Agenda

Advisory Committee on Rules of Civil Procedure

May 27, 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
Recognition of David Scofield and Todd Shaughnessy		Jonathan Hafen
Rule 4. Electronic service for personal jurisdiction.	Tab 2	Lane Gleave
Rule 101. Motion practice before court commissioners.	Tab 3	Commissioner Michelle Blomquist
Post-trial motions. Rules 50, 52, 59 and 60. Technical amendment to Rule 6.	Tab 4	Frank Carney
Rule 35. Physical and mental examination of persons.	Tab 5	Frank Carney
Rule 63. Disability or disqualification of a judge.	Tab 6	Tim Shea
Rule 9. Pleading special matters. Rule 58C. Motion to renew judgment.	Tab 7	Tim Shea
Rule 26.1. Disclosure and discovery in domestic relations actions.	Tab 8	Leslie Slaugh
Rule 5. E-filing and service in the juvenile court	Tab 9	Tim Shea

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

Meeting Schedule:

September 23, 2015

October 28, 2015

November 18, 2015

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – April 22, 2015

Present:	Jonathan Hafen, Judge James T. Blanch, Judge Kate Toomey, Terrie T. McIntosh, Amber M. Mettler, Rod N. Andreason, Sammi V. Anderson, Judge John L. Baxter, Scott S. Bell, Judge Todd M. Shaughnessy
Telephone:	Paul Stancil, Judge Lyle R. Anderson
Staff:	Timothy M. Shea, Heather M. Sneddon
Guest:	Frank J. Carney
Not Present:	Barbara L. Townsend, Leslie W. Slaugh, Magistrate Judge Evelyn J. Furse, Lori Woffinden, Steve Marsden, Trystan B. Smith, Judge Derek Pullan, David W. Scofield, Lincoln Davies

I. Welcome and approval of minutes. [Tab 1]

Jonathan Hafen welcomed the committee and invited comment on and a motion to approve the minutes. Terri McIntosh so moved and the minutes were unanimously approved.

II. Report on action by the Supreme Court on Rules 5, 7, 54, 56 and 58A. [Tab 2]

Mr. Hafen reported on the meeting with the Supreme Court. The Justices expressed their appreciation for the work of this committee. The Court approved as submitted Rules 5 and 54, and approved Rules 56 and 58A with slight phrasing changes. The Court removed a portion of the proposed committee note to Rule 56.

As to Rule 7, Mr. Shea had originally suggested that the rule address new evidence included in reply memoranda. The committee decided not to change the rule, but the Supreme Court has directed the committee to address the issue. Mr. Shea makes the same suggestion, which is reflected on page 10, lines 79-85. The change provides for an objection and response if new evidence is contained in the reply memorandum.

Discussion:

- Ms. McIntosh indicated that the change would be clearer if the second sentence came first.

- Mr. Andreason suggested that the clause "the moving party may file a response" in the third sentence be moved to the first sentence. The first sentence would then provide that if a reply memorandum includes new evidence, the nonmoving party may file an objection within 7 days and the moving party may file a response within 7 days. He proposed cutting the rest of the third sentence. Ms. Anderson seconded Mr. Andreason's proposal.

- Mr. Hafen invited a motion to approve Rule 7 with Mr. Andreason's proposed changes to Mr. Shea's addition. Ms. Anderson seconded and the motion carried.

III. Post-Trial Motions. Rules 50, 52, 59 and 60. Technical amendments to Rule 6. [Tab 3]

Frank Carney explained that his proposed changes to the post-trial motion rules were intended to be stylistic, such as getting rid of antiquated terms and names of motions, and to bring the rules into alignment with the federal rules. The changes also increase the deadlines for filing post-trial motions from 14 to a more realistic 28 days. Mr. Shea took Mr. Carney's proposals and reworked the post-trial motion rules to adopte much of the federal language.

Discussion:

- Rule 60. Mr. Shea discussed his efforts to conform the rule to the federal language. Mr. Andreason suggested the addition of a comma after "while the appeal is pending" in the last sentence of Rule 60(a).

- The committee further discussed the proposed changes to Rules 52 and 59.

- Mr. Carney identified the proposed changes to Rule 50 at page 44, line 55. As it stands, the rule does not identify the grounds for obtaining a judgment as a matter of law; it is based entirely upon case law. We therefore need to be careful in amending the rule, but the proposed change adds the grounds from the federal rule. We may also want to add a committee note similar to the federal comment from 1991.

- Mr. Carney clarified that in addition to stylistic changes, a material change to the rule is being proposed: the current requirement to renew a motion for directed verdict at the close of all evidence is being removed as it was from the federal rule. Otherwise, as it currently stands, if the motion is not made at that time, the party waives the right for a judgment notwithstanding the verdict—an unfair "gotcha." Mr. Carney suggested a committee note on that issue as well. Judge Toomey mentioned that a motion for directed verdict at the close of all evidence is unnecessary. Mr. Carney also proposed a change to the deadline for the motion from 14 to 28 days. Ms. Anderson and Mr. Bell expressed their agreement with the deadline change. Mr. Hafen invited a motion with respect to the proposed changes to Rule 50. Judge Toomey so moved with respect to the changes, and with a committee note. Ms. Anderson seconded. All approved the motion.

- Mr. Shea will include all of the discussed rules next month, except for perhaps Rule 6. The focus will be on Rule 52.

III. Rule 63. Disability or disqualification of a judge. [Tab 4]

Mr. Shea reported that there have been three separate suggestions to amend Rule 63: first, whether a second or subsequent motion should be allowed under some circumstances; second, whether an express prohibition against a response is needed; and third, whether to incorporate grounds for disqualification identified in federal statutes.

Discussion:

- Judge Shaughnessy commented that the first proposed change is based on the *Dahl* case, where the judge was challenged multiple times. Parties, however, do have an available

remedy. The judge has the discretion to consider more than one motion, and parties have the right to seek review through mandamus, etc. No matter what the committee decides, the rule will not change the requirements of the Code of Judicial Conduct; the judge is required to raise potential disqualification issues even if the parties do not.

- Regarding the second issue, Ms. Anderson asked why no response to a motion for disqualification is allowed. Mr. Shea said that the only options are for the judge to grant the motion or send it to a reviewing judge. Judge Toomey commented that motions to disqualify go only to the judge's knowledge and bias, so a response from the other party wouldn't be proper. Scott Bell also mentioned that a response would be simply gratuitous—the other side supporting the judge. Mr. Shea reported that the criminal rule has already been changed to reflect that no response is permitted. Judge Blanch mentioned that the reviewing judge is permitted to go to the certifying judge for information. Judge Shaughnessy and Mr. Shea commented that the certifying judge is not permitted to volunteer any information unless the reviewing judge invites a response.

- Mr. Shea also added a provision that informs parties to submit requests for decision with their motions to disqualify, as that is the mechanism to bring a motion to the judge's attention. Judge Toomey commented that it is particularly important on motions to disqualify, as the court may be taking action on the case without realizing that a motion to disqualify is pending.

