Agenda
Advisory Committee on Rules of Civil Procedure

February 26, 2014
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	Jonathan Hafen
Consideration of comments to rules • URCP 006. Time. • URCP 010. Form of pleadings and other papers. • URCP 058B. Satisfaction of judgment. • URCP 074. Withdrawal of counsel. • URCP 075. Limited Appearance.	Tab 2	Tim Shea
Rule 37. Discovery and disclosure motions; Sanctions.	Tab 3	Tim Shea
Rule 56. Summary judgment.	Tab 4	Tim Shea
Subcommittee Report on Rule 7 and Rule 58A.	Tab 5	Cullen Battle
Small Claims Rule 14. Settlement offers.	Tab 6	Tim Shea
Rule 7A. Motion for order to show cause.	Tab 7	Tim Shea
Transcript of deposition by certified court reporter.	Tab 8	Tim Shea

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

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

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 ON THE RULES OF CIVIL PROCEDURE

JANUARY 22, 2014

PRESENT: Jonathan Hafen, Chair, Sammi V. Anderson, W. Cullen Battle, Scott S. Bell, Hon. James T. Blanch, Frank Carney, Prof. Lincoln Davies, Hon. Evelyn J. Furse, Steven Marsden, Terrie T. McIntosh, Hon. Derek Pullan, David W. Scofield, Hon. Todd M. Shaughnessy, Trystan B. Smith, Lori Woffinden

STAFF: Timothy M. Shea, Nathan Whittaker

EXCUSED: Hon. Lyle R. Anderson, Hon. John L. Baxter, David H. Moore, Leslie W. Slaugh, Hon. Kate Toomey, Barbara L. Townsend

GUESTS: Teena Green, Frank Pignanelli, Renee Stacy

I. APPROVAL OF MINUTES

Mr. Hafen opened the meeting and entertained comments from the committee concerning the November 20, 2013 minutes. It was moved and seconded to approve the minutes as drafted in the meeting materials. The motion carried unanimously on voice vote.

II. RULE 30

The committee proceeded to consider a proposed revision to Rule 30 proposed by the Utah Court Reporters Association ("UCRA"). In attendance on behalf of UCRA were its president, Renee Stacy; its vice-president, Teena Green; and its lobbyist, Frank Pignanelli. Mr. Hafen welcomed them and invited them to present their proposed revisions.

Presentation. Ms. Stacy introduced the proposed revisions to Rule 30, which would amend paragraph (b)(2) to require a deposition recorded by stenographic means to be recorded by a certified court reporter, and would amend paragraph (f)(3) to require an official transcript of a non-stenographic recording of a deposition to be prepared by a certified court reporter. She explained that a certain company was offering reporting services that included "certified tran-

scripts," but the persons employed to prepare that transcript were not licensed under the Certified Court Reporters Licensing Act, Utah Code Ann. § 58-74-101 *et seq*. While Rule 30 currently allows a deposition to be recorded by "sound, sound-and-visual, or stenographic means," it does not say who is allowed to prepare a certified transcript. The company claimed that because there was a notary present at the deposition, this satisfied the requirement of taking a deposition before an officer authorized to administer oaths, and no other qualification was required. The UCRA reported the company to the Department of Occupational Licensing ("DOPL"), which issued a citation under Utah Code Ann. § 58-74-301 for court reporting without a license. The hearing judge dismissed the citation on the basis that the code does not prohibit preparing a transcript from a non-stenographic recording of a deposition.

A similar situation arose in the federal district court. In *Slaughter v. The Boeing Company*, No. 2:11-cv-537 (D. Utah Nov. 9, 2012), the court refused to strike a deposition transcript prepared from a video recording by a notary public who was not a certified court reporter. The court held that "although Utah does not explicitly spell out within a statute that notaries can take depositions . . . , the language of the statute and the Federal Rules of Civil Procedure together allow for a notary to videotape and certify a transcript."

Ms. Stacy argued that clarifying Rule 30 to state that only certified court reporters could record a deposition by stenographic means or prepare a certified transcript from a non-stenographic recording was essential to protect the integrity of the record. Otherwise, anyone would be allowed to actually type up the transcript. There would be no body overseeing their work and ensuring that they conform to the standards of ethics, fairness and professional conduct. Ms. Stacey also introduced supporting written statements by attorneys and law firms, which were received by the committee and attached to the minutes as Exhibit A. She then yielded to Ms. Green and Mr. Pignanelli to add their remarks.

Ms. Green affirmed Ms. Stacy's points, arguing that the licensure of court reporters ensures that a key judicial service—the recording and transcription of testimonial evidence—meets the state standards for competency and professionalism. Court reporters are required to meet continuing education requirements and to comply with the standards of professional conduct. To allow unlicensed individuals to provide that service would cede state control over this portion of the judicial process. Mr. Pignanelli represented that DOPL wants direction from either the legislature or the court, and that the legislature

would like to get input from the court before they act. Because several key legislators are looking to the supreme court and this committee for guidance on this issue, he urged the committee to act. Mr. Hafen thanked the UCRA for its presentation and opened the floor for further discussion.

Discussion. Mr. Carney asked Ms. Stacy whether she knew of any evidence that the transcripts prepared by non-court reporters were inaccurate. Ms. Stacy replied that she had seen transcripts that contained improper content such as non-verbal actions that normally the attorney would have to verbally make a record of. However, she did not know whether the records were accurate or not as she did not compare the transcripts to the recordings.

Mr. Battle asked whether the UCRA's position was that a court reporter should have to be present in order to record a deposition by non-stenographic means. Ms. Stacy replied that the UCRA's position was that a court reporter need not record the deposition, but would be required in order to prepare the transcript from that recording. Mr. Carney added that under Rule 28, all depositions must be taken before "an officer authorized to administer oaths" who is independent of the attorneys and parties to the action.

Mr. Carney opined that the important question is how a non-stenographic record is used in court. If a party prepared an unofficial transcript from that recording, what reason would an opposing party have to object so long as that party had a copy of the recording and could verify its accuracy? In response, Judge Furse asked why opposing counsel and the court should have to dig through the recording and figure out if it was accurate. If a transcript is certified by an independent court reporter, the court and the parties can trust it without having to verify its accuracy.

Mr. Marsden pointed out that, as written, the proposal would limit the admissibility of deposition transcripts prepared by a court reporter certified under the laws of a state other than Utah.

Mr. Whittaker asked whether this proposal was within the jurisdiction of the committee. Judge Blanch asked whether this matter would not better be resolved by the legislature amending the Certified Court Reporters Licensing Act to clarify that court reporting included preparing a transcript of a deposition from a non-stenographic recording. He added that this approach would get around the problem of out-of-state reporters. Mr. Shea replied that the Utah Supreme Court has jurisdiction to make rules regarding the minimum re-

quirements for preparing court records. Whether this proposal would be good policy would be a question for this committee's judgment and experience.

Judge Shaughnessy asked how this proposal would affect a situation where a lawyer wanted to prepare a transcript of portions of a court proceeding from a recording made by the court. He asked whether the lawyer would have to have a court reporter prepare a certified transcript in order to allow the judge to consider it. Other members of the committee replied that this proposal would only apply to depositions, not court proceedings. Mr. Marsden replied that another difference would be that the lawyer would not be holding him- or herself out as a court reporter, and would not be claiming the transcript to be certified.

Mr. Smith observed that one of the problems with the practice of non-stenographic recordings of depositions without a court reporter is that lawyers who do it often fail to indicate in their notices that they are not getting a court reporter—the opposing lawyer does not learn about this until he or she appears at the deposition. He added that afterwards, the lawyer will often refuse to share the recording. Judge Blanch responded that the rule was drafted so that a party or lawyer that wanted to take a non-stenographic recording could do so, but had to give notice so that the other party could hire a court reporter if it wanted one.

Mr. Carney stated that there are a lot of practitioners and parties who are troubled by the high cost of court reporting services. The recording technology available today is capable of producing accurate audio and visual recordings of the deposition. As long as both parties have access to the recording such that they can review and make objections, what would be the harm in allowing uncertified transcripts to be received by the court?

Judge Shaughnessy wondered about how a non-stenographic recording of a deposition would be used at trial. Would this proposal require that these recordings be transcribed by a court reporter before being presented at trial? Other members responded that the recording could be played at trial in lieu of a transcript.

Committee Action. By unanimous consent, the proposed revision was tabled in order to seek the input of other interested parties and for further research and discussion.

III. FEDERAL RULES MEETING

Mr. Hafen informed the committee that Judge Pullan testified before the Federal Civil Rules Committee on January 9, 2014 regarding the changes to the discovery provisions of the Utah Rules of Civil Procedure, especially as they relate to implementing the principle of proportionality. The Federal Civil Rules Committee is looking at civil discovery reform that would emphasize proportionality much in the same way that Utah's rules currently do. Judge Pullan introduced his opening statement to the Federal Civil Rules Committee, which was received by the committee and attached to the minutes as Exhibit B. Judge Pullan noted that he has been asked to submit a written comment by February 15th. He expressed his desire to have the comment come from the committee and proposed to circulate a draft to the members of the committee by email for their feedback and suggestions.

IV. RULE 5

Discussion. The committee next considered the proposed revision to Rule 5. This proposal had been tabled in the November 2013 meeting in order to prepare a draft for review that incorporated the changes agreed to at that meeting and that restyled the language of the rule as appropriate.

Judge Furse suggested that on line 67, the word "email" should be replaced by the words "electronic means," as otherwise paragraph (b)(4) would not apply to service by e-filing. Mr. Battle pointed out that as paragraph (b)(4) purports to govern when any paper is effectively served, there should be a remainder provision saying something to the effect of "service by other means is effective upon delivery."

Judge Blanch noted that while we think of email as being delivered instantaneously, that is not always the case. To illustrate his point, he related an issue faced by Judge Kelly—one party had served its bill of costs on the other party by email, but because the email had been held up in the queue by an intermediate server, the email did not reach the inbox of the other party until the next day. The other party therefore believed he had one more day to object than was actually the case. Judge Kelly concluded that he had discretion to extend the time for filing an objection to a bill of costs. Judge Blanch observed that Judge Kelly's conclusion would be correct in most instances under Rule 6(b), but there are some times where the judge has no discretion to extend the deadline, and this situation may be a problem. Other members pointed out that it ap-

peared that all of the jurisdictional deadlines appeared to be keyed from the discharge of a jury or the entry of a judgment, this scenario would not likely arise in a situation where a district court had no discretion to deal with it in an equitable manner.

Mr. Shea directed the committee's attention to subdivision (f) of the proposed revision, which outlines the procedure for filing an affidavit or declaration of a person other than the filer. He noted that this section was not in the previous version reviewed by the committee, and requested that they provide their comments and recommendations.

Judge Shaughnessy pointed out that paragraph (f)(4) implied that a filer could manually file an affidavit with a clerk, which is contrary to the e-filing rules. Other members observed that this provision was for *pro se* parties, and suggested that the clause "if the filer does not have an electronic filing account" be placed at the end of paragraph (f)(4).

With respect to the "keep safe" requirement of lines 118-20, Judge Blanch expressed his concern that electronic signatures may not fulfill the function of impressing upon the affiant or declarant the significance of signing the document. It is far too easy to play "fast and loose" with affidavits and declarations as it is; dispensing with the requirement to put pen to paper would further erode the trustworthiness of affidavits. He also pointed out that because drafters often have the "/S/" already on the signature lines of their template declarations. This could lead to confusion over whether an affiant has already read and consented to having his or her signature appended to the document.

Judge Furse added that if she were a lawyer, she would definitely want a hand-signed document; it was far too easy for a witness to deny a prior declaration or affidavit without his or her signature on the document. Moreover, if she were the attorney providing the affidavit, she would want a wet signature to avoid any questions being raised about filing a false statement.

Mr. Marsden related his experience with a client who e-signed documents using adobe acrobat. He stated that in that circumstance, the client had to enter a password in order to sign the document. He felt that a process such as this conveyed the significance of signing equally as well as putting pen to paper, and fulfilled the evidentiary function of a distinctive personal mark that indicated consent. He further suggested that a confirmatory email could serve the same functions.

Judge Blanch concluded that most people would read the "keep safe" requirement to require keeping original with a "wet" signature or some equivalent writing for the pendency of the case. He therefore withdrew his concern.

