

Agenda

Advisory Committee on Rules of Civil Procedure

May 22, 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

Recognition of service by Fran Wikstrom		Chief Justice Matthew Durrant
Approval of minutes	Tab 1	Fran Wikstrom
Rule 7. Pleadings allowed; motions, memoranda, hearings, orders. • Combine memorandum and motion. Lines 8-125 and lines 198-204. • Expedited procedures for discovery motions. Lines 160-197. • Finality of orders. - o Lines 139-159 and - o Rule 58A. Entry of judgment; abstract of judgment.	Tab 2	Tim Shea
Post-trial motions: Rules 6, 50, 52, 59, 60.	Tab 3	Frank Carney
FAQs	Tab 4	Fran Wikstrom
September meeting: Date; How should we do business?		Jonathan Hafen

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

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

September 25, 2013
October 23, 2013
November 20, 2013
January 22, 2014
February 26, 2014
March 26, 2014

April 23, 2014
May 28, 2014
September 24, 2014
October 22, 2014
November 19, 2014

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

APRIL 24, 2013

PRESENT: Francis M. Wikstrom, Chair, Trystan B. Smith, Terrie T. McIntosh, Francis J. Carney, Honorable John L. Baxter, Honorable Kate Toomey, Professor David Moore, Honorable Lyle R. Anderson, W. Cullen Battle, Steven Marsden, Lori Woffinden, W. Leslie Slauch, Honorable Derek Pullan, Honorable Todd M. Shaughnessy, Honorable James T. Blanch

TELEPHONE: Jonathan O. Hafen

STAFF: Tim Shea, Sammi Anderson, Diane Abegglen

EXCUSED: Professor Lincoln Davies, Barbara L. Townsend

GUESTS: Nathan Whittaker, Michael Jensen

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the March 27, 2013 minutes. The committee unanimously approved the minutes.

II. NEW APPOINTMENTS TO AND WITHIN COMMITTEE.

Mr. Wikstrom announced that Jon Hafen has been appointed by the Supreme Court to serve as chair of the committee when Mr. Wikstrom's term expires. Mr. Wikstrom also notified the committee that Judge Shelby has resigned and the Supreme Court has appointed Magistrate Judge Eva Furse to serve in his place. The committee expressed its pleasure regarding both appointments.

III. PROPOSED AMENDMENT TO RULE 13.

Mr. Nathan Whittaker joined the committee to revisit the prior month's discussion regarding a potential revision to Rule 13(e). Mr. Whittaker explained that Rule 13(e), which requires good cause to amend a pleading, could be inconsistent with Rule 15(a), which allows amendment any time before a responsive pleading is served. The committee discussed several possibilities to resolve the issue, including deletion of Rule 13(e) or adding language referring back to Rule 15(a). Mr. Slauch noted that 13(d) and 13(e) should be treated consistently. The committee asked Mr. Shea to prepare some draft language for consideration at the next meeting.

IV. EFFECT OF DISCOVERY RULE CHANGES ON PROBATE PRACTICE.

Mr. Michael Jensen joined the committee to revisit the prior month's discussion regarding the application of the discovery rule changes to probate practice. Mr. Jensen suggested that the committee exempt probate matters from the rules; specifically that probate cases warrant an exception to the initial disclosures because there are no damages and the information found in the disclosures is already known from the petition initiating the probate matter. Mr. Jensen suggests that probate matters be exempted from initial disclosures, but not from the remainder of the discovery rules. Various committee members expressed the sentiment that disclosures are intended to require production of information early and thereby limit the need for discovery. Judge Toomey and Mr. Slaugh expressed interest in having a specialty rule for probate. Mr. Wikstrom suggested that Mr. Jensen return with a proposal endorsed by the Estate Planning section of the Bar. Mr. Wikstrom indicated his uneasiness with a temporary exemption from the rules, emphasizing the need for a comprehensive solution. Mr. Battle moved to table the discussion until more estate practitioners can join the dialogue. Mr. Slaugh seconded Mr. Battle's motion. Judge Pullan expressed a preference for a specialty rule that is unique to different kinds of litigation, whatever the type, disagreed with the concept of exemption, encouraging Mr. Jensen to work with his colleagues to define who has what responsibility in an independent, specialty rule, as other sections have done. Judge Shaughnessy echoed that concern and encouraged the section to propose an actual rule, not just concepts. The committee agreed to table the discussion to allow estate practitioners to develop and propose a specialty rule.

