Agenda
Advisory Committee on Rules of Civil Procedure

March 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	Fran Wikstrom
Effect of disclosure and discovery changes on probate law practice		Mike Jensen
Rule 106. Modification of final domestic relations order. Rule 13. Counterclaim and cross-claim.	Tab 2	Nathan Whittaker
Effect of disclosure and discovery changes on family law practice		Judge Derek Pullan
Expedited procedures for discovery motions. Finality of orders. Central Utah v. King ¶27 Service of motions to renew a judgment.	Tab 3	Tim Shea
Post-trial motions: Rules 50, 52, 59, 60.	Tab 4	Frank Carney
Certificates of service for e-filed documents		Leslie Slaugh
Rule 54. Statement of post judgment interest rate in final judgment.	Tab 5	Judge Todd Shaughnessy
FAQs	Tab 6	Fran Wikstrom

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

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

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

FEBRUARY 27, 2013

PRESENT: Honorable James T. Blanch, Acting Chair, Trystan B. Smith, Terrie T. McIntosh, Francis J. Carney, David W. Scofield, Lori Woffinden, Steve Marsden, Professor Lincoln Davies, W. Cullen Battle

TELEPHONE: Honorable Lyle R. Anderson, Honorable Derek Pullan, Professor David Moore

STAFF: Tim Shea, Sammi Anderson, Diane Abegglen

EXCUSED: Francis M. Wikstrom, Chair, Jonathan O. Hafen, Leslie W. Slaugh

GUESTS: Jonathan Grover, Clint Munns

I. APPROVAL OF MINUTES.

Judge Blanch entertained comments from the committee concerning the January 23, 2013 minutes. The committee unanimously approved the minutes.

II. RULE 58B. Satisfaction of Judgment.

Jonathan Grover and Clint Munns attended the meeting to request that the word "shall", rather than "may", be included in the first sentence of Rule 58B(a), and to explain the need for the proposed revision. Mr. Munns satisfied a judgment entered against him, but then experienced considerable delay before the judgment creditor filed a satisfaction of judgment. This delay ruined Mr. Munns's credit and ultimately damaged his overall farming operation. When Mr. Munns sought to hold the creditor accountable in court, the district court held that 58B(a) was permissive, not mandatory, so that the creditor was not required to file a satisfaction of judgment. Messrs. Grover and Munns believe the creditor should bear the burden of filing a satisfaction of judgment.

The committee expressed sympathy for Mr. Munns's situation and discussed what could be done. Judge Blanch suggested inserting a sentence requiring that a satisfaction of judgment be filed within 30 days if requested by a debtor, and leaving the word "may" in the first sentence. Mr. Carney confirmed that there is a form "Satisfaction of Judgment" available to filers. Mr. Scofield pointed out that there are many different issues codified in many different laws and many different avenues to address different situations. Mr. Scofield suggested hearing from different groups

before any proposed rule change. The committee discussed the issues surrounding judgments and their satisfaction in full.

A motion was made to include a sentence that "[a]t the request of the judgment debtor, an owner or owner's attorney shall file a satisfaction of judgment within 28 days, if the judgment has been paid in full." Seconded and approved by the committee. The proposed revision was sent for comment.

III. RULE 64D. Writ of Garnishment.

Mr. Shea led a discussion regarding a proposed change to 64D(l) regarding writs of continuing garnishment. Legislation to make the proposed change is pending and Mr. Shea opined that the change is sensible. A writ of continuing garnishment will now be good for 12 months (instead of 4), unless a second or subsequent writ of continuing garnishment is in place. The idea is to reduce the creditor's costs in collecting on a judgment, which would be passed on to the debtors and consumers. The committee unanimously approved the proposed change.

IV. SENATE JOINT RESOLUTION 14.

Messrs. Shea and Battle led a discussion regarding SJR 14. The joint resolution would impose a requirement for cities and municipalities, which are presently exempt from the bonding requirement, to post a bond or other security when appealing a judgment for any amounts in excess of $5,000,000. Mr. Battle explained the rationale for the present city/municipality exemption. Discussion as to whether the committee would formally express its view on SJR 14 to the legislature. A motion to do so failed.

