These are new issues, and the Committee may choose not to introduce them at this time. Currently, there is no provision for conformed copies of orders, although the practice is common. The provision regarding correspondence is contained in CJA 4-504(4), which is proposed for deletion.
- ◊ Amend URCP 58A(d) to be little more than a cross reference to URCP 5.
- ◊ URCP 5 needs only modest amendments as it already governs responsibility for service of orders by one party upon another. Most of the proposed amendments are intended to simplify and modernize the rule a little bit, but are not strictly necessary to effect the goal of the committee.

Under these rules as amended:

- ◊ final orders, judgments and decrees must be served;
- ◊ any other order must be served if service is required by the order;
- ◊ the party preparing the order, judgment or decree is responsible for service;
- ◊ these general provisions regarding service are subject to control by the court;
- ◊ the time in which to appeal is not changed; and
- ◊ the rules and caselaw prohibiting lack of notice of the entry of judgment as grounds for an extension of time in which to appeal are changed.

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

(a) Service: When required.

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every final order, judgment and decree, every order required by its terms to be served, every pleading subsequent to the original complaint [~~unless the court otherwise orders because of numerous defendants~~], every paper relating to discovery [~~required to be served upon a party unless the court otherwise orders~~], every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, [~~notice of signing or entry of judgment under Rule 58A(d),~~] and similar paper shall be served upon each of the parties.

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

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

(b) Service: How made.

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party [~~himself~~] is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy [~~to him~~] or by mailing [~~it to him at his~~] a copy to the last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at [~~his~~] the person's office with [~~his~~] a clerk or [~~other~~] person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at [~~his~~] the person's dwelling house or usual place of abode

with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

[~~(2) A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any foreign attorney practicing in any of the courts of this state.~~]

(2) Unless otherwise directed by the court, the party preparing the paper shall cause it to be served.

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

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter [~~, but the court may upon motion of a party or on its own initiative order that depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding~~] together with a certificate of service showing the date, time, and manner of service completed by the person effecting service.

(e) Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may [~~permit the papers to be filed with him, in which event he shall~~] accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk [~~, if any~~].

URCP Rule 58A. Entry.

(a) Judgment upon the verdict of a jury. Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to

interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

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

(c) When judgment entered; notation in register of actions and judgment docket. A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) Notice of signing or entry of judgment. [~~The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court.~~] A copy of the signed judgment shall be served in the manner provided in Rule 5. [~~However, the~~] The time for filing a notice of appeal is not affected by the [~~notice~~] requirement of this provision.

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

(f) Judgment by confession. Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

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

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

[~~Advisory Committee Note. Paragraph (d) is intended to remedy the difficulties suggested by Thompson v. Ford Motor Co., 14 Utah 2d 334, 384 P.2d 109 (1963).~~]

URCP Rule 77. District courts and clerks.

(a) District courts always open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and hearings; orders in chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers without the attendance of the clerk or other court officials and at any place within the state, either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the county wherein the matter is pending without the consent of all the parties to the action affected thereby.

(c) Clerk's office and orders by clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but [~~his~~] such action may be suspended or altered or rescinded by the court upon cause shown.

(d) [~~Notice of orders or judgments.~~] Copies provided to the court for mailing. At the time of presenting any written order or judgment to the court for signing, the party seeking such order or judgment [~~shall~~] may deposit with the clerk [~~sufficient~~] copies thereof [~~for mailing as hereinafter required~~] with a pre-addressed envelope with postage pre-paid. Immediately upon the entry of an order or judgment, the clerk shall [~~serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and, shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed~~] conform the copies to the original and mail the copies to the party submitting them. Correspondence to

the court requiring a reply shall be accompanied by envelopes pre-addressed to the parties or counsel for parties with postage pre-paid.

(e) No fee where copies furnished. In every case where a copy of the pleadings, or other papers is to be certified, neither the sheriff, constable nor clerk shall charge or receive any fee for making such copy when the same is furnished to the officer by the party.

CJA Rule 4-504. Written orders, judgments and decrees.

Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.

Applicability:

This rule shall apply to all civil proceedings in courts of record except small claims.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

[~~(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.~~]

[~~(5)~~] (4) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the

court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

[~~(6)~~] (5) Except where otherwise ordered, all judgments and decrees shall contain, if known, the judgment debtor's address or last known address and social security number.

