Agenda

Advisory Committee on Rules of Civil Procedure

April 22, 2015

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes.	Tab 1	Jonathan Hafen
Report on action by the Supreme Court on Rules 5, 7, 54, 56 and 58A.	Tab 2	Jonathan Hafen
Post-trial motions. Rules 50, 52, 59 and 60. Technical amendment to Rule 6.	Tab 3	Frank Carney
Rule 63. Disability or disqualification of a judge.	Tab 4	Tim Shea
Rule 8. General rules of pleadings.	Tab 5	Tim Shea
Rule 9. Pleading special matters.	Tab 6	Tim Shea
Rule 26.1. Disclosure and discovery in domestic relations actions.	Tab 7	Leslie Slaugh

Committee Webpage: http://www.utcourts.gov/committees/civproc/

Meeting Schedule:

May 27, 2015

September 23, 2015

October 28, 2015

November 18, 2015

Tab 1

Minutes

Advisory Committee on the Rules of Civil Procedure

March 25, 2015

Draft: Subject to change

Present: Lyle Anderson, Rod Andreason, James Blanch, Lincoln Davies, Evelyn Furse, Jonathan Hafen, Presiding, Terrie McIntosh, Derek Pullan, David Scofield, Leslie Slaugh, Trystan Smith, Paul Stancil, Barbara Townsend, Lori Woffinden

Excused: Sammi Anderson, John Baxter, Scott Bell, Amber Mettler, Heather Sneddon, Kate Toomey

Staff: Tim Shea,

Guests: Frank Carney

(1) APPROVAL OF MINUTES.

The minutes of February 25, 2015 were amended to show Mr. Andreason as excused. The minutes were approved as amended.

(2) CONSIDERATION OF COMMENTS TO RULE 7.

Mr. Shea reported that he had edited the draft based on the discussion at the last meeting. The further changes are highlighted in this month's draft.

Regarding paragraph (g), request to submit for decision: The committee decided not to define the completion of briefing, but to add to the content of the request to submit for decision the date on which a response to objections raised in the reply memorandum had been filed.

Regarding paragraph (i), notice of supplemental authority: The committee decided not to describe the notice as a "letter," but because the notice will take the form of a pleading, to permit up to two pages, rather than one. The committee discussed how best to bring the notice to the judge's attention. If the notice is electronically filed, it will be categorized as "other," and will not be directed to the judge's work queue. Mr. Shea will request that the e-filing system be modified to create a document type of "notice of supplemental authority" and that the document be directed to the judge's work queue.

Regarding paragraph (l), motions that may be acted on without waiting for a response: The committee discussed how best to describe motions that can be acted on without waiting for a response. The specific motions discussed at the last meeting include a motion to permit an overlength motion or memorandum, a motion for an extension of time, and a motion to appear pro hac vice. Mr. Shea reported that Mr. Bell was unable to find the list of motions that he had mentioned at the last meeting. Mr. Shea reported that rules from other jurisdictions used the term "procedural" motions. The committee decided on "other similar motions."

Regarding paragraph (n), motion in opposing memorandum or reply memorandum prohibited: Mr. Andreason recommended changing "The proper procedure is to include in the subsequent memorandum an objection to the evidence" to "Instead, the party must include in the subsequent memorandum an objection to the evidence." The committee approved the change.

Regarding paragraph (o), overlength motion or memorandum: Ms. McIntosh recommended deleting the sentence "The court may act on the motion without waiting for a response" because this motion is listed in the earlier paragraph. The committee approved the change.

The committee decided that the plural of memorandum should be the Latin "memoranda," rather than the English "memorandums." Two datums were cited for the preference.

The committee approved the remainder of the further changes. The committee discussed whether to again publish the rule for comment. The committee decided that all of the further changes were in

response to suggestions made during the comment period and that the rule did not need to be republished. The committee recommended that the Supreme Court approve the rule, along with Rule 54 and Rule 58A.

(3) RULE 43. EVIDENCE.

Mr. Shea reported that the proposed amendment is from a committee of the Judicial Council that recommends using technology to conduct hearings and provide services remotely. He said that 15 courthouses are being fitted with sound systems, cameras and monitors. The criminal rules committee and the juvenile rules committee are considering similar rules for those cases, and the Judicial Council has a draft rule to describe the minimum requirements of a quality system.

Judge Pullan questioned whether the committee note promoted video testimony over live testimony by quoting from Bustillo v. Hilliard. Mr. Shea said that the quote was intended as a response to the committee note from the federal rule which says that deposition testimony is preferable to video testimony The committee decided that the "inmate" referred to in the note should be more fully described as the "plaintiff in a civil rights action."

The committee discussed whether to adopt the phrasing from the federal rule: "for good cause in compelling circumstances," whether one or the other would be sufficient, and if so, which one. Some members thought that "good cause" should be a sufficient showing and that the phrase is well known in other circumstances. Others felt that "compelling circumstances" represented a higher standard and that it would be easier to relax the standard based on experience than to raise the standard. Ultimately, the committee favored "good cause."

The committee approved the rule as amended to be published for comment.

(4) POST-TRIAL MOTIONS. RULES 50, 52, 59 AND 60.

Mr. Carney had proposed amendments several months ago to make Rule 50 more similar to its federal counterpart, which was adopted in 1991. There are three substantive changes. The first is to rename the motion from "motion for a directed verdict" and "motion for judgment notwithstanding the verdict" to "motion for judgment as a matter of law." Mr. Carney said the two current motions are really the same motion made at different times in the proceedings. He said the motion for a directed verdict described the former practice of directing the jury to enter a particular verdict, but that judges no longer take that approach. The new name for the motion is a more accurate description of the relief being requested and the grounds for that relief. The new name will not change the standards for considering the motion.

The second substantive change is to eliminate the requirement that a motion for a directed verdict be renewed at the close of all evidence. Under the federal rule and the proposed state rule, the motion must be made at the close of the other party's case and can be renewed, but it is not required. This eliminates a potential trap and still allows a party to correct an omission if the judge permits.

Finally, the federal rule was amended in 2009 to allow a more realistic 28 days after the judgment in which to make the motion. The current state rule is 14 days.

The remaining changes are to model the plain-language edits of the federal rules.

Mr. Carney recommends that all of the rules, like the federal rules, allow 28 days after judgment in which to file the motions, and he recommends that all of the rules, like the federal rules, calculate timeliness from the date the motion is filed. Currently the rules are a mix of when the motion was "filed" or "served" or "made."

Mr. Shea explained the further amendments he is proposing to Rule 52, Rule 59 and Rule 60.

Ms. McIntosh said that Rule 6 may also need to be amended to correct references to particular paragraphs within these rules.

The committee discussed the rules and will return to them at the next meeting.

