Agenda

Advisory Committee on Rules of Civil Procedure

September 23, 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
Introduction of members		Jonathan Hafen
Consideration of comments to: URCP 006. Time. URCP 008. General rules of pleadings. URCP 011. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions. URCP 050. Judgment as a matter of law in a jury trial; related motion for a new trial; conditional ruling. URCP 052. Findings and conclusions by the court; amended findings; waiver of findings and conclusions; correction of the record; judgment on partial findings. URCP 059. New trial; altering or amending a judgment. URCP 060. Relief from judgment or order. URCP 063. Disability or disqualification of a judge.	Tab 2	Tim Shea
Rule 41. Dismissal of actions.	Tab 3	Tim Shea
Rule 4. Process.	Tab 4	Tim Shea
Rule 9. Pleading special matters. Rule 26.02. Disclosures in personal injury actions. Rule 58C. Motion to renew judgment.	Tab 5	Tim Shea
Rule 26.1. Disclosure and discovery in domestic relations actions.	Tab 6	Leslie Slaugh

Report of the joint committee on the effect of post-judgment proceedings on time to appeal.	Tab 7	Rod Andreason, Paul Burke, Amber Mettler, Alan Mouritsen
Examination of 2015 amendments to the FRCP		Jonathan Hafen
Approval of meeting schedule. Note additional meeting on June 22.		Jonathan Hafen

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

Meeting Schedule:

October 28, 2015

November 18, 2015

January 27, 2016

February 24, 2016

March 23, 2016

April 27, 2016

May 25, 2016

June 22, 2016

September 28, 2016

October 26, 2016

November 16, 2016

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – May 27, 2015

Present:	Hon. Lyle Anderson, Rod Andreason, Hon. James Blanch, Lincoln Davies, Hon. Evelyn Furse, Jonathan Hafen, Terrie McIntosh, Amber Mettler, David Scofield, Hon. Todd Shaughnessy, Leslie Slaugh, Trystan Smith, Barbara Townsend
Telephone:	Lori Woffinden
Staff:	Timothy M. Shea, Heather M. Sneddon
Guests:	Frank J. Carney, Rep. Curtis Oda, Lane Gleave, Tyler Gleave, Comm. Michelle Blomquist
Not Present:	Hon. Kate Toomey, Scott S. Bell, Sammi Anderson, Steve Marsden, Hon. John Baxter, Hon. Derek Pullan, Paul Stancil

I. Welcome and approval of minutes. [Tab 1] – Jonathan Hafen.

Jonathan Hafen welcomed the committee and invited a discussion of the minutes. Ms. Mettler moved to approve the minutes. Ms. McIntosh seconded. The minutes were approved.

II. Recognition of David Scofield and Judge Shaughnessy – Jonathan Hafen.

Mr. Hafen expressed the committee's and the Supreme Court's thanks to Judge Shaughnessy and David Scofield for their service to the committee.

III. Rule 4. Electronic service for personal jurisdiction. [Tab 2] – Lane Gleave.

Mr. Hafen invited further discussion of recommendations regarding electronic service for personal jurisdiction. Lane Gleave said that he and his team had been asked to propose changes to Rule 4 to incorporate electronic service consistent with their program. They did quite a bit of research and believe their proposed language should be adequate, but he invites comments from the committee.

Discussion:

- Mr. Slaugh reiterated his concern regarding the kind of information needed to be given to people before they consented to electronic service to ensure that consent was educated and voluntary. What protections are in place to make sure no one's rights are violated? Mr. Gleave responded that two boxes must be checked before proceeding with the download. By checking the box, you agree to be served electronically. Another check box requires that the user agree to the terms of use of the website. There had been a question about what constitutes an electronic signature. Mr. Gleave indicated that the statute requires some form of action indicating consent; they have adopted the check box as that action. Mr. Shea believes that is correct, although the representation may be a little more revealing if it said that by checking the box, it constitutes an electronic signature. That said, under the statute, any act you intend to be a signature that is associated with an electronic transaction is in fact an electronic signature.
- Mr. Hafen mentioned two issues: What is coming from Mr. Gleave's program looks like it is coming from the court as opposed to elsewhere, and we need to address how the system is

ensuring the person who is acknowledging receipt is in fact the right person. Tyler Gleave responded that to achieve positive identification, the defendant is required to input the last four digits of his/her SS number. Lane Gleave commented that as part of that process, the SS number is loaded into the system before people log into the computer, so the computer tries to match what they already have. No download is permitted if the SS numbers do not match. Mr. Slaugh said that wouldn't preclude a husband accepting service for his wife if he knew her SS number. Lane Gleave said that was possible, but that is already permitted by regular personal service. Mr. Slaugh said the difference is that in that situation, we know who was actually served. There is room for fraud, but perhaps we cannot protect against all fraud. He recommended that we include something in the rule that permits the court to authorize electronic service even if consent is not received.