[~~(7)~~] (6) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

[~~(8)~~] (7) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

[~~(9)~~] (8) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

[~~(10)~~] (9) Nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.

URAP Rule 4. Appeal as of right: when taken.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Motions post judgment or order. If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the

judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) Filing prior to entry of judgment or order. Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) Extension of time to appeal. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. Excusable neglect includes the failure of the appealing party to receive a copy of the order or judgment appealed from if the party required to do so failed to comply with Utah Rule of Civil Procedure 5. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

voted unanimously in favor of the motion, with Mr. Love abstaining.

III. MAILING ORDERS AND JUDGMENTS May 24, 1996

Mr. Shea began by isolating two issues for discussion: 1) technical/clerical - problem of conforming four conflicting rules (URCPs 5, 58A, & 77, and CJA 4-504) that govern who is responsible for giving notice, and 2) substantive - problem of better protecting the appellate interests of a nonprevailing party who fails to get notice of the entry of a judgment.

Mr. Shea reminded the Committee that it had considered focusing the responsibility for giving notice on court clerks like the federal system. However, the Committee had concluded that this was not a viable option because unlike the federal system, there are fewer clerks and they are less well paid. In addition, because shifting noticing responsibilities to court clerks would likely overload the current system, the Committee had determined that it was unrealistic. Ms. Wood suggested that the noticing issue could be better handled by court clerks and asked why filing fees couldn't be raised to deal with the resulting burden. Mr. Sullivan responded that the Committee had an obligation to inform the Utah Supreme Court of an easier solution. Mr. Shea indicated that raising filing fees was not an easy task.

Mr. Shea referenced a memorandum he had drafted and circulated to the Committee that summarized the nature and cumulative effect of the proposed changes. He reported that the proposed changes place the burden of serving a final order/judgment/decree on the party preparing it. A party need only serve a non-final order/judgment/decree if service is required by the order, itself. Mr. Shea also indicated that the proposed changes would allow a court to direct parties to serve orders otherwise.

Mr. Shea indicated that the proposed changes did not change the 30 day time period a party has to appeal. Doing so would change a large body of existing case law, require a legislative enactment, and change Utah Rule of Appellate Procedure 4, which is outside the scope of the Committee's jurisdiction.

Mr. Kogan asked what sanction was currently available against a prevailing party who fails to give the required notice. Mr. Shea indicated that the non-prevailing party has the option to petition the trial court for more time. The trial court has discretion to do so, but is reluctant to exercise its discretion because late-filed appeals are closely scrutinized. Mr. Shea indicated that the proposed changes would expressly recognize that failure to give notice would be grounds for the trial court to exercise its discretion.

Mr. Sullivan asked why the changes related only to final and not interlocutory orders. Mr. Shea responded that no notice obligation existed with interlocutory orders and that the Committee had rejected an earlier draft that imposed notice obligations on

interlocutory orders. Mr. Battle indicated that although it made sense to make someone responsible for giving notice of the entry of interlocutory orders, making an unserved interlocutory order unenforceable would add a burden that did not already exist.

Judge Bunnell asked what constituted a prevailing party. Mr. Shea indicated that the proposed rule sidestepped this confusion by placing the burden on the party preparing the order and not the prevailing party. Mr. Sullivan asked who was responsible for serving orders prepared by the court. He suggested that the proposed changes include a provision requiring the court clerk to serve orders prepared by a judge.

The Committee reviewed Mr. Shea's draft rules as follows:

Mr. Sullivan asked why proposed rule 5 used "paper." Mr. Shea indicated that "paper" was intended as a generic term. Mr. Sullivan suggested changing "paper" to "paper or order" for clarity.

Ms. Wood asked whether it was clear under proposed rule (5)(b)(2) that a party had to serve a signed order, or just a proposed order. Mr. Sullivan suggested changing (5)(b)(2) to read "unless otherwise directed by the court, the party preparing the pleading, paper, or judgment, signed by the court, shall cause it to be served."