V. POST-TRIAL MOTIONS.

Mr. Carney led a discussion regarding potential revisions to the rules governing post-trial motions. First, Mr. Carney suggested updating the terms "directed verdict" to "judgment as a matter of law" and "judgment notwithstanding the verdict (JNOV)" to "renewed judgment as a matter of law." The committee approved these proposals.

Second, with respect to timing, Mr. Carney noted that the federal deadlines governing post-trial motions key off the act of filing. The Utah rules, however, key off of various different trigger verbs, including "move," "serve" and "made." Mr. Carney suggested that all verbs be changed to "file," thereby triggering motion deadlines from the act of filing, which is objectively verifiable and can be independently known.

Third, the Utah rule allows only 10 days to file a post-trial motion. The federal rules now allow 28 days. The committee agreed that the rules should be amended to allow 28 days.

Fourth, the committee discussed whether the Utah rule should require that a judgment as a matter of law be renewed at the close of all evidence. Mr. Carney explained that this is a procedural trap for the unwary and the federal rules have eliminated this requirement. The committee agreed to eliminate the requirement as well.

Last, Mr. Carney noted that the Utah rules are much more difficult to read than the federal post-trial motion rules. The committee discussed whether to undertake a rewrite intended to simplify the language, but not to convey any substantive changes beyond those discussed above. The committee ultimately agreed to undertake a linguistic rewrite patterned upon the language of the federal post-trial motion rules. Mr. Shea was asked to propose language for all the changes to the rules governing post-trial motions as reflected above.

VI. DISCUSSION OF POTENTIAL REVISIONS TO RULE 6.

In follow up to the discussion of post-trial motions, the committee discussed whether all timing requirements should be changed to a uniform 7, 14 or 21 days. The 3 day mailing period was also discussed. The federal rules allow 3 days for mailing even if a pleading is e-filed. As a general matter, the committee sees no reason to allow 3 extra days for mailing if the pleading or document is e-filed. With regard to documents that are not filed, such as discovery requests, the committee discussed revising the rule to require service by e-mail. The committee ultimately determined to table proposed revisions to Rule 6 to be discussed in connection with other rule changes.

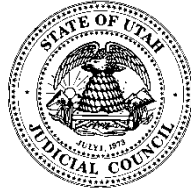
VII. POTENTIAL AMENDMENTS TO RULE 7.

The committee previously approved the conceptual change to merge the motion and supporting memorandum into one document. Mr. Shea's efforts to effect this merger prompted further discussion. Mr. Slauch noted that the federal rule allows a background section where a party can tell their story, but is not required to include every single fact in the statement of undisputed facts. There was general approval for this notion. Judge Shaughnessy noted the usefulness of a rule requiring a "Motion for X", so that judges can link related pleadings. The committee discussed whether this could be resolved through assigning a docket number to each filing or by requiring particular motions, memos, etc., to be linked when filing. Mr. Battle proposed revisions regarding the prohibition on filing a separate memorandum and regarding the prohibition on filing proposed orders with motions. Mr. Battle suggested that except in uncontested or ex parte matters, proposed orders not be filed before the court's decision. However, this does not taken into consideration the expedited discovery process, which deliberately requires competing proposed orders from the parties. Mr. Wikstrom noted the possibility that the committee may more effectively solve these matters through the e-filing process than through rule changes. Ultimately, Mr. Shea was asked to re-work the proposed Rule 7 revisions in light of the committee's discussion.

VIII. ADJOURNMENT.

The meeting adjourned at 6:03 pm. The next meeting will be held on May 22, 2013 at 4:00 p.m. at the Administrative Office of the Courts.

Tab 2



Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

MEMORANDUM

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

To: Civil Procedures Committee
From: Tim Shea *T. Shea*
Date: May 16, 2013
Re: Finality under Rule 7(f)(2)

[Central Utah Water Conservancy District v. King](#), 2013 UT 13 is the latest of three Utah Supreme Court opinions that use URCP 7(f)(2) to determine whether the order on which an appeal is based is an appealable order. The others, cited in the King opinion, are:

- [Giusti v. Sterling Wentworth Corp.](#), 2009 UT 2; and
- [Code v. Utah Dept of Health](#), 2007 UT 43.