- Judge Blanch raised the issue of the timing of consent—must consent be obtained when process is ready to be served? The current language may allow, for example, credit card companies to include boilerplate in their agreements regarding consent, and then use that consent to achieve service by using an old email address. Tyler Gleave said the language could be adjusted to require consent at the time of service.

- Mr. Andreason commented that "electronically" at lines 40 and 89-90 is very general. A defendant should agree to a particular method of electronic service and be served by that method.

- Mr. Slaugh asked whether the system automatically emails a copy of the summons and complaint. Lane Gleave responded that they are automatically downloaded to the user's computer as soon as they hit download. The summons becomes time stamped with that date and time. The IP address is tracked. Mr. Slaugh asked what happens if there is a problem during transmission. Tyler Gleave said they can attempt download later by going back to the website and filling out the forms again. Mr. Slaugh asked whether that results in two different service times. Lane Gleave said no; if there is a problem with download, there is no time-stamped service. And if there is a problem, attempted downloads are reported to Lane and Tyler's phones. If they see 2 or 3 attempts of trying to download, he will call and find out the problem. Sometimes they will just email the summons and complaint to the defendant.

- Mr. Slaugh asked whether there are size limitations on the file. Tyler Gleave responded that none are in place, but theoretically, a couple of GB per document. Mr. Scofield commented that color documents could be a problem. If they take a long time to download, will people wait to receive them? And if they are too big, they can't be emailed. Tyler Gleave said that by not requiring an email address, they permit a download. Mr. Scofield said that the speed of the download is affected by the speed of the defendant's ISP—it is not immediate. If an issue arose with the download and the documents couldn't be emailed, Lane Gleave said he would call the defendant, discuss the issue and default to another procedure under the rule to accomplish service if it couldn't be resolved. Mr. Shea mentioned that we are focused on ways in which electronic service would not be successful—the Gleaves want to know when it is not working and then they will fix it. But so long as there is no representation to the court that service was successful, that's okay. Tyler Gleave said that no return of service is given, and nothing is flagged as served, unless they know it worked.

- Mr. Shea asked whether our process is sufficient if we serve someone in another state. Mr. Slaugh responded that the long arm jurisdiction statute would permit it if the court has jurisdiction. Mr. Shea questioned whether service is accomplished in those situations under

that state's rules. Mr. Scofield said no, they serve it under Utah rules. The only problem is with international service and the Hague Convention.

- Mr. Shea raised the issue of permitting electronic service in situations when it is not allowed due to security regulations at the prison, for example. Judge Blanch commented that we don't have to prohibit such service just because it is impossible.
- Mr. Shea also pointed to lines 90-91 regarding "electronic service being complete upon initiation of service by the receiving party," and not writing the rule so specifically to the Gleaves' system. Mr. Scofield raised the issue of a glitch in the download—the process was initiated so service is complete despite the problem. Ms. Mettler said this language could also mean just email. Lane Gleave responded that the language was intended to capture the same type of service as certified letters, etc., which are considered served when the person signs for the letter even if the letter is not opened. If you hit the download button, that constitutes service. Mr. Slaugh said the way it is worded is confusing. Why "initiation of service" instead of "completion of service" or "download"? Judge Blanch noted that there are competing concerns at issue. We need to tailor the language to make it clear we are describing this kind of system, but not prohibiting anyone else from coming along afterward. The language, as it stands, is too broad.
- Mr. Slaugh asked why we don't allow service by email if someone consents to service in that manner. Judge Blanch said that if someone explicitly agrees to be served that way, that's fine. But we need to address the situation in which a 15-page contract has a buried provision that the person consents to being serviced via email. Mr. Slaugh said we should disallow that.
- Mr. Scofield said the benefit of this system is that the Gleaves won't give a return of service if they see a glitch. Just "electronic service" is concerning. Here we know what is happening because people are overseeing it. Judge Blanch raised his concern that allowing email service leads to common issues of inputting the wrong email address, the email landing in the person's junk mail, etc. Typically you know that email will work if you're agreeing to it, but if we're going to allow a plaintiff to get a default on email service, we must have evidence that it went through.
- Mr. Scofield suggested that we describe electronic service through a licensed process server so that the affidavit of service is at least somewhat reliable. Judge Blanch commented that the concepts that would give him comfort are an affirmative agreement at the time of service, and electronic service that doesn't record as successful until actually downloaded. Mr. Slaugh asked about email service if the person sending it checks the option for a delivery/read receipt. Judge Blanch responded that we allow people to opt into and agree to that after service of process, but that the Rule 4 service standard should be higher. Magistrate Judge Furse commented that you are already prohibited from serving your own complaint.
- Lane Gleave proposed changing the language to "electronic download" instead. Mr. Andreason, Judge Blanch and Mr. Slaugh prefer that language, and suggested making service complete when the download is complete. Mr. Shea said that there needs to be enough rigor in the Rule 4 service to meet minimum due process requirements. Given the committee's discussion, Mr. Shea will work with the Gleaves and invite others from the committee to help with further drafting and editing.
- Mr. Shea raised a concern regarding the confidentiality of the information that the process server receives. Lane Gleave said that they receive this information from the serving party, except perhaps for the IP address and phone number. Tyler Gleave confirmed that they