Mr. Shea asked whether "decree" should be included in the proposed rule. Mr. Battle suggested deleting "order" and "decree" from the proposed rules because "judgment," as defined by Rule 54, is an order from which any appeal lies. Mr. Sullivan indicated that the proposed rules also required service of nonfinal orders which by their terms were required to be served. Mr. Sullivan asked Mr. Shea to further investigate the use of these words in the proposed rules.

Mr. Sullivan suggested reiterating the concept that the party preparing a judgment is responsible for serving it in Rule 58A in (d) on page 3.

Mr. Sullivan indicated that (d) on page 4 was confusing. He questioned how often correspondence to the court required a reply and suggested striking the last sentence in (d). Mr. Shea responded that the sentence Mr. Sullivan suggested striking incorporated language from CJA 4-504 that was being stricken. The Committee agreed that the last sentence should be stricken. Mr. Sullivan also asked why (d) required a court clerk to mail copies of orders/judgments to parties if provided, when proposed rule 5 placed the burden of service on the party preparing the paper. Judge Bunnell responded that "may" was used in the first sentence of (d) and that providing copies to be conformed and mailed out by the court clerk was an alternative to the proposed rule 5. The Committee agreed the procedure was adequately set forth in proposed rule 5 and agreed to strike (d).

Mr. Shea indicated that proposed changes had been made to Utah Rule of

Appellate Procedure 4(e) to provide the trial court with a basis to extend the time to appeal if a party fails to comply with proposed rule 5. He indicated that changes to URAP 4 were outside of the Committee's jurisdiction, but he would recommend the changes to the committee that reviews the URAPs.

Mr. Sullivan suggested that Mr. Shea circulate a subsequent draft of the proposed rules, incorporating the Committee's suggestions, for the Committee to discuss at its September meeting.

IV. RULE 4: SERVICE OF PROCESS

Mr. Sullivan indicated that Rule 4 is several generations behind the current federal rule on service of summonses and complaints. Unlike its federal counterpart, Rule 4 provides no mechanism by which a plaintiff can present a defendant with a paper requesting the defendant waive the right to service in exchange for reduced costs, simpler process, and an extra 60 days to file a response. He explained that a defendant has 30 days to sign the waiver and return it. If the defendant does not waive service, the plaintiff can apply for and be awarded the costs of service and attorneys fees incurred obtaining the award, regardless of the ultimate outcome of the case.

Mr. Sullivan reported that the next to the last version of the federal rule allowed a plaintiff to serve by mail a summons and complaint with an acknowledgment for the defendant to sign and return, thereby avoiding the costs of service.

Mr. Sullivan referenced a memorandum circulated by Mr. Love that highlighted differences between the state and federal Rule 4. He indicated that some of the differences could be attributed to matters unique to state law, like how to serve school boards, children, incompetents, etc.

Mr. Sullivan reported that the Salt Lake Sheriff's Office had requested the Committee update Rule 4 because they believed it would decrease the number of summonses and complaints their office serves. The Committee has been reluctant to respond to the Sheriff Office's request because the vast majority of cases filed are collection cases; and, due to the nature of collection work, it is unlikely that a plaintiff would give a defendant additional time to answer a collection complaint. Notwithstanding, Mr. Sullivan indicated that it was generally a good policy to review state rules that had been updated in the federal system.

Mr. Sullivan asked Mr. Love to draft a new rule 4 that adopted the changes made to federal rule 4 for waiver of service of process and mailing of service of process. He suggested the additional 60 days granted under the federal rule be shortened to 30 days and that Mr. Love make any other changes that made sense so that the state rule coincided with the federal rule. Mr. Love agreed to have an amended rule 4 ready for consideration at the Committee's September meeting.

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

(a) Service: When required.

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint [~~unless the court otherwise orders because of numerous defendants~~], every paper relating to discovery [~~required to be served upon a party unless the court otherwise orders~~], every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, [~~notice of signing or entry of judgment under Rule 58A(d),~~] and similar paper shall be served upon each of the parties.

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

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

(b) Service: How made and by whom.

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party [~~himself~~] is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy [~~to him~~] or by mailing [~~it to him at his~~] a copy to the last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at [~~his~~] the person's office with [~~his~~] a clerk or [~~other~~] person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at [~~his~~] the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

[~~(2) A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any foreign attorney practicing in any of the courts of this state.~~]

(2) Unless otherwise directed by the court:

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

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

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

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

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter [~~, but the court may upon motion of a party or on its own initiative order that depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding~~] together with a certificate of service showing the date, time, and manner of service completed by the person effecting service.