Mr. Marsden suggested removing the words "an RTF of" from line 114, as paragraph (f)(3) appears to be meant to apply to native PDFs. The committee agreed to the change.

Ms. Anderson noted that subparagraphs (b)(5)(A) and (b)(5)(B) are redundant and suggested combining them. The committee agreed to the change.

Mr. Whittaker noted that the language of subparagraph (a)(1)(E) suggested that an *ex parte* motion need not be served. He explained that it was his understanding that a written motion made *ex parte* must be served, but that a judge may decide to act on an *ex parte* motion even if the opposing party may not yet have actually received the motion. Mr. Shea responded by pointing out that this is the same language that is in the current rule. Judge Shaughnessy added that e-filing would largely stop a party from filing an *ex parte* motion without serving it on the other party. Mr. Whittaker withdrew his concern.

Mr. Battle observed that nothing in the rules instructs a filer on how to file his own affidavit. He suggested editing (f) to apply to all affidavits and declarations, regardless of whether the signature is that of the filer or of another person. Judge Blanch pointed out that a filer's signature is verified electronically by the act of filing, so there is not the same concern with respect to "keeping safe" evidence of the signature. Judge Shaughnessy suggested that the language be edited to apply the general requirements for affidavits and declarations to everyone, and then to apply the "keep safe" requirements only to the signatures of persons other than the filer. The committee agreed to change subdivision (f) to delete "of a person other than the filer" from lines 109 and 110 and to add "of a person other than the filer" to line 118 after "declaration."

Judge Furse brought up a scenario where a non-party witness wants to keep the original of his or her own affidavit rather than surrendering it to the party. Several members suggested that the signer could sign multiple copies, or that the filer could keep a photocopy of the original, since it would be admissible to the same extent as the original under Rule 1003 of the Utah Rules of Evidence. Mr. Hafen pointed out that the proposed language was that the filer "must keep *the* original affidavit or declaration," and suggested that the language be changed to "must keep *an* original . . . ." The committee agreed to change "the" to "an" on line 118.

Mr. Whittaker observed that the proposed language of subdivision (d) requires a certificate of service to be included on all pleadings and papers. He observed the e-filing system generates a separate certificate of service, and questioned whether the committee intended to require a certificate of service in addition to the one generated by the e-filing system. Several members responded that the judges wanted a certificate of service in the same document as the filed paper. Mr. Whittaker thanked the committee for the clarification and withdrew his concern.

Committee Action. It was moved and seconded that Rule 5 be revised as proposed in the proposed revisions contained in the meeting materials, incorporating the following amendments:

- Line 67: replace "email" with "electronic means"
- Line 68: after the end of the sentence, add "Service by other means is effective upon delivery."
- Lines 72-76: delete entirely and replace with "(b)(5)(A) an order required by its terms to be served, a judgment, or any other paper required to be served must be served by the party preparing it; and"
- Line 109: delete "of someone other than the filer"
- Line 110: delete "of a person other than the filer"
- Line 114: delete "an RTF of"
- Line 117: after "filer" add "if the filer does not have an electronic filing account."
- Line 118: replace "the" with "an"
- Line 118: after "declaration" add "of a person other than the filer"

The motion carried unanimously on voice vote. The proposed revisions to Rule 5 were thereby approved for submission to the Administrative Office of Courts for publication and distribution pursuant to UCJA 11-103(2)-(3).

V. RULE 43

Discussion. The committee next considered the proposed revision to Rule 43. This proposal had been tabled in the November 2013 meeting in order to pre-

pare a draft for review that that removed the last sentence of (a) and took into account the provisions of Title 46 of the Utah Code. Mr. Shea noted that the latter purpose for tabling the proposal was moot, as those provisions had been moved into Rule 5, and so the current proposed revisions were just to remove the last sentence of (a) and to make minor stylistic changes.

Mr. Scofield questioned the proposed deletion of the word "orally" on line 3. He noted that current practice was to read deposition testimony into the record, and that it was possible that the change may be understood to allow deposition testimony to be introduced as documentary evidence. Mr. Shea responded that the change reflects the federal rules, and his understanding was that the change was to accommodate sign language.

Judge Pullan inquired as to the meaning of the following language in the proposed revision to 43(b): "If a motion is based on facts outside the record, the court may hear the matter on affidavits, declarations, testimony or depositions." He noted that the language seemed tautological: if evidence is received by affidavit, then it is in the record. Mr. Carney noted that the language was substantially the same as federal rule 43(c). Judge Pullan suggested that the history of the rule should be researched to determine whether it had continuing utility or whether it should be deleted. Mr. Carney volunteered to look at Wright & Miller and report back.

Mr. Shea informed the committee that they would soon receive recommendations on permitting remote testimony by contemporaneous audiovisual transmission from an advisory committee to the judicial council and recommended that the committee postpone further consideration of the rule until those recommendations were made.

Committee Action. Mr. Hafen sought unanimous consent to table the proposal until such time as the committee received recommendations from the advisory committee to the judicial council. No objection was made.

VI. FINAL JUDGMENT RULE

Mr. Battle noted that he had been working unofficially with other members to deal with the issue regarding finality of judgments as previously discussed in the committee's meeting of October 2013. He suggested that this item should be treated as a high priority and asked for an official subcommittee to be appointed. Mr. Hafen agreed and appointed a subcommittee composed of Mr. Battle, Mr. Whittaker, and Ms. Anderson, and asked them to report with their

findings and recommendations by February's meeting. Mr. Shea noted that Justice Parrish's law clerk, Laurie Abbott, had expressed an interest in this matter. Mr. Hafen recommended that she be made an *ex officio* member of the subcommittee.

VII. ADJOURNMENT

The meeting was adjourned at 6:00 p.m. The next meeting will be held on February 26, 2014 at 4:00 p.m. at the Administrative Office of the Courts.

EXHIBIT A: STATEMENTS IN SUPPORT OF UCRA PROPOSAL (9 PAGES)

KIPP AND CHRISTIAN, P.C.

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Michael F. Skolnick

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Writer's Direct Line: (385) 234-4703

November 8, 2013

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

Re: Court Reporters Licensing Act - Proposed Amendments

To whom it may concern:

I support efforts which I understand are underway by licensed court reporters in the state of Utah to strengthen the Court Reporters Licensing Act so that unlicensed persons cannot create transcripts. The goal of the Act should be to protect the integrity of the court's record, and accordingly, to preclude unlicensed individuals from purporting to create official records of discovery proceedings by simply showing up at a deposition with a video camera.

Very truly yours,

KIPP AND CHRISTIAN, P.C.

Michael F. Skolnick

MFS:nt

C. MICHAEL LAWRENCE, P.C.
Attorney at Law

Telephone: 801.270.5800

October 9, 2013

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

Re: Court Reporting laws

To Whom it May Concern:

It is the belief of this firm that court reporting services, both in-court and depositions, should only be performed by certified and licensed court reporters in order to maintain the integrity of transcripts and the integrity of the legal process in general.

It has come to my attention that at a recent DOPL hearing, an administrative law judge ruled the court reporting act was too vague and declined to take action against someone performing court reporting services with no training, credentials, or license. We believe that such a ruling is not good for the legal community.

Accordingly, we ask that the Bar adopt a resolution of support for a change and some clarity in the court reporting code sections, requiring that such services be performed only by certified and licensed court reporters.

Thank you for your attention to this matter.

Sincerely,

C. Michael Lawrence
Attorney at Law

5681 South Redwood Road, #23 • Taylorsville, Utah 84123 • Fax: 801.270.9299

DOWNEY & STRAUSS
Attorneys at Law
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Bobbie Downey: Admitted in CA
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Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

October 21, 2013

Re: Court Reporting Laws

To Whom it May Concern:

It is the belief of this firm that court reporting services, both in court and depositions, should only be performed by certified and licensed court reporters in order to maintain the integrity of transcripts and the integrity of the legal process in general.

It has come to my attention that at a recent DOPL hearing an administrative law judge ruled the Court Reporting Act was too vague and declined to take action against someone performing court reporting services with no training, credentials, or license. We believe that such a ruling is not good for the legal community.

Accordingly, we ask that the Bar adopt a resolution of support for a change and some clarity in the court reporting code sections, requiring that such services be performed only by certified and licensed court reporters.

Please do not hesitate to contact me if you would like to discuss the matter further.

Sincerely,

Susan Lee Strauss, Esq.

THE LAW OFFICES OF
MORGAN, MINNOCK, RICE & JAMES, L.C.

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BRIAN H. HESS
ALLISON S. FLETCHER
ANDREA M. KEYSAR
ANNA NELSON
ISAAC K. JAMES
JEREMY S. STUART
COLE L. BINGHAM

STEPHEN G. MORGAN (1940-2007)

October 23, 2013

Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

Re: Court Reporting Laws

To Whom It May Concern:

It is my belief that court reporting services, both in court and depositions, should only be performed by certified and licensed court reporters in order to maintain the integrity of transcripts and the integrity of the legal process in general.

It has come to my attention that at a recent DOPL hearing, an administrative law judge ruled the Court Reporting Act was too vague and declined to take action against someone performing court reporting services with no training, credentials, or license. I believe that such a ruling is not good for the legal community.

Accordingly, I am asking the Bar to take and support the necessary action for change and clarity in the court reporting code sections, requiring that such services be performed only by certified and licensed court reporters.

Thank you.

Very truly yours,

MORGAN MINNOCK RICE & JAMES

Dennis R. James

DRJ/lwa

VANCOTT

TIMOTHY W. BLACKBURN

email: tblackburn@vancott.com

October 22, 2013

VANCOTT, BAGLEY, CORNWALL & MCCARTHY, P.C.

ESTABLISHED 1874

Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

Re: Court Reporting Laws

TO WHOM IT MAY CONCERN:

It is the belief of this firm that court reporting services, both in court and depositions, should only be performed by certified and licensed court reporters in order to maintain the integrity of transcripts and the integrity of the legal process in general.

It has come to my attention that at a recent DOPL hearing an administrative law judge ruled the Court Reporting Act was too vague and declined to take action against someone performing court reporting services with no training, credentials, or license. We believe that such a ruling is not good for the legal community.

Accordingly, we ask that the Bar adopt a resolution of support for a change and some clarity in the court reporting code sections, requiring that such services be performed only by certified and licensed court reporters.

Thank you for your attention to this matter.

Sincerely,

Timothy W. Blackburn

TWB:dh

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RICHARDS BRANDT MILLER NELSON

A Professional Law Corporation

November 6, 2013

Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

RE: *Court Reporting Laws*

To Whom It May Concern:

It is the belief of this Firm that court reporting services, both in court and depositions, should only be performed by certified and licensed court reporters in order to maintain the integrity of transcripts and the integrity of the legal process in general.

It has come to my attention that at a recent DOPL hearing an administrative law judge ruled the Court Reporting Act was too vague and declined to take action against someone performing court reporting services with no training, credentials, or license. We believe that such a ruling is not good for the legal community.

Accordingly, we ask that the Bar adopt a resolution of support for a change and some clarity in the court reporting code sections, requiring that such services be performed only by certified and licensed court reporters.

Thank you for your attention to this matter.

Sincerely,

RICHARDS BRANDT MILLER NELSON

Lynn S. Davies
Managing Partner

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October 23, 2013

Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

Re: Court Reporting Laws

To Whom it May Concern:

It is the belief of this firm that court reporting services, both in court and depositions, should only be performed by certified and licensed court reporters in order to maintain the integrity of transcripts and the integrity of the legal process in general.

It has come to my attention that at a recent DOPL hearing an administrative law judge ruled the Court Reporting Act was too vague and declined to take action against someone performing court reporting services with no training, credentials, or license. We believe that such a ruling is not good for the legal community. Accordingly, we ask that the Bar adopt a resolution of support for a change and some clarity in the court reporting code sections, requiring that such services be performed only by certified and licensed court reporters.

Thank you for your attention to this matter.

Very truly yours,

STRONG & HANNI

By _____
Paul M. Belnap

PMB/bn

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ALAN W. MORTENSEN
ALSO ADMITTED IN
WYOMING
COLORADO

November 6, 2013

Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

Re: Court Reporting Laws

To Whom it May Concern:

It is the belief of this firm that in order to maintain the integrity of transcripts and the integrity of the legal process in general, court reporting services, both in court and depositions, should only be performed by certified and licensed court reporters.