request a phone number, which is mandatory so that they can send a text message. If there is an issue about who received or initiated the download, someone can go to the cellular carrier and see who had the phone. The person enters a 4-digit code via text to download the paper. It's a safeguard. Ms. Townsend asked whether there is a disclaimer saying what the phone number will be used for, since it is required. Tyler Gleave said that on the same field with the two check boxes, they agree to electronic service, and below agree to the terms and conditions, which includes a short block of text that says the process server doesn't give information to anyone but that it is retained indefinitely. The primary reason for the phone number is that if something goes wrong, they have a current number to get in touch with whoever attempted to initiate the download.

- Mr. Shea noted that the Commissioner had asked for a copy of the summons and proposed folding that in. Mr. Hafen agreed. The subcommittee will address these issues and the rule will be discussed at the next meeting.

IV. Rule 101. Motion practice before court commissioners. [Tab 3] – Commissioner Michelle Blomquist.

With respect to Rule 101, Comm. Blomquist reported that the committee has looked at the issue of practice in the domestic realm. After a very long process, the committee's proposal reflects general agreement. The proposed rule was sent out for public comment, and those comments have been reviewed by the committee. One comment was very specific regarding the language, and others concerned the timelines. The committee had come to consensus on the timelines after input from hundreds of domestic attorneys; thus, the subcommittee voted to leave the rule as it is. It has gone through the comment period. The rule is limited to practice before the commissioners and is expressly excluded from Rule 7.

Discussion:

- Mr. Hafen asked whether someone with an immediate issue, like a protective order, can get in front of a judge. Comm. Blomquist responded that they can. That is not part of Rule 101. Because so many domestic attorneys wanted the deadline pushed to 28 days for regular motions, the committee took that input.

- Mr. Slaugh asked why the dates are tied to the hearing date rather than the motion filing date. Comm. Blomquist said that was before her time, but unlike Rule 7, there are no rulings without hearings. Mr. Slaugh also raised the "necessary evidence" phrase referenced in line 5, and asked whether it should include certified copies of deeds, deposition transcripts, etc. Comm. Blomquist commented that the rule mentions some of those, including voluminous exhibits. Mr. Hafen asked what the threshold is for "voluminous." Comm. Blomquist responded that "voluminous" is over ten pages and requires a summary. If you have 100 pages, you include a summary and bring the documents to the hearing to share with counsel. The issue is that commissioners have 8-10 hearings every morning and cannot look at voluminous exhibits. However, the "voluminous exhibits" exception does not apply to documents with particular legal significance, such as tax returns. Ms. Mettler asked whether the expectation is that the party would file for overlength, and Comm. Blomquist said yes.

- Magistrate Judge Furse asked whether there would be any value in saying "not including relief under Rule 65" to make line 99 more clear. Comm. Blomquist said that the existing language is pretty much what the rule says right now, and there have been no issues. "Motion for temporary relief" is a term of art in the domestic arena. Mr. Slaugh noted that line 35 says

motion for temporary "orders" rather than "relief," and suggested they be consistent. Comm. Blomquist suggested going with "temporary orders" so there is no cross-over with Rule 65.

- Mr. Andreason suggested that at line 13, the language be changed to "any other party." He also suggested changing "opposing party" to "responding party," and removing "overly" before "voluminous" on lines 71 and 74. Mr. Shea commented that even "voluminous" could be stricken—if it exceeds ten pages, it must be submitted in summary form.
- Mr. Smith asked about the contexts for summary relief and the distinctions between TROs and protective orders versus temporary orders/relief. Comm. Blomquist said that for TROs and protective orders, there is an urgent nature to them that permits parties to get into court immediately. But other issues come up that must be dealt with before the end of the case, such as preservation of the marital estate and custody issues. Temporary orders address issues, and have lower evidentiary standards and separate rules.
- Mr. Slaugh suggested adding "or other admissible evidence" to line 6, and changing "opposition" to "response" throughout. At line 39, "must" should be inputted. At line 71, "are deemed to be overly voluminous and" should be deleted. At line 75, "are deemed not to be overly voluminous, regardless of length, and" should be deleted. Comm. Blomquist is fine with these changes.
- Mr. Andreason said that at lines 26-28, you get lost on the different forms of reply to a counter motion. Comm. Blomquist agreed. At the end of the sentence, he recommends just putting "to the motion," then "any response" and "any reply," and "the reply" for the following sentence. He also recommended adding all serial commas. Comm. Blomquist confirmed that the last reply needs "the." Mr. Andreason also proposed a comma after "hearing" on line 10.
- Mr. Smith commented that three days doesn't seem like much for a significant counter motion. Mr. Shea said that the policy served by the short turnaround is to get all issues to the commissioner at the same time for a decision, rather than having separate hearings on the motion and countermotion. It is important that that policy be served, as these cases frequently involve children, custody, support and visitation. Comm. Blomquist commented that by the time of the last reply, both parties have briefed their issues so much that there isn't much left to address.
- Mr. Slaugh moved to send the rule to the Supreme Court with the proposed revisions. Magistrate Judge Furse seconded, and the motion carried.