(5) RULE 63. DISABILITY OR DISQUALIFICATION OF A JUDGE.

Mr. Shea reported that there had been three requests for changes to Rule 63. One would describe the required practice that the subject judge either grant the motion or transfer it to a reviewing judge for consideration without further response from the parties and without hearings. The second request would permit a second or subsequent motion if the motion was based on grounds not in existence at the time of the earlier motion. The third would incorporate the grounds for disqualification described in a federal statute.

The committee discussed the rule and will return to it at the next meeting.

(6) RULE 73. ATTORNEY FEES.

Mr. Shea reported that Rule 73 is being considered by the joint workgroup formed with the appellate rules committee, and that these proposed amendments are premature. The committee tabled the rule until the report from the workgroup.

(7) ADJOURNMENT

The committee adjourned at 6:00.

Tab 2

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
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April 16, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rules 5, 7, 54, 56 and 58A

The Supreme Court approved as submitted Rules 5 and 54. The court approved with just a slight change in some phrasing Rules 56 and 58A. The court also removed a substantial portion of the proposed committee note to Rule 56.

The justices appeared favorably disposed to the committee's proposal for Rule 7, but would like us to re-examine paragraph (f). The justices were inclined to agree with the comments that pointed out that we had provided an opportunity to respond to an objection made in a reply memorandum, but we had not provided for an opportunity to object to new evidence introduced in the reply memo.

I have attached the draft of Rule 7 that you recommended to the court with a second version of paragraph (f) added. The second rendering of paragraph (f) was submitted for your consideration in February, but you decided to recommend the first rendering, which had been published for comment. The discussion by the committee favoring the version published for comment was to the effect that the rule should not invite a string of rebuttal and surrebuttal memos, which adds to the time before the judge can rule on the motion. The justices considered this argument but felt that a party should not be denied the opportunity to object to evidence introduced for the first time in the reply memo.

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

(a) Pleadings. Only these pleadings are allowed:

(a)(1) a complaint;

(a)(2) an answer to a complaint;

(a)(3) an answer to a counterclaim designated as a counterclaim;

(a)(4) an answer to a crossclaim;

(a)(5) a third-party complaint;

(a)(6) an answer to a third-party complaint; and

(a)(7) a reply to an answer if ordered by the court.

(b) Motions. A request for an order must be made by motion. The motion must be in writing unless made during a hearing or trial, must state the relief requested, and must state the grounds for the relief requested. Except for the following, a motion must be made in accordance with this rule.

(b)(1) A motion, other than a motion described in paragraphs (b)(2), (b)(3) or (b)(4), made in proceedings before a court commissioner must follow Rule 101.

(b)(2) A request under Rule 26 for extraordinary discovery must follow Rule 37(a).

(b)(3) A request under Rule 37 for a protective order or for an order compelling disclosure or discovery—but not a motion for sanctions—must follow Rule 37(a).

(b)(4) A request under Rule 45 to quash a subpoena must follow Rule 37(a).

(b)(5) A motion for summary judgment must follow the procedures of this rule as supplemented by the requirements of Rule 56.

(c) Name and content of motion.

(c)(1) The rules governing captions and other matters of form in pleadings apply to motions and other papers. The moving party must title the motion substantially as: “Motion [short phrase describing the relief requested].” The motion must include the supporting memorandum. The motion must include under appropriate headings and in the following order:

(c)(1)(A) a concise statement of the relief requested and the grounds for the relief requested; and

(c)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party and argument citing authority for the relief requested.

(c)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the motion.

(c)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the motion may not exceed 25 pages, not counting the attachments, unless a longer motion is permitted by the court. Other motions may not exceed 15 pages, not counting the attachments, unless a longer motion is permitted by the court.

(d) Name and content of memorandum opposing the motion.

(d)(1) A nonmoving party may file a memorandum opposing the motion within 14 days after the motion is filed. The nonmoving party must title the memorandum substantially as: "Memorandum opposing motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(d)(1)(A) a concise statement of the party's preferred disposition of the motion and the grounds supporting that disposition;

(d)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the nonmoving party and argument citing authority for that disposition; and

(d)(1)(C) objections to evidence in the motion, citing authority for the objection.

(d)(2) If the non-moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(d)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the memorandum opposing the motion may not exceed 25 pages, not counting the attachments, unless a longer memorandum is permitted by the court. Other opposing memoranda may not exceed 15 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

(e) Name and content of reply memorandum.

(e)(1) Within 7 days after the memorandum opposing the motion is filed, the moving party may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum opposing the motion. The moving party must title the memorandum substantially as "Reply memorandum supporting motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(e)(1)(A) a concise statement of the new matter raised in the memorandum opposing the motion;

(e)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party not previously set forth that respond to the opposing party's statement of facts and argument citing authority rebutting the new matter;

(e)(1)(C) objections to evidence in the memorandum opposing the motion, citing authority for the objection; and

(e)(1)(D) response to objections made in the memorandum opposing the motion, citing authority for the response.

(e)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(e)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the reply memorandum may not exceed 15 pages, not counting the attachments, unless a longer

memorandum is permitted by the court. Other reply memoranda may not exceed 10 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

(f) Response to objections in the reply memorandum. If the reply memorandum includes an objection to evidence, the nonmoving party may file a response to the objection no later than 7 days after the reply memorandum is filed. The response may not exceed 3 pages.

(f) Objection to evidence in the reply memorandum; response. If the reply memorandum includes evidence not previously set forth, the nonmoving party may file an objection to the evidence no later than 7 days after the reply memorandum is filed. If the reply memorandum includes an objection to evidence, the nonmoving party may file a response to the objection no later than 7 days after the reply memorandum is filed. If the nonmoving party files an objection to evidence raised for the first time in the reply memorandum, the moving party may file a response to the objection within 7 days after the objection is filed. The objection or response may not be more than 3 pages.

(g) Request to submit for decision. When briefing is complete or the time for briefing has expired, either party may file a "Request to Submit for Decision, but, if no party files a request, the motion will not be submitted for decision. The request to submit for decision must state whether a hearing has been requested and the dates on which the following documents were filed:

(g)(1) the motion;

(g)(2) the memorandum opposing the motion, if any;

(g)(3) the reply memorandum, if any; and

(g)(4) the response to objections in the reply memorandum, if any.

(h) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing must be separately identified in the caption of the document containing the request. The court must grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(i) Notice of supplemental authority. A party may file notice of citation to significant authority that comes to the party's attention after the party's motion or memorandum has been filed or after oral argument but before decision. The notice may not exceed 2 pages. The notice must state the citation to the authority, the page of the motion or memorandum or the point orally argued to which the authority applies, and the reason the authority is relevant. Any other party may promptly file a response, but the court may act on the motion without waiting for a response. The response may not exceed 2 pages.

