Agenda
Advisory Committee on Rules of Civil Procedure

February 27, 2013
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	Judge James Blanch
Rule 58B. Satisfaction of judgment	Tab 2	Tim Shea
Rule 64D. Writ of garnishment.	Tab 3	Tim Shea
Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.	Tab 4	Tim Shea
Post-trial motions: Rules 50, 52, 59, 60.	Tab 5	Frank Carney
Certificates of service for e-filed documents		Leslie Slaugh
Effect of disclosure and discovery changes on family law practice		Judge Derek Pullan
FAQs	Tab 6	Judge James Blanch

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

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

March 27, 2013
April 24, 2013
May 22, 2013
September 25, 2013
October 23, 2013
November 20, 2013

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

January 23, 2013

PRESENT: Francis M. Wikstrom, Chair, W. Cullen Battle, Judge John L. Baxter, James T. Blanch, Professor Lincoln Davies, Jonathan Hafen, Steven Marsden, Terrie T. McIntosh, Honorable David O. Nuffer, Honorable Derek Pullan, David W. Scofield, Leslie W. Slaugh, Trystan B. Smith, Honorable Kate Toomey, Barbara L. Townsend

TELEPHONE: Honorable Lyle R. Anderson, Professor David H. Moore

STAFF: Tim Shea, Diane Abegglen

EXCUSED: Sammi Anderson, Janet H. Smith, Francis J. Carney

GUEST: Chief Justice Matthew B. Durrant, Debra Moore

I. RECOGNITION OF JUDGE DAVID NUFFER

Chief Justice Durrant thanked Judge Nuffer for ten years of service on the committee and presented him with a certificate of appreciation. Mr. Wikstrom added his thanks and noted Judge Nuffer's dedicated service and many contributions to the committee. Chief Justice Durrant thanked the committee members for their hard work.

II. MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the November 28, 2012 minutes. The committee unanimously approved the minutes.

III. WRITS OF GARNISHMENT

Mr. Shea reported that Sen. Hillyard has filed legislation that will change the duration for a writ of continuing garnishment from 120 days to 12 months. There is a companion joint resolution of the legislature that removes the duration of the writ from Rule 64D. Mr. Shea said that the resolution is protected and that members should not distribute it.

Mr. Wikstrom raised the question of whether the Court has the sole power to determine the duration of the writ since writs are issued by the courts. Ms. McIntosh said that when the committee discussed the rule years ago the creditors wanted a

four-month duration because they were afraid only the first creditor would be paid. Mr. Slaugh said there may be a way to renew the writ rather than apply for a new one after the old writ expires. Mr. Wikstrom said that the committee would be willing to discuss the matter with Sen. Hillyard and consider whether to make appropriate amendments to the rule, and he asked Mr. Shea to convey to Rick Schwermer a summary of the committee's discussion.

IV. ABOTA JURY SUMMIT

Mr. Wikstrom said that the ABOTA Jury Summit would be held in Austin, TX on October 10. Judge Pullan said that he has agreed to present on the new rules of disclosure and discovery.

V. APPEALS

Mr. Wikstrom distributed a new paragraph (g) to Rule of Appellate Procedure 4 proposed by the appellate advisory committee that would allow the trial court judge to reinstate the time to appeal under certain conditions. He said the appellate committee had approved this amendment for comment earlier today. Mr. Shea distributed amendments to Rule of Civil Procedure 58A, which this committee has been working on. Mr. Shea said that the new URAP 4(g) would eliminate the need for the proposed URCP 58A(h), re-entry of judgment

Mr. Hafen moved to approve the proposed amendment to URCP 58A(d), but not proposed paragraph (h) nor the change in the title. Judge Toomey seconded the motion. The motion passed unanimously. Appellate Rule 4 and civil Rule 58A will be published for comment in tandem.

VI. CONSIDERATION OF COMMENTS ON PROPOSED RULES.

Tim Shea summarized proposed changes to Rule 3 of the Rules of Small Claims Procedure which would permit regular service and alternative service in small claims cases. Mr. Marsden moved to approve the amendments and recommend adoption to the Supreme Court. Mr. Slaugh seconded the motion. The motion passed unanimously.

VII. DISCOVERY TIER DATA

Ms. Moore said that about a week ago the e-filing interface had been modified to require the filer to designate a discovery tier for the case. If no tier is declared, the filing will bounce back. The change will apply to all case initiations. Ms. Moore did not know whether a defendant would have to declare a tier as part of a counter claim, but she will check.