At a recent DOPL hearing an administrator ruled the Court Reporting Act was too vague and declined to take action against someone performing court reporting services with no training, credentials, or license. We believe that such a ruling is not good for the legal community.

Accordingly, we ask that the Bar adopt a resolution of support for a change and some clarity in the court reporting code sections, requiring that such services be performed only by certified and licensed court reporters.

I appreciate your attention to this matter.

Sincerely,

Alan W. Mortensen

AWM/kh

Subj: **RE: court reporter certification**
Date: 11/1/2013 12:49:11 P.M. Mountain Daylight Time
From: ghunt@williamsandhunt.com
To: ReneeStacy@aol.com

Renee:

We would be pleased to help and support you but frankly do not believe that further legislation is necessary. Perhaps whoever was prosecuting this guy before DOPL did not know what they were doing. §58-1-501 makes it very clear that rendering services or employing anyone to render services by anyone who does not have a license in any profession where a license is required under title 58, is both unlawful and unprofessional conduct. As you know, court reporters are required to be licensed under Utah Code Anno, §58-74-101, et seq. So, the vagueness argument is inexplicable to me. When you have a moment, please call me. I would like to know how we can help.
Regards,
George

George A. Hunt
Lawyer
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WILLIAMS HUNT
LAWYERS

From: ReneeStacy@aol.com [mailto:ReneeStacy@aol.com]
Sent: Friday, November 01, 2013 12:30 PM
To: George A. Hunt
Subject: court reporter certification

George, I would like to call you and discuss with you the support we as court reporters need to support legislation for clearing up statutory language for creating transcripts.

Below are the talking points our lobbyists have given us. I am on my way to a depo right now so I can't call you, but I will give you a call later, if that's okay.

Here are the talking points for a discussion with key lawyers.

-Appreciate the friendship and professional relationship with [lawyer]

-Certified reporters licensed by the Utah Department of Professional Licensing (DOPL) are an integral part of ensuring that depositions and testimony are correctly transcribed.

-Over the last several years, several individuals have attempted to transcribe proceedings, whether by video or otherwise, without licensure or certification.

-We view such attempts to provide transcribing services without the assurance of licensure as a threat to a

EXHIBIT B: OPENING STATEMENT OF JUDGE PULLAN (5 PAGES)

Opening Statement—Hon. Judge Derek P. Pullan

Federal Civil Rules Committee Hearing

Phoenix, Arizona

January 9, 2014

Judge Campbell and Members of the Committee:

I am a state district court judge in Utah and a member of the Utah Supreme Court's Civil Rules Committee. Twenty-three years ago Judge Campbell was my civil procedure professor.

This Committee has proposed comprehensive amendments aimed at civil discovery reform. I will limit my comments to the issue of whether proportionality should be the principle that governs the scope of civil discovery.

Proportionality is not new to the federal rules. Rule 1 has always sought the just, speedy, and inexpensive determination of every cause.[1] Since 1983, the rules have permitted parties and the court to limit discovery that was unreasonable or unduly burdensome.[2] Sadly, that provision—buried deep in the middle of Rule 26—was never enforced with the vigor contemplated.[3] A later effort to give proportionality teeth was largely ineffective.[4] In the end,

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[1] FED. R. CIV. P.
[2] FED. R. CIV. P. 26(b)(2)(C).
[3] FED. R. CIV. P. 26 advisory committee's note ("The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated.").
[4] FED. R. CIV. P. 26(b)(1) ("All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).").

proportionality limitations could never counterbalance the broad language defining the scope of permitted discovery.[5]

The proposed amendment would change that. Parties would be permitted to discover any matter relevant to a claim or defense "and proportional to the needs of the case" in light of certain express considerations. In making this proposal, the Committee is not inventing the wheel.

For more than two years, Utah Rule 26 has allowed litigants to discover relevant material but only if "the discovery satisfies the standards of proportionality."[6] Discovery is proportional if "reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties resources, the importance of the issues, and the importance of the discovery in resolving the issues."[7]

But what about cases in which one side has access to all the relevant materials, such as employment cases? As here, some Utah attorneys expressed concern that in these cases a proportionality standard would unfairly curtail discovery. To address this concern, Utah placed in the definition of proportionality a requirement that courts consider a litigant's "opportunity to obtain the information . . . taking into account the parties' relative access to the information."[8]

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[5] *See,* Favro, Philip J. & Pullan, Hon. Derek P., *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure,* 2012 MICH.ST. L. REV. 933.
[6] UTAH R. CIV. P. 26(b)(1).
[7] UTAH R. CIV. P. 26(b)(2)(A).
[8] UTAH R. CIV. P. 26(b)(2)(F).

Under new Utah Rule 26, "the party seeking discovery always has the burden of showing proportionality and relevance."[9] Before, the burden was on the responding party to seek protection from unduly burdensome requests. Reversing this burden is critical to managing discovery costs, especially in light of the exponential growth of retained data. Further, to ensure proportionality "the court may enter orders under Rule 37."[10] Possible Rule 37 orders include an order that "the costs . . . of discovery be allocated among the parties as justice requires."[11]

In a further effort to achieve proportionality, Utah divided litigation into three tiers based on the amount in controversy. We imposed presumptive limits on deposition hours, interrogatories, requests for production, and requests for admission.[12] The days to complete this standard discovery are limited.[13] Parties must disclose more about their case-in-chief earlier, so

[9] UTAH R. CIV. P. 26(b)(3); 37(b)(2). The burden to prove relevance and proportionality is *always* on the requesting party, whether proportionality is raised in the context of a motion to compel, motion to quash, or motion for discovery sanctions.
[10] UTAH R. CIV. P. 26(b)(3).
[11] UTAH R. CIV. P. 37(c)(10).
[12] UTAH R. CIV. P. 26(c)(5) includes the following table:

Tier 1	Amount of Damages	Total Fact Deposition Hours	Rule 33 Interrogatories including all discrete subparts	Rule 34 Requests for Production	Rule 36 Requests for Admission	Days to complete standard fact discovery
1	$50,000 or less	3	0	5	5	120
2	More than $50,000 and less than $300,000 or non-monetary relief	15	10	10	10	180
3	$300,000 or more	30	20	20	20	210

[13] *Id.*

that discovery requests shoot with a rifle not a shotgun.[14] Failure to make timely initial disclosures means you don't use the undisclosed document or witness in your case-in-chief.[15]

In the spirit of federalism, Utah is a laboratory with more than two years of experience testing the very proportionality framework under consideration by this Committee. But Utah is not alone. Federal circuit and district courts have implemented pilot programs and local rules using proportionality as the key to managing litigation costs.[16] Twenty-one other states have adopted or are in the process of considering civil discovery reform.[17] This is an ideal time for federal rule makers to provide a proportionality-based discovery model and bring uniformity to these grassroots efforts.

As I noted earlier, notwithstanding the grand vision of Rule 1, few in the United States would describe civil litigation as "speedy" and "inexpensive." Burgeoning discovery costs ultimately undermine equal justice under the rule of law. Parties with meritorious claims but modest means are denied access to justice. Specious claims settle to avoid the discovery bill. Requiring that discovery costs be proportional to what is at stake in the litigation restores balance to a system which aspires to the just, *and* the speedy, *and* the inexpensive determination of *every* cause for all people.

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[14] UTAH R. CIV. P. 26(a)(1). A party must identify each fact witness that party intends to call in its case-in-chief and, except for an adverse party, a summary of the expected testimony. A party must also serve on opposing parties a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief.

[15] UTAH R. CIV. P. 26(d)(4). Note that this is a sanction under Rule 26 not Rule 37. Therefore, there is no requirement to show bad faith or persistent dilatory conduct.

[16] Favro and Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules*, 2012 MICH. ST. L. REV. 933, 955-966, describing e-discovery pilot program in the Seventh Circuit, a model e-discovery order in the Federal Circuit, and local proportionality rules in the district of Maryland, the district of New Jersey, and the northern district of California.

[17] *See*, Institute For The Advancement Of The American Legal System, Rule One Initiative, http://iaals.du.edu/initiatives/rule-one-initiative/action-on-the-ground.

Philip J. Favro and I wrote a law review article titled *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure.*[18] I offer that article and my opening statement into the record. Utah's Civil Rules Committee intends to supplement the record with a more detailed written comment.

I welcome any questions.

[18] *Supra* notes 5 and 17.

Tab 2

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: February 20, 2014
Re: Rules for final action

The comment period for the following rules has closed, and they are ready for your final recommendations.

- URCP 006. Time. Repeal and reenact. Conforms the computation of time to the approach of the Federal Rules of Civil Procedure. Deadlines of 30 days or less in several rules will be modified to a uniform 7/14/21/28 days. If approved, those rules will be amended to change the deadlines as indicated, but the rules will not be published for comment.
- URCP 010. Form of pleadings and other papers. Amend. Prohibits a graphic or "wet" signature on an electronically filed document.
- URCP 058B. Satisfaction of judgment. Amend. Requires the creditor to file a satisfaction of judgment within 28 days after the judgment has been paid.
- URCP 074. Withdrawal of counsel. Amend. Permits an attorney making a limited appearance to withdraw by announcing the withdrawal in court, if permitted by the judge.
- URCP 075. Limited Appearance. Amend. Permits an attorney making a limited appearance to announce the appearance in court, if permitted by the judge.

The comments are attached. Here are my thoughts:

(1) Rule 6

Two of the comments suggest that there is confusion over the term “mail.” This has come up before in the context of whether the rule allows 3 extra days in which to respond after service by email or electronic filing. I do not understand how anyone can insist on equating mail with e-mail. Personally, I do not see any reason for confusion, other than lawyers who have missed a deadline need to create some.

One of the comments suggests that the rule should restrict the term “mail” to US Postal Service mail to differentiate it from UPS, FedEx, bicycle couriers and others. I think the commenter reaches the wrong conclusion. If anything, those carriers should be included

within the scope of “mail.” If the sender pays for next-day delivery, should the receiver have only 2 extra days in which to respond?

One of the comments notes that a 10-day deadline in Rule 3(a) is proposed to be changed to 14, but the reference to the same deadline in Rule 4(c)(2) is not. I simply missed this one. The reference to 10 days in Rules 4(c)(2) should be changed to 14. Changing the filing deadline to 14 days raises the question of whether the call-in date should be more than 14 days.

One of the comments discusses the intersection of Rule 6(a)(4) and Rule 101(c) and (g). The latter two expressly state “business” days. Rule 101(d) also designates “business” days. The commenter recommends an amendment to the effect that even if the documents are e-filed, they have to be filed by 5 pm or the close of the business day. Rather than create this exception to the general approach of eliminating the distinction between business and calendar days, I recommend changing the time frames, all of which are less than 7 days, to a fixed number of hours.

(2) Rule 10

(a) Graphic signatures

All of the comments that addressed the prohibition of graphic signatures objected to the change. Most discussed the difficulty with documents notarized apart from the litigation that are filed as an attachment to a pleading, motion or other paper. My understanding of the recommendation of the Board of District Court Judges is that the prohibition is intended only for pleadings, motions and other documents that historically have been signed by the filer. A document signed or notarized apart from the case could still be scanned and filed as an attachment. The proposed change does appear to be too broad. Ms. Moore suggests deleting the reference entirely. Perhaps changes to this part of Rule 10 should wait for the provisions on electronically filing notarized documents under Rule 5. The committee approved that rule for comment at the January meeting

(b) Other issues

One of the comments observes that the committee note conflicts with the new margins. Frankly, none of the note adds any value, and I recommend that it be deleted.

One of the comments suggests that Rule 10 require a party to provide an address at which s/he can be personally served. If needed, that change should be considered at a later date.

(3) Rule 58

One of the comments recommends that “shall” should be changed to “must,” as needed. I have made that further change in this draft. Another comment says that the time and expense of filing a satisfaction will be passed on to the debtor. One comment recommends 90 days, rather than 28, as the time in which to file a satisfaction of judgment.

(4) Rules 74 and 75

One of the comments supports the changes. Another suggests that we have a rule that describes how an attorney can appear on behalf of a client. If needed, that change should be considered at a later date.

One of the comments suggests that the phrase “if permitted by the judge” is ambiguous. The motivation for the amendment is to allow a volunteer lawyer in one of the bar’s “signature programs” to appear on behalf of a client for one hearing (domestic order-to-show-cause hearings and debt collection hearings are the current scope of the programs) and withdraw at the end of that hearing. The objective is to allow the attorney to appear and withdraw by an oral notice at the hearing, rather than by written notice, cutting down on the paperwork, avoiding the requirement that the document be e-filed, and facilitating pro bono representation.