V. RULE 7.

Mr. Shea led the discussion regarding two proposed revisions to Rule 7. The first revision is to eliminate the necessity to file a separate motion. The committee discussed whether this should be optional or mandatory, tracking the language of the local federal rule. The consensus of the committee was to bring the rule into line with the federal local rule. Mr. Shea agreed to work on some language for the next meeting.

The second proposed revision relates to the expedited procedure for discovery motions, which currently resides in the Code of Judicial Administration. The proposal is to move it into the Rules of Civil Procedure. Mr. Marsden recommended shortening the length of the statement of issues and the time period for responding. Mr. Smith spoke about his experience with the procedure in his practice. His impression is that it is working quite well. No motion to shorten the response period was made. The committee discussed whether to impose a time limit as to when a ruling must or should be issued. This discussion was tabled, by motion, until more of the committee's judges were present to discuss such a change's impact.

VI. FAQ's.

FAQ 1 – Expert discovery – timing of disclosures, elections and extensions. This FAQ and Answer was approved for publication as written.

FAQ 2 – This FAQ and Answer was deleted as it has been negated by a recent amendment explaining rebuttal experts.

FAQ 3 – The committee decided that the answer is clear enough from the plain text of the rule, such that there is no need for a FAQ. The FAQ and Answer are deleted from the FAQ list.

FAQ 4 – Committee decided to approve the FAQ related to what constitutes a "brief summary" of the opinions. Motion to adopt as written, seconded and approved by the committee for publication.

VII. ADJOURNMENT.

The meeting adjourned at 6:04 pm. The next meeting will be held on March 27, 2013 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2

DAY SHELL & LILJENQUIST, L.C.

ATTORNEYS AT LAW

David H. Day*
Phillip B. Shell
Michael E. Day
Nathan Whittaker
J.Ed Christiansen

*Admitted in Wyoming

45 EAST VINE STREET
MURRAY, UTAH 84107
TELEPHONE: 801-262-6800

Of Counsel:
Robert C. Liljenquist

Fax: 801-262-6758
www.dslaw.com

Sender's e-mail:
nathan@dslaw.com

March 15, 2013

Francis M. Wikstrom, Chair
Advisory Committee—Rules of Civil Procedure
450 S. State St.
Salt Lake City, UT 84114
tims@utcourts.gov

Re: Motions to Modify Child Support under Rule 106(a)

Dear Mr. Wikstrom:

Pursuant to Rule 11-102(1) of the Supreme Court Rules of Professional Practice, I hereby petition the Committee to clarify the proper procedure for modifying an order of child support. There is currently a conflict between the Rules of Civil Procedure and the Utah Code as to whether a party seeking to modify an order of child support must file a petition, or whether he or she may file a motion. This conflict has led to confusion regarding the proper form of service and procedure to modify an order of child support, and it is an issue that it would be proper for the Committee to address.

I. SECTION 210(8) OF THE CHILD SUPPORT ACT CONFLICTS WITH RULE 106(A).

Rule 106(a) of the Utah Rules of Civil Procedure provides as follows:

> Except as provided in Utah Code Section 30-3-37, proceedings to modify a divorce decree or other final domestic relations order shall be commenced by filing a petition to modify.[1]

However, Section 210(8) of the Utah Child Support Act provides that if "a child support order has not been issued or modified within the previous three years, a parent, legal guardian, or the office may ***move*** the court to adjust the amount of a child support order."[2]

1. Utah Code Ann. § 30-3-37(3) provides that "The court shall, upon motion of any party or upon the court's own motion, schedule a hearing with notice to review the notice of relocation and parent-time schedule . . . ."