(j) Orders.

(j)(1) Decision complete when signed; entered when recorded. However designated, the court's decision on a motion is complete when signed by the judge. The decision is entered when recorded in the docket.

(j)(2) Preparing and serving a proposed order. Within 14 days of being directed by the court to prepare a proposed order confirming the court's decision, a party must serve the proposed order on the other parties for review and approval as to form. If the party directed to prepare a proposed order fails to timely serve the order, any other party may prepare a proposed order confirming the court's decision and serve the proposed order on the other parties for review and approval as to form.

(j)(3) Effect of approval as to form. A party's approval as to form of a proposed order certifies that the proposed order accurately reflects the court's decision. Approval as to form does not waive objections to the substance of the order.

(j)(4) Objecting to a proposed order. A party may object to the form of the proposed order by filing an objection within 7 days after the order is served.

(j)(5) Filing proposed order. The party preparing a proposed order must file it:

(j)(5)(A) after all other parties have approved the form of the order (The party preparing the proposed order must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.);

(j)(5)(B) after the time to object to the form of the order has expired (The party preparing the proposed order must also file a certificate of service of the proposed order.); or

(j)(5)(C) within 7 days after a party has objected to the form of the order (The party preparing the proposed order may also file a response to the objection.).

(j)(6) Proposed order before decision prohibited; exceptions. A party may not file a proposed order concurrently with a motion or a memorandum or a request to submit for decision, but a proposed order must be filed with:

(j)(6)(A) a stipulated motion;

(j)(6)(B) a motion that can be acted on without waiting for a response;

(j)(6)(C) an ex parte motion;

(j)(6)(D) a statement of discovery issues under Rule 37(a); and

(j)(6)(E) the request to submit for decision a motion in which a memorandum opposing the motion has not been filed.

(j)(7) Orders entered without a response; ex parte orders. An order entered on a motion under paragraph (l) or (m) can be vacated or modified by the judge who made it with or without notice.

(j)(8) Order to pay money. An order to pay money can be enforced in the same manner as if it were a judgment.

(k) Stipulated motions. A party seeking relief that has been agreed to by the other parties may file a stipulated motion which must:

(k)(1) be titled substantially as: "Stipulated motion [short phrase describing the relief requested];

(k)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(k)(3) include a signed stipulation in or attached to the motion and;

(k)(4) be accompanied by a request to submit for decision and a proposed order that has been approved by the other parties.

(l) Motions that may be acted on without waiting for a response.

(l)(1) The court may act on the following motions without waiting for a response:

(l)(1)(A) motion to permit an over-length motion or memorandum;

(l)(1)(B) motion for an extension of time if filed before the expiration of time;

(l)(1)(C) motion to appear pro hac vice; and

(l)(1)(E) other similar motions.

(l)(2) A motion that can be acted on without waiting for a response must:

(l)(2)(A) be titled as a regular motion;

(l)(2)(B) include a concise statement of the relief requested and the grounds for the relief requested;

(l)(2)(C) cite the statute or rule authorizing the motion to be acted on without waiting for a response; and

(l)(2)(D) be accompanied by a request to submit for decision and a proposed order.

(m) Ex parte motions. If a statute or rule permits a motion to be filed without serving the motion on the other parties, the party seeking relief may file an ex parte motion which must:

(m)(1) be titled substantially as: "Ex parte motion [short phrase describing the relief requested];

(m)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(m)(3) cite the statute or rule authorizing the ex parte motion;

(m)(4) be accompanied by a request to submit for decision and a proposed order.

(n) Motion in opposing memorandum or reply memorandum prohibited. A party may not make a motion in a memorandum opposing a motion or in a reply memorandum. A party who objects to evidence in another party's motion or memorandum may not move to strike that evidence. Instead, the party must include in the subsequent memorandum an objection to the evidence.

(o) Overlength motion or memorandum. The court may permit a party to file an overlength motion or memorandum upon a showing of good cause. An overlength motion or memorandum must include a table of contents and a table of authorities with page references.

(p) Limited statement of facts and authority. No statement of facts and legal authorities beyond the concise statement of the relief requested and the grounds for the relief requested required in paragraph (c) is required for the following motions:

(p)(1) motion to allow an over-length motion or memorandum;

(p)(2) motion to extend the time to perform an act, if the motion is filed before the time to perform the act has expired;

(p)(3) motion to continue a hearing;

(p)(4) motion to appoint a guardian ad litem;

(p)(5) motion to substitute parties;

(p)(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-510.05;

(p)(7) motion for a conference under Rule 16; and

(p)(8) motion to approve a stipulation of the parties.

Advisory Committee Notes [Add to existing notes]

The 2015 changes to Rule 7 repeal and reenact the rule. Many of the provisions from the former Rule 7 are preserved in the 2015 version, but there are many changes as well. The committee's intent is to bring more regularity to motion practice. Some of these features are found in Rule 7-1 of the U.S. District Court for the District of Utah:

- integrate the memorandum supporting a motion with the motion itself;
- describe more uniform motion titles;
- describe more uniform content in the memoranda;
- regulate the process for citing supplemental authority;
- prohibit proposed orders before a decision, except for specified motions;
- move the special requirements for a motion for summary judgment to Rule 56;
- allow a limited statement of facts for specified motions;
- require an objection to evidence, rather than a motion to strike evidence; and
- require a counter-motion rather than a motion in the opposing memorandum.

The 2015 amendments in this rule, as well as in Rule 54 and Rule 58A, respond to the Supreme Court's directive to the committee in *Central Utah Water Conservancy District v. King*, 2013 UT 13 ¶27. In that case the Supreme Court directed the committee to address the problem of undue delay when the parties fail to comply with former Rule 7(f)(2). A major objective of the 2015 amendments is to continue the policy of clear expectations of the parties established in:

- *Butler v. Corporation of The President of The Church of Jesus Christ of Latter-Day Saints*, 2014 UT 41
- *Central Utah Water Conservancy District v. King*, 2013 UT 13;
- *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2;
- *Houghton v. Dep't of Health*, 2008 UT 86; and
- *Code v. Dep't of Health*, 2007 UT 43.

However, the 2015 amendments do so in a manner simpler than the "magic words" required under the former Rule 7(f)(2).

In these cases, the Supreme Court established a policy favoring a clear indication of whether a further document would be required from the parties after a judge's decision. The parties should not be required to guess what, if anything, should come next.