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 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 (c), 52(b), 59(b), (d) and (e), and 60(b).

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

Deadline Changes in Conjunction with Rule 6

Rule	Change	To
3(a)	10	14
4(c)(2)	10	14
4(c)(2)	13	14
4(f)(1)	20	21
7(c)(1)	5	7
7(c)(1)	10	14
7(f)	15	21
7(f)	5	7
12(a)	20	21
12(a)(1)	10	14
12(a)(2)	10	14
12(e)	10	14
12(f)	20	21
14(a)	10	14
15(a)	20	21
15(a)	10	14
17(c)(2)	20	21
17(c)(3)	20	21
27(a)(2)	20	21
38(b)	10	14
38(c)	10	14
50(b)	10	14
50(c)(2)	10	14
52(b)	10	14
53(d)(1)	20	21
53(e)(2)	10	14
54(d)(2)	5	14
56(a)	20	21
59(b)	10	14
59(c)	10	14

Rule	Change	To
59(c)	20	21
59(d)	10	14
59(e)	10	14
60(b)	3 months	90
62(a)	10	14
63(b)(1)(B)	20	21
63(b)(1)(B)(iii)	20	21
64(d)(3)(C)	10	14
64(d)(3)(D)(ii)	10	14
64(e)(2)	10	14
64(f)(1)	5	7
64A(i)(5)	10	14
64D(h)	10	14
64D(i)	20	21
64E(d)(1)	10	14
65A(b)(2)	10	14
65C(h)(3)	20	21
65C(k)	Delete “plus time...”	
65C(m)(1)	5	7
66(f)	10	14
68(c)(3)	10	14
68(c)(4)	10	14
69C(f)	20	21
69C(i)(2)	5	7
69C(i)(2)	15	21
74(c)	20	21
101(b)	Delete “calendar”	
101(c)	5	7
101 (c), (d), (g)	Change days to hours	

Rule 10. Form of pleadings and other papers.

(a) **Caption; names of parties; other necessary information.**

(a)(1) All pleadings and other papers filed with the court ~~shall~~ must contain a caption setting forth the name of the court, the title of the action, the file number, if known, the name of the pleading or other paper, and the name, if known, of the judge (and commissioner if applicable) to whom the case is assigned. A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, ~~shall~~ must include in the caption the discovery tier for the case as determined under Rule 26.

(a)(2) In the complaint, the title of the action ~~shall~~ must include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known ~~shall~~ must be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties ~~shall~~ must be designated as "all unknown persons who claim any interest in the subject matter of the action."

(a)(3) Every pleading and other paper filed with the court ~~shall~~ must state in the top left hand corner of the first page the name, address, email address, telephone number and bar number of the attorney or party filing the paper, and, if filed by an attorney, the party for whom it is filed.

(a)(4) A party filing a claim for relief, whether by original claim, counterclaim, cross-claim or third-party claim, ~~shall~~ must also file a completed cover sheet substantially similar in form and content to the cover sheet approved by the Judicial Council. The clerk may destroy the coversheet after recording the information it contains.

(b) **Paragraphs; separate statements.** All statements of claim or defense ~~shall~~ must be made in numbered paragraphs. Each paragraph ~~shall~~ must be limited as far as practicable to a single set of circumstances; and a paragraph may be adopted by reference in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials ~~shall~~ must be stated in a separate

count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by reference; exhibits.** Statements in a paper may be adopted by reference in a different part of the same or another paper. An exhibit to a paper is a part thereof for all purposes.

(d) **Paper format.** All pleadings and other papers, other than exhibits and court-approved forms, ~~shall~~ must be 8½ inches wide x 11 inches long, on white background, with a top margin of not less than ~~2~~ 1½ inches~~,~~ and a right~~, and~~ left and bottom margin of not less than 1 inch ~~and a bottom margin of not less than one-half inch, with text or images only on one side~~. All text or images ~~shall~~ must be clearly legible, ~~shall~~ must be double spaced, except for matters customarily single spaced, must be on one side only and ~~shall~~ must not be smaller than 12-point size.

(e) **Signature line.** The name of the person signing ~~shall~~ must be typed or printed under that person's signature. If a paper is electronically ~~signed~~ filed, the paper ~~shall~~ must contain the typed or printed name of the signer ~~with or~~ without a graphic signature. If a proposed document ready for signature by a court official is electronically filed, the order must not include the official's signature line and must, at the end of the document, indicate that the signature appears at the top of the first page.

(f) **Non-conforming papers.** The clerk of the court ~~shall~~ may examine ~~all~~ the pleadings and other papers filed with the court. If they are not prepared in conformity with paragraphs (a) – (e), the clerk ~~shall~~ must accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) **Replacing lost pleadings or papers.** If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(h) **No improper content.** The court may strike and disregard all or any part of a pleading or other paper that contains redundant, immaterial, impertinent or scandalous matter.

(i) **Electronic papers.**

(i)(1) Any reference in these rules to a writing, recording or image includes the electronic version thereof.

(i)(2) A paper electronically signed and filed is the original.

(i)(3) An electronic copy of a paper, recording or image may be filed as though it were the original. Proof of the original, if necessary, is governed by the Utah Rules of Evidence.

(i)(4) An electronic copy of a paper ~~shall~~ must conform to the format of the original.

(i)(5) An electronically filed paper may contain links to other papers filed simultaneously or already on file with the court and to electronically published authority.

Advisory Committee Notes

~~As a general matter, Rule 10 deals with the form of papers filed with the court - both "pleadings" as defined in Rule 7(a) and "other papers filed with the court," including motions, memoranda, discovery responses, and orders. The changes in the present rule were promulgated to clarify ambiguities in the prior rule and to address specific problems encountered by the courts. Paragraph (b), (c) and (e) of the rule were not changed, except that paragraph (e) was redesignated as (g) and new paragraphs (e) and (f) were added.~~

~~Paragraph (a). This paragraph specifies requirements for captions in every paper filed with the court. In addition to the other requirements, the caption must contain the name of the judge to whom the case is assigned, if the judge's name is known at the time the paper is filed. In the top left-hand corner of the first page, each paper must state identifying information concerning the attorney representing the party filing the paper. Finally, every pleading must state the name and current address of the party for whom it is filed; this information should appear on the lower left-hand corner of the last page. This information need not be set forth in papers other than pleadings.~~

~~Paragraph (d). The changes in this paragraph make it clear that papers filed with the court must be "typewritten, printed or photocopied in black type." The Advisory~~

~~Committee considered suggestions from groups that so-call "dox matrix" printing be specifically prohibited. The Advisory Committee, however, settled on the requirements that "typing or [printing shall be clearly legible . . . and shall not be smaller than pica size. If typing or printing on papers filed with the court complies with these standards, the papers should not be deemed to violate the rule merely because they were prepared in a dox matrix printer. As currently written, this paragraph also removes any confusion concerning the top margin and left margin requirements (now 2 inches and 1 inch respectively), and this paragraph imposes new requirements for right and bottom margins (both one-half inch).~~

~~Paragraph (e). This paragraph, which is an addition to the rule, requires typed signature lines and signature lines and signatures in permanent black or blue ink.~~

~~Paragraph (f). The changes in this paragraph make it clear that the clerk must accept all papers for filing, even though they may violate the rule, but the clerk may require counsel to substitute conforming for nonconforming papers. The clerk is given discretion to waive requirements of the rule for parties who are not represented by counsel; for good cause shown, the court may relieve parties of the obligation to comply with the rule or any part of it.~~

Rule 58B. Satisfaction of judgment.

(a) **Satisfaction by acknowledgment.** ~~A judgment may be satisfied by the owner or the owner's attorney by filing an acknowledgment of satisfaction in the court in which the judgment was first entered after payment of the judgment.~~ Within 28 days after full satisfaction of the judgment, the owner or the owner's attorney must file an acknowledgment of satisfaction in the court in which the judgment was entered. If the owner is not the original judgment creditor, the owner or owner's attorney ~~shall~~ must also file proof of ownership. If the satisfaction is for part of the judgment or for fewer than all of the judgment debtors, it ~~shall~~ must state the amount paid or name the debtors who are released.

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

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

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

Rule 74. Withdrawal of counsel.

(a) **Notice of withdrawal.** An attorney may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and no hearing or trial has been set. If a motion is pending or a hearing or trial has been set, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing or trial.

(b) **Withdrawal of limited appearance.** An attorney who has entered a limited appearance under Rule 75 shall withdraw from the case ~~by filing and serving a notice of withdrawal~~ upon the conclusion of the purpose or proceeding identified in the Notice of Limited Appearance:

(b)(1) by filing and serving a notice of withdrawal; or

(b)(2) if permitted by the judge, by orally announcing the withdrawal on the record in a proceeding.

An attorney who seeks to withdraw before the conclusion of the purpose or proceeding shall proceed under subdivision (a).

(c) **Notice to Appear or Appoint Counsel.** If an attorney withdraws other than under subdivision (b), dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until ~~20~~ 21 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

(d) **Substitution of counsel.** An attorney may replace the counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel and the client. Court approval is not required if new counsel certifies in the notice of substitution that counsel will comply with the existing hearing schedule and deadlines.

Rule 75. Limited appearance.

(a) **Purposes.** An attorney acting pursuant to an agreement with a party for limited representation that complies with the Utah Rules of Professional Conduct may enter an appearance limited to one or more of the following purposes:

(a)(1) filing a pleading or other paper;

(a)(2) acting as counsel for a specific motion;

(a)(3) acting as counsel for a specific discovery procedure;

(a)(4) acting as counsel for a specific hearing, including a trial, pretrial conference, or an alternative dispute resolution proceeding; or

(a)(5) any other purpose with leave of the court.

(b) **Notice.** Before commencement of the limited appearance the attorney shall file a Notice of Limited Appearance signed by the attorney and the party or, if permitted by the judge, orally announce the limited appearance on the record in a proceeding. The Notice shall specifically describe the purpose and scope of the appearance and state that the party remains responsible for all matters not specifically described in the Notice. The clerk shall enter on the docket the attorney's name and a brief statement of the limited appearance. The Notice of Limited Appearance and all actions taken pursuant to it are subject to Rule 11.

(c) **Motion to clarify.** Any party may move to clarify the description of the purpose and scope of the limited appearance.

(d) **Party remains responsible.** A party on whose behalf an attorney enters a limited appearance remains responsible for all matters not specifically described in the Notice.

(1) Rule 6

Rule 6(c) needs to be clarified as to what constitutes mail - USPS, email, electronic filing with the Court whereby parties are sent copies by the efiling program at the court - are these all considered mail? In light of required efiling, is (c) ever applicable to filing deadlines?

Thank you for clarifying in Rule 6(a)(4)(A)!

Posted by Randy Birch December 7, 2013 10:51 AM

Re 6(c): the rule should state explicitly that it refers to U.S. mail. "Mail" can and does include email and transmittal by commercial services, all of which are mail. The Rule can avoid disputes and confusions by stating that it means US mail.

Posted by J. Bogart November 30, 2013 08:51 AM

In the "list of deadlines" to be changed along with the proposed change to URCP 006, you show URCP Rule 3(a) changing the 10 days to file the complaint after service to 14 days. However, in URCP Rule 4(c)(2) you do not make the correlating change from 10 days to 14 days of when the complaint needs to be filed. This will create great confusion as Rule 3 will allow 14 days and Rule 4 will allow only 10 days. The only deadline in Rule 4(c)(2) that you propose to change is the number of days the defendant has to call the court clerk to find out if the complaint was filed. You are changing that from 13 days to 14 days. Changing only that call in date, without changing the other date will create confusion and disagreement between the rules.

Posted by Russell Mitchell November 27, 2013 10:46 AM

Re revised URCP Rule 6(a)(4): It would be helpful to amend or clarify the deadlines in URCP Rule 101(c) and (g) which are based on "business days" rather than calendar days like the rest of the rules. Generally, a "business day" is understood to begin at 8 a.m, end at 5 p.m., and excludes weekends and legal holidays. However, revised Rule 6(a)(4) implies a document electronically filed past the close of business but before midnight would be considered timely filed. There is some disagreement amongst the commissioners whether a response filed at 11:59pm 7 calendar days before a hearing would be considered filed 5 business days in advance and therefore timely or untimely because it was filed after 5 p.m. and therefore only 4 business days before a hearing. Given that URCP 101(c) imposes a short turnaround time for a reply (and even shorter if you're replying to a counter-motion under URCP 101(g)), I'd urge the committee to clarify that documents filed under URCP 101 must be electronically filed by 5 p.m.,

otherwise they are not considered as having been filed and served until the next business day.