2. Utah Code Ann. § 78B-12-210(8)(a) (emphasis added).

II. IT IS UNCLEAR WHICH PROVISION TAKES PRECEDENCE.

Ordinarily, under the Utah Constitution, it would be without question that Section 210(8) would be void to the extent that it purports to dictate a form for presenting a claim for relief to the courts.[3] However, the Legislature has the power to "amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses . . . ."[4] While S.B. 182, the bill that amended Section 210(8) to its current version,[5] passed both houses of the legislature by the requisite two-thirds majority,[6] it is unclear whether passage of this bill had the effect of amending Rule 106(a).

It is clear that the Legislature intended to allow a modification of child support brought under Section 210(8) to be brought by motion. Before S.B. 182 was passed, the statute that is now Section 210(8) read: "If a child support order has not been issued or modified within the previous three years, a parent, legal guardian, or the office may ***petition*** the court to adjust the amount of a child support order."[7] S.B. 182 explicitly struck out the word "petition" and replaced it with "move."[8] While there is little in the way of floor or committee debate, the stated purpose behind S.B. 182 is to bring "the Office of Recovery Services into compliance with the federal Deficit Reduction Act of 2006 regarding the collection and modification of child support awards."[9] Section 1 of S.B. 182 requires the Office of Recovery Services to review child support orders that have not been modified within the previous three years, and "if appropriate, move the tribunal to adjust the amount of the order . . . ."[10]

However, it is unclear whether intent to change a judicial procedure plus a two-thirds majority vote of both houses is sufficient to amend the Rules of Civil Procedure. It is common practice for the Legislature to amend the procedure rules by a joint resolution that specifically indicates what rule is to be changed and what changes are to be made to the existing language of the rule.[11] In contrast to the normal procedure of making amendments,

---

3. *See* Utah Const. art. VIII, § 4 (granting to the Utah Supreme Court the authority to "adopt rules of procedure.").

4. *Id.*

5. *See* Child Support Modifications for TANF Recipients, S.B. 182, 56th Gen. Sess., 2007 Utah Laws 1176, *available at* http://le.utah.gov/~2007/bills/sbillenr/sb0182.htm.

6. *See* S.B. 182 Bill Status History, *available at* http://le.utah.gov/~2007/status/sbillsta/sb0182.htm.

7. Utah Code Ann. § 78-45-7.2(8)(a) (2003 version) (emphasis added).

8. S.B. 182, *supra* note 5.

9. *Id.*

10. *Id.*

11. *See, e.g.*, Joint Resolution Amending Rules of Civil Procedure on Peer Review, S.J.R. 15, 59th Gen. Sess., 2012 Utah Laws __, *available at* http://le.utah.gov/~2012/bills/sbillenr/sjr015.htm;

nowhere in S.B. 182 did the Legislature invoke its Article VIII, Section 4 power, reference Rule 106(a) or purport to amend it, or indicate that the bill was intended to take precedence over contrary provisions of the Utah Rules of Civil Procedure. While the Utah Supreme Court does not appear to have opined on the correct form of a legislative amendment of judicial procedure rules, it seems unlikely that the Court would countenance implicit amendment of procedure rules, as it would create an unworkable scheme.[12]

III. THE CONFLICT CREATES PROCEDURAL ISSUES THAT LEAD TO DUE PROCESS CONCERNS THAT THE COMMITTEE IS IN THE BEST POSITION TO ADDRESS.

Whether or not initiating a child support modification by motion is valid, the Office of Recovery Services uses the procedure in adjusting child support awards in the district courts. Attached to this letter is an example motion and memorandum in support from ORS with identifying information redacted. It appears that ORS's practice is to serve these two documents upon the parties pursuant to Rule 4. As you can see in the attached exhibit, there is no summons, but rather a section of the motion entitled "Notice to Parties" that indicates that if a party objects to the motion, he or she should "file a memorandum in opposition within 10 days after service of this motion, in accordance with Rule 7 of the Utah Rules of Civil Procedure."

While the failure to serve a summons and failure to give notice of the correct time to file a response[13] raise due process concerns,[14] this problem is unlikely to go away on its own or

---

Resolution Amending Rules of Civil Procedure – Judgment, H.J.R. 16, 55th Gen. Sess., 2004 Utah Laws 1725, *available at* http://le.utah.gov/~2004/bills/hbillenr/hjr016.htm.