The King opinion states: "Rule 7(f)(2) of the Utah Rules of Civil Procedure specifies the point at which a district court's decision becomes final, triggering the appeal period." ¶9. The court goes on to say:

The plain language of rule 7(f)(2) makes clear that the rule is a mandatory prerequisite to appellate jurisdiction. Under rule 7(f)(2), the default provision is that the "prevailing party shall ... serve upon the other parties a proposed order in conformity with the court's decision." This default provision applies "unless" the district court approves the proposed order submitted with a party's initial memorandum or when the district court explicitly directs that no additional order is required. Rule 7(f)(2) therefore provides district courts with the flexibility to finalize their decisions depending on the cases before them. ¶10.

Finally, the court directs:

To address this potential for undue delay when the parties fail to comply with rule 7(f)(2), we hereby request that our advisory committee review rule 7(f)(2) and address the possibility of endlessly hanging appeals. For example, the Federal Rules of Civil Procedure contain provisions designed to address this issue. See FED.R.APP.P. 4(a)(7); FED.R.CIV.P. 58(c). These provisions set a maximum time of 150 days for filing an appeal in cases where the district court's judgment has not otherwise been finalized. ¶27

With three opinions in six years, the law is firmly set that, under Rule 7(f)(2), the record must show that either:

- (1) the court approves an order submitted with an initial memorandum;

The mission of the Utah judiciary is to provide the people an open, fair, efficient, and independent system for the advancement of justice under the law.

(2) the court enters an order prepared by counsel and served on opposing counsel pursuant to rule 7(f)(2); or

(3) the court explicitly directs that no additional order is necessary. ¶15.

Regarding the first scenario, the committee is considering an amendment to prohibit a proposed order with a party's motion or response. Judges report that they are seldom signed. The second scenario includes orders prepared by the non-prevailing party, even if the judge does not direct the non-prevailing party to prepare an order. Both Code and Giusti involved final, appealable orders prepared by the non-prevailing party.

The third scenario is not expressly stated in the rule¹ but has been repeatedly stated by the court. The requirement that an order include a representation that no additional order is necessary is effectively limited to orders, however they may be titled, prepared by the judge. In King, the judge prepared the order.

My understanding of Rule 7(f)(2) is that it was not intended to be the litmus test for appeals that it has become. Rule 54, not Rule 7, governs finality and whether a particular order can be appealed. Rule 7(f)(2) provides flexibility for the judge to say who will prepare the order ("Non-prevailing party will prepare the order because the prevailing party does not have a lawyer; I'll do this one myself; the clerk's minute entry will be good enough; the AOC has prepared this handy-dandy form that I can use."), but preserving a default in the event that the judge is silent. The court recognizes this purpose of flexibility in its opinion, but the rule apparently carries an unintended consequence as well. I believe that it was not the committee's intent to prevent an order from being an appealable order merely by virtue of it being prepared by the judge.

If the committee deletes the opportunity for the parties to submit proposed orders with their memorandums, one of the three scenarios that now satisfies the Rule 7(f)(2) finality test will go away. (It was seldom used in any event.) What will be left is:

- one of the parties prepares the order; or
- the court prepares the order and includes language to the effect that "no additional order is necessary."

The court did not invite the committee to codify the "magic words" nor to amend Rule 7 to eliminate the basis for them, but both options have been raised. Before proceeding the committee should discuss whether either direction is preferable to simply leaving the rule to its evolution through caselaw.

If the committee wants to recommend codifying a phrase to show that the judge is satisfied with the document s/he has prepared, I recommend using the phrase quoted by the court "no additional order is necessary." This conveys the message "this is my

¹ The language of Rule 7(f)(2) is different: "... unless otherwise directed by the court, the prevailing party shall ... serve upon the other parties a proposed order in conformity with the court's decision."

final word on the matter” without influencing the question of whether the order is appealable under Rule 54.

Given the consistency of the court’s decisions, I recommend not trying to remove the basis on which this finality principle is established. The court’s focus on special words to indicate finality is based on the phrase: “... unless otherwise directed by the court” Removing that phrase coupled with a committee note explaining the change, might be enough to change the course of the law, but it would also remove the bright-line test that the court obviously favors.

The court does invite the committee to propose an amendment that would set a maximum time for appealing a case in which a judge-prepared order has not been finalized by use of the phrase “no additional order is necessary.” The federal rule² cited in the King decision regulates when a judgment is considered “entered.” URCP 58A(c) already answers that question:

A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when it is signed and filed as provided in paragraphs (a) or (b). The clerk shall immediately record the judgment in the register of actions and the register of judgments.