Posted by Scott Wiser November 26, 2013 08:09 PM

(2) Rule 10

Once again, the rules seem to be proposed without any thought to pro se defendants. With many pro se defendants, we often have signed settlement documents. A breach of that settlement would be filed with the Court but it would be with a "wet" signature. There needs to be modifications to allow for certain types of documents to be "wet". I agree that if allowed to be scanned in, that would be sufficient. Pro se defendants do not understand the electronic signature and it causes undo confusion.

Posted by Kirk Cullimore January 14, 2014 04:17 PM

I agree with the comments of Stewart and Noel, and would vote to allow scanned signatures, not just the /s/ for the reasons stated.

Posted by Randy Birch December 7, 2013 10:51 AM

How does the proposed Rule 10 accommodate affidavits, verified petitions, and other documents that are signed by a non-attorney and/or may require notarization. I have seen documents submitted by other parties that purport to be "notarized" but have only a "/s/" with the notary's name, and no notary stamp. This does not meet the legal requirements for notarization as I understand them. A blanket prohibition on all "wet" signatures seems problematic. Nor is it readily apparent what problem this proposed prohibition is intended to solve.

Posted by Stephen Howard December 6, 2013 10:43 AM

I echo the comments regarding the proposed amendment to Rule 10 regarding graphic or "wet" signatures, specifically those of Noel Hyde. This is counterproductive and unnecessary. The proposed rule is too broad and if anything should be drastically limited to address the specific issues you are seeking to address.

Posted by Stewart December 4, 2013 03:35 PM

The proposed change to sub-paragraph (e) or URCP 10 to preclude "wet" signatures on all documents filed electronically is burdensome, confusing, and unnecessary. Mandatory electronic filing of all documents results in the electronic submission of numerous documents that were not originally prepared in an electronic format (such as original wills, certificates, notices, and recordable documents relating to real estate

transactions). The most efficient way to convert such documents to an electronic format is to scan them as .pdf documents - including the original "wet" signatures. The proposed change to the rule suggests that some other much more cumbersome process will be required in order to recreate an electronic document that includes an electronic signature in place of the "wet' signature. I understand that the argument favoring the proposed change is that it is desirable that all filed documents be electronically "readable," and that scanned documents with "wet" signatures do not meet that criteria. However, in this circumstance, the end does not justify the means. "Wet" signatures have not only been legally sufficient, but have been legally required from time immemorial, and provide a much greater assurance that a document has actually been signed by the identified individual than does any currently-available form of electronic signature. Current scanning technology permits very accurate presentation of originally-signed documents, and is both efficient and inexpensive. The current language of the rule appropriately imposes specific requirements on the form of documents which filers choose to sign electronically. However, the proposed shift to require that all filed documents be so signed exalts electronic form over practical and legal reality, and does so in a way that will result in increased expense, reduced efficiency for attorneys and others using the system, and diminished integrity of the legal record. The presence in our legal record of documents that may not meet particular criteria of electronic readability is a very small price to pay for the preservation of the legal sufficiency of "wet" signatures. "Wet" signatures should always be a valid option for any filed documents, and required forms of electronic signatures should apply only when the filer chooses to submit an electronic signature. Encouraging their use is appropriate, but precluding everything else is not.

Posted by Noel S. Hyde November 27, 2013 10:29 AM

Rule 10(a)(1):

Although not a proposed change, in Line 4, the phrase ", if known," should be added after "the file number" similar to Line 5 when commencing an action since neither the file number nor the judge's name is known at the time of filing.

Rule 10(a)(4):

Although not a proposed change, the term "cover sheet" is not applicable to new cases filed electronically.

Rule 10(d):

The Advisory Committee Note re the right and bottom margins is inconsistent with Lines 38-39 in Rule 10(d). The proposed language is 1 inch but the Advisory Note indicates a change to 1/2 inch for the right and bottom margins.

Posted by Michael A Jensen November 27, 2013 09:24 AM

On Rule 10, please consider adding an exception that a notarized document may have wet signatures by both the signer and the notary. Anything less would be very difficult to notarize. Otherwise, perhaps the new rule could limit the "no wet ink" requirement to motions and pleadings.

Thank you!

Posted by Ken Prigmore November 27, 2013 08:20 AM

While making changes to URCP Rule 10, please consider the situation where litigious pro se Plaintiff litigants may file frivilous pleadings while providing no information about a physical address where they can be personally served. A defendant is personally served to be brought into the action, a Plaintiff should be required to provide a physical address where they can be located as well. Some pro se Plaintiffs provide an address for a UPS store (or other similar business) with commercially available mail boxes as their address, which gives the appearance of a physical address when it is nothing more than a mailbox. While this works for mail, it is not an address where they can be found and served a court order or subpoena or any other process that may come up.

Please consider adding to the rule that an actual physical address of where the party can be found, or their current residential address, must be provided and clarify that "address" must include a physical location, not just a mailing address.

Posted by Russell Mitchell November 26, 2013 05:02 PM

What is a graphic signature? Our office scanned our signatures and affix them to our pleadings as a pdf inserted object. This would not be precluded by the rules, correct?

David Holman, by email 11/26/2013.

I agree with the comments to the effect that the proposed prohibition of a graphic signature is too broad. My intent was only to limit the filer's own signature on the complaint, motion, or whatever, not to prohibit other documents with graphic signatures from being scanned and filed as exhibits. If the filer needs to verify a complaint, for example, the verification can be filed as a scanned exhibit to the complaint. That's the way I described the requirement to attorneys at CLEs such as the Fall Forum, which Judge Hyde attended. I checked in with him and he seemed fine with that approach. Unfortunately, I didn't focus enough on the language of the proposed rule when I met with the advisory committee.

The reason for the prohibition is to preserve the requirement that documents be filed in searchable PDF format, which has numerous advantages. We considered allowing filers to OCR documents with a graphic signature to convert them to a searchable format, but

the conversion process introduces formatting errors into the document. The errors can be fixed, but not conveniently.

We also considered creating a list of exceptions to the searchable PDF requirement, but that introduces a level of complexity into the formatting requirements that would make compliance difficult for filers and difficult for us to enforce. It's easier just to say graphic signatures are okay on exhibits.

I would prefer that the rule were completely silent about the graphic signature. So, the phrase "with or without graphic signature" would be deleted and the sentence would end with "signer." That would give us the flexibility to change the requirements to fit our changing needs, improvements in technology, etc., without having to go back to the committee. I think that would be consistent with Judge Shaughnessy's suggestion that we create a single requirements document that the rules can just refer to (which I haven't done yet).

If the committee doesn't like that approach, I suggest withdrawing the proposed amendment for now. I'm planning a "PDF Summit" with Judge Nuffer and some attorneys who file in both state and federal court to try to work out some of the disparities in our respective formatting requirements. I may have something to propose on this issue after that.

Based on this, if you think I should come to the meeting next Wednesday to clarify any of this, let me know. It's important enough that I'm certainly willing to forego participation in the mock trials this year. I've done it in the past and there's always next year.

Debra J. Moore, District Court Administrator, by email 1/15/2014 9:54 AM

(3) Rule 58B

The proposed rule change to URCP 58B requiring the mandatory filing of a satisfaction of judgment is unduly burdensome and unnecessarily increases costs to those practitioners who handle a large volume of collection cases, which will only result in this increased cost/fee being passed to the judgment debtor. The cost and time required to prepare, file, and mail satisfaction of judgments on hundreds, if not thousands, of collection cases when paid in full will not be borne by the creditor or its attorneys. Ultimately, the costs/fees associated with the preparation, filing, and mailing of a mandatory satisfaction will be passed to the judgment debtor by including said anticipated cost/fee in the amount required to satisfy the judgment. Rather than automatically increase the cost associated with each case where the judgment is satisfied, URCP 58B should not be amended and instead the common practice of only filing a satisfaction upon the request of and at the cost to the judgment debtor on a case-by-case basis continued.

Posted by Derek Barclay January 14, 2014 04:13 PM

I like that the word "shall" was replaced by "must" in rule 10. This is why I don't understand why the new language in rule 58B uses "shall" instead of "must." I would change that to be consistent with what appears to be an attempt to modernize the language in the rules.

Posted by Axel Trumbo November 26, 2013 04:32 PM

In regards to the proposed comments to 58B, I believe 28 days is much too short of a timeline considering defendants can dispute credit card payment and issue stop payment orders. Although this is uncommon, making the deadline so short could contribute to defendants fraudulently cancelling payments after a satisfaction is obtained. I believe 90 days would be a better outside deadline in order to allow for all payments to clear, communication between clients to occur, and then documents to be submitted to the court.

E. Glen Nickle, Bar No. 6621, by email 11/27/13

(4) Rule 74 and 75

The proposed changes to Rules 74 and 75, permitting oral limited appearances and withdrawals from such appearances, are extremely helpful. In conjunction with Utah Rule of Professional Conduct 6.5, these Rule changes will help facilitate pro bono services that include limited court appearances. Simplifying pro bono representation is a wonderful goal, and the proposed changes do a great deal in furtherance of that goal.

Posted by Charles A. Stormont November 26, 2013 04:54 PM

There is a rule governing the withdrawal of counsel and the limited appearance of counsel, but no rule explains how an attorney appears as counsel in a general sense. At least not to my knowledge. I think the language in Rule 9 of the Rules of the Supreme Court of the United States should be adopted.

The rule, entitled "Appearance of Counsel," explains that "[t]he attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record shall be clearly identified." See http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf

This would clarify the process for new lawyers.

Posted by Axel Trumbo November 26, 2013 04:43 PM

Regarding withdrawal of counsel: As of now, withdrawal once the litigation has commenced requires judicial approval. This rule would permit an attorney to "withdraw

by announcing the withdrawal in court, if permitted by the judge". What must be permitted? The announcement in court? The withdrawal? Simply not allowing the attorney to say, on the record, "I withdraw" is both awkward and a waste of resources. He/she can simply walk out in the hall, write it down and give it to the clerk. Requiring judicial permission to make the motion is no different than requiring judicial permission to withdraw.

Judge James Taylor, by email 11/27/13

(5) In general

There are too many abusive rules being filed at once, and I couldn't possibly fight them all if I were being paid full time to do so. The people need a grant fund to allow them to fight proposed rules on the grounds of civil rights or misfeasance/malfeasance.

Posted by Matthew Falkner January 6, 2014 06:19 PM

Tab 3

Rule 37. Discovery and disclosure motions; Sanctions.

(a) ~~**Motion for order compelling disclosure or discovery**~~ **Grounds for expedited discovery motion**. Following the procedures of paragraph (b):

(a)(1) ~~A~~ a party or the person from whom disclosure is required or discovery is sought may move for a protective order;

(a)(2) a party may move to quash a subpoena or to compel compliance with a subpoena under Rule 45;

(a)(3) a party may move for extraordinary discovery under Rule 26; and

(a)(4) a party may move to compel disclosure or response to a discovery request ~~and for appropriate sanctions~~ if another party:

~~(a)(1)(A)~~ (a)(4)(A) fails to disclose, fails to respond to a discovery request, or makes an evasive or incomplete disclosure or response to a request for discovery;

~~(a)(1)(B)~~ (a)(4)(B) fails to disclose, fails to respond to a discovery request, fails to supplement a disclosure or response or makes a supplemental disclosure or response without an adequate explanation of why the additional or correct information was not previously provided;

~~(a)(1)(C)~~ (a)(4)(C) objects to a discovery request ;

~~(a)(1)(D)~~ (a)(4)(D) impedes, delays, or frustrates the fair examination of a witness; or

~~(a)(1)(E)~~ (a)(4)(E) otherwise fails to make full and complete disclosure or discovery.