V. Post-trial motions. Rules 50, 52, 59 and 60. Technical amendment of Rule 6. [Tab 4] – Frank Carney.

Mr. Carney reviewed Mr. Shea's changes and they look good. Mr. Shea believes the rules are ready to go out for comment. Judge Blanch moved to send them out for comment. Mr. Smith seconded, and the motion carried.

VI. Rule 35. Physical and mental examination of persons. [Tab 5] – Frank Carney

Mr. Carney discussed an issue that has arisen with the last sentence of the existing advisory committee note on Rule 35 regarding the treatment of medical examiners as other expert witnesses, with the required disclosure and the option of a report or deposition. People have taken the sentence to mean that you don't have to disclose the report from an IME—you only have to disclose it if the expert is going to testify at trial under Rule 26 and the other side gets either a report or deposition. That was not the intent; the intent was that Rule 35 reports should be required to be disclosed, and the defendant may not withhold the report by not designating the examiner as an expert for trial. Mr. Carney suggests taking that sentence out of the note and replacing it with his proposed language.

Discussion:

- Mr. Smith remembers the committee's prior discussion, but recalled a vote that Rule 35 examiners were not required to produce a report unless they were to serve as experts and a report was elected. The whole idea behind the new rules was to reduce the cost of discovery, and that is the meaning of the comment. You get to elect a report or a deposition, and you don't get the report unless you elect it. Mr. Scofield expressed the same recollection. Mr. Carney said the rule says you must have a report.
- Judge Shaughnessy said there is a historical reason for this. The old Rule 35 required them to produce a report of the examination. This was important for policy reasons—the results of any diagnostic test performed were to be produced. The Rule 35 examiner is not acting as the doctor for that patient, but under the old rule, the idea was that they should have to do a report and disclose to the patient the results of the test. Mr. Carney said that last time, the committee was just talking about taking away the requirement that all prior reports be produced. They still have to do reports under the current rule. Judge Shaughnessy noted that this comes up all the time; he has required a Rule 35 report and a deposition, but not a Rule 26 report. He doesn't think they are the same. The plaintiff can then elect to get a full Rule 26 report that requires all opinions and factual bases to be identified and be limited to the opinions offered in the report, or to elect a deposition and be responsible for cleaning out the witness and eliciting all opinions. The committee should address the issue. Mr. Smith said the issue should be explicitly addressed in the rule. Lines 11-14 are unclear.
- Magistrate Judge Furse suggested that a separate report under Rule 35(b) seems inconsistent with cutting discovery costs. She also asked whether there is danger in requiring the other side to produce a Rule 35 report when there is no doctor-patient relationship. Mr. Slaugh said that if you submit to an involuntary examination, you should get to receive the results of that exam.
- Mr. Scofield noted that the Rule 35 report is not a Rule 26 report unless someone calls the examiner as an expert. If a report is elected, does the Rule 35(b) report become the expert report or is there a separate Rule 26 report? Mr. Slaugh said the rule requires clear disclosure of the expert after examination. The examination findings are not necessarily coextensive with what a Rule 26 report would be later. The findings could be much more abbreviated. Mr. Smith noted that the other side gets to make an election. If they elect a deposition, they are not limited to what is in the Rule 35 report. There is a question as to whether we want the expense of both a Rule 35 report and a deposition; the rule needs to address this. Magistrate Judge Furse commented that doctors are the most expensive experts, so we undercut our efforts to save costs with this rule.

- Judge Blanch said that with this proposal, we're saying that there is no such thing as a consulting expert on physical examinations under Rule 35. If the patient submits to a Rule 35 examiner, you are stuck with that report. Are there policy reasons for this? Magistrate Judge Furse said there is value in having consulting experts in this realm, but to get another examination, you have to go to court. Judge Shaughnessy commented that there are consulting experts, but they are records consultants. Mr. Slaugh said that once you have the physical examination, he doesn't see how you don't disclose those findings to the patient given the invasion of privacy. Mr. Smith said the difference is that the plaintiff's bar is able to send their clients to many doctors for opinions, and the results of those examinations do not have to be disclosed. Judge Shaughnessy commented that the defense bar also has its roster of experts.

VII. Rule 63. Disability or disqualification of a judge. [Tab 6] – Tim Shea

Mr. Shea has made further amendments to Rule 63 after the last meeting. The critical language is lines 22-27 regarding the standard of "did not know of and could not have known of." If the timeliness of the motion is being decided, the party must describe in an affidavit how and when it came to know of the reasons.