VIII. NOTICE OF DEADLINES

Mr. Shea said that he had distributed an earlier draft of the notice of deadlines form and has incorporated some of the suggested changes. He has calculated the deadlines based on the amendments to Rule 26 approved this morning by the Supreme Court. The amendments will take effect April 1.

Mr. Hafen said that the notice should include the deadline for dispositive motions. The committee agreed that the notice should include only deadlines provided by rule, and Mr. Hafen volunteered to draft an appropriate rule amendment.

Mr. Hafen moved to remove the second sentence of the form and the word "otherwise" from the third sentence. Mr. Marsden seconded the motion. The motion passed unanimously. Ms. Moore will work with the programmers to include the amended notice in the district court case management system.

IX. EXPEDITED PROCEDURES FOR RESOLVING DISCOVERY ISSUES

Mr. Shea reported that the Judicial Council has adopted Rule 4-502, which makes the expedited process for discovery disputes, originally adopted by the Third District Court, applicable statewide. He said that Council would like that rule to be a temporary measure, until this committee can consider appropriate amendments to the Rules of Civil Procedure.

Mr. Wikstrom asked the judges for their experience with the local rules. Judge Toomey said that she has used the expedited process about 20 times and has asked for additional briefs only twice. She thought the process disposed of discovery disputes quickly and with appropriate outcomes. Judge Blanch said that he has a criminal calendar and has not used the process frequently, but he too thought that it is working as planned. Judge Pullan reported a decline in discovery motions; he thinks that the new rules are forcing the parties into more reasonable positions.

Mr. Hafen said that in his conversations a few lawyers complained of judges not acting quickly, but that most input has been favorable. Judge Toomey said that lawyers should simply call the judge if the judge has not scheduled a telephone conference within the time required. Sometimes a matter is simply not brought to the judge's attention.

The committee discussed whether to include a motion for extraordinary discover or an objection to a subpoena. They decided to remove an objection to a

subpoena. Mr. Shea said that motions for extraordinary discovery were included in the Third District Court local rule on which this is based.

The committee discussed whether to add the expedited process to Rule 7 or Rule 37 and decided on the former.

The committee discussed whether the process should be an expedited process for resolving a discovery disputes or an expedited preliminary process to see whether the dispute could be resolved before filing a discovery motion. Mr. Shea said the local rule was a pre-motion process, and this proposal is drafted using that model. Mr. Marsden suggested that the process should be a request for permission to file a discovery motion. Judge Toomey said she did not favor a "mini motion." Judge Pullan said that is how the current process is working. Mr. Slaugh said the process should resolve the dispute, not be a preliminary step to a motion.

Mr. Shea will provide the committee with another draft at the next meeting.

X. PROOF OF ELECTRONIC SIGNATURE

Mr. Shea said that the presiding judge of the Third District Court has requested an amendment that would require a party relying on a physical representation of an electronic signature to assert that the person whose signature is represented did in fact sign the document. Mr. Shea proposed some language for the committee to consider. After discussion the committee concluded that the issue was not procedural. The matter might be appropriate for the evidence committee since the draft provides for authentication of an electronic signature.

XI. FAQs.

Mr. Wikstrom presented the next set of FAQs for publication on the court's webpage. Ms. McIntosh suggested adding the year to the April 1 reference since the Q & A might be on the webpage for a long time. Professor Davies suggested referring to the paragraph in Rule 26 that will include discovery of rebuttal expert opinions. Mr. Hafen moved to adopt the first two questions and answers under the first category. Mr. Marsden seconded the motion. The motion passed unanimously.

XII. ADJOURNMENT.

The meeting adjourned at 6:00 pm. The next meeting will be held on February 27, 2013 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

Rule 58B. Satisfaction of judgment.

(a) **Satisfaction by acknowledgment.** A judgment ~~may~~ shall be satisfied by the owner or the owner's attorney by filing an acknowledgment of satisfaction in the court in which the judgment was first entered after payment of the judgment. If the owner is not the original judgment creditor, the owner or owner's attorney shall also file proof of ownership. If the satisfaction is for part of the judgment or for fewer than all of the judgment debtors, it shall state the amount paid or name the debtors who are released.

(b) **Satisfaction by order of court.** The court in which the judgment was first entered may, upon motion and satisfactory proof, enter an order declaring the judgment satisfied.