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

~~(a)(3) The moving party must attach a copy of the request for discovery, the disclosure, or the response at issue. The moving party must also attach a certification that the moving party has in good faith conferred or attempted to confer~~

~~with the other affected parties in an effort to secure the disclosure or discovery without court action and that the discovery being sought is proportional under Rule 26(b)(2).~~

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

~~(b)(1) A party or the person from whom disclosure is required or discovery is sought may move for an order of protection. The moving party shall attach to the motion a copy of the request for discovery or the response at issue. The moving party shall also attach a certification that the moving party has in good faith conferred or attempted to confer with other affected parties to resolve the dispute without court action.~~

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

(b) **Expedited procedures for discovery motions.**

(b)(1) **Motion length and content.** The motion must be no more than four pages, not including permitted attachments, and must include in the following order:

(b)(1)(A) the relief sought and the grounds for the relief sought stated succinctly and with particularity;

(b)(1)(B) 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;

(b)(1)(C) a statement regarding proportionality under Rule 26(b)(2); and

(b)(1)(D) if the motion is a motion for extraordinary discovery, a statement certifying that the party has reviewed and approved a discovery budget.

(b)(2) **Response length and content.** No more than 7 days after the moving party has filed the motion, the nonmoving party may file a response. The response must be no more than four pages, not including permitted attachments, and must address the issues raised in the motion.

(b)(3) **Attachments.** Unless other attachments are required by law, the moving party must attach to the motion only a copy of the request for discovery, the disclosure, or the response at issue. The nonmoving party must attach to its response any required attachments that were omitted by the moving party.

(b)(4) **Proposed order.** Each party must file a proposed order concurrently with its motion or response.

(b)(5) **Decision.** Upon filing of the response or expiration of the time to do so, either party may and the moving party must file a Request to Submit for Decision under Rule 7(d). The court will promptly:

(b)(5)(A) decide the motion on the pleadings and papers;

(b)(5)(B) schedule a hearing by telephone conference or other electronic communication; or

(b)(5)(C) order additional briefing and establish a briefing schedule.

(b)(6) **Request for sanctions prohibited.** A motion or response under this paragraph may not include a request for sanctions under paragraph (e).

(b)(7) **Motion does not toll discovery time.** A motion or response under this paragraph does not suspend or toll the time to complete standard discovery.

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) **~~F~~Sanctions for failure to comply with order.**

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

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

~~(e)(2)(A)~~ (e)(1) deem the matter or any other designated facts to be established in accordance with the claim or defense of the party obtaining the order;

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

~~(e)(2)(C)~~ (e)(3) stay further proceedings until the order is obeyed;

~~(e)(2)(D)~~ (e)(4) dismiss all or part of the action, strike all or part of the pleadings, or render judgment by default on all or part of the action;

~~(e)(2)(E)~~ (e)(5) order the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure;

~~(e)(2)(F)~~ (e)(6) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

~~(e)(2)(G)~~ (e)(7) instruct the jury regarding an adverse inference.

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

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

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

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

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

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

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

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

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

Advisory Committee Notes

[Add to existing notes]

2014 Amendment.

Paragraph (b) 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 Rule 7, unless the judge directs that Rule 7 applies.

Rule 37(a)(2), which directed a motion for a discovery order against a nonparty witness to be filed in the judicial district where the subpoena was served or deposition was to be taken, has been deleted. A discovery-related motion brought by or against a nonparty served or deposed within the state must be filed in the court in which the action is pending.

Tab 4

Rule 56. Summary judgment.

(a) **Motion for summary judgment or partial summary judgment.** A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court ~~shall~~ must grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below.

(a)(1) Instead of a statement of the facts under Rule 7(c)(2), a motion for summary judgment must contain a statement of material facts claimed not to be genuinely disputed. Each fact must be separately stated in numbered paragraphs and supported by citing to materials in the record under paragraph (c)(1) of this rule.

(a)(2) Instead of a statement of the facts under Rule 7(d)(2), a memorandum opposing the motion must include a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record under paragraph (c)(1) of this rule. The memorandum may contain a separate statement of additional facts in dispute, which must be separately stated in numbered paragraphs and similarly supported.

(a)(3) The motion and the memorandum opposing the motion 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.

(a)(4) Each fact set forth in the motion or in the memorandum opposing the motion that is not disputed is deemed admitted for the purposes of the motion.

(b) **Time to file a motion.** A party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(c)(1) **Supporting factual positions**. A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must support the assertion by:

(c)(1)(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(c)(1)(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(c)(2) **Objection that a fact is not supported by admissible evidence**. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c)(3) **Materials not cited**. The court need consider only the cited materials, but it may consider other materials in the record.

(c)(4) **Affidavits or declarations**. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

(d) **When facts are unavailable to the non-moving party.** If a non-moving party shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(d)(1) defer considering the motion or deny it;

(d)(2) allow time to obtain affidavits or declarations or to take discovery; or

(d)(3) issue any other appropriate order.

(e) **Failing to properly support or address a fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(e)(1) give an opportunity to properly support or address the fact;

(e)(2) consider the fact undisputed for purposes of the motion;

(e)(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the moving party is entitled to it; or

(e)(4) issue any other appropriate order.

(f) **Judgment independent of the motion.** After giving notice and a reasonable time to respond, the court may:

(f)(1) grant summary judgment for a non-moving party;

(f)(2) grant the motion on grounds not raised by a party; or

(f)(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to grant all the requested relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or declaration submitted in bad faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. ~~An~~ The court may also hold an offending party or attorney ~~may also be held~~ in contempt or ~~subjected to~~ order other appropriate sanctions.

Advisor Committee Notes

The objective of the 2014 amendment is to adopt the style of Federal Rule of Civil Procedure 56 without changing the substantive Utah law. The 2014 amendment also moves to this rule the special briefing requirements of motions for summary judgment formerly found in Rule 7.

Nothing in these changes should be interpreted as changing the line of Utah cases that the party with the burden of proof on an issue must meet its initial burden to present materials in the record establishing that no genuine issue of material fact exists and that the party with the burden of proof is entitled to judgment as a matter of law. Only then must the party without the burden of proof demonstrate that there is a genuine dispute as to a material fact. Orvis v. Johnson, 2008 UT 2, Harline v. Barker, 912 P.2d 433 (Utah 1996), K & T, Inc. v. Koroulis, 888 P.2d 623, (Utah 1994)—contrary to the holding in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Tab 5

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: February 20, 2014
Re: "Completeness" (Rule 7) and "finality" (Rule 58A)

After much sifting, the subcommittee has concluded that there are two critical questions, and we are seeking the full committee's preferences, which should enable us to build the remainder of the rules.

- When is an order complete?
- When is an order a judgment?

When is an order complete?

In four cases over the last six years, the Supreme Court has established a policy favoring a clear indication of whether some further document is required from a party after a judge's decision. That is sound policy. The parties should not be required to guess about what, if anything, should come next.

Under the caselaw there were two ways to meet the test: prepare the order in one of the three ways described by Rule 7(f)(2); or expressly state in the order that nothing further is required from the parties. The problem, essentially, is when an order is prepared in some manner other than the three described in the rule, yet the order does not expressly state that nothing further is required. The order technically is not complete, but everyone proceeds as if it is. Problems develop later.

The caselaw imposes a requirement that may not be apparent from reading the rule, making the current circumstance is untenable. To reduce the likelihood of surprise, Rule 7 should continue the policy of a bright-line test for a completed decision, and whatever test is adopted should be clearly stated in the rule itself

The the subcommittee believes that the rule should move away from treating the manner in which the order is prepared as a means of satisfying the test. There are too many ways in which an order can be prepared for an exhaustive list of when nothing further is required. Whether an order is prepared in one of the approved ways is sometimes difficult to determine, and reliance on that conclusion is risky.

The subcommittee offers two approaches—approximately 180 degrees apart—and requests the committee's direction before drafting a rule around either. Both would establish a bright-line test for when an order is complete. Neither would completely eliminate the risk of surprise.

- An order signed by the judge is not complete unless there is an express direction that nothing further is required.
- An order signed by the judge is complete unless there is an express direction for some further action.

The first option is an extension of the caselaw. The second reverses the presumption of that caselaw.

Benefits and risks of the first option

The rule would be an extension of the current caselaw.

If there is no express direction that nothing further is required—making the order incomplete—the order cannot be appealed. Although it has not yet been reported, an incomplete order might not be enforceable. These implications would come to light when the appeal is dismissed for lack of finality (An order cannot be final if it is not complete.) or when a defense to enforceability is raised upon application for a writ or supplemental order. The party seeking to appeal or enforce the order would have to prepare for the judge’s signature an order expressly stating that nothing further is required.

Benefits and risks of the second option

The one condition that can be counted on is the judge's signature. If that signature imposes completeness by operation of law, most of the problems of the first opinion are avoided. The order can be enforced as permitted by the rules. A party may seek permission to appeal an interlocutory order, and, if the order meets the tests for a judgment, it can be appealed.

However, by avoiding one set of problems, this approach creates another that is perhaps even more significant than those under the first option. If there is no express direction that something further is required, the order is complete upon signing. If the parties do not realize the significance of that and spend the next 30 days trading draft orders, the parties will lose the right to appeal a final order and to seek permission to appeal an interlocutory order. The time for appeal being jurisdictional, there may be no way to remedy this risk.

When is an order a judgment?

A judgment is any order from which an appeal lies. Rule 54(a). Which orders can be appealed? In essence, orders that resolve all issues as to all parties. Rule 54(b):

> “In the absence of [an express direction for the entry of judgment], 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.”

On this point, the state rule is nearly identical to the federal rule. However, the state rule is different from the federal rule on how to enter a judgment.

URCP 58A	FRCP 58
(a) 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) 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) 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.	Every judgment and amended judgment [with some exceptions] must be set out in a separate document. The clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when: (A) the jury returns a general verdict; (B) the court awards only costs or a sum certain; or (C) the court denies all relief. The court must promptly approve the form of the judgment, which the clerk must promptly enter, when: (A) the jury returns a special verdict or a general verdict with answers to written questions; or (B) the court grants other relief not described in this subdivision (b). 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.

Summary of the differences

- A federal judgment must be set out in a separate document. The purpose of the separate document is to help distinguish judgments from other orders. There is no counterpart in the state rule governing judgments, but under Rule 7(f)(3) an order must be in a separate document, and a judgment is a special type of order. Rule 7(f)(1) casts confusion on this point by saying "An order includes every direction of the court … not included in a judgment."
    - This discrepancy needs to be fixed. Should the judgment be a special type of order? Or should a judgment be different from an order. The federal rules follow the former model. The state rules have features of both. Requiring a separate document as under the

federal rules has advantages, but apparently even the federal courts have a difficult time defining finality.

- The federal court clerk and the state court clerk sign judgments under different circumstances.
    - This difference likely does not add to the analysis. Under the state rules and traditions, the judges sign orders, and the clerks record them. Clerks can sign some documents with a judge’s signature stamp, but this is exercising delegated authority. The clerk has authority to sign certain writs and orders in her own right, but the list is limited.
- Under the state rule, all judgments are entered when signed and filed. The clerk is directed to record the judgment immediately, but the rule does not assign any consequences to the recording. Under the federal rule when a judgment is entered depends on whether the judgment has to be in a separate document. If the judgment has to be in a separate document (all instances except orders on post-judgment motions), then the judgment is entered when the clerk enters it in the civil docket and either the judgment is set out in a separate document or 150 days have passed since the clerk made that entry. If a separate document is not required, then the judgment is entered when the clerk enters it in the civil docket
    - The line marking entry of an order (including a judgment) in the state courts is when the judge signs the order and it is filed with the clerk. The line marking entry of an order in federal court is when the clerk enters that order in the docket, unless the order is a judgment requiring a separate document. In the latter case, the line marking entry is the combination of entry by the clerk and the approval of the separate document, or the combination of entry by the clerk and passage of 150 days from whatever document was signed and entered in the first instance.
    - The federal rule imposes completeness and finality by operation law after 150 days, regardless of errors or omissions. This is, in essence, the second option under the first question above, but the federal rule adds 150 days so that anyone caught unaware that the appeal clock is ticking has less reason to complain.

The subcommittee recommends amending Utah Rule 58A to track Federal Rule 58 as closely as possible. This will apply the separate document requirement to judgments only, helping to distinguish them from non-appealable orders. Confusion may still result from the fact that the separate document will be signed by the judge, whereas under the federal rules the separate document is either signed and entered by the clerk, or prepared and entered by the clerk after the court has approved the form of the judgment. The subcommittee will continue to look at ways to alleviate the problem of distinguishing judgments from other orders, but some confusion may be an unavoidable consequence of our state system.