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

(c) When judgment entered; notation in register of actions and judgment docket. A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) Notice of signing or entry of judgment. [~~The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court.~~] A copy of the signed judgment shall be served by the party preparing it in the manner provided in Rule 5. [~~However, the~~] The time for filing a notice of appeal is not affected by the [~~notice~~] requirement of this provision.

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

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

~~[Advisory Committee Note. Paragraph (d) is intended to remedy the difficulties suggested by Thompson v. Ford Motor Co., 14 Utah 2d 334, 384 P.2d 109 (1963).]~~

URCP Rule 77. District courts and clerks.

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(b) Trials and hearings; orders in chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers without the attendance of the clerk or other court officials and at any place within the state, either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the county wherein the matter is pending without the consent of all the parties to the action affected thereby.

(c) Clerk's office and orders by clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but [~~his~~] such action may be suspended or altered or rescinded by the court upon cause shown.

~~[(d) Notice of orders or judgments. At the time of presenting any written order or judgment to the court for signing, the party seeking such order or judgment shall deposit with the clerk sufficient copies thereof for mailing as hereinafter required. Immediately upon the entry of an order or judgment, the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and, shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack~~

~~of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed.~~]

[~~(e)~~] (d) No fee where copies furnished. In every case where a copy of the pleadings, or other papers is to be certified, neither the sheriff, constable nor clerk shall charge or receive any fee for making such copy when the same is furnished to the officer by the party.

CJA Rule 4-504. Written orders, judgments and decrees.

Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.

Applicability:

This rule shall apply to all civil proceedings in courts of record except small claims.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

[~~(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.~~]

[~~(5)~~] (4) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the

court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

[~~(6)~~] (5) Except where otherwise ordered, all judgments and decrees shall contain, if known, the judgment debtor's address or last known address and social security number.

[~~(7)~~] (6) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

[~~(8)~~] (7) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

[~~(9)~~] (8) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

[~~(10)~~] (9) Nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.

URAP Rule 4. Appeal as of right: when taken.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Motions post judgment or order. If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the

judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) Filing prior to entry of judgment or order. Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) Extension of time to appeal. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. Excusable neglect includes the failure of the appealing party to receive a copy of the order or judgment appealed from if the party required to do so failed to comply with Utah Rule of Civil Procedure 5. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

MINUTES

Supreme Court's Advisory Committee on the Rules of Civil Procedure

Administrative Office of the Courts
230 South 500 East, Ste. 300
Salt Lake City, Utah 84102

Monday, September 23, 1996
4:00 p.m.

Francis M. Wickstrom, Presiding

PRESENT:
Francis M. Wickstrom
Glenn C. Hanni
Terrie T. McIntosh
Perrin Love
Virginia Smith
Mary Ann Wood
James Soper
Hon. Anne Stirba

EXCUSED:
Hon. Boyd Bunnell
Alan L. Sullivan
Terry S. Kogan
W. Cullen Battle
Hon. Ronald Boyce
M. Karlynn Hinman
Thomas R. Karrenberg
John L. Young
David I. Isom

STAFF:
Peggy Gentles
Tim Shea

I. Welcome and Approval of Minutes.

Francis Wickstrom welcomed Committee members to the meeting and stated that Alan Sullivan had asked him to preside over the next two meetings. Mr. Wickstrom referred to his letter to Committee members asking that the next two meetings be scheduled for Tuesday October 22, 1996 and Wednesday December 4, 1996. Mr. Wickstrom introduced Peggy Gentles, Staff Attorney at the Administrative Office of the Courts. The May minutes were approved.

II. Appearance Pro Hac Vice.

Tim Shea informed Committee members that the proposed Rule on the Appearance Pro Hac Vice was being sent out this week for comment. The publication date, if approved by the Supreme Court, would be April 1997.

III. Mailing Orders and Judgments.

Mr. Shea noted that at the meeting last Spring the Committee had expressed interest in making changes to the rules governing mailing of orders and judgments. The changes were intended to clarify who is responsible for mailing orders and to protect appellate interests of the non prevailing party. Mr. Shea noted that several rules govern this area.