(c) **Effect of satisfaction.** Satisfaction of a judgment, whether by acknowledgement or order, shall discharge the judgment, and the judgment shall cease to be a lien as to the debtors named and to the extent of the amount paid. A writ of execution or a writ of garnishment issued after partial satisfaction shall include the partial satisfaction and shall direct the officer to collect only the balance of the judgment, or to collect only from the judgment debtors remaining liable.

(d) **Filing certificate of satisfaction in other counties.** After satisfaction of a judgment, whether by acknowledgement or order, has been entered in the court in which the judgment was first entered, a certificate by the clerk showing the satisfaction may be filed with the clerk of the district court in any other county where the judgment has been entered.

Tab 3

Rule 64D. Writ of garnishment.

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

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

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

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

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

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

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

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

(b)(5) that the plaintiff has attached the garnishee fee established by Utah Code Section 78A-2-216.

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

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

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

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

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

(c)(5) that the plaintiff has attached or will serve the garnishee fee established by Utah Code Section 78A-2-216.

(d) **Defendant identification.** The plaintiff shall submit with the affidavit or application a copy of the judgment information statement described in Utah Code Section 78B-5-201 or the defendant's name and address and, if known, the last four digits of the defendant's social security number and driver license number and state of issuance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) **Reply to answers; request for hearing.**

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

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

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

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

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

(h)(2) The reply is deemed denied, and the court shall conduct an evidentiary hearing as soon as possible and not to exceed 14 days.

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

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

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

(i) **Delivery of property.** A garnishee shall not deliver property until the property is due the defendant. Unless otherwise directed in the writ, the garnishee shall retain the property until 20 days after service by the garnishee under subsection (g). If the garnishee is served with a reply within that time, the garnishee shall retain the property and comply with the order of the court entered after the hearing on the reply. Otherwise, the garnishee shall deliver the property as provided in the writ.

(j) **Liability of garnishee.**

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

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

(j)(2)(B) The creditor must attach to the motion for an order to show cause a statement that the creditor has in good faith conferred or attempted to confer with the garnishee in an effort to settle the issue without court action.

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

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

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

(k) **Property as security.**

(k)(1) If property secures payment of a debt to the garnishee, the property need not be applied at that time but the writ remains in effect, and the property remains subject to being applied upon payment of the debt. If

property secures payment of a debt to the garnishee, the plaintiff may obtain an order authorizing the plaintiff to buy the debt and requiring the garnishee to deliver the property.

(k)(2) If property secures an obligation that does not require the personal performance of the defendant and that can be performed by a third person, the plaintiff may obtain an order authorizing the plaintiff or a third person to perform the obligation and requiring the garnishee to deliver the property upon completion of performance or upon tender of performance that is refused.

(l) **Writ of continuing garnishment.**

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

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

(l)(2)(A) ~~120 days~~ one year;

(l)(2)(B) 120 days after service of a second or subsequent writ of continuing garnishment;

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

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

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

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

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

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

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

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

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

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

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

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

Tab 4

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders.

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

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

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

(c) **Memoranda.**

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

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

(c)(3) **Content.**

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

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

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

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

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

(e) **Hearings.** The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under

Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) **Orders.**

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

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

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

(g) **Expedited procedures for discovery motions.** A motion for extraordinary discovery under Rule 26, a motion for a protective order or a motion for an order compelling disclosure or discovery under Rule 37, or a motion to quash a subpoena under Rule 45, shall follow the procedures of this paragraph.

(g)(1) The motion shall be no more than four pages, not including permitted exhibits and attachments, and shall include:

(g)(1)(A) a certification that the requesting party has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action;

(g)(1)(B) a statement regarding proportionality under Rule 26(b)(2);

(g)(1)(C) if the request is a request for extraordinary discovery, a statement complying with Rule 26(c); and

(g)(1)(D) the relief sought and the grounds for the relief sought stated succinctly and with particularity.

(g)(1)(E) an attached copy of the request for discovery, the disclosure, or the response at issue;

(g)(1)(F) an attached proposed order; and

(g)(1)(G) no other exhibits or attachments, unless required by law.

(g)(2) No more than seven days after the moving party has served the motion, an opposing party may file a response. The response shall be no more than four pages, not including permitted exhibits and attachments, and shall include:

(g)(2)(A) a statement regarding proportionality under Rule 26(b)(3);

(g)(2)(B) a succinct statement regarding the relief sought and the grounds for the relief sought;

(g)(2)(C) an attached copy of the request for discovery, the disclosure, or the response at issue, to the extent needed and not included among the requesting party's papers;

(g)(2)(D) an attached proposed order; and

(g)(2)(E) no other exhibits or attachments, unless required by law.