Tab 6

Rule 14. Settlement offers.

(a) Unless otherwise specified, an offer made under this rule is an offer to resolve all claims in the action between the parties to the date of the offer, including costs, interest and, if attorney fees are permitted by law or contract, attorney fees.

(b) If the adjusted award is not more favorable than the offer, the offeror is not liable for costs, prejudgment interest or attorney fees incurred by the offeree after the offer, and the offeree must pay the offeror's costs incurred after the offer. The court may suspend the application of this rule to prevent manifest injustice.

(c) An offer made under this rule must:

(c)(1) be in writing;

(c)(2) expressly refer to this rule;

(c)(3) be made after the judgment and before the notice of appeal;

(c)(4) remain open for at least 10 days; and

(c)(5) be served on the offeree under Rule 5 of the Rules of Civil Procedure.

(d) Acceptance of the offer must be in writing and served on the offeror under Rule 5 of the Rules of Civil Procedure. Upon acceptance, either party may file the offer and acceptance with a proposed judgment.

(e) "Adjusted award" means the amount awarded by the judge after trial de novo and, unless excluded by the offer, the offeree's costs and interest incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer. If the offeree's attorney fees are subject to a contingency fee agreement, the court shall determine a reasonable attorney fee for the period preceding the offer.

(f) The offeror’s costs includes the filing fee and other costs for an appeal to a trial de novo.

Tab 7

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: February 20, 2014
Re: Process for motion for order to show cause

The Board of District Court Judges has recommended and the Judicial Council has approved a rule within the code of judicial administration to govern the process for orders to show cause. As with the expedited process for discovery motions, the Board's and the Council's intent is to have this process ultimately included within the rules of civil procedure and repeal the provision from the code of judicial administration.

I have used for the baseline the rule adopted by the Board and Council. I recommend several amendments to simplify the text. Whatever draft is approved by the committee would of course be entirely new text.

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

Rule 7A. Motion for order to show cause.

(a) **Motion.** ~~A party who seeks to~~ To enforce an order or a judgment ~~of a court against an opposing~~ a party may file an ex parte motion for an order to show cause following the procedures of this rule. ~~The motion must be filed with the same court and in the same case in which that order or judgment was entered. The motion shall be made only on an ex parte basis, and the procedures of Rule 7 of the Utah Rules of Civil Procedure shall not apply.~~

(b) **Affidavit.** The motion ~~for an order to show cause~~ must be accompanied by at least one ~~supporting~~ affidavit or declaration under Utah Code Section 78B-5-705~~. Each supporting affidavit must be~~ based on personal knowledge and ~~must~~ setting forth admissible facts and not mere conclusions sufficient to show cause to believe a party has violated an order or judgment. At least one ~~supporting~~ affidavit or declaration must state the title and date of entry of the order or judgment which the moving party seeks to enforce.

(c) **Order to show cause.** The motion ~~for an order to show cause~~ must be accompanied by ~~the~~ a proposed order to show cause, which ~~shall~~ must:

(c)(1) state the title and date of entry of the order or judgment which the moving party seeks to enforce;

(c)(2) ~~specify~~ state the relief sought by the moving party;

(c)(3) state whether the moving party has requested that the ~~opposing~~ non-moving party be held in contempt and, if ~~such a request has been made~~ so, ~~recite~~ state that the ~~sanctions~~ penalties for contempt may include, but are not limited to, a fine of up to $1000 ~~or less~~ and ~~a~~ confinement in jail ~~commitment of~~ for up to 30 days ~~or less~~.

(c)(4) order the ~~opposing~~ non-moving party to ~~make a first appearance in court~~ appear personally or through counsel at a ~~specific~~ stated date, time and place ~~and, then and there,~~ to explain ~~why or~~ whether the ~~opposing~~ non-moving party acted or failed to act in compliance with ~~such~~ the order or judgment;

~~(c)(4) order the opposing party to appear personally or through legal counsel at the first appearance;~~

(c)(5) state that no written response ~~to the motion and order to show cause~~ is required;

(c)(6) state that the ~~first appearance shall not be the~~ hearing is not an evidentiary hearing, but ~~shall be~~ is for the purpose of determining:

(c)(6)(A) whether the ~~opposing~~ non-moving party ~~contests~~ denies the ~~allegations~~ claims made by the moving party;

(c)(6)(B) whether an evidentiary hearing is ~~necessary~~ needed;

(c)(6)(C) the ~~specific~~ issues ~~to be resolved through an evidentiary hearing~~ on which evidence may be submitted; and

(c)(6)(D) the estimated length of ~~any such~~ an evidentiary hearing.

(d) **Service.** If the court ~~grants the motion and issues~~ enters an order to show cause, the moving party must have the order, the motion and all ~~supporting~~ affidavits and declarations served upon the ~~opposing~~ non-moving party~~. Service shall be made~~ in the manner ~~prescribed~~ for service of a summons and complaint at least 7 days before the hearing.~~, unless the moving party shows~~ For good cause ~~for~~ the court may order that service ~~to~~ be made ~~by mailing or delivery to the opposing party's~~ on the non-moving party's counsel of record ~~and the court so orders~~. The ~~date of the opposing party's first appearance on the order to show cause may not be sooner than five days after service thereof, unless~~ court may order less than 7 days notice of the hearing if:

(d)(1) the motion requests an earlier ~~first appearance~~ date; and

(d)(2) it clearly appears from specific facts shown by the declarations or affidavits that immediate and irreparable ~~injury, loss, or damage~~ harm will result to the moving party if the ~~first appearance~~ hearing is not held sooner ~~than five days after service of the order to show cause; and~~

~~(d)(3) the court agrees to an earlier first appearance date~~.

(e) **First ~~appearance~~ hearing.** ~~The opposing party's first appearance on the order to show cause, at the date, time and place stated therein, shall not be the evidentiary hearing.~~ At the ~~first appearance~~ hearing, the court ~~shall~~ will determine:

(e)(1) whether the ~~opposing~~ non-moving party ~~contests~~ denies the ~~allegations~~ claims made by the moving party;

(e)(2) whether an evidentiary hearing is ~~necessary~~ needed;

(e)(3) the ~~specific~~ issues ~~to be resolved through an evidentiary hearing~~ on which evidence may be submitted; and

(e)(4) the estimated length of ~~any such~~ an evidentiary hearing.

The court may enter an order regarding any claim that the non-moving party does not deny. The court may order the parties to file memoranda on legal issues before the evidentiary hearing. Memoranda must follow the requirements of Rule 7. ~~If the opposing party does not contest the allegations made by the moving party, the court may proceed at the first appearance as the circumstances require.~~

(f) **Evidentiary hearing.** ~~At the evidentiary hearing on a contested order to show cause, the moving party shall~~ The moving party bears the burden of proof on all ~~allegations which are~~ claims made in ~~support of~~ the ~~order~~ motion.

(g) **Limitations.** An motion for an order to show cause may not be ~~requested in order to obtain an original order or judgment; for example, an order to show cause may not be~~ used to obtain a temporary restraining order or ~~to establish~~ a temporary order~~s~~ in a divorce case or any other original order or judgment. ~~This rule shall apply only in civil actions, and shall not be applied to orders to show cause in criminal actions.~~ This rule does not apply to an order to show cause issued by ~~a~~ the court on its own initiative. This rule does not apply to a motion for an order to show cause from a court commissioner.

Tab 8

Administrative Office of the Courts

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

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

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: February 20, 2014
Re: Requiring transcriptions by a certified court reporter

I've attached excerpts of several rules and statutes that currently govern recording depositions and transcribing that record. *State v. Menzies*, 845 P.2d 220, 225 (Utah 1992) may also be relevant.

I recommend that the committee amend Rule 30(b)(2) to require a certified court reporter when a deposition is recorded by stenographic means. It appears from the discussion that this is the universal practice, so the change should have no practical impact.

> (b)(2) The notice shall designate the method by which the deposition will be recorded. With prior notice to the officer, witness and other parties, any party may designate a recording method in addition to the method designated in the notice. Depositions may be recorded by sound, by sound-and-visual, or by stenographic means by a certified court reporter as defined by Utah Code Section 58-74-102, and the party designating the recording method shall bear the cost of the recording. The appearance or demeanor of witnesses or attorneys shall not be distorted through recording techniques.

If the committee wants to require that a published deposition be transcribed by a certified court reporter, I recommend amending Rule 32(e) instead of Rule 30(f)(3) as was suggested in the January meeting. Instead the committee should simply delete the last sentence of Rule 30(f)(3).

> (f)(3) Upon payment of reasonable charges, the officer shall furnish a copy of the record to any party or to the witness. ~~An official transcript of a recording made by non-stenographic means shall be prepared under Utah Rule of Appellate Procedure 11(e).~~

Th deleted sentence makes no sense in the context of a deposition. URAP 11(e) governs requests for transcripts of the trial court record, and that transcription process is not available for recordings not made on the district court or juvenile court audio recording systems.

If the committee wants to require that a published deposition be transcribed by a certified court reporter, I recommend amending Rule 32(e).

> (e) Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or non-stenographic form, but, if in non-stenographic form, the party shall also provide the court with a transcript of the portions so offered transcribed by a certified court reporter as defined by Utah Code Section 58-74-102.

Given the current Rule 32(e) and the holding in Menzies (see attachment), it appears that the Utah courts have not required transcripts from certified court reporters for many years. So, unlike the suggested change to Rule 30(b)(2), this amendment would be a significant change to Utah law.

If the committee wants to consider this course of action, I recommend hearing from representatives of businesses who video record depositions and then transcribe that record. If there is not sufficient support for requiring that a published deposition be transcribed by a certified court reporter, then the committee might amend Rule 30 as proposed without hearing from others.

Deposition and transcript laws

(1) URCP Rule 28. Persons before whom depositions may be taken.

(a) Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term "officer" as used in Rules 30, 31, and 32 includes a person appointed by the court or designated by the parties under Rule 29.

….

(2) URCP Rule 30. Depositions upon oral questions.

(b) Notice of deposition; general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.

….

(b)(2) The notice shall designate the method by which the deposition will be recorded. With prior notice to the officer, witness and other parties, any party may designate a recording method in addition to the method designated in the notice. Depositions may be recorded by sound, by sound-and-visual, or by stenographic means by a certified court reporter as defined by Utah Code Section 58-74-102, and the party designating the recording method shall bear the cost of the recording. The appearance or demeanor of witnesses or attorneys shall not be distorted through recording techniques.

….

(f)(3) Upon payment of reasonable charges, the officer shall furnish a copy of the record to any party or to the witness. ~~An official transcript of a recording made by non-stenographic means shall be prepared under Utah Rule of Appellate Procedure 11(e).~~

….

(3) URCP Rule 32. Use of depositions in court proceedings.

(a) Use of depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

….

(d) Publication of deposition. Use of a deposition under Subsection (a) of this rule shall have the effect of publishing the deposition unless the court orders otherwise in response to objections.

(e) Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered transcribed by a certified court reporter as defined by Utah Code Section 58-74-102.

(4) State v. Menzies, 845 P.2d 220, 225 (Utah 1992)

II. QUALIFICATIONS OF THE COURT REPORTER

At the trial level, Menzies argued that because Lee was not licensed in Utah, the transcript she prepared could not be used on appeal. The trial court rejected this argument, ruling that Lee's licensure status did not affect the validity of the transcript because Lee was “de facto” qualified. On appeal, Menzies claims that this ruling constitutes abuse of discretion.

Menzies' argument is based on Utah Code Ann. § 78–56–15, which provides that “no person may be appointed to the position of shorthand reporter nor act in that capacity ... unless he has received a certificate from the Division of Occupational and Professional Licensing,” and on Utah Code Ann. § 76–3–206(2) and Utah Rule of Criminal Procedure 26(10), which provide for mandatory review of the “entire record” in every case in which a sentence of death is imposed. Menzies asserts that these statutes and rule 26(10) implicitly provide that only a transcript prepared by a certified reporter may be used to review a capital case. In the alternative, he argues that even if the transcript can be used, the presumption that the record is correct, provided in Utah Code Ann. § 78–56–6, should not apply to a transcript that was not prepared by a certified reporter.