Mr. Shea referred to the document sent to Committee members dated September 17, 1996. Mr. Shea highlighted some of the changes that had been made. In Rule 5(a)(1) "judgment" had replaced "judgment, order, decree." Rule 5(b)(2)(C) adds a requirement that any order or judgment prepared by the court must be served by the court.

Rule 5(d) has had language removed referring to discovery documents. Mr. Shea suggested that a Committee note be added to indicate that other rules may govern of filing of discovery documents. Terrie McIntosh suggested that subparagraph (d) be amended to expressly refer to the rule in the Code of Judicial Administration that refers to filing of discovery documents. Mary Anne Wood suggested that language "all papers which are required to be filed and served" be added. Virginia Smith suggested that the language be broader.

Mr. Shea noted that Rule 58(a) has been amended to add requirement that the party preparing a judgment for the court's signature must serve the judgment. Mr. Shea noted that the Committee could suggest a change to the Rule of Appellate Procedure which would change existing case law. The proposed amendment would define excusable neglect to include failure of the appealing party to receive a copy of the order of judgment if the party required to serve the judgment had failed to comply with Rule 5. Mr. Wickstrom expressed concern that a potential for abuse still exists. Glenn Hanni stated that there had been a great deal of debate around this issue and the prevailing sentiment was that some finality should be given to all parties. Ms. Wood noted that most parties would get something from the court separate from the papers prepared by the opposing party, for instance a minute entry or notice of a hearing. Ms. Smith noted that in default judgments that may not be the case. Mr. Shea noted that the major concern was for pro se parties who did not prevail in the trial court. Ms. McIntosh asked whether Rule 4 of Appellate Procedure had been through the Advisory Committee on Appellate Procedure. Judge Stirba moved that the rules prepared by Mr. Shea be tentatively approved with the one change regarding discovery documents and that amendments to RAP 4 be recommended to the Appellate Rules Committee. Ms. Wood seconded. The motion passed unanimously.

IV. Comments on Rule 11.

Rule 11 was published for comment in the Spring. However, the Committee did not meet in time to consider the comments for November publication. Peggy Gentles presented a synopsis of the comments received. Following that synopsis, Mr. Wickstrom asked if the Committee wished to make any changes in response.

The Committee discussed the Judicial Rules Review Committee comment that adopting a federal rule may not be appropriate for Utah practice. Specifically the JRRC was concerned that this rule would bar entering a general denial in litigation as a tactic preceding

Tab 4

Rule 37. Discovery and disclosure motions; Sanctions.

(a) **Motion for order compelling disclosure or discovery.**

(a)(1) A party may move to compel disclosure or discovery and for appropriate sanctions if another party:

(a)(1)(A) fails to disclose, fails to respond to a discovery request, or makes an evasive or incomplete disclosure or response to a request for discovery;

(a)(1)(B) fails to disclose, fails to respond to a discovery request, fails to supplement a disclosure or response or makes a supplemental disclosure or response without an adequate explanation of why the additional or correct information was not previously provided;

(a)(1)(C) objects to a discovery request ;

(a)(1)(D) impedes, delays, or frustrates the fair examination of a witness; or

(a)(1)(E) otherwise fails to make full and complete disclosure or discovery.

(a)(2) A motion may be made to the court in which the action is pending, or, on matters relating to a deposition or a document subpoena, to the court in the district where the deposition is being taken or where the subpoena was served. A motion for an order to a nonparty witness shall be made to the court in the district where the deposition is being taken or where the subpoena was served.

(a)(3) The moving party must attach a copy of the request for discovery, the disclosure, or the response at issue. The moving party must also attach a certification that the moving party has in good faith conferred or attempted to confer with the other affected parties in an effort to secure the disclosure or discovery without court action and that the discovery being sought is proportional under Rule 26(b)(2).

(b) **Motion for protective order.**

(b)(1) A party or the person from whom discovery is sought may move for an order of protection from discovery. The moving party shall attach to the motion a copy of the request for discovery or the response at issue. The moving party shall also attach a certification that the moving party has in good faith conferred or

attempted to confer with other affected parties to resolve the dispute without court action.