Discussion:

- Magistrate Judge Furse said "their" is used on line 3 when talking about a single judge. Mr. Shea and Judge Shaughnessy suggested changing the language to "judge's duties." Mr. Andreason proposed dropping the first preposition in line 16 to become: "knew or should have known of."
- Judge Shaughnessy asked how subsection (b)(6) operates in practice. Mr. Slaugh said that if the motion is filed within 21 days of the date when you knew or should have known, then you have to have a timeliness affidavit. If there are other grounds, then you do not.
- With the foregoing changes, Mr. Andreason moved to send the rule out for comment. Ms. McIntosh seconded, and the motion carried.

VIII. Rule 5. E-filing and service in the juvenile court. [Tab 9] – Tim Shea

Mr. Shea reported that an amendment has been requested on p. 54, line 37. Because the juvenile court does not have its own rules for service, it relies on Rule 5. In juvenile court, however, practitioners don't receive notification when something has been filed. Therefore, they have asked for this exception to be approved on an expedited basis so that electronic filing is not recognized as effective service in juvenile court when electronic filing goes live for them on November 1st. Both the committee and the board have asked for this change, and Mr. Shea has received no opposition.

Discussion:

- Mr. Andreason asked whether the juvenile rules are separate from the Rules of Civil Procedure. Messrs. Shea and Hafen responded that they are, but they do not cover everything. Mr. Hafen explained that they rely on the civil and criminal rules as well, and that they have a rule that incorporates all of the civil rules that have no juvenile counterpart. Mr. Andreason questioned why this provision is not put into the juvenile rules instead. Mr. Shea suggested that, but the board and committee would both prefer to have the change in the civil rules.
- Some members noted that the language is a bit awkward. Messrs. Scofield and Hafen suggested moving "except in the juvenile court" to the end of the sentence. Mr. Shea will make the change.

- Ms. Townsend moved to approve the rule as amended, with the above change. Judge Blanch seconded, and the motion carried.

IX. Adjournment.

The meeting adjourned at 5:56 pm. The next meeting will be held on September 23, 2015 at 4:00 pm 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
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900
Fax 801-578-3999

September 14, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Comments to Rules 6, 8, 11, 50, 52, 59, 60 and 63

The committee published the attached rules for comment. They are ready for your recommendations to the Supreme Court. The comments also are attached.

In an attempt to save a little time, I have already made some further changes in response to the grammar-and-style-type comments. I have indicated these by striking through the comment. If you disagree with any of those changes, please point them out before or at the meeting.

There were no comments to Rules 8 or 11. The only comments to Rule 63 were grammar-and-style-type comments. No one seems to disagree with the committee's direction for the other rules. The comments seem intended to try to clarify.

The comment period for Rule 43 and Rule 55 also has closed. Comments to those rules are still being considered by staff.

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).

Rule 8. General rules of pleadings.

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

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

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

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

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

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

Advisory Committee Notes

Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.

(a) Signature.

(a)(1) Every pleading, written motion, and other paper ~~shall~~ must be signed by at least one attorney of record, or, if the party is not represented, by the party.

(a)(2) A person may sign a paper using any form of signature recognized by law as binding. Unless required by statute, a paper need not be accompanied by affidavit or have a notarized, verified or acknowledged signature. If a rule requires an affidavit or a notarized, verified or acknowledged signature, the person may submit a declaration pursuant to Utah Code Section 78B-5-705. If ~~a statute requires~~ an affidavit or a paper with a notarized, verified or acknowledged signature ~~and~~ is filed, the party ~~electronically files the paper, the signature shall be notarized pursuant to Utah Code Section 46-1-16~~ must comply with Rule 5(f).

(a)(3) An unsigned paper ~~shall~~ will be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(b)(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(b)(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(b)(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(b)(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that ~~subdivision~~ paragraph (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated ~~subdivision~~ paragraph (b) or are responsible for the violation.

(c)(1) How initiated.

(c)(1)(A) By motion. A motion for sanctions under this rule ~~shall~~ must be made separately from other motions or requests and shall describe the specific conduct alleged to violate ~~subdivision~~ paragraph (b). It ~~shall~~ must be served as provided in Rule 5, but ~~shall~~ may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other

period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

(c)(1)(B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate ~~subdivision~~ paragraph (b) and directing an attorney, law firm, or party to show cause why it has not violated ~~subdivision~~ paragraph (b) with respect thereto.

(c)(2) Nature of sanction; limitations. A sanction imposed for violation of this rule ~~shall~~ must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in ~~sub~~paragraphs (c)(2)(A) and (c)(2)(B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation.

(c)(2)(A) Monetary sanctions may not be awarded against a represented party for a violation of ~~subdivision~~ paragraph (b)(2).

(c)(2)(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(c)(3) Order. When imposing sanctions, the court ~~shall~~ will describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

Advisory Committee Notes

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. Judgment must be entered separately under Rule 58A.

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

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

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

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

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

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

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

~~(c) Affidavits; time for filing.~~ When the ~~application~~ motion for a new trial is ~~made~~ filed under ~~Subdivision~~ paragraph (a)(1), (2), (3), or (4), it ~~shall~~ must be supported by affidavits or declarations. ~~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~~ A motion ~~shall~~ under paragraph (b) 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, if there is no judgment or order, from 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.~~

38

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 ~~the~~ his or her 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 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~~ must 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.