12. Holding that a statute that does not purport to amend the judicial procedure rules has the effect of amending those rules would not inform legislators as to the effect of the legislation or the threshold required for passage. The practice of implicit amendment would also create contingent-effect legislation—if it passes by majority vote but not by a two-thirds majority, the substantive provisions of the legislation would take effect, but the procedural provisions would not. However, the procedural provisions would still be in the statute, and it would require researching the legislative history to determine whether the two-thirds threshold was reached. Finally, the practice of implicit amendment would not give the Court and its advisory committees any clear notice of amendments, and would require the Court to disclaim statutory amendments in either the text of rules or the advisory committee notes (which, given the Court's experience in attempting to disclaim the Privileged Communications Statute, *see* Utah R. Evid. 506, advisory committee note; *Sorensen v. Barbuto*, 2008 UT 8, ¶ 8, 177 P.3d 614; *Burns v. Boyden*, 2006 UT 14, ¶ 12 & n.2, 133 P.3d 370; *Debry v. Goates*, 2000 UT App 58, ¶ 24 n.2, 999 P.2d 582, seems like an uphill battle).

13. The correct date for response under the existing rules of civil procedure would be five business days before the date of the hearing for those districts that have domestic relations commissioners, *see* Utah R. Civ. P. 101(c). Arguably, in those districts without court commissioners, the time to respond should be twenty days after service, *see* Utah R. Civ. P. 106(a).

14. *See Jackson Constr. Co. v. Marrs*, 2004 UT ¶ 10 (holding that proper issuance and service of a summons is a fundamental requirement of due process); *Stichting Mayflower Mountain Fonds v.*

be resolved by normal judicial processes. Because of their responsibility to adjust child support for TANF recipients,[15] ORS is the largest filer of child support modifications. Without specific guidance from a rule or judicial decision, it is unlikely that ORS will change its established practice. Moreover, appellate courts are unlikely to pass on the question, as it is unlikely that these errors would be so consequential as to be reversible.[16] This is the type of situation that the Committee is ideally suited to address.[17]

IV. AFTER CONSULTATION WITH THE OFFICE OF RECOVERY SERVICES AND OTHER INTERESTED PARTIES, THE COMMITTEE SHOULD CRAFT A RESPONSE TO SECTION 210(8).

A solution to the problem posed by Section 210(8) could be crafted in a number of ways, depending on the Committee's judgment on the necessity of allowing a party to modify child support by motion rather than petition. As I do not usually practice family law, I will not venture an opinion on that subject, but I am sure that ORS, the Family Law Section of the Bar and the Board of District Court Judges would all have opinions on this issue. If the Committee decides that modification of child support under Section 210(8) should be initiated by motion, it could simply amend Rule 106(a) as follows:

> Except as provided in Utah Code Sections 30-3-37 and 78B-12-210(8), proceedings to modify a divorce decree or other final domestic relations order shall be commenced by filing a petition to modify.

If the Committee decides that modification of child support should proceed only by petition, it could simply disclaim Section 210(8), either by advisory committee note as was done with respect to Rule 506 of the Utah Rules of Evidence, or by adding the phrase "Notwithstanding any statutory provisions to the contrary" to Rule 106(a). In addition, there may be other procedures that interested parties may suggest, such as whether the timeframe for response in Rule 106(a) is appropriate, whether a modification could be entered by default without a hearing, and what evidence would be required to be submitted with the motion in order to grant a motion by default.

Jordanelle Special Service Dist., 2001 UT App 257, ¶¶ 13-14, 47 P.3d 86 (holding that defects in a summons render service of process "fatally defective").

15. *See* Utah Code Ann. § 62A-11-306.2.

16. *See Meyers v. Interwest Corp.* 632 P.2d 879, 881 (Utah 1981) (holding that while a summons that stated that an out-of-state defendant had twenty days to answer the complaint was defective, "the defect was inconsequential" as it was not possible that the defendant "could have been harmed by reliance on that statement.").