(g)(3) Upon filing of the response or expiration of the time to do so, either party may and the moving party shall file a Request to Submit for Decision under paragraph (d). The court will promptly decide the motion. The court may decide the motion on the pleadings and papers unless the court schedules a hearing. The hearing may be by telephone conference or other electronic communication. The court may order additional briefing and establish a briefing schedule.

Advisory Committee Notes

Tab 5

Trial and Post-Trial Motions

Francis J. Carney

I wish the Advisory Committee to consider several aspects of our rules on trial and post-trial motions. Short papers on each of these issues follow.

1. Names- do we want to update the names of the motion "for directed verdict" and motion "JNOV" as the federal rules did some years ago?

2. Timing- all the federal rules are to be **filed** on a certain date; our state rules have a confusing mix of events: served or "made" or "move."

3. All of our post-trial motions (except Rule 60) motions are to be made within 10 days of entry of judgment. The federal rules were amended in 2009 to allow a more realistic 28 days. (Note that these deadlines are jurisdictional and *cannot* be extended by stipulation or order.) Do we want to do likewise?

4. We have a procedural trap in our state rule 50(b); namely, that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence. The federal rules have eliminated this trap, and we should consider doing so as well.

5. In general terms, the rewrite of the federal trial and post-trial motions rules make them clearer than our state rules. We may want to consider adopting the federal versions.

Names of Trial Motions

Rule 50 describes the motions for a "directed verdict" and for "judgment notwithstanding the verdict."

Do we want to revise the antiquated and anachronistic names of these motions-- as the federal courts did more than twenty years ago-- to motions "for judgment as a matter of law" and "renewal of motion for judgment as a matter of law."

The note to the 1991 federal rule amendment is useful:

> *The revision abandons the familiar terminology of "direction of verdict" for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding*.

I wonder if we want to revamp Rule 50 to modernize and simplify the language.

Timing for Post-Trial Motions: Filed/Served/Move/Made

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

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

Note:

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

Timing for Post-Trial Motions: 10 or 28 days?

All post-trial motions (with the exception of Rule 60 motions to alter or amend judgment) must be "made/moved/served" within **10 days** of entry of the judgment.

The federal rules were changed in 2009 to allow **28 days** on all such motions. This is the federal Advisory Committee Note:

> *Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.*

Do we want to similarly extend the deadline for these motions in state practice? The considerations are the same for state practice as they are for federal.

The Trap in Rule 50 on JNOV

It is the rule that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence.

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

> *Prior to the 2006 amendment of the Federal Rule, it was long established that a post-verdict motion under Rule 50(b) for judgment as a matter of law could not be made unless a previous Rule 50(a) motion for judgment as a matter of law was made by the moving party at the close of all the evidence. The purpose of requiring a renewed motion for judgment as a matter of law at that time was to give the opposing party an opportunity to cure the defects in proof that otherwise might preclude the party from taking the case to the jury. A large sample of illustrative and relatively recent cases is set out in the note below.*
>
> *Because this requirement was a potential trap for the unwary, the federal courts fortunately took a liberal view of what constituted a motion for judgment as a matter of law at the close of all the evidence in deciding whether there was a sufficient foundation for the later motion under Rule 50(b). The note below contains numerous examples of the mechanisms used by the courts to employ the liberal view of what constitutes an end of trial motion for judgment as a matter of law. Other courts, however, were less willing to excuse noncompliance with the requirement of the rule and applied it in a more demanding fashion.*
>
> . . .
>
> *Before the rule was amended in 2006, when the movant failed inexcusably to raise an objection to the sufficiency of evidence in a motion for judgment as a matter of law at the close of all the evidence, some courts denied all review, although others reviewed, but only for clear error. . . This review was exceedingly narrow, and only unusual circumstances justified allowing a motion at the close of the plaintiff's case to stand in place of a motion at the close of all the evidence.*
>
> *The 2006 amendments were designed to render all of this confusion and technicality*

moot. The amendments revised Rule 50(b) to permit renewal after verdict of any Rule 50(a) motion for judgment as a matter of law. This abolished the earlier requirement that a motion for judgment as matter of law had to be made at the close of all the evidence. However, the district court only can grant the Rule 50(b) motion on the grounds advanced in the preverdict motion, because the former is conceived of as only a renewal of the latter . . . .

9B Fed. Prac. & Proc. Civ.3d § 2537.