The invitation seems to be to amend the date on which the order is considered “entered.” This would be done in Rule 58A(c), not Rule 7(f)(2). Normally, I would not recommend amending the effective date of “entering” an order, because that concept has been fixed for some time. But there is no way to translate the passage of time into judicial intent that no additional order is necessary, and leaving “entry” as is and designating the judge-prepared order as “final” 90 days after signature does not dovetail with URAP 4(a): “[I]f an appeal is permitted as a matter of right ..., the notice of appeal ... shall be filed ... within 30 days after the date of entry of the judgment or order appealed from.”

I do not know what effect amending Rule 58A(c), dealing with judgments, will have on orders under Rule 7(f)(2) that are not judgments.

² FRCP 58(c): For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

(A) it is set out in a separate document; or

(B) 150 days have run from the entry in the civil docket.

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~~ filed. No other pleading shall be ~~allowed~~ filed, 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~~ filed 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~~ filed 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~~ Name and content of motions.

~~(c)(1) Memoranda required, exceptions, filing times.~~ All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. The moving party shall title the motion "Motion to [short phrase describing the relief sought]. The motion shall not exceed ## pages. The motion shall contain under appropriate headings and in the following order:

(c)(1) A concise summary statement of the relief sought and the grounds for the relief sought.

(c)(2) A concise summary statement of the facts as alleged by the party necessary for a decision on the issue.

(c)(3) 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.

31 such as affidavits or discovery materials. Each fact set forth in the moving party's
32 memorandum is deemed admitted for the purpose of summary judgment unless
33 controverted by the responding party.

34 (c)(4) A motion for summary judgment may contain a concise statement of facts
35 and allegations for the limited purpose of providing background and context for the
36 case, dispute, and motion. The statement of facts or allegations may cite supporting
37 evidence.

38 (c)(5) An argument citing authority for the relief requested.

39 (c)(6) Relevant portions of documents cited in the motion, such as affidavits or
40 discovery materials or opinions, statutes or rules.

41 (d) Name and content of memorandum opposing the motion. Within ~~ten~~ 14 days
42 after service-filing of the motion ~~and supporting memorandum~~, a party opposing the
43 motion shall file a memorandum in opposition. The party opposing the motion shall title
44 the memorandum "Memorandum opposing the motion to [short phrase describing the
45 relief sought]." The memorandum shall not exceed ~~##~~ ## pages. The opposing
46 memorandum shall contain under appropriate headings and in the following order:

47 (d)(1) A succinct summary statement of the grounds for opposing the relief
48 sought.

49 (d)(2) A succinct summary statement of the facts as alleged by the party
50 necessary for a decision on the issue.

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

(d)(4) A memorandum opposing a motion for summary judgment may contain a concise statement of facts and allegations for the limited purpose of providing background and context for the case, dispute, and motion. The statement of facts or allegations may cite supporting evidence.

(d)(5) Objections to evidence included in the motion.

(d)(6) An argument citing authority opposing the relief requested.

(d)(7) Relevant portions of documents cited in the memorandum, such as affidavits or discovery materials or opinions, statutes or rules.

(e) Name and content of reply memorandum. Within five-7 days after service-filing of the memorandum ~~in opposition~~ opposing the motion, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum ~~in opposition~~ opposing the motion. The reply memorandum shall be titled "Memorandum replying to the memorandum opposing the motion to [short phrase describing the relief sought]." The memorandum shall not exceed ### pages. The reply memorandum shall contain under appropriate headings and in the following order:

(e)(1) Reply to objections made in the memorandum opposing the motion.

(e)(2) Objections to evidence included in the memorandum opposing the motion.

(e)(3) A succinct summary statement of the matter raised in the memorandum opposing the motion.

(e)(4) An argument citing authority rebutting the matter raised in the memorandum opposing the motion.

(e)(5) Relevant portions of documents cited in the memorandum, such as affidavits or discovery materials or opinions, statutes or rules.

If the reply memorandum includes an objection to evidence included in the memorandum opposing the motion, the non-moving party may file a response to the objection no later than 7 days after the reply is filed.