There were three ways to meet the test: a proposed order was submitted with the supporting or opposing memorandum; an order was prepared at the direction of the judge; the decision included an

express indication that a further order was not required. The 2015 amendments remove a proposed order from the process in most circumstances. The trend under the former rule was to include in every order an indication that nothing further was required, sometimes even when the order expressly directed a party to prepare a further order. In other cases orders were prepared in some manner other than as described in the rule, yet the order did not expressly state than nothing further was required. The order technically was not complete, but everyone proceeded as if it were.

The 2015 amendments continue the policy of a bright-line test for a completed decision but do not rely on conditions that might or might not be met. The one condition that can be counted on is the judge's signature. Under the former rule, a completed decision was imposed by operation of law when the order was prepared in one of the recognized ways. The 2015 rule imposes a completed decision by operation of law when the document memorializing the decision is signed. Under the former rule, the judge's silence meant that something further was required, unless the order was prepared in one of the ways described in Rule 7. The presumption in the 2015 amendments is the opposite: silence means that nothing further is required from the parties. Judges can expressly require an order confirming a decision if one is needed in a particular case.

The committee recognizes the many different forms a judge's decision might take, and discussed defining "order," but decided against the attempt. There are too many variations. If written, the document might be titled "order," "ruling," "opinion," "decision," "memorandum decision," etc. The decision might not be written; an oral directive is an order. A clerk's minute entry of an oral decision is, when signed by the judge, treated the same as a written order. The committee decided instead to modify a phrase of long standing from Rule 54(b)—"a decision, however designated"—in this rule and in Rule 58A. In this rule, however a judge's decision may be designated, that decision is complete when the judge signs the document memorializing the decision. Whether there is a right to appeal is determined by whether the decision—or subsequent order confirming the decision—is a judgment. That analysis is governed by Rule 54. When the judgment is entered is governed by Rule 58A. If the order is not a judgment, the time in which to petition for permission to appeal under Rule of Appellate Procedure 5 is calculated from the date on which an order confirming an earlier decision is entered, but only if the judge directs that a confirming order be prepared. If the judge does not direct that a confirming order be prepared, the time is calculated from the date on which the decision, however designated, is entered.

Tab 3

Trial and Post-Trial Motions

Francis J. Carney

March 12, 2015

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

The relevant state and federal rules are attached. FJC Materials 2- 9.

1. Names- do we want to update the names of the motion "for directed verdict" and motion "JNOV" as the federal rules did some years ago? FJC Materials 10

2. Timing- all the federal rules are to be **filed** on a certain date; our state rules have a confusing mix of events: served or "made" or "move." FJC Materials 11-12.

3. All of our post-trial motions (except Rule 60) motions are to be made within 14 days of entry of judgment. The federal rules were amended in 2009 to allow a more realistic 28 days. (Note that these deadlines are jurisdictional and *cannot* be extended by stipulation or order.) Do we want to do likewise? FJC Materials 13.

4. We have a procedural trap in our state rule 50(b); namely, that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence. The federal rules have eliminated this trap, and we should consider doing so as well. FJC Materials 14- 18.

5. In general terms, the rewrite of the federal trial and post-trial motions rules make them clearer than our state rules. We may want to consider adopting the federal versions; my idea on how this might look is attached. FJC Materials 19- 25.

FJC

Rules on Trial and Post-Trial Motions
March 12, 2015

UTAH RULES OF CIVIL PROCEDURE[1]

Rule 6. Time

(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).

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

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

(b) Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict **made at the close of all the evidence** is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than **14 days** after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within **14 days** after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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

(c)(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether

[1]All added emphasis is mine.

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

(c)(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than **14 days** after entry of the judgment notwithstanding the verdict.

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

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

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

(b) Amendment. Upon motion of a party made not later than **14 days** after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

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

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

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

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

(d) Correction of the record. If anything material is omitted from or misstated in the transcript of an audio or video record of a hearing or trial, or if a disagreement arises as to whether the record

accurately discloses what occurred in the proceeding, a party may move to correct the record. The motion must be filed within 10 days after the transcript of the hearing is filed, unless good cause is shown. The omission, misstatement or disagreement shall be resolved by the court and the record made to accurately reflect the proceeding.

Rule 59. New trials; amendments of judgment.

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

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

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

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

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

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

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

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than **14 days** after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has **14 days** after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 21 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than **14 days** after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than **14 days** after entry of the judgment.

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and

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

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 90 days after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 6(B) EXTENDING TIME.

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

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

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

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

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

(a) Judgment as a Matter of Law.

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

(A) resolve the issue against the party; and

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

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

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

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

(2) order a new trial; or

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

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

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

or denying the motion for a new trial.

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

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

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

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

(a) Findings and Conclusions.

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

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

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

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

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

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

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

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

required by Rule 52(a).[2]

RULE 59. NEW TRIAL; ALTERING OR AMENDING A JUDGMENT

(a) In General.

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

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

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

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

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

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

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

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

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

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

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

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

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

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

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

(4) the judgment is void;

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

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

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

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

(d) . . .

-1-

Names of Trial Motions

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

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

The note to the 1991 federal rule amendment is useful:

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

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

State	Federal
Rule 50: Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict. Rule 50(b)- . . . Not later than fourteen days after the entry of judgment, a party who has moved for a directed verdict may **move** to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion for directed verdict.	Rule 50- Judgment as a Matter of Law (b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may **file** a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.
Rule 59 New trials; amendments of judgment. (b) Time for motion. A motion for a new trial shall be **served** not later than 14 days after the entry of the judgment.	Rule 50(d)- Time for Rule 59 New Trial Motion (d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be **filed** no later than 10 days after the entry of the judgment.
	(b) Time to File a Motion for a New Trial. A motion for a new trial must be **filed** no later than 10 days after the entry of judgment.
(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be **served** not later than 14 days after entry of the judgment.	A motion to alter or amend a judgment must be **filed** no later than 10 days after the entry of the judgment.

Rule 60. Relief from judgment or order. The motion shall be **made** within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken.	Rule 60. Relief from Judgment or Order (c)(1) Timing. A motion under Rule 60(b) must be **made** within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
Rule 52. Findings by the court. (b) Amendment. Upon motion of a party **made** not later than 14 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly.	Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings (b) Amended or Additional Findings. On a party's motion **filed** no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly.

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Timing for Post-Trial Motions: 14 or 28 days?

All post-trial motions (with the exception of Rule 60 motions to alter or amend judgment) must be "made/moved/served" within **14 days** of entry of the judgment.