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

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

(Emphasis added.)

So federal Rule 50(b) now reads:

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

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

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

(Emphasis added.)

I know of no Utah case on point, but there are plenty of federal cases (pre-amendment) that dinged an appellant on this[1], and the rule seems clear that the motion must be renewed at the close of all the evidence.

Do we want to change this?

[1] *See, e.g., Davoll v. Webb,* 194 F.3d 1116, 1136 (10th Cir. 1999).

major life activity, and with respect to the issue of their qualifications, that the plaintiffs have not established as a matter of law that any of the plaintiffs have met all of the qualifications and requirements of the employer." *Id.* at 3665. Denver then put on its defense, which included calling numerous witnesses. At the close of all the evidence, plaintiffs moved for judgment as a matter of law but Denver did not.

***1136** [28] A failure to move for a directed verdict on a particular issue will bar appellate review of that issue. *See FDIC v. United Pac. Ins. Co.*, 20 F.3d 1070, 1076 (10th Cir.1994) ("Defendant's failure to raise the bond coverage issue in its directed verdict motion precludes us from reviewing the sufficiency of the evidence to support the jury's bond coverage finding"); *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1551 (10th Cir.1989) ("Failure to move for a directed verdict on this ground ... precludes Defendant from challenging the sufficiency of the evidence of crashworthiness negligence on appeal."); *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1478 (10th Cir.1985). Similarly, "[a]s a general rule, a defendant's motion for directed verdict made at the close of the plaintiff's evidence is deemed waived if not renewed at the close of all the evidence; failure to renew that motion bars consideration of a later motion for judgment n.o.v."*Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1455 (10th Cir.1987) (citing cases). "Failure to renew the motion thus prevents a defendant from challenging the sufficiency of the evidence on appeal." *Id.; see also* 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2536 (2d ed. 1994) ("It is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court. Indeed a motion at the close of plaintiff's case will not do unless it is renewed at the close of all the evidence.").

Denver did not move for judgment as a matter of law on whether plaintiffs were qualified for vacant positions at the close of the evidence, and never moved for judgment as a matter of law on the undue hardship issue. Denver does not contend otherwise, nor does it claim that it should be excepted from the general rule precluding appellate review. We therefore decline to consider its sufficiency of evidence claims.

C. Evidentiary Issues

[29][30] Denver asserts the district court erred in four of its evidentiary and discovery rulings. Specifically, Denver contests (1) the district court's prohibition of the term "affirmative action" and like phrases at trial; (2) the introduction of one of Denver's responses to a request for an admission; (3) the admission of Dr. Kleen's testimony; and (4) the denial of Denver's motion to extend expert witness discovery and for examination of plaintiffs pursuant to Fed.R.Civ.P. 35. We review a district court's evidentiary rulings and rulings on motions in limine for an abuse of discretion. *See McCue v. Kansas Dept. of Human Resources*, 165 F.3d 784, 788 (10th Cir.1999); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1092 (10th Cir.1997). We review de novo a district court's interpretation of the Federal Rules of Evidence. *See Reeder v. American Econ. Ins. Co.*, 88 F.3d 892, 894 (10th Cir.1996).

1. *Prohibition on "Affirmative Action" and Like Terms*

[31] We first address whether the district court erred in granting plaintiffs' motion in limine prohibiting Denver from using terms like "affirmative action," "special rights," and "preferences." In granting that motion, the district court stated, "[w]ith regard to the issues of defendants using language at trial that plaintiffs were seeking preferences or affirmative action or special rights, defendants are precluded from using such language because it would simply muddy the waters and obfuscate the issues, and its prejudicial effect might outweigh its probative value." Aplt.App. at 2767. On appeal,

50(a), "[a] motion for a directed verdict shall state the specific grounds therefor." A motion for judgment n.o.v. cannot assert new matters not presented in the motion for directed verdict. *Dow Chemical Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 486 (10th Cir.1990); *United States v. Fenix & Scisson, Inc.*, 360 F.2d 260, 265 (10th Cir.1966), *cert. denied*,386 U.S. 1036, 87 S.Ct. 1474, 18 L.Ed.2d 599 (1967).