- Mr. Hafen raised the third proposed change to Rule 63, which is to incorporate the grounds for disqualification that are found in 28 U.S.C. § 455 (page 56, lines 37-53). Judge Baxter commented that the proposed change takes poorly drafted language from the federal statute and puts it where it doesn't need to be. Utah already has the Code of Judicial Conduct. Mr. Shea stated that he had attempted to incorporate the proposal using simpler language than the federal statute, but he believes "legally sufficient" found in line 34—which is in the current rule—is enough. Several committee members commented that all of this is already contained in the Code of Judicial Conduct and should not be incorporated into Rule 63.

- Mr. Andreason asked whether the committee should codify what "legally sufficient" means, and whether practitioners are to refer to the Code of Judicial Conduct and/or case law. Judge Shaughnessy commented that no articulation of the standard is necessary because the audience for the rule is judges against whom these motions are filed and the reviewing judges. Judges are well-trained on the issue and parties do not get to weigh in by opposing the motion.

- Mr. Andreason asked whether the Supreme Court had weighed in on line 22, i.e., "did not exist," and whether it should instead say "did not know and could not have reasonably known." Ms. Anderson mentioned that the same issue exists in subsection (b)(2)(C). Judge Shaughnessy suggested that the language be changed to reflect that successive motions are permitted on "new grounds." Judge Blanch asked how many motions to disqualify are really frivolous or tactical, as that may dictate how much the rule should encourage second motions. Committee members commented that frivolous motions have been a problem in the past, and are still common. Mr. Shea noted that we have not been directed by the Supreme Court to add a provision that permits successive motions; the Court has simply observed that the rules permit only one.

- Based on the discussion, Mr. Hafen questioned whether the committee wants to propose the change to permit successive motions. Mr. Andreason believes permitting further motions only upon grounds that "did not exist" before is too harsh and would prefer a "did not know and could not have reasonably known" standard. The committee discussed the prudence of permitting second motions and concluded that they should be permitted. With respect to the standard, Mr. Shea proposed that if the new language from subsection (b)(2)(C) is kept, the last sentence of (b)(3) concerning one motion could simply be deleted. Mr. Andreason commented that it might be difficult to discern what "should have known" means—will depositions have to be taken? Judge Shaughnessy explained that these motions are often filed at the last minute, which makes them hard to address by judges like Judge Anderson who do not have reviewing judges immediately available. Mr. Shea suggested adding a committee note regarding the *Dahl* case, wherein the Court stated that there may be situations where more than one motion is appropriate. As to "should have known," Judge Anderson commented that it means with the exercise of reasonable diligence. Ms. Anderson commented that "with the exercise of reasonable diligence" is probably unnecessary in subsection (b)(2)(C). Judge Anderson questioned whether the moving party should have the responsibility of addressing how they came to know of the information underlying the motion. Mr. Hafen agreed with the suggestion, proposing that facts supporting timeliness be added to the affidavit requirement in the rule. Mr. Shea will prepare a draft for review next month.

IV. Rule 8. General rules of pleadings. [Tab 5]

Mr. Shea explained the proposed changes to Rule 8, which include updating "contributory negligence" to "comparative fault," and changing all "shalls" to "musts." Mr. Andreason moved to accept the changes, Judge Blanch seconded, and all approved.

V. Rule 9. Pleading special matters. [Tab 6]

Mr. Shea reported that he received a request from a paralegal suggesting that Rule 9(k) might be incorrect given the Judgment Renewal Act. A lawyer from the firm sent a follow-up letter, suggesting that complaints or motions alleging failure to pay a judgment should require a copy of the judgment to be attached. Mr. Shea believes that makes sense, even though a motion is not technically a pleading.

Discussion:

- Judge Blanch asked when a complaint would be filed as opposed to a motion to renew a judgment. Ms. Anderson commented that a complaint is necessary if the judgment is not domestic. Judge Blanch observed that the Judgment Renewal Act governs all domestic judgments and Section 78B-5-302 establishes how to domesticate a foreign judgment. So Rule 9(k) should never be needed.

- After discussion the committee agreed that Rule 9(k) could be deleted, but that there should be a rule based on the Judgment Renewal Act giving parties directions. Mr. Shea will prepare a draft for the next meeting.

VI. Adjournment.

The meeting adjourned at 5:55 pm. The next meeting will be held on May 27, 2015 at 4:00pm at the Administrative Office of the Courts.

Tab 2

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah
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May 6, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Electronic service of summons and complaint under Rule 4

Mr. Lane Gleave recommends the amendments to paragraph (d)(1)(A) and paragraph (d)(2)(D) to implement electronic service of the complaint and summons for personal jurisdiction. Please recall that he demonstrated his program of electronic service at the January 28 meeting.

If you support the concept, I recommend that we work with paragraph (d)(2)(D) since electronic service is more like service by mail than service by personal delivery.

Independent of this, Commissioner Conklin requests that the proof of service include a copy of the summons. That amendment is on line 130.

We have not yet reviewed this rule with an eye toward simplifying the language.

Rule 4. Process.

(a) Signing of summons. The summons shall be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and served.

(b)(i) Time of service. In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative.

(b)(ii) In any action brought against two or more defendants on which service has been timely obtained upon one of them,

(b)(ii)(A) the plaintiff may proceed against those served, and

(b)(ii)(B) the others may be served or appear at any time prior to trial.

(c) Contents of summons.

(c)(1) The summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 14 days after service to determine if the complaint has been filed.

(c)(3) If service is made by publication, the summons shall briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file with the court.

(d) Method of service. Unless waived in writing, service of the summons and complaint shall be by one of the following methods:

(d)(1) Personal service. The summons and complaint may be served in any state or judicial district of the United States by the sheriff or constable or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by any other person 18 years of age or older at the time of service and not a party to the action or a party's attorney. If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof. Personal service shall be made as follows:

(d)(1)(A) Upon any individual other than one covered by subparagraphs (B), (C) or (D) below, by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable

age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process or by delivering a copy of the summons and complaint by electronic means to a person who has agreed to be served electronically;

(d)(1)(B) Upon an infant (being a person under 14 years) by delivering a copy of the summons and the complaint to the infant and also to the infant's father, mother or guardian or, if none can be found within the state, then to any person having the care and control of the infant, or with whom the infant resides, or in whose service the infant is employed;

(d)(1)(C) Upon an individual judicially declared to be of unsound mind or incapable of conducting the person's own affairs, by delivering a copy of the summons and the complaint to the person and to the person's legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person;

(d)(1)(D) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy of the summons and the complaint to the person who has the care, custody, or control of the individual to be served, or to that person's designee or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served;

(d)(1)(E) Upon any corporation not herein otherwise provided for, upon a partnership or upon an unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and the complaint to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy of the summons and the complaint to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business;

(d)(1)(F) Upon an incorporated city or town, by delivering a copy of the summons and the complaint to the recorder;

(d)(1)(G) Upon a county, by delivering a copy of the summons and the complaint to the county clerk of such county;

(d)(1)(H) Upon a school district or board of education, by delivering a copy of the summons and the complaint to the superintendent or business administrator of the board;

(d)(1)(I) Upon an irrigation or drainage district, by delivering a copy of the summons and the complaint to the president or secretary of its board;

(d)(1)(J) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy of the summons and the complaint to the attorney general and any other person or agency required by statute to be served; and

(d)(1)(K) Upon a department or agency of the state of Utah, or upon any public board, commission or body, subject to suit, by delivering a copy of the summons and the complaint to any member of its governing board, or to its executive employee or secretary.