17. *See Anderson v. Taylor*, 2006 UT 79, ¶ 13, 149 P.3d 352 (noting that the advisory committees are best equipped to proposing comprehensive solutions to procedural due process problems); *Id.* at ¶ 23 (recognizing that the particulars of rule-making require information gathering and "study and examination," which the advisory committee is in the best position to do).

———— ◆ ————

Thank you for your time and attention to this matter, and feel free to contact me if you have any questions regarding the issues raised by this petition. I look forward to hearing from you in due course.

Sincerely,

Nathan Whittaker
DAY SHELL & LILJENQUIST, L.C.

TIME 2040 DATE 11-30-12
SERVED [redacted]
RELATION
ADDRESS
SERVER
TD'S LEGAL PROCESS LLC 964-9393

[redacted]
Assistant Attorney General
Mark Shurtleff #4666
Attorney General
Attorneys for State of Utah
515 East 100 South
P. O. Box 45088
Salt Lake City, UT 84145-0088
Telephone: (801)536-8366
Email: [redacted]@utah.gov
Fax: (801)536-8315

FILED DISTRICT COURT
Third Judicial District
DEC 07 2012
SALT LAKE COUNTY
By _____
Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

[redacted]

Petitioner,

vs.

[redacted]

Respondent,

STATE OF UTAH, Office of Recovery Services,

Intervenor.

MOTION TO ADJUST CHILD SUPPORT AMOUNT

Civil No. [redacted]

Judge [redacted]

Commissioner [redacted]

Pursuant to Utah Code Ann. §§ 62A-11-106(1) and 78B-12-210(8), the State of

Utah Office of Recovery Services moves this Court to adjust the base child support amount in the Stipulated Order ("existing order") entered on or about June 9, 2009. The base child support amount should conform to the Uniform Child Support Guidelines based upon evidence of income and/or appropriate credits produced at the hearing. The basis for the motion is set forth in the memorandum in support.

DATED this 27 day of November, 2012.

[redacted]
Assistant Attorney General
Attorney for State of Utah

ORS Case No. [redacted]

NOTICE TO PARTIES

You are hereby notified that if you object to the adjustment of child support as requested in this motion, you should file a memorandum in opposition within 10 days after service of this motion, in accordance with Rule 7 of the Utah Rules of Civil Procedure and serve copies of the memorandum upon each of the parties in accordance with Rule 5 and/or Rule 101 of the Utah Rules of Civil Procedure.

[redacted]
Assistant Attorney General
Mark Shurtleff #4666
Attorney General
Attorneys for State of Utah
515 East 100 South
P. O. Box 45088
Salt Lake City, UT 84145-0088
Telephone: (801)536-8366
Email: [redacted]@utah.gov
Fax: (801)536-8315

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

[redacted] Petitioner, vs. [redacted] Respondent, STATE OF UTAH, Office of Recovery Services, Intervenor.	**MEMORANDUM IN SUPPORT OF MOTION TO ADJUST CHILD SUPPORT AMOUNT** Civil No. [redacted] Judge [redacted] Commissioner [redacted]

The State of Utah Office of Recovery Services ("Office") submits the following

memorandum in support of its Motion to Adjust Child Support Amount.

1. The term "child" refers to the following child or children of [redacted] ("father") and [redacted] ("mother"):

Name of child	Date of birth
[redacted]	[redacted]

2. The Office is a real party in interest because it is providing services as part of the federal child support program.

3. The existing child support order is more than three years old, a difference of 10% or more exists between the current order and the amount required under the guidelines, the difference is not of a temporary nature, and the order adjusting the payor's ordered support amount will not deviate from the guidelines.

4. Upon information and belief, the father's gross monthly income is [redacted] A supporting affidavit is attached as Exhibit A.

5. Upon information and belief, the mother's gross monthly income is [redacted] A supporting affidavit is attached as Exhibit A.