[4] This court has recognized that in satisfying the requirements of Rule 50, technical precision is unnecessary. *Fenix & Scisson*, 360 F.2d at 266. Because the requirement of Rule 50 that a directed verdict motion must precede a motion for judgment n.o.v. is " 'harsh in any circumstance [ ],' " a directed verdict motion should not be reviewed narrowly but rather in light of the purpose of the rules to secure a just, speedy, and inexpensive determination of a case. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2537, at 597 n. 32 (1971) (quoting *Mosley v. Cia. Mar. Adra S.A.*, 362 F.2d 118, 121-22 (2d Cir.1966), *cert. denied*,385 U.S. 933, 87 S.Ct. 292, 17 L.Ed.2d 213, 385 U.S. 933, 87 S.Ct. 296, 17 L.Ed.2d 213 (1966)); *see also National Indus., Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1549 (11th Cir.1986) (taking liberal view because "rule is a harsh one"). As the Fourth Circuit has noted, "rigid application of this rule is inappropriate ... where such application serves neither of the rule's rationales-protecting the Seventh Amendment right to trial by jury, and ensuring that the opposing party has enough notice of the alleged error to permit an attempt to cure it before resting." *FSLIC v. Reeves*, 816 F.2d 130, 138 (4th Cir.1987); *see also McCarty v. Pheasant Run, Inc.* 826 F.2d 1554, 1556 (7th Cir.1987) (modern rationale of rule is opposing party should have opportunity to rectify deficiencies in evidence presented to jury before it is too late); *Miller v. Rowan Cos.*, 815 F.2d 1021, 1024 n. 4, 1025 (5th Cir.1987) (aims of rule include avoiding trapping plaintiff after submittal to jury because he cannot then cure defects in proof and securing fair trial); *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1429 (9th Cir.1986) (purpose of directed verdict motion is to provide notice of claimed evidentiary insufficiencies and preserve issue of sufficiency of evidence as question of law); *Sharon Steel Corp.*, 781 F.2d at 1549 (purpose of directed verdict requirement is to avoid ambushing court and opposing party after the verdict so that only remedy is completely new trial) (citing *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018, 1025 (5th Cir.1979)); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 831-32 (3d Cir.1983) (same) (citing *Wall v. United States*, 592 F.2d 154 (3d Cir.1979)).

Here, UTC moved for a directed verdict on the blacklisting claim after Anderson had presented his case at trial. At the close of all the evidence, UTC again moved for a directed verdict on the blacklisting claim. In this directed verdict motion, UTC specifically argued there was insufficient ***1504** evidence to support a claim for civil blacklisting under section 44-119. Following the jury verdict, UTC filed a motion for judgment n.o.v. and a motion for new trial on the grounds the evidence was insufficient to support the civil blacklisting claim. Because UTC raised insufficiency of the evidence on the blacklisting claim as specific grounds for both the motion for directed verdict and the motion for judgment n.o.v., we hold UTC has complied with the requirements of Rule 50.

Anderson argues Rule 50 demands that UTC must have stated in the directed verdict motion the evidence is insufficient to prove the element of a criminal blacklisting conviction. Although Rule 50(a) requires a motion for directed verdict to state the "specific grounds," the rule does not define how specific the grounds must be. We are convinced that UTC's directed verdict motion satisfies the rule's requirement. To be sure, a more specific motion may be upheld. *See, e.g., Acosta*, 717 F.2d at 832; *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 179 n. 2 (5th Cir.1983), *cert. denied*,464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984). However, a significant number of the cases interpreting Rule 50's specificity requirement have accepted less specificity in directed verdict motions. *See, e.g., Sharon Steel*, 781 F.2d at 1548-49

From Anderson v United Tel.

Rules on Trial and Post-Trial Motions

UTAH RULES OF CIVIL PROCEDURE[1]

Rule 6. Time

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

Rule 41. Dismissal of actions.

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

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) Motion for directed verdict; when made; effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict **made at the close of all the evidence** is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than **ten days** after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within **ten days** after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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[1]All added emphasis is mine.

(c) Same: conditional rulings on grant of motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than **ten days** after entry of the judgment notwithstanding the verdict.

(d) Same: denial of motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

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

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

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

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

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

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

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

(d) . . .

Rule 59. New trials; amendments of judgment.

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) **Insufficiency of the evidence to justify the verdict** or other decision, or that it is against law.

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than **10 days** after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than **10 days** after entry of the judgment.

Rule 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) the judgment is void; (5) 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 (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within **a reasonable time** and for reasons (1), (2), or (3), not more than **3 months** after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. 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. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 6(B) EXTENDING TIME.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions. **A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)**.