(f) No other memoranda. No other memoranda will be considered-filed without leave of court. ~~A party may attach a proposed order to its initial memorandum.~~

~~(c)(2) Length(g) Over-length memoranda. 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 motion or 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~~ An over-length motion or memorandum shall contain after the caption 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.~~

(h) Content of certain motions. No statement of facts and legal authority other than the statement of the relief sought and grounds for the relief sought is required for a motion to:

(h)(1) extend time to perform an act, if the motion is filed before the time to perform the act expires;

(h)(2) reschedule a hearing other than a trial;

(h)(3) appoint a guardian ad litem;

(h)(4) substitute a party;

(h)(5) refer to or withdraw from the court's ADR program;

(h)(6) schedule a settlement conference; and

(h)(7) approve a stipulation.

~~(d)~~ (i) **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 opposing the motion, ~~if any, was served, the date and~~ the reply memorandum, ~~if any, was were~~ served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

~~(e)~~ (i) **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)~~ (k) **Orders.**

~~(f)(1)~~ (k)(1) An order includes every written 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 entered 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)~~ (k)(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~~ 14 days after the court's decision, serve upon the other parties a

proposed order in conformity with the court's decision. If the prevailing party does not timely serve a proposed order, any other party may serve upon the parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five-7 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)-(k)(3) Unless the motion is ex parte or is agreed to by all parties, a party shall not attach a proposed order to a motion or memorandum. Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(l) 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.

(l)(1) Length and content. The motion shall be no more than four pages, not including permitted exhibits and attachments, and shall include in the following order:

(l)(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;

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

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

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

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

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

(l)(1)(I) no other exhibits or attachments, unless required by law.

(l)(2) Response length and content. No more than 7 days after the moving party has filed the motion, the non-moving party may file a response. The response shall be no more than four pages, not including permitted exhibits and attachments, and shall include in the following order:

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

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

(l)(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;

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

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

(l)(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 (i). 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

To reduce the number of electronic filings and to streamline briefing, the 2013 amendment combines the written motion with its supporting memorandum into a single document. The amendment also adopts the expedited procedures for discovery motions formerly approved by the Judicial Council. The expedited procedures are intended to be complete, without the need to refer to the procedures for other motions, unless the judge directs that the other procedures apply.

Rule 58A. Entry of judgment; abstract of judgment.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to Rule 54(b), the clerk shall promptly sign and file the judgment upon the verdict of a jury. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury, the court shall direct the appropriate judgment, which the clerk shall promptly sign and file.

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

(c) When judgment entered; recording.

(c)(1) A judgment prepared by a party is complete and shall be deemed is considered entered for all purposes, except the creation of a lien on real property, when it is signed and filed as provided in paragraphs (a) or (b).

(c)(2) A judgment prepared by the court is complete and is considered entered for all purposes, except the creation of a lien on real property, when it is signed and filed as provided in paragraphs (a) or (b) if the court expressly directs that no order from the parties is necessary.

(c)(3) If the court does not expressly direct that no order from the parties is necessary, a judgment prepared by the court is complete and is considered entered for all purposes, except the creation of a lien on real property, 90 days after it is signed and filed as provided in paragraphs (a) or (b).

(c)(4) The clerk shall immediately record the signed and filed judgment in the register of actions and the register of judgments.

(d) **Notice of judgment.** ~~A~~The party preparing the judgment shall promptly serve a copy of the signed judgment ~~shall be promptly served by the party preparing it on the~~ other parties in the manner provided in Rule 5 and promptly file proof of service with the court. ~~The time for filing a notice of appeal is not affected by this requirement.~~

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

29 (f) **Judgment by confession.** If a judgment by confession is authorized by statute,
30 the party seeking the judgment must file with the clerk a statement, verified by the
31 defendant, to the following effect:

32 (f)(1) If the judgment is for money due or to become due, it shall concisely state
33 the claim and that the specified sum is due or to become due.

34 (f)(2) If the judgment is for the purpose of securing the plaintiff against a
35 contingent liability, it must state concisely the claim and that the specified sum does
36 not exceed the liability.

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

38 The clerk shall sign and file the judgment for the specified sum, with costs of entry, if
39 any, and record it in the register of actions and the register of judgments.