6. The parent(s) without physical custody should be required to pay the amount of support provided in the guidelines based upon proof of income and/or appropriate credits produced at the hearing. If no further proof of income and/or

[redacted]

appropriate credits is produced then beginning January 2013, the father's base child support amount should be adjusted to at least [redacted] per month and the mother's base child support amount should be adjusted to at least [redacted] per month. A Child Support Obligation Worksheet is attached as Exhibit B.

7. The final child support amounts may be different than the amount requested above, depending upon proof of income and/or appropriate credits produced at the hearing. If a parent fails to appear at the hearing, child support may be adjusted based upon the best evidence available at the time of hearing, without that party's input.

8. Except as provided herein, the existing order should remain unchanged.

Based upon the foregoing, the Office respectfully requests the Motion to Adjust Child Support Amount be granted.

DATED this 27th day of November, 2012.

[redacted]
Assistant Attorney General
Attorney for State of Utah

ORS Case No. [redacted]

[redacted]

DAY SHELL & LILJENQUIST, L.C.

ATTORNEYS AT LAW

David H. Day*
Phillip B. Shell
Michael E. Day
Nathan Whittaker
Debbie A. Snow
Dustin M. Parmley

*Admitted in Wyoming

45 EAST VINE STREET
MURRAY, UTAH 84107
TELEPHONE: 801-262-6800

Of Counsel:
Robert C. Liljenquist

Fax: 801-262-6758
www.dslaw.com

Sender's e-mail:
nathan@dslaw.com

June 25, 2012

Fran Wikstrom, Chair
SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF CIVIL PROCEDURE
% Timothy M. Shea
450 S. State St.
Salt Lake City, UT 84114
tims@utcourts.gov

Re: Proposed Amendment to Rule 13

To Whom It May Concern:

I am writing this letter to request that the Committee consider deleting Rule 13(e) of the Utah Rules of Civil Procedure, which currently states:

> (e) Omitted counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

Rule 13(e) should be deleted as it is redundant of Rule 15 and adds unnecessary confusion. While Rule 15(a) allows an answer to be amended to assert a counterclaim without court permission if less than 20 days has elapsed since the answer was served, Rule 13(e) seems to suggest that an omitted counterclaim always needs the permission of the court. I have had a personal experience with a district court judge ruling that my counterclaim, asserted by means of submitting an amended answer within 20 days of my original answer, was not validly filed.

The Federal Rules Committee has already found that this language is unnecessary. Rule 13(e) was based on Rule 13(f) of the Federal Rules of Civil Procedure, which contained the same language. This subsection was deleted from the federal rules in 2009, as it was "largely redundant of Rule 15." Notes of 2009 Amendments to Federal Rules of Civil Procedure (go to *http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/CompletedRules.aspx* and select *August 2007—December 2009 Amendments* from the menu).

While this is a minor problem, I don't imagine it will require a lot of time to fix on the part of the Committee. Thank you in advance for your consideration, and please feel free to contact me if you have any questions about this matter.

Sincerely,

Nathan Whittaker
DAY SHELL & LILJENQUIST, L.C.

Tab 3

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 and memoranda.** 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.**~~ (b)(2) **No separate supporting memorandum.** All motions, except uncontested or ex parte motions, shall ~~be accompanied by~~ include a supporting memorandum. The motion and supporting memorandum must be contained in one document.

(b)(3) **Filing times.** 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)~~ (b)(4) **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)~~ (b)(5) **Content.**

~~(c)(3)(A)~~ (b)(5)(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)~~ (b)(5)(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)~~ (b)(5)(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)~~ (b)(5)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(c) **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.

(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~~ 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) **Length and content.** 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) **Response length and content.** 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)(2);

(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) **Decision.** 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 4

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.

---

[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]

---

[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;

---

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 5

Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **Demand for judgment.**

(c)(1) **Generally.** Except as to a party against whom a judgment is entered by default, and except as provided in Rule 8(a), every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(c)(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) **Costs.**

(d)(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(d)(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after

service of the memorandum of costs, file a motion to have the bill of costs taxed by the court.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

Tab 6

FAQs

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

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:

(2) 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.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) 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:

(8) 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.