Public Comment to URCP

URCP 6

Line 50: Will changing the reference from 60(b) to (c) confuse people? I know 60(c) is the reference to the time for filing a motion under 60(b), but a lot of people know what a 60(b) motion is so well that they don't even look up the reference anymore. Perhaps it should be changed to "60(b)-(c)" to avoid confusion?

URCP 50

Line 10: I know that the federal rule says "the court finds," but if I'm not mistaken, the legal sufficiency of the evidence is a conclusion of law rather than a finding of fact. Should the word "finds" be replaced by "concludes"?

~~Line 54: Consider changing "not later than" to "no later than". See Garner, Guidelines for Drafting and Editing Court Rules, 4.6, at 33 (recommending "no later than" in place of "not later than").~~ Done

URCP 52

~~Line 7: Consider adding the sentence "Judgment must be entered separately under Rule 58A." to the end of (a)(1). This reinforces the separate document requirement.~~ Done.

Lines 22-24: Does the statement of reasons need to be in writing, or can it be made orally on the record? See line 7.

~~Line 25: Consider changing "not later than" to "no later than". See Garner, Guidelines for Drafting and Editing Court Rules, 4.6, at 33 (recommending "no later than" in place of "not later than").~~Done.

URCP 59

~~Line 14: Consider changing "surprise, which ordinary prudence" to "surprise that ordinary prudence", as "ordinary prudence could not have guarded against" restricts the type of surprise that qualifies under the rule. See Garner, Guidelines for Drafting and Editing Court Rules, 4.3.A, at 30-31 ("Use that, not which, as a restrictive relative pronoun.").~~Done.

~~Line 15: Consider changing "evidence, which could not," to "evidence that could not," for the reason explained above in Line 14.~~ Done.

~~Line 17: Consider changing "damages, appearing" to "damages that appear" as it is a more standard language for setting off a restrictive modifying clause. Alternatively, consider deleting the comma between "damages" and "appearing", as restrictive clauses are not set off by commas.~~ Done.

~~Line 19: Consider deleting the comma between "decision" and "or", as "or that the verdict or decision is against law" is not an independent clause.~~ Done.

~~Line 25: Consider changing "affidavit or declaration" to "one or more affidavits or declarations" to match the wording used on Line 26. (The words "one or more" is included merely to resolve any concerns about the plural construction being interpreted to require multiple affidavits. If that is not a concern, feel free to omit "one or more" from the clause.)~~ Done.

URCP 60

~~Line 23: Consider changing "The motion must be filed" with "A motion under Rule 60(b) must be filed". Otherwise, it may raise questions as to whether (c) applies to a motion under 60(a).~~ Done.

Since the purpose is to clarify and simplify the Rule 60, it would be beneficial to elaborate on 60(b)(1) and 60(b)(6), maybe in the Advisory Committee Notes. Those two (2) parts seem to come into play in Motions to Set Aside for our firm.

It would be valuable to know what level of scrutiny constitutes "mistake, inadvertence, surprise, or excusable neglect." We have received motions to set aside a judgment from opposing counsel and parties, that just list any mistake. Sometimes the Judge sees it in the Defendant's favor, sometimes in the Plaintiff's. If 60(b)(1) is a supposed to be a low threshold to meet, then it might not be worth using the

Court's time with a hearing and pleadings; if it is a higher threshold, we know to spend more time putting together a defense and challenge a Motion to Set Aside.

With 60(b)(6), it would beneficial if it more clearly matched Utah case law. If the 90 days has passed, defendants will use 60(b)(6) as a work around. Utah case law states that 60(b)(6) cannot be used if the asserted grounds fall under any other subsection of 60(b). *Menzies v.Galetka*, 150 P.3d 480, 2006 UT 81 (Utah 2006). If 60(b)(6) clearly identified that if the moving party's reason(s) to set aside falls under 60(b)(1) to 60(b)(5), 60(b)(6) should not be used. This would eliminate Motions to set aside that are not timely.

Keisuke L. Ushijima, by email June 26, 2015

~~Regarding URCP 60(c), it is unclear what date has priority; the date of the entry of the written order or the date of the proceeding. Previously we could rely on the language as to when the order was entered, but that has been removed. Perhaps stating "not more than 90 days after the entry of the judgment... or if no order is signed the date of the proceeding.~~ Done.

Posted by Russell Yauney June 30, 2015 04:41 PM

URCP 63

~~Lines 2-3: "their" is plural, while its referent, "the judge," is singular. Consider changing "their" to "his or her"~~ Done.

~~Line 31: Consider changing "may take no further action" to "must take no further action" or "must not take any further action." See Garner, Guidelines for Drafting and Editing Court Rules, 4.2.E, at 30 ("Change may not to must not or cannot.").~~ Done.