(d)(2) Service by mail or commercial courier service.

(d)(2)(A) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by mail or commercial courier service in any state or judicial district of the United States provided the defendant signs a document indicating receipt.

(d)(2)(B) The summons and complaint may be served upon an entity covered by paragraphs (d)(1)(E) through (d)(1)(I) by mail or commercial courier service in any state or judicial district of the United States provided defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt.

(d)(2)(C) Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this rule.

(d)(2)(D) The summons and complaint may be served upon an individual other than one covered by paragraphs (d)(1)(B) or (d)(1)(C) by electronic service in any state or judicial district of the United States provided the defendant agrees to be served electronically. Electronic service is complete upon initiation of service by the receiving party.

(d)(3) Service in a foreign country. Service in a foreign country shall be made as follows:

(d)(3)(A) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(d)(3)(B) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(d)(3)(B)(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(d)(3)(B)(ii) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(d)(3)(B)(iii) unless prohibited by the law of the foreign country, by delivery to the individual personally of a copy of the summons and the complaint or by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(d)(3)(C) by other means not prohibited by international agreement as may be directed by the court.

(d)(4) Other service.

(d)(4)(A) Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual

parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties.

(d)(4)(B) If the motion is granted, the court shall order service of process by means reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. Unless service is by publication, a copy of the court's order shall be served upon the defendant with the process specified by the court.

(d)(4)(C) In any proceeding where summons is required to be published, the court shall, upon the request of the party applying for publication, designate the newspaper in which publication shall be made. The newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made.

(e) Proof of service.

(e)(1) If service is not waived, the person effecting service shall file proof with the court. The proof of service must state the date, place, and manner of service and include a copy of the summons. Proof of service made pursuant to paragraph (d)(2) shall include a receipt signed by the defendant or defendant's agent authorized by appointment or by law to receive service of process. If service is made by a person other than by an attorney, the sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, the proof of service shall be made by affidavit.

(e)(2) Proof of service in a foreign country shall be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to paragraph (d)(3)(C), proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(e)(3) Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(f) Waiver of service; Payment of costs for refusing to waive.

(f)(1) A plaintiff may request a defendant subject to service under paragraph (d) to waive service of a summons. The request shall be mailed or delivered to the person upon whom service is authorized under paragraph (d). It shall include a copy of the complaint, shall allow the defendant at least 21 days from the date on which the request is sent to return the waiver, or 30 days if addressed to a defendant outside of the United States, and shall be substantially in the form of the Notice of Lawsuit and Request for Waiver of Service of Summons set forth in the Appendix of Forms attached to these rules.

(f)(2) A defendant who timely returns a waiver is not required to respond to the complaint until 45 days after the date on which the request for waiver of service was mailed or delivered to the defendant, or 60 days after that date if addressed to a defendant outside of the United States.

(f)(3) A defendant who waives service of a summons does not thereby waive any objection to venue or to the jurisdiction of the court over the defendant.

(f)(4) If a defendant refuses a request for waiver of service submitted in accordance with this rule, the court shall impose upon the defendant the costs subsequently incurred in effecting service.

Advisory Committee Notes

Tab 3

Rule 101. Motion practice before court commissioners.

(a) **Written motion required.** An application to a court commissioner for an order ~~shall~~ must be by motion which, unless made during a hearing, ~~shall~~ must be made in accordance with this rule. A motion ~~shall~~ must be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought. Any evidence necessary to support the moving party's position must be presented by way of one or more affidavits or declarations. The moving party may also file a supporting memorandum.

(b) **Time to file and serve.** The moving party ~~shall~~ must file the motion and ~~attachments~~ any supporting papers with the clerk of the court and obtain a hearing date and time. The moving party ~~shall~~ must serve the responding party with the motion and ~~attachments and~~ supporting papers, together with notice of the hearing at least ~~14~~ 28 days before the hearing. ~~A party may file and serve with the motion a memorandum supporting the motion.~~ If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) **Response; ~~reply~~.** The ~~responding~~ party opposing a motion may file a response, consisting of any responsive memorandum, affidavit(s) or declaration(s). ~~shall file~~ The response must be filed and ~~serve~~ served on the moving party ~~with a response and attachments~~ at least ~~7~~ 14 days before the hearing. ~~A party may file and serve with the response a memorandum opposing the motion. The moving party may file and serve the responding party with a reply and attachments at least 3 business days before the hearing. The reply is limited to responding to matters raised in the response.~~

(d) **Reply.** The moving party may file a reply, consisting of any reply memorandum, affidavit(s) or declaration(s). The reply must be filed and served on the opposing party at least 7 days before the hearing. The contents of the reply must be limited to rebuttal of new matters raised in the memorandum opposing the motion.

(e) **Counter motion.** Opposing a motion is not sufficient to grant relief to the responding party. An opposing party may request affirmative relief by way of a counter motion. A counter motion need not be limited to the subject matter of the original motion. All of the provisions of this rule apply to counter motions except that a counter motion must be filed and served with the response. The response to the counter motion must be filed and served no later than the reply. The reply to the response to the counter motion must be filed and served at least 3 business days before the hearing. A reply must be served in a manner that will cause the reply to be actually received by the party opposing the counter motion (i.e. hand-delivery, fax or other electronic delivery as allowed by rule or agreed by the parties) at least 3 business days before the hearing. A separate notice of hearing on counter motions is not required.

~~(d) **Attachments; objection to failure to attach.**~~

~~(d)(1) As used in this rule "attachments" includes all records, forms, information and affidavits necessary to support the party's position. Attachments for motions~~(f) **Necessary documentation.** Motions and responses regarding temporary orders concerning alimony ~~shall include~~, child support, division of debts, possession or disposition of assets, or litigation expenses, must be accompanied by verified financial declarations with documentary income verification ~~and a financial declaration.~~attached

as exhibits, unless financial declarations and documentation are already in the court's file and remain current. Attachments for motions and responses regarding child support and child custody ~~shall~~ also include ~~income verification, a financial declaration and~~ a child support worksheet. ~~A financial declaration shall be verified.~~

~~(d)~~(g) **No other papers.** No moving or opposing papers other than those specified in this rule are permitted.

(h) **Exhibits; objection to failure to attach.**

(h)(1) Except as provided in paragraph (h)(3) of this rule, any documents such as tax returns, bank statements, receipts, photographs, correspondence, calendars, medical records, forms, or photographs must be supplied to the court as exhibits to one or more affidavits (as appropriate) establishing the necessary foundational requirements. Copies of court papers such as decrees, orders, minute entries, motions, or affidavits, already in the court's case file, may not be filed as exhibits. Court papers from cases other than that before the court, such as protective orders, prior divorce decrees, criminal orders, information or dockets, and juvenile court orders (to the extent the law does not prohibit their filing), may be submitted as exhibits.