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

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

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

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The Trap in Rule 50 on JNOV

It is the rule that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence under Rule 50(b):

> *Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict* ***made at the close of all the evidence*** *is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 14 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 14 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.*

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

> *Prior to the 2006 amendment of the Federal Rule, it was long established that a post-verdict motion under Rule 50(b) for judgment as a matter of law could not be made unless a previous Rule 50(a) motion for judgment as a matter of law was made by the moving party at the close of all the evidence. The purpose of requiring a renewed motion for judgment as a matter of law at that time was to give the opposing party an opportunity to cure the defects in proof that otherwise might preclude the party from taking the case to the jury. A large sample of illustrative and relatively recent cases is set out in the note below.*
>
> *Because this requirement was a potential trap for the unwary, the federal courts fortunately took a liberal view of what constituted a motion for judgment as a matter of law at the close of all the evidence in deciding whether there was a sufficient foundation for the later motion under Rule 50(b). The note below contains numerous examples of the mechanisms used by the courts to employ the liberal view of what constitutes an end of trial motion for judgment as a matter of law. Other courts, however, were less willing to excuse noncompliance with the requirement of the rule and applied it in a more demanding fashion.*

. . .

Before the rule was amended in 2006, when the movant failed inexcusably to raise an objection to the sufficiency of evidence in a motion for judgment as a matter of law at the close of all the evidence, some courts denied all review, although others reviewed, but only for clear error. . . This review was exceedingly narrow, and only unusual circumstances justified allowing a motion at the close of the plaintiff's case to stand in place of a motion at the close of all the evidence.

The 2006 amendments were designed to render all of this confusion and technicality moot. The amendments revised Rule 50(b) to permit renewal after verdict of any Rule 50(a) motion for judgment as a matter of law. This abolished the earlier requirement that a motion for judgment as matter of law had to be made at the close of all the evidence. However, the district court only can grant the Rule 50(b) motion on the grounds advanced in the preverdict motion, because the former is conceived of as only a renewal of the latter . . . .

9B Fed. Prac. & Proc. Civ.3d § 2537.

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

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. *Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. . . .*

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.

. . .

(Emphasis added.)

So federal Rule 50(b) now reads:

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

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

(2) order a new trial; or

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

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

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

(Emphasis added.)

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

Do we want to change this?

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[1] *See, e.g., Davoll v. Webb,* 194 F.3d 1116, 1136 (10th Cir. 1999); *Anderson v. United Tel., 933 F.2d 1500, 1503 (10th Cir. 1991).*

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

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

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

C. Evidentiary Issues

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

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

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

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

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

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

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

FJC Notes on Rule 50

I have entirely rewritten Rule 50, taking verbatim the present federal rule 50. This proposal:

1. Simplifies the language in accordance with the federal rule.

2. Eliminates the archaic terms "directed verdict" and "motion for JNOV" and conforms our state rule to the 1991 federal amendment of using "motion for judgment as a matter of law" and "renewal of motion for judgment as a matter of law."

3. Eliminates the trap of the technical requirement to renew the MDV at the literal close of all the evidence.

4. Make it clear that the operative event is to "file" the motion, not "move" as it now states in 50(b).

5. Extends the 10 day deadline for filing the JNOV/RMJML (which, under Rule 6(b) cannot be extended) to a more realistic 28 days, as in the federal rules.

6. The standard for granting the motions are intended to remain the same.

Proposed State Rule 50

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) Judgment as a Matter of Law.

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

(A) resolve the issue against the party; and

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

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

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion

addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

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

(2) order a new trial; or

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

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

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

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

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

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

Proposed Advisory Committee Note

The 2015 amendment to Rule 50 adopts the changes previously adopted by the Federal Rules of Civil Procedure. As noted in the 1991 federal Advisory Committee Note,

> The revision abandons the familiar terminology of “direction of verdict” for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it

> might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.

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

FJC Notes on Rule 59

Rule 59, in its federal version, differs substantially from the state rule. Therefore, I have preserved the present state rule 59 with only the changes noted in red. I am not clear whether we want to change *all* the time deadlines, so I have left some of them with question marks.

Proposed Rule 59

Rule 59. New trials; amendments of judgment.

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

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

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

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

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

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

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

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be **filed** ~~served~~ not later than **28** ~~14~~ days after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be **filed** ~~served~~ with the motion. The opposing party has **??** ~~14~~ days after such **filing** ~~service~~ within which to **file** ~~serve~~ opposing affidavits. The time within which the affidavits or opposing affidavits shall be **filed** ~~served~~ may be extended for an

additional period not exceeding **??** ~~21~~ days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than **??** ~~14~~ days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be **filed** ~~served~~ not later than **28** ~~14~~ days after entry of the judgment.

FJC Notes on Rule 60

Like Rule 59, Rule 60 in its federal version differs substantially from the state rule. I have therefore preserved the present state rule 60 with only the minor change noted in red.

Proposed Rule 60

Rule 60. Relief from judgment or order.

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

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be **filed** ~~made~~ within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FJC Notes on Rule 52

Only minor changes are needed here.

Proposed Rule 52

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

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

(b) Amendment. Upon motion of a party **filed** ~~made~~ not later than 14 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be **filed** ~~made~~ with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

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

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

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

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

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

Rule 50. ~~Motion for a directed verdict and for judgment notwithstanding the verdict.~~ Judgment as a matter of law in a jury trial; related motion for a new trial; conditional ruling.

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

~~(b) Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted~~

(a) Judgment as a matter of law.

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

(a)(1)(A) resolve the issue against the party; and

(a)(1)(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

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

(b) Renewing the motion after trial; alternative motion for a new trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to ~~a~~ the court later ~~determination of~~ deciding the legal questions raised by the motion. ~~Not~~No later than ~~14~~ 28 days after the entry of judgment~~, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 14~~—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury ~~has been~~ was discharged~~,~~—the moving party may ~~move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the~~ file a renewed motion for judgment ~~to stand or may reopen~~ as a matter of law and may include an alternative joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

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

(2) order a new trial; or

(3) direct the entry of judgment as ~~if the requested verdict had been directed~~ a matter of law.

~~If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.~~

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

~~(c)(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall~~ **(c) Granting renewed motion; conditional ruling on a motion for a new trial.**

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

(c)(2) Conditionally granting the motion for a new trial ~~is thus conditionally granted, the order thereon~~ does not affect the judgment's finality ~~of the judgment. In case the motion for a new trial has been conditionally granted and~~; if the judgment is reversed ~~on appeal~~, the new trial ~~shall~~must proceed unless the appellate court ~~has~~orders otherwise ~~ordered. In case~~. If the motion for a new trial ~~has been~~is conditionally denied, the ~~respondent on appeal~~appellee may assert error in that denial; ~~and~~ if the judgment is reversed ~~on appeal, subsequent proceedings shall be in accordance with the order of~~, the case must proceed as the appellate court orders.

~~(c)(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve~~ a **(d) Time for losing party's new-trial motion.** Any motion for a new trial ~~pursuant to~~under Rule 59 ~~not~~by a party against whom judgment as a matter of law is rendered must be filed no later than ~~14~~ 28 days after the entry of the judgment ~~notwithstanding the verdict~~.