Posted by Nathan Whittaker July 10, 2015 11:15 AM

~~The proposed amendment to URCP 63(a) uses the plural pronoun "their" when referring to a single judge. This is grammatically incorrect. The word "their" should be replaced with either "his" or "her."~~ Done.

Posted by Adam July 1, 2015 12:03 PM

Tab 3

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900

September 14, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 41

I realized too late that amendments to Rule 41 should have been published for comment with the amendments to Rule 52.

Rule 52(e) is being amended to move a provision from Rule 41(b) [lines 27-33 of this draft]. With that provision now in Rule 52(e), it should be deleted from Rule 41.

I have modeled this draft after federal Rule 41, which involves two substantive changes worth noting. Lines 7-8 change "response to the complaint permitted under these rules" to "a motion for summary judgment." Line 9 moves a stipulated dismissal from requiring court approval to the discretion of the plaintiff.

The other amendments are the plain-language amendments that we routinely consider.

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect ~~thereof~~.

(a)(1) By the plaintiff.

(a)(1)(A) Subject to ~~the provisions of~~ Rule 23(e) and ~~of~~ any applicable statute, the plaintiff may dismiss an action ~~may be dismissed by the plaintiff~~ without a court order ~~of court~~ by filing:

(a)(1)(A)(i) a notice of dismissal ~~at any time before service by the adverse~~ before the opposing party ~~of~~ serves an answer or ~~other response to the complaint permitted under these rules~~ a motion for summary judgment; or

(a)(1)(A)(ii) a stipulation of dismissal signed by all parties who have appeared.

(a)(1)(B) Unless the notice or stipulation states otherwise ~~stated in the notice of dismissal~~, the dismissal is without prejudice~~, except that a notice of dismissal operates as an adjudication upon the merits when filed by a~~. But if the plaintiff ~~who has once~~ previously dismissed ~~in~~ any federal- or state-court ~~of the United States or of any state an~~ action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(a)(2) By court order ~~of court~~. ~~Unless the plaintiff timely files a notice of dismissal under~~ Except as provided in paragraph (a)(1) ~~of this subdivision of this rule~~, an action may only be dismissed at the plaintiff's request ~~of the plaintiff on~~ by court order ~~of the court based either~~ on~~:~~

~~(a)(2)(i) a stipulation of all of the parties who have appeared in the action; or~~

~~(a)(2)(ii) upon such~~ terms ~~and conditions as~~ the court ~~deems~~ considers proper. If a defendant has pleaded a counterclaim ~~has been pleaded by a defendant prior to the service upon him of~~ before being served with the plaintiff's motion to dismiss, the action ~~shall not~~ may be dismissed ~~against~~ over the defendant's objection ~~unless~~ only if the counterclaim can remain pending for independent adjudication by the court. Unless the order states otherwise ~~specified in the order~~, a dismissal under this paragraph is without prejudice.

(b) Involuntary dismissal; effect ~~thereof~~. ~~For failure of~~ If the plaintiff fails to prosecute or to comply with these rules or any court order ~~of court~~, a defendant may move ~~for dismissal of an~~ to dismiss the action or ~~of~~ any claim against ~~him~~ it. ~~After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).~~ Unless the ~~court in its order for~~ dismissal order otherwise ~~specifies~~ states, a dismissal under this ~~subdivision~~ paragraph and any dismissal not ~~provided for in~~ under this rule, other than a dismissal for lack of jurisdiction, ~~or for~~ improper venue, or ~~for lack of an indispensable~~ failure to join a party under Rule 19, operates as an adjudication ~~up~~on the merits.

(c) Dismissal of counterclaim, cross-claim, or third-party claim. ~~The provisions of this rule apply~~ This rule applies to the dismissal of any counterclaim, cross-claim, or third-party claim. A claimant's voluntary dismissal ~~by the claimant alone pursuant to Paragraph~~ under paragraph (a)(1) ~~of Subdivision (a) of this rule shall~~ must be made before a responsive pleading is served or, if there is ~~none~~ no responsive pleading, before ~~the introduction of~~ evidence is introduced at ~~the~~ a trial or hearing.

(d) Costs of previously-dismissed action. If a plaintiff who ~~has once~~ previously dismissed an action in any court ~~commences~~ files an action based ~~up~~on or including the same claim against the same defendant, the court may ~~make such~~ order ~~for the payment~~ the plaintiff to pay all or part of the costs of the previous action ~~previously dismissed as it may deem proper~~ and may stay the proceedings ~~in the action~~ until the plaintiff has complied ~~with the order~~.

(e) Bond or undertaking to be delivered to ~~adverse~~ opposing party. ~~Should~~ If a party dismisses ~~his~~ a complaint, counterclaim, cross-claim, or third-party claim, ~~pursuant to Subdivision~~ under paragraph (a)(1)~~(i) above,~~ after a provisional remedy has been allowed ~~such~~ the party, the bond or undertaking filed in support of ~~such~~ the provisional remedy must ~~thereupon~~ be delivered ~~by the court~~ to the ~~adverse~~ party against whom ~~such~~ the provisional remedy was obtained.