40 (g) **Abstract of judgment.** The clerk may abstract a judgment by a signed writing
41 under seal of the court that:

42 (g)(1) identifies the court, the case name, the case number, the judge or clerk
43 that signed the judgment, the date the judgment was signed, and the date the
44 judgment was recorded in the registry of actions and the registry of judgments;

45 (g)(2) states whether the time for appeal has passed and whether an appeal has
46 been filed;

47 (g)(3) states whether the judgment has been stayed and when the stay will
48 expire; and

49 (g)(4) if the language of the judgment is known to the clerk, quotes verbatim the
50 operative language of the judgment or attaches a copy of the judgment.

51

Tab 3

Rule 6. Time.

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

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

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

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

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

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

(a) Computing time. The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.

(a)(1) When the period is stated in days or a longer unit of time:

(a)(1)(A) exclude the day of the event that triggers the period;

(a)(1)(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(a)(1)(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(a)(2) When the period is stated in hours:

(a)(2)(A) begin counting immediately on the occurrence of the event that triggers the period;

(a)(2)(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(a)(2)(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(a)(3) Unless the court orders otherwise, if the clerk's office is inaccessible:

(a)(3)(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or

(a)(3)(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(a)(4) Unless a different time is set by a statute, local rule, or court order, filing on the last day means:

(a)(4)(A) for electronic filing, at midnight; and
(a)(4)(B) for filing by other means, the filing must be made before the clerk's office is scheduled to close.

(a)(5) The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(a)(6) "Legal holiday" means the day for observing:

(a)(6)(A) New Year's Day;
(a)(6)(B) Dr. Martin Luther King, Jr. Day;
(a)(6)(C) Washington and Lincoln Day;
(a)(6)(D) Memorial Day;
(a)(6)(E) Independence Day;
(a)(6)(F) Pioneer Day;
(a)(6)(G) Labor Day;
(a)(6)(H) Columbus Day;
(a)(6)(I) Veterans' Day;
(a)(6)(J) Thanksgiving Day;
(a)(6)(K) Christmas; and
(a)(6)(L) any day designated by the Governor or Legislature as a state holiday.

(b) Extending time.

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

(b)(1)(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)(1)(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

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

92 (c) Additional time after service by mail. When a party may or must act within a
93 specified time after service and service is made by mail, 3 days are added after the
94 period would otherwise expire under paragraph (a).

95

Rule 50. Motion for ~~a directed verdict and for judgment notwithstanding the verdict~~ judgment as a matter of law.

~~(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.

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

~~(c)(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.~~

~~(c)(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.~~

(a) **Motion for judgment as a matter of law.** 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. 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)(1) resolve the issue against the party; and

(a)(2) 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.

(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, the court is considered to have submitted the action to the jury subject to later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment a party who has moved for

judgment as a matter of law may file a renewed motion for judgment as a matter of law.
If a verdict was not returned, the party may file a renewed motion for judgment as a
matter of law no later than 28 days after the jury has been discharged. A renewed
motion for judgment as a matter of law may include a motion for a new trial under Rule
59. In ruling on the renewed motion, the court may:

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

(b)(2) order a new trial; or

(b)(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.**

(c)(1) 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.

(c)(2) 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.

Advisory Committee Notes

The 2013 amendment to Rule 50 adopts the changes previously adopted by the Federal Rules of Civil Procedure. As noted in the 1991 federal Advisory Committee Note,

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.

The standards for granting the motion remain unchanged. The time for making the motion has been extended to 28 days after entry of judgment. Finally, in accordance with the 2006 federal rules amendment, the amended rule removes the technical requirement that the motion be renewed at the literal close of all the evidence, a requirement that the Committee determined was an unnecessary trap for the unwary.

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

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

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

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

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

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

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

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

Findings and conclusions by the court; judgment on partial findings.

(a) Findings and conclusions.

(a)(1) 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.

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

(a)(3) 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.

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

(a)(5) 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.

(a)(6) Findings of fact, whether based on oral or other evidence, must not be set aside unless 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

61 findings—and may amend the judgment accordingly. The motion may accompany a
62 motion for a new trial under Rule 59.

63 (c) **Judgment on partial findings.** If a party has been fully heard on an issue during
64 a nonjury trial and the court finds against the party on that issue, the court may enter
65 judgment against the party on a claim or defense that, under the controlling law, can be
66 maintained or defeated only with a favorable finding on that issue. The court may,
67 however, decline to render any judgment until the close of the evidence. A judgment on
68 partial findings must be supported by findings of fact and conclusions of law as required
69 by paragraph (a).