(h)(2) If ~~attachments~~ papers or exhibits referred to in a motion or necessary to support the moving party's position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If ~~attachments~~ papers or exhibits referred to in the response or necessary to support the ~~responding~~ opposing party's position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect ~~shall~~ must be cured within 2 business days after notice of the defect or at least ~~2~~ 3 business days before the hearing, whichever is earlier.

~~(e) **Courtesy copy.** Parties shall deliver to the court commissioner a courtesy copy of all papers filed with the clerk of the court within the time required for filing with the clerk. The courtesy copy shall state the name of the court commissioner and the date and time of the hearing.~~

~~(f)~~(h)(3) Voluminous exhibits which cannot conveniently be examined in court may not be filed as exhibits, but the contents of such documents may be presented in the form of a summary, chart or calculation under Rule 1006 of the Utah Rules of Evidence. Unless they have been previously supplied through discovery or otherwise and are readily identifiable, copies of any such voluminous documents must be supplied to the other parties at the time of the filing of the summary, chart or calculation. The originals or duplicates of the documents must be available at the hearing for examination by the parties and the commissioner. Collections of documents, such as bank statements, checks, receipts, medical records, photographs, e-mails, calendars and journal entries, that collectively exceed ten pages in length, are deemed to be overly voluminous and must be presented in summary form. Individual documents with specific legal significance, such as tax returns, appraisals, financial statements and reports prepared by an accountant, wills, trust documents,

contracts, or settlement agreements, are deemed not to be overly voluminous, regardless of length, and should be submitted in their entirety.

(i) **Length.** Initial memoranda may not exceed 10 pages of argument without leave of the court. Response and reply memoranda may not exceed 5 pages of argument without leave of the court. The total number of pages submitted to the court by each party may not exceed 25 pages, including affidavits, attachments and summaries, but excluding financial declarations and income verification. The court commissioner may permit the party to file an over-length memorandum upon ex parte application and showing of good cause.

(j) **Late filings; sanctions.** If a party files or serves papers beyond the time required in ~~subsections (b) or (c),~~ this rule, the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

~~(g) **Counter motion.** Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion. This rule applies to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served no later than the reply. The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing. A separate notice of hearing on counter motions is not required.~~

~~(h) **Limit on hearing.** The court commissioner shall not hold a hearing on a motion before the deadline for an appearance by the respondent under Rule 12.~~

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

~~(j)~~(l) **Hearings.**

(l)(1) The court commissioner may not hold a hearing on a motion for temporary relief before the deadline for an appearance by the respondent under Rule 12.

(l)(2) Unless the court commissioner specifically requires otherwise, when the statement of a person is set forth in an affidavit, declaration or other document accepted by the commissioner, that person need not be present at the hearing. The statements of any person not set forth in an affidavit, declaration or other acceptable document may not be presented by proffer unless the person is present at the hearing and the commissioner finds that fairness requires its admission.

(m) **Motions to judge.** The following motions ~~shall~~ must be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be ~~to~~ considered by the judge.

(n) **Objection to court commissioner's recommendation.** A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection under Rule 108.

~~Committee Notes~~

~~The 2014 amendments changed the deadline in paragraph (c) from 5 business days to 7 days as part of the adoption of the federal "days-are-days" approach to calculating time. That is, intervening weekends and holidays are included in the calculation even for relatively short periods of time. The amendments also deleted "calendar" from paragraph (b), but the application of the 2014 reenactment of Rule 6 yields the same result. However, the amendments did not change the deadlines of two and three business days in paragraphs (c), (d) and (g). These remain exceptions to the general approach.~~

RULE 101

Passim: Change “shall” to “must,” “may," or “should” as appropriate. Bryan A. Garner, Guidelines for Drafting and Editing Court Rules, § 4.2.B (5th ed. 2007).

Lines 2-16: Consider adding "(a) Motion” before line 2, and then changing (a) and (b) into (a)(1) and (a)(2), respectively. As (c) (d) & (e) are all about one paper, it is more consistent with your organization.

Line 7: consider revising “affidavits or declarations” to include the exhibits mentioned in (f).

Lines 7-8: Omit the sentence “The moving party may also file a supporting memorandum.” It seems to contradict the preference in Rule 7 that a memorandum in support should be part of the motion.

Lines 13, 20, 27: Omit “calendar,” as I believe the purpose is to conform with the “days are days” approach of Rule 6.

Line 16: Change “service may not be made through counsel” to “service must be made on the attorney and party”—that seems to better express the requirement better.

OR

Line 16: Change “may not” to “must not.” Garner, § 4.2.E.

Line 17: consider changing “may” to “must” unless commissioners agree that a written response is optional. That would seem to contradict the sanctions allowed in part (j).

Line 29: change “memorandum opposing the motion” to “response"

Lines 30-42: Replace “counter motion” with either “counter-motion” or countermotion.” See Chicago Manual of Style § 7.84 (15th ed. 2003) (indicating preference for hyphenated or closed compounds if they are in common use).

Lines 37 & 40-41: Consider your options on this: The actual time to respond to the response to countermotion is expressed on this graph:

If the reply is due 3 <u>business</u> days before the hearing, the reply will be due on this day/ this many business days after the response/ this many business days before the hearing:

<u>Day of Hearing: Mon Tue Wed Thu Fri</u>

Regular Weekend W/2/3 Th/2/3 F/2/3 M/2/3 Tu/2/3

Friday Holiday T/1/3 W/1/3 Th/1/3 M/1/3 Tu/2/3

Monday Holiday W/2/3 W/1/3 Th/1/3 F/1/3 Tu/1/3

If the reply is due 2 <u>business</u> days before the hearing, the reply will be due on this day/ this many business days after the response/ this many business days before the hearing:

<u>Day of Hearing: Mon Tue Wed Thu Fri</u>

Regular Weekend Th/3/2 F/3/2 M/3/2 Tu/3/2 W/3/2

Friday Holiday W/2/2 Th/2/2 M/2/2 Tu/2/2 W/3/2

Monday Holiday Th/3/2 Th/2/2 F/2/2 Tu/2/2 W/2/2

If the reply is due 3 <u>calendar</u> days before the hearing, the reply will be due on this day/ this many business days after the response/ this many business days before the hearing:

<u>Day of Hearing: Mon Tue Wed Thu Fri</u>

Regular Weekend F/4/1 F/3/2 F/2/3 M/2/3 Tu/2/3

Friday Holiday Th/3/1 Th/2/2 Th/1/3 M/1/3 Tu/2/3

Monday Holiday F/4/1 F/3/1 F/2/2 F/1/3 Tu/2/3

If the reply is due 2 <u>calendar</u> days before the hearing, the reply will be due on this day/ this many business days after the response/ this many business days before the hearing:

<u>Day of Hearing: Mon Tue Wed Thu Fri</u>

Regular Weekend F/4/1 F/3/2 M/3/2 Tu/3/2 W/3/2

Friday Holiday Th/3/1 Th/2/2 M/2/2 Tu/2/2 W/2/2

Monday Holiday F/4/1 F/3/1 F/2/2 Tu/2/2 W/2/2

Lines 41-42: Change “a separate notice of hearing on counter motions is not required” to “a separate notice of hearing is not required for counter motions”

Lines 46-55: Consider making this a part of the current (h), especially as the objection to failure to attach refers to the documents referred to in these lines.