RULE 50. JUDGMENT AS A MATTER OF LAW IN A JURY TRIAL; RELATED MOTION FOR A NEW TRIAL; CONDITIONAL RULING

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than **28 days** after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than **28 days** after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than **28 days** after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

RULE 52. FINDINGS AND CONCLUSIONS BY THE COURT; JUDGMENT ON PARTIAL FINDINGS

(a) Findings and Conclusions.

(1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) For an Interlocutory Injunction. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) For a Motion. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) Effect of a Master's Findings. A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Findings of fact, whether based on oral or other evidence, must not be set aside unless Setting Aside the Findings. clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than **28 days** after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).[2]

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[2]This is the equivalent to Utah Rule of Civil Procedure 41(b) ("The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to

RULE 59. NEW TRIAL; ALTERING OR AMENDING A JUDGMENT

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than **28 days** after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than **28 days** after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than **28 days** after the entry of the judgment.

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

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

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

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render any judgment until the close of all the evidence").

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within **a reasonable time**—and for reasons (1), (2), and (3) no more than **a year** after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) . . .

Tab 6

FAQs

(1) Expert discovery — Timing of disclosures, elections and extensions.

Question: If parties want to stipulate (or move) to extend the 28 days for expert discovery, does the stipulation (or motion) have to be filed "before the close of standard discovery and after reaching the limits of standard discovery," as provided in Rule 26(c)(6) and Rule 29?

Answer: No. There are limits on the discovery of expert witnesses, but stipulations and motions to extend those limits are not bound by the same time frame for extraordinary discovery. See Rule 26(c)(5), which expressly excludes expert disclosure and discovery. The required timing for stipulations and motions for extraordinary fact discovery, found in Rule 26(c)(6) and in Rule 29, does not apply. Stipulations and motions to modify the limits of expert discovery can be filed after the close of fact discovery.

(2) Expert discovery — Rebuttal experts.

Question: How does the designation of rebuttal experts work?

Answer: The disclosure of rebuttal experts and the election of reports by them or depositions of them use the same procedures and time frames as for experts generally. An amendment effective April 1 will expressly state that.

(3) Expert discovery — Payment for expert's report.

Question: Does the requesting party have to pay for the report from the opposing expert witness?

Answer: No. Under Rule 26(a)(4)(B) the party deposing an expert offered by another party pays for the cost of a deposition, and the party offering the expert pays the cost for preparing a report.

(4) Expert discovery — Data relied upon by an expert.

Question: In disclosing an expert, Rule 26(a)(4)(A) says to provide, among other things "a brief summary of the opinions to which the witness is expected to testify [and] all data and other information that will be relied upon by the witness in forming those opinions…." Does this mean the party must produce actual records? Or does it mean just a summary list, such as "my training, my education, my 30 years of experience, the plaintiff's medical records"?

Answer: The disclosure should include a concise, yet thorough, summary of the expert's opinions in the same way that a summary of the expected testimony of fact witnesses is to be disclosed in initial disclosures. The disclosure does not have to include the actual records relied upon in forming those opinions, but it should identify

the records reviewed, the texts consulted and so forth, keeping in mind that such foundation topics should be more fully described in the report or deposition.

Question: Must an expert produce his or her complete file? The Committee Note to Rule 26, under "Expert disclosures and timing," says that the party offering the expert must disclose, among other things, "a complete copy of the expert's file for the case." The note separately identifies the need to disclose "all of the facts and data that the expert has relied upon in forming the expert's opinions." Yet the comparable provision in the rule itself, Rule 26(a)(4)(iii), includes only the latter.

Answer:

(5) Expert discovery — Discovery among aligned parties.

Question: Rule 26(a)(4)(C) says "If no election [requiring a report from or deposition of an opposing party's expert] is made, then no further discovery of the expert shall be permitted." What happens if multiple defendants do not file an election? Does the rule default to a deposition as provided in Rule 26(a)(4)(D)?

Answer: No. Rule 26(a)(4)(D) defaults to a deposition only if "competing" elections are served by multiple defendants; i.e. one defendant asks for a report and the other asks for a deposition. In that case, the rule says that the parties will depose the witness. However, if no defendant files an election, then no further discovery is permitted (no report, no deposition) under Rule 26(a)(4)(C).

> Note: The next Q & A raises another reason to restate some fact discovery principles as part of expert discovery.

Question: Expert depositions are limited to 4 hours under Rule 26(a)(4)(B). Does this mean per side or in total? Rule 26(c)(5) calculates discovery limits for "plaintiffs collectively, defendants collectively, and third-party defendants collectively, but this applies to standard discovery, and not expert discovery.