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,~~ any party on any issue 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~~ reasons:

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

(a)(2) ~~M~~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, which~~ may be proved by the affidavit of any
~~one of the~~ jurors.;

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

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

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

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

(a)(7) ~~E~~Error in law.

(b) Alternative in action tried without a jury. 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.

~~(b)-(c)~~ **Time for motion.** A motion for a new trial shall be ~~served~~filed not later than ~~10-28~~ days after the entry of the judgment.

~~(c) Affidavits; time for filing.~~ When the ~~application~~motion for a new trial is made under ~~Subdivision paragraph~~ (a)(1), (2), (3), or (4), it shall be supported by affidavit. ~~Whenever a motion for a new trial is based upon affidavits they, which~~ shall be ~~served~~filed 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) **New trial** ~~On~~ **initiative of court or for reasons not in the motion.** Not later than ~~10-28~~ days after entry of ~~the~~ judgment the court ~~of on~~ its own ~~initiative~~ may order a new trial for any reason ~~for which it might have granted that would justify~~ a new trial on motion of a party, ~~and in t.~~ 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.

(e) **Order.** The order granting a motion for a new trial shall specify the ~~grounds therefor~~ reasons for the new trial.

~~(e)-(f)~~ **Motion to ~~alter or~~ amend a judgment.** A motion to ~~alter or~~ amend the judgment shall be ~~served~~filed not later than ~~10-28~~ days after entry of the judgment.

FEDERAL 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,

60 amend findings of fact and conclusions of law or make new ones, and direct the entry of
61 a new judgment.

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

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

67 (d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than
68 28 days after the entry of judgment, the court, on its own, may order a new trial for any
69 reason that would justify granting one on a party's motion. After giving the parties notice
70 and an opportunity to be heard, the court may grant a timely motion for a new trial for a
71 reason not stated in the motion. In either event, the court must specify the reasons in its
72 order.

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

Advisory Committee Notes

(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, the 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:

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

(b)(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);

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

(b)(4) the judgment is void;

(b)(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

(b)(6) any other reason that justifies relief.

(c) **Timing and effect of the motion.**

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

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

(d) **Other powers to grant relief.** This rule does not limit a court's power to:

(d)(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(d)(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(d)(3) set aside a judgment for fraud on the court.

Tab 4

FAQs

(1) Electronic filing — “3-day mailing” rule.

Question: Does the party responding to a motion or other filing have three extra days in which to respond if the motion or other filing is served by the electronic filing system?

Answer: No. [Rule 6](#)(e) allows the responding party three extra days in which to respond only if the motion or other filing is served by mail. The rule does not allow that additional time when service is by any other method, including hand delivery, fax, email or by the electronic filing system.

Neither does the e-filer have to take the extra step of mailing the filing to any lawyer in the case who has an e-filing account. The e-filing system will automatically notify the other lawyers of the filing, so electronically filing the document satisfies the service requirement. [Rule 5](#)(b)(1)(A)(i).

The filer must still complete a certificate of service designating “e-filing” as the method by which the other parties were served. And the filer must still notify parties, usually self represented, who do not have an e-filing account in one of the traditional ways.

(2) Discovery tiers — Effect of not designating a discovery tier

Already published:

Question: What if a party fails to designate a specified tier as required by Rule 26(c)(3), but pleads a claim for specified damages and unspecified damages in an amount to be determined at trial? For example, what if a party pleads \$20,000 in economic damages and for such non-economic damages in an amount to be determined at trial?

Answer: Parties should anticipate the value of all their claims for relief and damage calculations, and [plead in to designate](#) the appropriate tier [in the caption and in the cover sheet](#). [Designating the appropriate tier is required by Rule 8\(a\) and by Rule 10\(a\). Failure to do so might be appropriate grounds for the clerk to require conforming pleadings under Rule 10\(f\) or for a motion for a more definite statement under Rule 12\(e\).](#)

In the above example, if a party claims [specified economic damages](#) and [unspecified non-economic damages](#) ~~and seeks an award of \$50,000 or more~~, she should [“plead that ... damages are such as to qualify for a specified tier”](#) and designate ~~an appropriate tier or specify the damages sought for economic and non-economic damages in the caption of the pleading~~.

(3) 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:

(4) 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.

(5) 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.

(6) 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](#).

(7) 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.

(8) 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.

(9) 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:

(10) 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.