Line 47: Consider deleting “temporary orders concerning” —the documentation is probably required whether the motion is for a temporary order or not.

Line 56: Consider consolidating into (d) and changing to “no further memoranda, affidavits or declarations will be considered without leave of court.”

Line 99: Change “should” to “must”

Line 101: Change “initial memoranda” to “A motion and a response”

Line 102: Delete “response and” and change “reply memoranda” to "A reply.”

Line 149: As the term is not elsewhere defined in the rules, it would probably be a good idea to define “business days” here.

Nathan Whittaker

I strongly disagree with the timing changes for the filing of motions, counter-motions and supporting documents. Oftentimes getting before the commissioner quickly is critical, so guaranteeing one can't get before a commissioner for at least 4 weeks is not only unnecessary but imposes delays and further burdens on people who need any kind of expedited hearing. The whole thing seems a fix for a problem that doesn't exist.

Posted by Gregory B. Wall December 17, 2014 10:06 AM

Rule 101(i): I retract me previous comment. I see now that the term "initial memoranda" refers to both the supporting and opposing memorandum, and that the term "response" in rule 101(i) is likely referring to the response that can be filed after a reply memorandum to address objections as allowed under the new rule 7.

Posted by Axel Trumbo December 10, 2014 02:27 PM

Rule 101(b)

Changing the time frame of a hearing from 14 days to 28 days is a bad idea in many divorce-type actions. When a parent is withholding children from the other parent or no financial support is being given, waiting an additional 14 days could be a big deal, causing a party to potentially go an entire month without seeing the children or without the ability to pay bills. Some may suggest the party could get a TRO if necessary, but "immediate and irreparable" is a high standard and not necessarily consistent from judge to judge.

The current timing requirements should remain in place.

Posted by Justin Caplin December 10, 2014 12:32 PM

In sub part (a) of the rule, it does not make it clear that all supporting documents and "other documents" must be filed at the same time as the Motion. One of the problems I encounter is that lawyers are filing affidavits and other documents that are trickling in from discovery up until the date of hearing.

With regard to 101(b), requiring litigants to wait at least 28 days for a hearing on Motion for Temporary Orders is going to result in more Temporary Restraining Orders.

With regard to 101(e), the counter motion provisions of the rule are a big problem. It is good that the rule seeks to clarify that the counter motion need not be concerning the same issues, or the same facts. This has been a point of contention. The argument that it should be only concerning th same issues and the same facts, however, remains the same. Which is, that to give one party half as much time to prepare to defend against a counter motion as the original respondent had to respond to the first motion filed, violates the original moving parties' rights to due process of law, and equal protection under the law.

It is one thing to give the original moving party half as long to reply to a counter motion with it is concerning the same facts and issues. But if the counter motion can be on a completely separate matter, ie different facts and different issues, to allow the original moving party only half as long to develop a defense makes a law trained person cry foul.

As a practical matter, these motions get made early in the case, even before Initial Disclosures are due. People are waiting to have the hearing date. In the meantime, Initial Disclosures become due, but somebody doesn't provide them. Somebody sends out a subpoena, and the documents come trickling in at the last minute before the hearing. Supporting documents that were not available when the original motion was filed get filed late. The party making the counter motion has 2 more weeks to work up their counter motion, and gets to do it as subpoenaed documents are trickling in, and after Initial Disclosures have become due.

There is simply no way to give one party half as much time as the other party to defend against a motion and have it turn out fair, UNLESS THERE IS A STRICT POLICY THAT THE COURT WILL NOT CONSIDER SUPPLEMENTAL MATERIALS THAT ARE FILED LATE. Of course, this hamstrings the court with someone files the missing tax returns that give the Court some kind of certainty that it has the facts right 2 days before the hearing. There is precious little solace for the litigant that substantive due process has occurred when their procedural due process rights have been violated.

The rule proposed states that Replies shall not contain fact assertions not in the original motion, but they commonly do. Judges are supposed to ignore them, but is is hard to do when it seems relevant, and there is precious little to go on. It seems to me that a rejoinder should be allowed, when the reply that is filed contains new material. How else can a litigant keep the Court from being unfairly persuaded by materials that violate the rules?

With regard to rule 101(h)(3), parties are required to file, in every domestic case, 2 years worth of tax returns, pay stubs for a year, and 3 months worth of bank statements in support of the Financial Declaration. Each one of these "collections" is going to be more than 10 pages in length. The rule needs to contain an exception for these so that the Court is not getting a summary sheet, and lawyers don't have to prepare a summary sheet, for documents that are required with every Financial Declaration. The language in (h)(3) is not a model of clarity.

Posted by David McPhie December 9, 2014 10:22 AM

Rule 101(i): There must be a mistake. The rule states that the supporting memorandum can have 10 pages of argument, but the opposing memorandum can only have 5. And then the reply memorandum can also have 5. This results in the moving party having 15 pages of argument, while the non-moving

party has only 5. This does not follow the normal practice of giving both parties an equal amount of time / space to make their arguments, while giving the first an opportunity to address new matters. It should be 10 pages in support, 10 in opposition, and 5 in reply.

Posted by Axel Trumbo December 5, 2014 07:55 PM

Rule 56 needs to include a statement as to length of a summary judgment motion and memorandum. Rule 7 indicates length cannot exceed 15 pages, excluding appendix. I don't see where "appendix" is defined. Rule 56 supplements Rule 7 by requiring the statement undisputed material facts in the motion and a response to those facts in the opposition memorandum. In many cases that is not possible in 15 pages. If the summary judgment motion and memorandum and the opposition thereto, are to be limited to 15 pages, excluding the statement of material facts, then that should be clearly stated in the rule.

Posted by Stuart H. Schultz November 29, 2014 03:18 PM

Comments directed to Rule 101 (i) - "The total number of pages submitted to the court by each party shall not exceed 25 pages, including affidavits, attachments and summaries, but excluding financial declarations and income verification."

Comments-

(1) Does the "total number of pages" requirement reset when a counter-motion is filed, or is the 25 page limit apply to the total number of pages filed by a party in connection with both the motion and counter-motion?

(2) Is 25 pages really adequate enough to get the job done? How did the committee arrive at these numbers? Family law cases are often complex and have a lot of issues that need to be addressed and a total of 25 pages does not seem like a lot, especially when you factor in what the rule is counting as a "page" that goes towards the total allowed number of pages. Pages that contain the Certificate of Service (which btw have to be attached to each document now) and notarized signature pages are some examples of necessary nonsubstantive fillers, which will negatively cut into the number of pages that will be left for addressing the issues.