~~(d) Same: denial of motion.~~**(e) Denying the motion for judgment as a matter of law; reversal on appeal.** If the court denies the motion for judgment ~~notwithstanding the verdict is denied~~ as a matter of law, the prevailing party ~~who prevailed on that motion~~ may, as ~~respondent~~ appellee, assert grounds entitling ~~him~~ it to a new trial ~~in the event~~ if the appellate court concludes that the trial court erred in denying the motion ~~for judgment notwithstanding the verdict~~. If the appellate court reverses the judgment, ~~nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the~~ it may order a new trial, direct the trial court to determine whether a new trial ~~shall~~ should be granted, or direct the entry of judgment.

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

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

~~(b) Motion for judgment notwithstanding the verdict.~~ ~~Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 14 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 14 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.~~

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

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

~~(c)(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 14 days after entry of the judgment notwithstanding the verdict.~~

~~(d) Same: denial of motion.~~ ~~If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the~~

~~event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.~~

(a) Motion for judgment as a matter of law. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the moving party to judgment. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(a)(1) resolve the issue against the party; and

(a)(2) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(b) Renewing the motion after trial; alternative motion for a new trial. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the moving party may file a renewed motion for judgment as a matter of law. A renewed motion for judgment as a matter of law may include a motion for a new trial under Rule 59. In ruling on the renewed motion, the court may:

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

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

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

(c) Granting the renewed motion; conditional ruling on a motion for a new trial.

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

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

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

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

Advisory Committee Notes

The 2015 amendment to Rule 50 adopts the changes previously adopted by the Federal Rules of Civil Procedure. As noted in the 1991 federal Advisory Committee Note,

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

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

Rule 52. Findings and conclusions by the court; amended findings; waiver of findings and conclusions; correction of the record; judgment on partial findings.

(a) ~~Effect~~ Findings and conclusions.

(a)(1) In all actions tried upon the facts without a jury or with an advisory jury, the court ~~shall~~ must find the facts specially and state separately its conclusions of law. ~~thereon, and judgment shall be entered pursuant to Rule 58A; in~~ The findings and conclusions must be made part of the record and may be stated in writing or orally following the close of the evidence.

(a)(2) In granting or refusing interlocutory injunctions the court ~~shall~~ must similarly set forth the findings of fact and conclusions of law ~~which constitute the grounds of~~ that support its action. ~~Requests for findings are not necessary for purposes of review.~~

(a)(3) A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(a)(4) Findings of fact, whether based on oral or ~~documentary~~ other evidence, ~~shall~~ must not be set aside unless clearly erroneous, and the reviewing court must give due regard ~~shall be given~~ to the ~~opportunity of the~~ trial court's opportunity to judge the credibility of the witnesses.

(a)(5) The findings of a master, to the extent that the court adopts them, ~~shall~~ must be considered as the findings of the court. ~~It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.~~

(a)(6) The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court ~~shall~~ must, however, issue a brief written statement of the ~~ground~~ reasons for its decision on all motions granted under Rules 12(b), 50~~(a) and (b)~~, 56, and 59 when the motion is based on more than one ~~ground~~ reason.

(b) ~~Amendment~~ Amended or additional findings. Upon motion of a party ~~made~~ filed not later than ~~14~~ 28 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may ~~be made with~~ accompany a motion for a new trial ~~pursuant to~~ under Rule 59. ~~When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.~~

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

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

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

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

(d) Correction of the record. If anything material is omitted from or misstated in the transcript of an audio or video record of a hearing or trial, or if a disagreement arises as to whether the record accurately discloses what occurred in the proceeding, a party may move to correct the record. The motion must be filed within ~~10~~ 14 days after the transcript of the hearing is filed, unless good cause is shown. The omission, misstatement or disagreement ~~shall~~ will be resolved by the court and the record made to accurately reflect the proceeding.

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

Rule 59. New trials; ~~amendments of~~ amended judgment.

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

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

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

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

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

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

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

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

(b) Time for motion. A motion for a new trial ~~shall be served not~~ must be filed no later than ~~14~~ 28 days after ~~the~~ entry of the judgment.

~~(c) Affidavits; time for filing.~~ When the ~~application~~ motion for a new trial is ~~made~~ filed under ~~Subdivision~~ paragraph (a)(1), (2), (3), or (4), it ~~shall~~ must be supported by affidavit. ~~Whenever~~ If a motion for a new trial is ~~based upon~~ supported by affidavits ~~they shall be served~~ the affidavits must be filed with the motion. ~~The opposing party has 14 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 21 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits~~.

(c) Further action after non-jury trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct entry of a new judgment.

(d) ~~On~~ New trial on initiative of court. ~~Not~~ No later than ~~14~~ 28 days after entry of the judgment the court ~~of~~ on its own ~~initiative~~ may order a new trial for any reason ~~for which it might have granted~~ that would justify a new trial on motion of a party~~, and in the order shall specify the grounds therefor~~. After

giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment ~~shall be served not~~ must be filed no later than ~~14~~ 28 days after entry of the judgment.

(f) Order. The order granting a new trial must state the reasons for the new trial.

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. ~~Clerical~~ The court may correct a clerical mistake~~s in judgments, orders or other parts of the record and errors therein~~ or a mistake arising from oversight or omission~~ may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders~~ whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. ~~During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafte~~r After a notice of appeal has been filed and while the appeal is pending the mistake may be ~~so~~ corrected only with leave of the appellate court.

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

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

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

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

(b)(4) the judgment is void;

(b)(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or ~~otherwise~~ vacated, or it is no longer equitable that the judgment should have prospective application; or

(b)(6) any other reason ~~justifying~~ that justifies relief ~~from the operation of the judgment~~.

(c) Timing and effect of the motion. The motion ~~shall~~ must be ~~made~~ filed within a reasonable time and for reasons in paragraph (b)(1), (2), or (3), not more than 90 days after entry of the judgment~~,~~ or order~~,~~ or the date of the proceeding ~~was entered or taken~~. ~~A motion under this Subdivision (b)~~ The motion does not affect the finality of a judgment or suspend its operation.

(d) Other power to grant relief. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

~~Advisory Committee Notes~~

Rule 6. Time.

(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)~~ (d), 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 under Rule 5(b)(1)(A)(iv), 3 days are added after the period would otherwise expire under paragraph (a).

Tab 4

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April 16, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 63

There have been three requests to amend Rule 63.

First, the rule needs to be amended to remove any doubt about whether a response to a motion to disqualify a judge is permitted. This amendment is found on line 25. I have included in line 10 a requirement for a request to submit for decision because it is frequently mentioned that motions are not submitted without one, but this is contrary to URCrP 29(c)(1)(D).