Answer: It is the committee's intent that the limitation on expert deposition hours apply to each side collectively, as in depositions for fact discovery.

(6) Effect of partial motions to dismiss on deadlines for disclosures and discovery.

Question: If there is a Rule 12 motion to dismiss some claims, but answers are filed on other claims, are the deadlines stayed?

Answer: No. If an answer is filed — absent any order or stipulation otherwise — the time for disclosures and discovery begin to run. If there is no answer, but rather a Rule 12 motion to dismiss all claims for relief, the deadlines are not stayed; they do not begin to run. The Committee Note to Rule 26 states, "the time periods for making Rule 26(a)(1) disclosures, and the presumptive deadlines for completing fact discovery, are

keyed to the filing of an answer. If a defendant files a motion to dismiss or other Rule 12(b) motion in lieu of an answer, these time periods normally would not begin to run until that motion is resolved."

Careful practice requires filing an answer to claims for which no motion to dismiss has been filed, although a stipulation commonly obviates the need for this.

(7) Subpoena for medical examiner's reports.

Question: The former Rule 35(c) provided for the production of prior reports from a medical examiner. That provision has been eliminated. Can a party still get those reports through subpoenas?

Answer: Yes. As the Committee Note to Rule 35 says: "The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. … Medical examiners will be treated as other expert witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition." Discovering the earlier reports is subject to requirements of proportionality and relevance under Rule 26.

(8) Special practice rules — Wrongful death claims.

Question: Rule 26.2 applies to "actions seeking damages arising out of personal physical injuries or physical sickness." Does it apply to actions claiming wrongful death?

Answer: Yes. The Committee used 26 USC § 104(a)(2) as its model and intended that "actions seeking damages arising out of personal physical injuries or physical sickness" be broadly interpreted to include wrongful death claims.

(9) Special practice rules — Effective date.

Question: Rule 26.2 was not part of the group of rules amended on November 1, 2011. Does it apply only to cases filed on or after its effective date, December 22, 2011, to cases filed on or after the effective date of the other disclosure and discovery amendments November 1, 2011, or to all pending cases?

Answer:

All pending cases. The general rule is that amendments to the Rules of Civil Procedure apply to further proceedings in actions pending on the effective date of the amendment (See Rule 1.), and the Supreme Court did not make an exception for Rule 26.2 as it did for the rules amended on November 1, 2011.

(10) Special practice rules — Divorce modification.

(Bob Wilde) **Question:** In a divorce modification seeking to increase child support where assets and net worth are irrelevant, is it necessary to disclose the non-income items in 26.1(c)?

Answer:

(11) Supplementing disclosures

From Todd

Question: How frequently must a party supplement disclosures?

From Frank:

I have a med mal case where specials are under $5,000 however the general damages are substantial, permanent and lifelong. Cases like this have been tried to verdict across the nation as high as 1.2 million but most are in the $300,000 to $600,000 range. I have filed complaint alleging tier 3. Defendant files (after answer) with "Motion for Protective Order & Issuance of an Order that the Claim falls Under Tier 1." I have reread the committee notes of the new rules but really nothing on point regarding tier limits. Do the new rules provide that the Plaintiff can claim what damages they think they are? To hold otherwise would allow the Court to determine damages.

From John Bogart

If I serve an interrogatory on Mr. A and Mr. A's LLC is that one interrogatory or two?

As they are aligned and for practical purposes the same, it could be one. But there are two parties. Does any of that matter? Is it interrogatories directed to a side now, rather to a party? Rule 33 is still by party, but the allocation isn't.

From: John Bogart [mailto:jbogart@telosvg.com]

Sent: Monday, January 21, 2013 3:17 PM

To: Francis M. Wikstrom

Subject: Some Questions re Civil Rules for FAQ

There are a lot of approaches to the Initial and Supplemental Disclosures requirements. Perhaps the Committee would address the following two kinds of reactions:

1) A Plaintiff is required to serve supplemental disclosures identifying documents/witnesses from the disclosures of Defendants that the Plaintiff intends to use in its case in chief.

2) A Defendant in a multiparty case identifies documents in its Initial Disclosure by reference — the documents attached to pleadings of the parties and/or disclosed by any other party.

3) Incorporation of disclosures of other parties by general reference (e.g., 'all witnesses identified by any other party' and 'all documents identified or produced by any other party').

The Committee might consider service by email as all filings will shortly be electronic — or that reliance on the court's notification system is sufficient for service of motions, memoranda, etc.