(3) If there is going to be a "total number of pages" limit then it should only apply to the combined total number of pages in the initial memorandum, response memorandum, and affidavits, and exclude all other docs (ex. motion, countermotion, reply, attachments, etc...). Attached evidence is very important, and can often be quickly reviewed, but be voluminous, so do we really want attached evidence to be included in the page limit? Moreover, when initially preparing the motion with an accompanying memo and affidavits, it will be really hard to gauge how many pages you will need to "leave" for later to file a reply with attachments, especially when you don't have the other side's response yet and are thus unable to gauge what an adequate reply will need to be.

(4) Asking for leave to file an overlength memorandum is a simple feel good insert into the rule to appease concerns over the limit requirements, but in practice such requests are frowned on by the Court and problematic for the practitioner. How do you know when to make such a request - Up front, in the middle of preparation or at the end of your preparation? How fast will it take for the Court to get back to you, and will you have enough time to ask and get an answer before your deadline? The amount of preparation that is needed to make such a request will negatively impact your preparation for the case at hand and the cost of the case.

Posted by JBr November 29, 2014 11:51 AM

My comments are regarding the proposed changes to URCP 101(i), which presently reads:

101 Length. Initial memoranda shall not exceed 10 pages of argument

102 without leave of the court. Response and reply memoranda shall not exceed 5

103 pages of argument without leave of the court. The total number of pages

104 submitted to the court by each party shall not exceed 25 pages, including

105 affidavits, attachments and summaries, but excluding financial declarations

106 and income verification. The court commissioner may permit the party to file

107 an over-length memorandum upon ex parte application and showing of good

108 cause.

I don't think it's fair that a response brief be limited to 5 pages of argument. I suggest it should be 10, like the brief in support of the original motion.

The word "initial" seems a bit vague. Is the memorandum in support of a counter-motion considered an "initial memorandum"?

The 25-page limit also feels vague. If the moving party files a motion that is 23 pages long, does that mean he only gets 2 pages for his reply? Is it meant to be 25 pages per filing? What if there is a counter-motion?

Here is my suggested rewrite of Rule 101(i):

***

Memoranda in support of a motion before a domestic commissioner shall not exceed 10 pages of argument. The motion, memorandum, affidavits, attachments and summaries, but excluding financial declarations and income verification, shall not exceed 25 pages. Memoranda in response to a motion shall not exceed 10 pages of argument. The response memorandum, affidavits, attachments and summaries, but excluding financial declarations and income verification, shall not exceed 25 pages. Reply memoranda shall not exceed 5 pages of argument. The reply memorandum, affidavits, attachments and summaries, but excluding financial declarations and income verification, shall not exceed 25 pages.

In the event of a counter motion as provided herein: (1) the counter-movant shall file a single consolidated memorandum in opposition to the original motion and in support of the counter motion, the consolidated memorandum shall not exceed 10 pages of argument, and the counter motion, consolidated memorandum, affidavits, attachments and summaries, but excluding financial declarations and income verification, shall not exceed 25 pages; and (2) the movant who filed the original motion shall file a single consolidated memorandum opposing the counter motion and replying to the response to the original motion, the consolidated memorandum shall not exceed 10 pages of argument, and the consolidated memorandum, affidavits, attachments and summaries, but excluding financial declarations and income verification, shall not exceed 25 pages.

Parties may seek leave of court to exceed the page limits provided here. The court commissioner may permit a party to file an over-length memorandum upon ex parte application and showing of good cause.

***

Finally, 25 pages seems awfully tight. If there must be a page limit, 30 sounds more appropriate: 10 pages for Argument, 10 pages of factual recitations, 10 pages of exhibits. Even if every family law lawyer lived under those restrictions, that would be a huge reduction in the quantity of paperwork.

Thank you

From: Jim Hunnicutt <jim@dolowitzhunnicutt.com>

Date: Mon, Dec 15, 2014 at 3:10 PM

Tab 4

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~~ Judgment as a matter of law. ~~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.~~

(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 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) 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~~ If the court does not grant a motion for judgment as a matter of law made under paragraph (a), the court is ~~deemed~~ 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 entry of judgment~~—~~ or if the motion addresses a jury issue not decided by a verdict, ~~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~~ no later than 28 days after the jury ~~has been~~ was 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 moving party 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. ~~If a verdict was returned~~ In ruling on the renewed motion the court may:

(b)(1) allow ~~the~~ judgment ~~to stand or may reopen the judgment and either~~ on the verdict if the jury returned a verdict;

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

(b)(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:~~ Granting the renewed motion; conditional rulings ~~on grant of~~ a motion for new trial.

(c)(1) If ~~the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted,~~ the court ~~shall~~ 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.

(c)(2) ~~If~~ 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.

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

Advisory Committee Notes

The 2016 amendments adopt the plain-language style of Federal Rule of Civil Procedure 50. We also borrow heavily from the 1991 federal Advisory Committee Note, which explains the changes and the reasoning behind them:

> 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.

….

Paragraph (a)(1) articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard. …. The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury …. Because this standard is also used as a reference point for entry of summary judgment under 56(a), it serves to link the two related provisions.

The revision authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case. Thus, the second sentence of paragraph (a)(1) authorizes the court to consider a motion for judgment as a matter of law as soon as a party has completed a presentation on a fact essential to that party's case. Such early action is appropriate when economy and expedition will be served. In no event, however, should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact. ….

As in the federal rule, the time for filing the motion has been extended to 28 days after entry of judgment. Finally, in accordance with the 2006 federal 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~~ but 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).

Advisory Committee Note

The 2016 amendments adopt the plain-language style of Federal Rule of Civil Procedure 52. And, like the federal rule, the 2016 amendments move a provision formerly found in Rule 41(b) to this rule. Formerly, if a plaintiff had presented its case and the evidence did not support the claim, the court—in a trial by the court—could find for the defendant without having to hear the defendant's evidence. The equivalent provision now found in paragraph (e) extends that principle to claims other than the plaintiff's and, if a party's evidence on any particular element of the cause of action is complete but insufficient, allows the court to make findings and conclusions and enter judgment accordingly.

Rule 59. New trials; amendments of altering or amending a 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) Iirregularity in the proceedings of the court, jury or adverse opposing 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) Mmisconduct 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 or declaration of any one of the jurors.;

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

(a)(4) Nnewly 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) Eexcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.;

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

(a)(7) Eerror 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 or declaration. Whenever If a motion for a new trial is based upon supported by affidavits or declarations, they shall must 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.

(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 or for reasons not in the motion. 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. The order granting a new trial must state the reasons for the new trial.

(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.

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 thereafter~~ 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~~ opposing 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~~

~~The 1998 amendment eliminates as grounds for a motion the following: "(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action." This basis for a motion is not found in the federal rule. The committee concluded the clause was ambiguous and possibly in conflict with rule permitting service by means other than personal service.~~

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)~~ 60(c).

(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 5

MEMORANDUM

To: Rules Committee
From: Frank Carney
Date: April 24, 2015
Subject: Rule 35

You will recall that we amended Rule 35 on medical examinations several years ago, removing the requirement for automatic production of reports from prior examinations, allowing for routine video recording of the examination, etc.