Second, it has been observed that a person should not be precluded from filing a second motion to disqualify a judge if the grounds on which the motion is based did not exist at the time of the first motion. This amendment is found on lines 21 – 22.

Finally, David Scofield has asked the committee to consider whether Rule 63 should include the grounds for disqualification found in 28 U.S.C. 455. I have attached the federal statute, and I have proposed amendments on lines 37 – 53 that are intended to incorporate the federal grounds. The statute is very poorly worded—indeed, paragraph (b)(4) seems to be wholly contained within the scope of paragraph (b)(5)(iii)—and I have tried to include the substantive provisions in simpler text. But even this is a rather tortured construction.

Rule 63. Disability or disqualification of a judge.

(a) Substitute judge; Prior testimony. If the judge to whom an action has been assigned is unable to perform their duties ~~required of the court under these rules~~, then any other judge of that district or any judge assigned pursuant to Judicial Council rule is authorized to perform those duties. The judge to whom the case is reassigned may ~~in the exercise of discretion~~ rehear the evidence or some part of it.

(b) ~~Disqualification~~ Motion to disqualify; affidavit.

~~(b)(1)(A)~~ (b)(1) A party to ~~any~~ an action or the party's attorney may file a motion to disqualify a judge. The motion ~~shall~~ must be accompanied by a certificate that the motion is filed in good faith and ~~shall~~ must be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest. The motion must also be accompanied by a request to submit for decision.

~~(b)(1)(B)~~ (b)(2)) The motion ~~shall~~ must be filed after commencement of the action, but not later than 21 days after the last of the following:

~~(b)(1)(B)(i)~~ (b)(2)(A) assignment of the action or hearing to the judge;

~~(b)(1)(B)(ii)~~ (b)(2)(B) appearance of the party or the party's attorney; or

~~(b)(1)(B)(iii)~~ (b)(2)(C) the date on which the moving party learns of or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

If the last event occurs fewer than 21 days ~~prior to~~ before a hearing, the motion ~~shall~~ must be filed as soon as practicable.

~~(b)(1)(C)~~ (b)(3) Signing the motion or affidavit constitutes a certificate under Rule 11 and subjects the party or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to disqualify in an action, unless the second or subsequent motion is based on grounds that did not exist at the time of the earlier motion.

~~(b)(2)~~ **(c) Reviewing judge.**

(c)(1) The judge ~~against whom~~ who is the subject of the motion ~~and affidavit are directed shall~~ must, without further hearing or a response from another party, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. The judge ~~shall~~ may take no further action in the case until the motion is decided. If the judge grants the motion, the order ~~shall~~ will direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

~~(b)(3)(A) If~~ (c)(2) The reviewing judge must assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so if the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and ~~legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so~~ the judge who is the subject of the motion:

(c)(2)(A) has a personal bias or prejudice about a party or the judge's impartiality might reasonably be questioned;

(c)(2)(B) has personal knowledge of disputed facts about the matter;

(c)(2)(C) served as lawyer in the matter;

(c)(2)(D) practiced law with a lawyer who, during the association, served as a lawyer in the matter;

(c)(2)(E) or a lawyer with whom the judge practiced law has, during the association, been a material witness in the matter;

(c)(2)(F) while serving in governmental employment expressed an opinion concerning the merits of the matter or participated as counsel, adviser or material witness in the matter;

(c)(2)(G) or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is:

(c)(2)(G)(i) a party to the proceeding or an officer, director or trustee of a party;

(c)(2)(G)(ii) a lawyer in the proceeding;

(c)(2)(G)(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(c)(2)(G)(iv) known by the judge likely to be a material witness in the proceeding.

~~(b)(3)(B)~~ (c)(3) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion ~~and affidavit~~ an affidavit ~~responsive~~ responding to questions posed by the reviewing judge.

~~(b)(3)(C)~~ (c)(4) The reviewing judge may deny a motion not filed in a timely manner.

Tab 5

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April 16, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 8. General rules of pleadings.

About a year ago, it was suggested that Rule 8 be amended to refer to "comparative fault" rather than "contributory negligence." It was observed that the former is more in keeping with statutes:

Although Utah Code Section 78B-5-818 is titled "comparative negligence," the text of the statute uses the term "fault." That is the term defined by Section 78B-5-817, and the succeeding statutes use the term as well:

- Section 78B-5-819
- Section 78B-5-820

Rule 8. General rules of pleadings.

(a) Claims for relief. An original claim, counterclaim, cross-claim or third-party claim ~~shall~~ must contain a short and plain: (1) statement of the claim showing that the party is entitled to relief; and (2) demand for judgment for specified relief. Relief in the alternative or of several different types may be demanded. A party who claims damages but does not plead an amount ~~shall~~ must plead that their damages are such as to qualify for a specified tier defined by Rule 26(c)(3). A pleading that qualifies for tier 1 or tier 2 discovery ~~shall~~ constitutes a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15.

(b) Defenses; form of denials. A party ~~shall~~ must state in simple, short and plain terms any defenses to each claim asserted and ~~shall~~ must admit or deny the statements in the claim. A party without knowledge or information sufficient to form a belief about the truth of a statement ~~shall~~ must so state, and this has the effect of a denial. Denials ~~shall~~ must fairly meet the substance of the statements denied. A party may deny all of the statements in a claim by general denial. A party may specify the statement or part of a statement that is admitted and deny the rest. A party may specify the statement or part of a statement that is denied and admit the rest.

(c) Affirmative defenses. An affirmative defense ~~shall~~ must contain a short and plain: (1) statement of the affirmative defense; and (2) a demand for relief. A party ~~shall~~ must set forth affirmatively in a responsive pleading accord and satisfaction, arbitration and award, assumption of risk, ~~contributory negligence,~~ comparative fault, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. If a party mistakenly designates a defense as a counterclaim or a counterclaim as a defense, the court, on terms, may treat the pleadings as if the defense or counterclaim had been properly designated.

(d) Effect of failure to deny. Statements in a pleading to which a responsive pleading is required, other than statements of the amount of damage, are admitted if not denied in the responsive pleading. Statements in a pleading to which no responsive pleading is required or permitted are deemed denied or avoided.

(e) Consistency. A party may state a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. If statements are made in the alternative and one of them is sufficient, the pleading is not made insufficient by the insufficiency of an alternative statement. A party may state legal and equitable claims or legal and equitable defenses regardless of consistency.

(f) Construction of pleadings. All pleadings ~~shall~~ will be construed to do substantial justice.