However, section 78–56–15, section 76–3–206(2), and rule 26(10) neither prohibit the use of transcripts prepared by an uncertified reporter nor revoke the presumption of correctness for transcripts prepared by uncertified reporters. Furthermore, although section 78–56–15 requires a Utah license for the position of court reporter, section 78–56–17 provides for unlicensed court reporters under certain conditions. The rules of statutory construction require that these sections be read together, harmonizing their provisions so that neither section negates a part of the other. Given this rule of construction, section 78–56–15 cannot be read as a total prohibition against the use of transcripts prepared by uncertified reporters. Nor can this section be read as providing that transcripts prepared by uncertified reporters are not entitled to the presumption of correctness. Therefore, Menzies' statutory argument is not compelling.

(5) Section 58-74-102. Definitions.

….

(3) "Certified court reporter" means any person who engages in the practice of court reporting who is:

(a) a shorthand reporter certified by the National Court Reporters Association; or

(b) a voice reporter certified by the National Verbatim Reporters Association.

….

(7) "Practice of court reporting" means the making of a verbatim record of any … deposition … or other sworn testimony given under oath.

(6) Section 58-74-301. Licensure required.

(1) A license is required to engage in the practice of court reporting.

(2) The division shall issue to any person who qualifies under this chapter a license to practice as a certified court reporter.

(7) Section 58-74-501. Unlawful conduct.

(1) It is unlawful for any person not licensed in accordance with this chapter to assume the title or use the abbreviation C.S.R. or C.V.R. or any other similar words, letters, figures, or abbreviation to indicate that the person using that title or abbreviation is a certified court reporter.

….

(8) Section 58-1-501. Unlawful and unprofessional conduct.

(1) "Unlawful conduct" means conduct, by any person, that is defined as unlawful under this title and includes:

(a) practicing or engaging in, representing oneself to be practicing or engaging in, or attempting to practice or engage in any occupation or profession requiring licensure under this title if the person is:

(i) not licensed to do so or not exempted from licensure under this title; or

….

2012 WL 5473134
Only the Westlaw citation is currently available.
United States District Court,
D. Utah,
Central Division.

Blake SLAUGHTER, an individual and James Starr, an individual, Plaintiffs,
v.
The BOEING COMPANY, a Delaware Corporation, Defendant.

No. 2:11–cv–537–DN–BCW. | Nov. 9, 2012.

Attorneys and Law Firms

April L. Hollingsworth, Hollingsworth Law Office LLC, Salt Lake City, UT, Hubert A. Grissom, Olympic Law Group PLLP, Tampa, FL, for Plaintiffs.

Mary Anne Q. Wood, Aaron M. Pacini, Wood Balmforth LLC, Salt Lake City, UT, for Defendant.

Opinion

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO OVERRULE DEFENDANT'S OBJECTIONS TO PLAINTIFFS' TAKING AND TRANSCRIPTION OF DEPOSITIONS OF TRACY GERTINO AND JEREMY FOX

BROOKE C. WELLS, United States Magistrate Judge.

***1** This matter was referred to Magistrate Judge Brooke C. Wells by District Judge David Nuffer pursuant to 28 U.S.C. § 636(b)(1)(A).[1] Before the Court is Plaintiffs' Motion to Strike Objections or Overrule Defendant's Objections to Plaintiffs' Taking and Transcription of Depositions of Tracy Gertino and Jeremy Fox.[2] The Court has carefully reviewed the objection, motion and memoranda submitted by the parties. Pursuant to civil rule 7–1(f) of the United States District Court for the District of Utah Rules of Practice, the court elects to determine the motion on the basis of written memoranda and finds that oral argument would not be helpful or necessary.[3]

1 Docket No. 32.

2 Docket No. 31.

3 *See* DUCivR 7–1(f).

BACKGROUND

At issue are the depositions of two of Defendant's employees, Tracy Gertino and Jeremy Fox. The deposition notices for these two individuals stated, in pertinent part:

> PLEASE TAKE NOTICE that Plaintiffs ... will take the deposition of TRACY GERTINO [and JEREMY FOX] before a certified court reporter, notary public or some other official authorized by law to administer oaths ... [.] The oral examination will be videotaped ... [.] The videotaped deposition is taken for use at trial and all other purposes permitted by the Federal Rules of Civil Procedure.[4]

4 Exh. A., docket no. 30.

Plaintiffs employed Lee Richan of AVLawDepot, LLC to administer, videotape, transcribe and certify the depositions. Mr. Richan is notary, licensed by the State of Utah. Defendant objects to the notice and the method of taking the depositions because the notice did not clarify exactly how the deposition was to be taken. Defendant further objects to the deposition because Defendant alleges that the Mr. Richan is not certified to prepare transcriptions in state or federal courts. Defendant requests that the depositions be stricken and not be available for use in the proceedings.

Conversely, Plaintiffs contend that the use of videotape and notaries in Utah are proper methods for recording and transcribing depositions under the Federal Rules

of Civil Procedure. Plaintiffs also point to the use of video recording being allowed in both Utah state courts and administrative procedures. Further, Plaintiffs are requesting attorney's fees and costs in having to file the motion to overrule Defendant's objections.

ANALYSIS

I. *Deposition Notices*

Rule 30 of the Federal Rules of Civil Procedure states, in relevant part, that "[t]he party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means [and] any party may arrange to transcribe a deposition."[5] Rule 30 further states that "[w]ith prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice."[6] Plaintiffs have met the requirements of these provisions. In the notice of depositions, Plaintiffs indicated that the depositions would be taken "... before a certified court reporter, notary public or some other official authorized by law to administer oaths ... [.] The oral examination will be videotaped ..." The depositions were taken as noticed in the deposition notices sent to the Defendant. Further, the rules regarding notice contemplate that if counsel for the Defendant had objections to the method of recording or were concerned that they would not be recorded to its satisfaction, Defendant could have arranged for another method of recording or transcription. Here, counsel for the Defendant did not arrange for another means of recording or transcription and the deposition notices were proper.

5 Fed.R.Civ.P. 30(b)(3)(A).

6 Fed.R.Civ.P. 30(b)(3)(B).

II. *The Use of Videotape and a Notary Publics during Depositions.*

***2** Next, Defendant argues that Mr. Richan, a notary, who videotaped and later transcribed and certified the deposition transcript is not qualified to prepare a transcript of the deposition and therefore such transcripts should be striken and not allowed for use in these proceedings.

First, under the Federal Rules of Civil Procedure, videotaped depositions are al lowed.[7] Rule 28 provides that a deposition may be taken before "an officer authorized to administer oaths either by federal law or by the law in the place of examination."[8]

7 *See* Fed.R.Civ.P. 30(b)(3)

8 Fed.R.Civ.P. 28; *see generally*, *Meacham v. Church*, No. 2:08–cv–535, 2010 WL 1576711, at *4 (D.Utah 2010)(concluding [t]he plain language of [Rule 30] is clear: absent a waiver, "a deposition must be conducted before an officer appointed or designated under Rule 28.")

Here, as stated in the notice, the depositions at issue took place in Salt Lake City, Utah. In Utah, notaries are statutorily authorized to administer oaths.[9] Although there is statutory support for notaries taking depositions, Utah case law with regard to this subject is virtually silent. However, in dicta to *Wooley v.. Wight*, the Utah Supreme Court applying Utah law stated that "[a] deposition may be taken before an officer authorized to administer oaths. A notary public is such an officer."[10]

9 Utah Code Ann. § 46–1–6(4)(providing that "the following notarial acts may be performed by a notary within the state: (1) acknowledgements; (2) copy certifications; (3) jurats; and (4) oaths or affirmations.")

10 *Wooley v. Wight*, 238 P. 1114, 1116 (Utah, 1925), *overruled on other grounds by Olson v. District of Salt Lake County*, 71 P.2d 529, 533 (Utah, 1937).

Moreover, it appears that neither the 10th Circuit or courts within this District have ruled on this specific issue regarding the nonstenographic video recording of a deposition which is administered and later certified by a notary. However, in looking to other states, it appears that at least both Colorado and Texas statutorily allows notaries to take depositions.[11] Further, an opinion issued by the Attorney General of Texas has explicitly found that "notaries public have authority to take written depositions in non-stenographic form."[12]

11 *See* COLO.REV.STAT. ANN. § 12–55–110(1)(b),(d)("[e]very notary public is empowered to: (b) administer oaths & affirmations; (d) take depositions, affidavits, verifications, and other sown testimony or statements[.]"); TEX. GOV'T CODE ANN. § 406.016(a)(4)-(5) ("a notary public has the same authority as the county clerk to (4) take depositions; (5) certify copies of documents not recordable in the public records ...").

12 Op. Tex. Atty. Gen. JM–110 (1983)

In addition, the Federal Rules of Civil Procedure provide additional safeguards for depositions that are taken non-stenographically. Under Rule 30(b)(5)(B), "[i]f the deposition is recorded non-stenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) [the officer's name and place of business; the date, time and place of the deposition; and the deponent's name]. Further, Rule 30(5)(B) requires that "[t]he deponent's and attorney's appearance or demeanor must not be distorted through recording techniques." Here, at least from the deposition transcript excerpt provided as an exhibit to Defendant's objection, it appears that Mr. Richan did comply with the requirements of Rule 30(b)(5(A)(i)-(iii).[13] Mr. Richan provided his name, place of business, time and place of deposition and the deponent's name.[14] The videotape, provided it is of good quality (which there has been no argument that it is not) ensures the accuracy contemplated by the Federal Rules.[15] Moreover, if the Defendant was truly concerned about the accuracy of the transcript of the depositions could have hired their own certified court reporter to transcribe the depositions from the videotape as contemplated by the Federal Rules of Civil Procedure. Thus, although Utah does not explicitly spell out within a statute that notaries can take depositions as in other states, the language of the statute and the Federal Rules of Civil Procedure together allow for a notary to videotape and certify a transcript.

13 *See* Exh. D, docket no. 30.

14 *Id.*

15 *See Clark v. Schaller*, No. 06–C–242, 2006 WL 288296, at *1(E.D.Wis., 2006) (holding that an *in forma pauperis* Plaintiff who wished to have an individual authorized to administer oaths take the Defendant's deposition is not entitled to court assistance for the recording of such a deposition. In so holding, the Court stated, "[a]bsent audio(visual) recording, then, [the Plaintiff] must provide a court reporter or other competent stenographer.")

III. *Attorney's Fees & Costs*

***3** Rule 30(d)(3)(C) of the Federal Rules of Civil Procedure directs that "Rule 37(a)(5) applies to the award of expenses."[16] Generally, Rule 37 governs the awarding of sanctions for failure to cooperate in discovery and/or the award of expenses for protective orders. It provides in relevant part:

16 Fed.R.Civ.P.30(d)(3)(C).

> [i]f the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent upon whose conducted necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. *But the court must not order this payment if:* (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing part's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust.[17]

17 Fed.R.Civ.P. 37(a)(5)(A)(emphasis added).

Upon review of the motion and memoranda, (i) the Court concludes that the present motion was filed by Plaintiffs in response to an objection that was filed by Defendant. It does not appear that the parties attempted to "meet and confer" other than during the deposition itself when counsel for Defendant objected to the form of the depositions; (ii) Defendant's response to the Plaintiff's motion was substantially justified as it appears that this issue has not been previously decided by a Court in this district and (iii) based on the court's conclusion to the second factor, an award of expenses would be unjust. Therefore, the Court denies Plaintiffs' request for attorney's fees and expenses.

CONCLUSION

For the foregoing reasons, it is HEREBY ORDERED that the Plaintiff's Motion to Strike Objections, or Overrule Defendant's Objections to Plaintiffs' Taking and Transcription of Depositions of Tracy Gertino and Jeremy Fox[18] is HEREBY GRANTED. The depositions as well as the notices were proper under both the Federal and Utah Rules of Civil Procedure. Accordingly, the oral depositions of Tracy Gertino and Jeremy Fox were appropriately conducted and as such the testimonies of both witnesses will not be stricken. However, as stated above, the Court is not inclined to award attorney's fees and costs and therefore DENIES Plaintiffs' request for attorney's fees and costs.

[18] Docket no. 31.

Appellate History (2)

Direct History (1)

1. Slaughter v. Boeing Co.
2012 WL 5473134 , D.Utah , Nov. 09, 2012

Related References (1)

2. Slaughter v. Boeing Co.
2013 WL 65462 , D.Utah , Jan. 04, 2013