(b)(2) If the motion raises issues of proportionality under Rule 26(b)(2), the party seeking the discovery has the burden of demonstrating that the information being sought is proportional.

(c) **Orders.** The court may make any order to require disclosure or discovery or to protect a party or person from discovery being conducted in bad faith or from annoyance, embarrassment, oppression, or undue burden or expense, or to achieve proportionality under Rule 26(b)(2), including one or more of the following:

(c)(1) that the discovery not be had;

(c)(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c)(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(c)(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(c)(5) that discovery be conducted with no one present except persons designated by the court;

(c)(6) that a deposition after being sealed be opened only by order of the court;

(c)(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(c)(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(c)(9) that a question about a statement or opinion of fact or the application of law to fact not be answered until after designated discovery has been completed or until a pretrial conference or other later time; or

(c)(10) that the costs, expenses and attorney fees of discovery be allocated among the parties as justice requires.

(c)(11) If a protective order terminates a deposition, it shall be resumed only upon the order of the court in which the action is pending.

(d) **Expenses and sanctions for motions.** If the motion to compel or for a protective order is granted or denied, or if a party provides disclosure or discovery or withdraws a disclosure or discovery request after a motion is filed, the court may order the party, witness or attorney to pay the reasonable expenses and attorney fees incurred on account of the motion if the court finds that the party, witness, or attorney did not act in good faith or asserted a position that was not substantially justified. A motion to compel or for a protective order does not suspend or toll the time to complete standard discovery.

(e) **Failure to comply with order.**

(e)(1) Sanctions by court in district where deposition is taken. Failure to follow an order of the court in the district in which the deposition is being taken or where the document subpoena was served is contempt of that court.

(e)(2) Sanctions by court in which action is pending. Unless the court finds that the failure was substantially justified, the court in which the action is pending may impose appropriate sanctions for the failure to follow its orders, including the following:

(e)(2)(A) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

(e)(2)(B) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters into evidence;

(e)(2)(C) stay further proceedings until the order is obeyed;

(e)(2)(D) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

(e)(2)(E) order the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure;

(e)(2)(F) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(e)(2)(G) instruct the jury regarding an adverse inference.

(f) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that:

(f)(1) the request was held objectionable pursuant to Rule 36(a);

(f)(2) the admission sought was of no substantial importance;

(f)(3) there were reasonable grounds to believe that the party failing to admit might prevail on the matter;

(f)(4) that the request is not proportional under Rule 26(b)(2); or

(f)(5) there were other good reasons for the failure to admit.

(g) **Failure of party to attend at own deposition.** The court on motion may take any action authorized by paragraph (e)(2) if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to appear before the officer taking the deposition, after proper service of the notice. The failure to act described in this paragraph may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under paragraph (b).

(h) **Failure to disclose.** If a party fails to disclose a witness, document or other material, or to amend a prior response to discovery as required by Rule 26(d), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by paragraph (e)(2).

(i) **Failure to preserve evidence.** Nothing in this rule limits the inherent power of the court to take any action authorized by paragraph (e)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored

information lost as a result of the routine, good-faith operation of an electronic information system.

Advisory Committee Notes

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
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: January 18, 2012
Re: Conflict between Rule 11(d) and Rule 26(e)

Terrie McIntosh points out that there is a conflict between Rule 11(d) and Rule 26(e).

Rule 11(d)

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

Rule 26(e)

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

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

Tab 6

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

(a) **Service: When required.**

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

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

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

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

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

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

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

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

(b) **Service: How made.**

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

(b)(1)(A) If a hearing is scheduled 5 days or less from the date of service, the party shall use the method most likely to give prompt actual notice of the hearing. Otherwise, a party shall serve a paper under this rule:

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

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

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

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

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

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

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

(b)(1)(B) Service by mail, email or fax is complete upon sending. Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.

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

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

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

(b)(2)(C) each pleading, judgment, or paper shall include as the last page a signed certificate of service showing the date and manner of service and on whom it was served; and

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

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

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

(e) **Filing with the court defined.** A party may file with the clerk of court using any means of delivery permitted by the court. The court may require parties to file electronically with an electronic filing account. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge. The filing date shall be noted on the paper.

Advisory Committee Notes