However, issues have inadvertently arisen over the need in all cases for a report of the examination. At the time, our intention (to my recollection) was that ALL medical examinations would require a report of that examination to be produced. This was independent of the requirement for a report from testifying experts under Rule 26.

Our Advisory Committee Note, among other things, says this:

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. It is the Committee's view that this provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the production of prior reports of other examinations. ***Medical examiners will be treated as other expert witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition.***

The idea behind the last sentence was that one could always subpoena reports from prior examinations, and then attempt to prove "proportionality." Unfortunately, this last sentence has been interpreted by some as meaning that reports need not be provided under Rule 35, but only under Rule 26, when the expert is designated as a testifying expert.

I do not recall that being our intention. There are cases where a Rule 35 examiner is not called as a witness– for example, if the opinions are unexpectedly favorable to the plaintiff. Nevertheless, a report should be required, and the defendant should not have the option of withholding the opinion by not designating the examiner as an expert for trial.

The attached draft amendment to the Advisory Committee Note resolves this issue.

Rule 35. Physical and mental examination of persons.

(a) Order for examination. When the mental or physical condition or attribute of a party or of a person in the custody or control of a party is in controversy, the court may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or control. The order may be made only on motion for good cause shown. All papers related to the motion and notice of any hearing ~~shall~~ must be served on a nonparty to be examined. The order ~~shall~~ must specify the time, place, manner, conditions, and scope of the examination and the person by whom the examination is to be made. The person being examined may record the examination by audio or video means unless the party requesting the examination shows that the recording would unduly interfere with the examination.

(b) Report. The party requesting the examination ~~shall~~ must disclose a detailed written report of the examiner, setting out the examiner's findings, including results of all tests made, diagnoses and conclusions. If the party requesting the examination wishes to call the examiner as an expert witness, the party ~~shall~~ must disclose the examiner as an expert as required by Rule ~~26(a)(3)~~ 26(a)(4).

(c) Sanctions. If a party or a person in the custody or under the legal control of a party fails to obey an order entered under paragraph (a), the court on motion may take any action authorized by Rule ~~37(e)~~ 37(b), except that the failure cannot be treated as contempt of court.

Advisory Committee Notes

Rule 35 has been substantially revised. A medical examination is not a matter of right, but should only be permitted by the trial court upon a showing of good cause. Rule 35 has always provided, and still provides, that the proponent of an examination must demonstrate good cause for the examination. And, as before, the motion and order should detail the specifics of the proposed examination.

The parties and the trial court should refrain from the use of the phrase "independent medical examiner," using instead the neutral appellation "medical examiner," "Rule 35 examiner," or the like.

The ~~C~~committee has determined that the benefits of recording generally outweigh the downsides in a typical case. The amended rule therefore provides that recording shall be permitted as a matter of course unless the person moving for the examination demonstrates the recording would unduly interfere with the examination.

Nothing in the rule requires that the recording be conducted by a professional, and it is not the intent of the committee that this extra cost should be necessary. The committee also recognizes that recording may require the presence of a third party to manage the recording equipment, but this must be done without interference and as unobtrusively as possible.

The former requirement of Rule 35(c) providing for the production of prior reports on other examinees by the examiner was a source of great confusion and controversy. It is the ~~C~~committee's view that this provision is better eliminated, and in the amended rule there is no longer an automatic requirement for the production of prior reports of other examinations. ~~Medical examiners will be treated as other expert~~

~~witnesses are treated, with the required disclosure under Rule 26 and the option of a report or a deposition.~~

A report must be provided for all medical examinations under this rule. If the medical examiner is going to be called as an expert witness at trial, then the designation and disclosures under Rule 26(a)(4) also are required, and the opposing party has the option of requiring, in addition to the Rule 35(b) report, the expert's report or deposition under Rule 26(a)(4)(C).

Tab 6

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 or with the exercise of reasonable diligence~~ knew of or should have ~~learned~~ known 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.

(b)(4) No party may file more than one motion to disqualify in an action, unless the second or subsequent motion is based on grounds that the party did not know of and could not have known of at the time of the earlier motion.

(b)(5) If timeliness of the motion is determined under paragraph (b)(2)(C) or paragraph (b)(4), the affidavit supporting the motion must state when and how the party came to know of the reason for disqualification.

~~(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)~~ (c)(2) 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 .

~~(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 7

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May 6, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 9. Pleading special matters. Rule 58C. Motion to renew judgment.

At your last meeting, you decided that, since a domestic judgment could be renewed by motion and a foreign judgment could be domesticated, Rule 9(k) is superfluous and should be deleted. You also decided that you want to include in the Rules of Civil Procedure a rule governing renewal of a judgment by motion.

I've deleted Rule 9(k) and added a committee note explaining that action. The other changes are plain-language amendments that we chip away at as rules are amended for a substantive purpose. Some of these follow FRCP 9, but this rule remains significantly different from the federal rule because the state rule has several provisions with no counterpart in the federal rule.

I propose Rule 58C as the most logical place for a rule governing renewal of a judgment. Most of the draft is based on the Judgment Renewal Act, which is cited in the committee note. I have also included a rendering of the service requirements that were discussed.

I've drafted the service provisions in this particular fashion because of the Act. Section 78B-6-1803 says: "Notice of a motion for renewal of judgment is served in accordance with the Rules of Civil Procedure…." The statute does not say which rule of procedure, and presumably the supreme court could require personal or alternative service under Rule 4. However, Section 78B-6-1802 says "A court … may renew a judgment … if … the facts in the supporting affidavit are determined by the court to be accurate and the affidavit affirms that notice was sent to the most current address known for the judgment debtor…." The word "sent" at least implies service other than personal service.

Whether the legislature can impose this level of procedural detail without amending a rule of procedure is questionable, but to avoid a conflict between the rule and the statute, I recommend something similar the approach suggested in this draft.

Rule 9. Pleading special matters.

(a)~~(1)~~ Capacity. It is not necessary to ~~aver~~ allege 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~~ a party or the capacity of ~~any~~ a 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~~ denial, which ~~shall~~ must 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~~ at trial.

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

~~(a)(3)~~ (c) Actions to quiet title; description of interest of unknown parties. ~~In~~ If a party in an action to quiet title ~~wherein any of the parties are~~ is designated in the caption as "unknown," the pleadings may describe ~~such~~ the 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~~ its title ~~thereto~~."

~~(b)~~ (d) Fraud, mistake, condition of the mind. In ~~all averments of~~ alleging fraud or mistake, a party must state the circumstances constituting fraud or mistake ~~shall be stated~~ with particularity. Malice, intent, knowledge, and other conditions of a person's mind ~~of a person~~ may be ~~averred~~ alleged generally.

~~(c)~~ (e) Conditions precedent. In pleading ~~the performance or occurrence of~~ conditions precedent, it is sufficient to ~~aver~~ allege generally that all conditions precedent have been performed or have occurred. ~~A denial of performance or occurrence shall be made specifically and~~ When denying that a condition precedent has been performed or has occurred, a party must do so with particularity~~, and when so made the~~. The party pleading the performance or occurrence shall ~~on the trial~~ establish the facts showing ~~such~~ performance or occurrence at trial.