Advisory Committee Notes

Tab 6

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April 16, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Effect of Renewal of Judgment Act on Rule 9

In 2011 the Legislature passed the Renewal of Judgment Act, which allows a judgment to be renewed by motion. Rule 9(k), titled "renew judgment," requires: "A complaint alleging failure to pay a judgment shall describe the judgment with particularity or attach a copy of the judgment to the complaint." The committee has never considered the effect of the Act on Rule 9(k), but the possibility that the provision might now be obsolete and in error has been raised.

Historically the failure to pay a judgment was itself a cause of action that had to be filed within 8 years of the judgment. Utah Code Section 78B-2-311. Although these proceedings were known in the vernacular as "renewing a judgment," they were new actions claiming nonpayment of the judgment on the original lawsuit: new case number; new filing fee; service under URCP 4; answer; etc.

The cause of action still exists, and filing a complaint would at least arguably be necessary if the unpaid judgment originated in a federal court or in a court of another state. The Act applies to judgments of "courts of record," Utah Code Section 78B-6-1802, and "courts of record" are defined by the Utah Constitution and various statutes as Utah state courts. Obviously the federal district courts and many of the courts of other states are courts of record, but not in the same technical sense as the Utah state courts. When the phrase is used in a statute or rule, it is intended to exclude justice courts, which are described as "courts not of record."

I've not asked for a count, but likely all or nearly all Utah district court judgments are renewed by motion. The courts have published a webpage describing how it is done.

I do not think the Act renders Rule 9(k) incorrect. Although the need to file a complaint alleging failure to pay a judgment may be rare, it may at times be necessary, so I believe we should not delete paragraph (k). We might add a committee note referring to the Judgment Renewal Act and the webpage describing motions to renew a judgment, or we might simply leave the rule as is.

Rule 9. Pleading special matters.

(a)(1) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. A party may raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity by specific negative averment, which shall include facts within the pleader's knowledge. If raised as an issue, the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(a)(2) Designation of unknown defendant. When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(a)(3) Actions to quiet title; description of interest of unknown parties. In an action to quiet title wherein any of the parties are designated in the caption as “unknown,” the pleadings may describe such unknown persons as “all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto.”

(b) Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) Official document or act. In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) Time and place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special damage. When items of special damage are claimed, they shall be specifically stated.

(h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) Private statutes; ordinances. In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) Libel and slander.

(j)(1) Pleading defamatory matter. It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(j)(2) Pleading defense. In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(k) Renew judgment. A complaint alleging failure to pay a judgment shall describe the judgment with particularity or attach a copy of the judgment to the complaint.

(l) Allocation of fault.

(l)(1) A party seeking to allocate fault to a non-party under Title 78B, Chapter 5, Part 8 shall file:

(l)(1)(A) a description of the factual and legal basis on which fault can be allocated; and

(l)(1)(B) information known or reasonably available to the party identifying the non-party, including name, address, telephone number and employer. If the identity of the non-party is unknown, the party shall so state.

(l)(2) The information specified in subsection (l)(1) must be included in the party's responsive pleading if then known or must be included in a supplemental notice filed within a reasonable time after the party discovers the factual and legal basis on which fault can be allocated. The court, upon motion and for good cause shown, may permit a party to file the information specified in subsection (l)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial.

(l)(3) A party may not seek to allocate fault to another except by compliance with this rule.

Tab 7

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April 16, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 26.1

I have on the list of pending matters next to Leslie's a request to make the disclosure deadlines in Rule 26.1(b) the same as those in Rule 26(a)(2).

Rule 26.1. Disclosure and discovery in domestic relations actions.

(a) Scope. This rule applies to the following domestic relations actions: divorce; temporary separation; separate maintenance; parentage; custody; child support; and modification. This rule does not apply to adoptions, enforcement of prior orders, cohabitant abuse protective orders, child protective orders, civil stalking injunctions, or grandparent visitation.

(b) Time for disclosure. In addition to the disclosures required in Rule 26, in all domestic relations actions, the documents required in this rule ~~shall be disclosed by the petitioner within 14 days after service of the first answer to the complaint and by the respondent within 28 days after the petitioner's first disclosure or 28 days after that respondent's appearance, whichever is later~~ must be served on the other parties:

(b)(1) by the plaintiff within 14 days after filing of the first answer to the complaint; and

(b)(2) by the defendant within 42 days after filing of the first answer to the complaint or within 28 days after that defendant's appearance, whichever is later.

(c) Financial declaration. Each party ~~shall~~ must disclose to all other parties a fully completed court-approved Financial Declaration and attachments. Each party ~~shall~~ must attach to the Financial Declaration the following:

(c)(1) For every item and amount listed in the Financial Declaration, excluding monthly expenses, ~~the producing party shall attach~~ copies of statements verifying the amounts listed on the Financial Declaration that are reasonably available to the party.

(c)(2) For the two tax years before the petition was filed, complete federal and state income tax returns, including Form W-2 and supporting tax schedules and attachments, filed by or on behalf of that party or by or on behalf of any entity in which the party has a majority or controlling interest, including, but not limited to, Form 1099 and Form K-1 with respect to that party.

(c)(3) Pay stubs and other evidence of all earned and un-earned income for the 12 months before the petition was filed.

(c)(4) All loan applications and financial statements prepared or used by the party within the 12 months before the petition was filed.

(c)(5) Documents verifying the value of all real estate in which the party has an interest, including, but not limited to, the most recent appraisal, tax valuation and refinance documents.

(c)(6) All statements for the 3 months before the petition was filed for all financial accounts, including, but not limited to checking, savings, money market funds, certificates of deposit, brokerage, investment, retirement, regardless of whether the account has been closed including those held in that party's name, jointly with another person or entity, or as a trustee or guardian, or in someone else's name on that party's behalf.

(c)(7) If the foregoing documents are not reasonably available or are in the possession of the other party, the party disclosing the Financial Declaration ~~shall~~ must estimate the amounts entered on

the Financial Declaration, the basis for the estimation and an explanation why the documents are not available.

(d) Certificate of service. Each party ~~shall~~ must file a Certificate of Service with the court certifying that he or she has provided the Financial Declaration and attachments to the other party ~~in compliance with this rule~~.

(e) Exempted agencies. Agencies of the State of Utah are not subject to these disclosure requirements.

(f) Sanctions. Failure to fully disclose all assets and income in the Financial Declaration and attachments may subject the non-disclosing party to sanctions under Rule 37 including an award of non-disclosed assets to the other party, attorney's fees or other sanctions deemed appropriate by the court.

(g) Failure to comply. Failure of a party to comply with this rule does not preclude any other party from obtaining a default judgment, proceeding with the case, or seeking other relief from the court.

(h) Notice of requirements. Notice of the requirements of this rule ~~shall~~ must be served on the Respondent and all joined parties with the initial petition.

Advisory Committee Notes