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

~~(e)~~ (g) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or ~~of~~ a board or officer, it is sufficient to ~~aver~~ plead 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)~~ (h) Time and place. ~~For the purpose of~~ An allegation of time or place is material when 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)~~ (i) Special damage. ~~When~~ If an item~~s~~ of special damage ~~are~~ is claimed, ~~they shall~~ it must be specifically stated.

~~(h)~~ (j) 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~~ the statute ~~specifically and definitely~~ by section number, subsection designation, if any, or ~~otherwise~~ designating the provision relied ~~up~~on sufficiently ~~clearly~~ to identify it. If ~~such~~ the allegation is ~~controverted~~ denied, the party pleading the statute must establish~~, on the~~ at trial~~,~~ the facts showing that the cause of action is ~~so~~ barred.

~~(i)~~ (k) 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~~ a statute or ordinance, it is sufficient to refer to ~~such~~ the 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 statute~~s~~ or ordinance~~s~~. The court ~~shall thereupon~~ must take judicial notice ~~thereof~~ of the statute or ordinance.

~~(j)~~ (l) Libel and slander.

~~(j)(1)~~ (l)(1) Pleading defamatory matter. ~~It is not necessary in~~ 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~~ allege generally that the ~~same~~ defamatory matter out of which the action arose was published or spoken concerning the plaintiff. If ~~such~~ the allegation is ~~controverted~~ denied, the party alleging the ~~such~~ defamatory matter must establish~~, on the~~ at trial~~,~~ that it was ~~so~~ published or spoken.

~~(j)(2)~~ (l)(2) Pleading defense. ~~In his answer to an action for libel or slander, the~~ 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~~. Whether or not justification ~~or not~~ is proved, ~~he~~ the defendant may give ~~in~~ evidence of 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)~~ (m) Allocation of fault.

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

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

~~(l)(1)(B)~~ (m)(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)~~ (m)(2) The information specified in ~~subsection (l)(1)~~ paragraph (m)(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)~~ paragraph (m)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial.

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

Advisory Committee Note

The 2016 amendments deleted former paragraph (k) on renewing judgments because it was superfluous. The Renewal of Judgment Act (Utah Code Sections 78B-6-1801 through 78B-6-1804) allows a domestic judgment to be renewed by motion, and Section 78B-5-302 governs domesticating a foreign judgment, which can then be renewed by motion.

The process for renewing a judgment by motion is governed by Rule58C.

Rule 58C. Motion to renew judgment.

(a) Motion. A judgment creditor may renew a judgment by filing a motion in the original action before the statute of limitations on the original judgment expires. A copy of the judgment must be filed with the motion.

(b) Affidavit. The motion must be supported by an affidavit:

(b)(1) accounting for the original judgment and all post-judgment payments, credits, and other adjustments provided for by law or contained in the original judgment; and

(b)(2) affirming that notice was sent to the most current address known for the judgment debtor, stating why the moving party knows the address to be the judgment debtor's correct address.

(c) Service under Rule 4. If the judge is not convinced that the address is the judgment debtor's correct address, the judge may order that the motion be served on the judgment debtor under Rule 4.

(d) Rule 7 applies. The procedures and time limits of Rule 7 apply.

(e) Effective date of renewed judgment. If the court grants the motion, the court will enter an order renewing the original judgment from the date of entry of the order or from the scheduled expiration date of the original judgment, whichever occurs first. The statute of limitations on the renewed judgment runs from the date the order is signed and entered.

Advisory Committee Note

The Renewal of Judgment Act (Utah Code Sections 78B-6-1801 through 78B-6-1804) allows a domestic judgment to be renewed by motion, and Section 78B-5-302 governs domesticating a foreign judgment, which can then be renewed by motion. The statute of limitations on an action for failure to pay a judgment is governed by Utah Code Section 78B 2 311.

Tab 8

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May 6, 2015

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

I have on the list of pending matters next to Leslie's name 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

Tab 9

Rule 5. Service and filing of pleadings and other papers.

(a) When service is required.

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(a)(1)(A) a judgment;

(a)(1)(B) an order that states it must be served;

(a)(1)(C) a pleading after the original complaint;

(a)(1)(D) a paper relating to disclosure or discovery;

(a)(1)(E) a paper filed with the court other than a motion that may be heard ex parte; and

(a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

(a)(2) Serving parties in default. No service is required on a party who is in default except that:

(a)(2)(A) a party in default must be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(a)(2)(C) a party in default for any reason must be served with notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason must be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) a party in default for any reason must be served under Rule 4 with pleadings asserting new or additional claims for relief against the party.

(a)(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b) How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if

(b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

(b)(2) When to serve. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.

(b)(3) Methods of service. A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing if the person being served has an electronic filing account;

(b)(3)(B) emailing it to the email address provided by the person or to the email address on file with the Utah State Bar, if the person has agreed to accept service by email or has an electronic filing account;

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

(b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

(b)(4) When service is effective. Service by mail or electronic means is complete upon sending.

(b)(5) Who serves. Unless otherwise directed by the court:

(b)(5)(A) every paper required to be served must be served by the party preparing it; and

(b)(5)(B) an order or judgment prepared by the court will be served by the court.

(c) Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(c)(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(c)(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(c)(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(c)(4) a copy of the order must be served upon the parties.

(d) Certificate of service. A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served.

(e) Filing. Except as provided in Rule 7(f) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

Advisory Committee Notes

The 1999 amendment to subdivision (b)(1)(B) does not authorize the court to conduct a hearing with less than 5 days notice, but rather specifies the manner of service of the notice when the court otherwise has that authority.

2001 amendments

Paragraph (b)(1)(A) has been changed to allow service by means other than U.S. Mail and hand delivery if consented to in writing by the person to be served, i.e. the attorney of the party. Electronic means include facsimile transmission, e-mail and other possible electronic means.

While it is not necessary to file the written consent with the court, it would be advisable to have the consent in the form of a stipulation suitable for filing and to file it with the court.

2015 amendments

Since the Rules of Juvenile Procedure do not have a rule on serving papers, this rule applies in juvenile court proceedings under Rule 1, Rule 81(a) and Rule of Juvenile Procedure 2.

Under paragraph (b)(3)(A), electronically filing a document has the effect of serving the document on lawyers who have an e-filing account. (Lawyers representing parties in the district court are required to have an account and electronically file documents. Code of Judicial Administration Rule 4-503.) The 2015 amendment excepts from this provision documents electronically filed in juvenile court.

Although electronic filing in the juvenile court presents to the parties the documents that have been filed, the juvenile court e-filing application (CARE), unlike that in the district court, does not deliver an email alerting the party to that fact. The Board of Juvenile Court Judges and the Advisory Committee on the Rules of Juvenile Procedure believe this difference renders electronic filing alone insufficient notice of a document having been filed. So in the juvenile court, a party electronically filing a document must serve that document by one of the other permitted methods.