Advisory Committee Note

The 2016 amendments adopt the plain-language style of Federal Rule of Civil Procedure 41. And, like the federal rule, the 2016 amendments move a central provision of paragraph (b) from this rule to Rule 52(e). 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 Rule 52(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.

In these circumstances the court's action goes beyond simple dismissal; the court is finding for a party on the merits. This principle more properly belongs in the rule on findings and conclusions than in the rule on dismissing an action.

Tab 4

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900

September 14, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 4. Process.

The committee needs to consider three sets of amendments to Rule 4.

Commissioner Catherine Conklin has requested that the proof of service include a copy of the summons. That change is on line 171.

In St. Jeor v. Kerr Corporation, 2015 UT 49, the supreme court asked that we review Rule 4(b), which allows service on other parties up to the date of trial provided at least one defendant is timely served. See ¶2 of the opinion and footnote 5. I believe we will need a small subcommittee to consider the policies behind the rule and the approach of other jurisdictions.

The third matter is the request by Mr. Lane Gleave to permit electronic service of the complaint and summons. The committee consensus was to consider appropriate amendments. As demonstrated to the committee, electronic service was in essence acceptance of service. The defendant agrees to be served by the electronic process. Utah does not have a rule authorizing acceptance of service. We, like the federal rules, have a provision for waiver of service, and we have a provision for service by mail.

Service by mail depends primarily on the carrier returning to the plaintiff a receipt signed by the defendant. The receipt assures the court that the defendant has actual notice of the action and of the obligations described in the summons.

Waiver of service is a misnomer, and is in effect service by mail. The defendant waives service of the summons, but the complaint must still be delivered—regular mail is permitted—and the plaintiff must include with the complaint a form that describes all of the obligations imposed by a summons, except that the defendant has additional time in which to file an answer. The waiver assures the court that the defendant has actual notice of the action and of the obligations described in the request for waiver.

The amendments I have proposed eliminate service by mail—which the federal rule does not provide for—and waiver of service—which is essentially service by mail—and combines them into acceptance of the summons and complaint—since, other than lawyers, no one knows what "process" is. Acceptance is in essence waiver by a more accurate name.

The method of delivery to the defendant does not matter. Electronic delivery, as proposed by Mr. Gleave, would be sufficient, but there would be no need to program an application because mail or email also would be sufficient. The "agreement" mentioned in paragraph (d)(3) and elsewhere takes the place of the waiver form under waiver of service or the signed receipt under service by mail. That agreement assures the court that the defendant has actual notice of the action and of the obligations described in the

summons. As with waiver, there is no need for a third-party process server to deliver the summons and complaint. This has the added advantage of doing away with the arcane "cause to be served."

If the agreement is not returned within the time permitted, the plaintiff will have to serve the complaint and summons the traditional way. I propose amending the time to serve so the 120-day requirement does not include the time for requesting and not obtaining acceptance. The agreement doesn't exist yet, but I anticipate a form that includes any necessary information.

The policy served by waiver of service, service by mail and acceptance of the summons and complaint is to make service easier and less costly, but the rule serves the policy only to the extent that the rule is used. I believe that acceptance will be used more frequently than either waiver of service or service by mail.

Waiver of service includes two incentives for the defendant. The first allows extra time to answer. I have omitted this. There is no need to allow extra time to answer because the defendant controls the start date—the date the agreement is returned. But if the extra time is an important incentive, it can be included. Waiver of service also imposes on the defendant the cost of traditional service if service is not waived. I have omitted this as well because the plaintiff will recover actual costs in either event. If the summons and complaint are accepted, the costs are minimal. If not accepted, the cost increases. The committee might consider denying recovery of service costs if acceptance of service is not tried first.

I omitted service in a foreign country, which is included in the current service-by-mail provisions, because the committee seemed to have doubts about the effectiveness of foreign service other than by the Hague or other treaty provisions.

If the committee endorses this approach, Rule 12(a) will require conforming amendments. If the committee wants to consider acceptance of the summons and complaint in an action begun under Rule 3(a)(2)—the so-called 10-day summons rule—conforming amendments to Rule 3 also will be required.

Rule 4. Process.

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

(b)(i) Time of service. ~~In~~ Unless the summons and complaint are accepted in an action commenced under Rule 3(a)(1), the summons ~~together with a copy of~~ and the complaint ~~shall~~ must be served no later than ~~120~~ 150 days after ~~the filing of~~ the complaint is filed. ~~unless the~~ The court may allow~~s~~ a longer period of time for good cause shown. If the summons and complaint are not timely served, the action ~~shall~~ will be dismissed~~,~~ without prejudice on ~~application~~ motion 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~~ before trial.

(c) Contents of summons.

(c)(1) The summons ~~shall~~ must:

(c)(1)(A) contain the name and address 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~~

(c)(1)(B) be directed to the defendant~~,~~;

(c)(1)(C) 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~~

(c)(1)(D) state the time within which the defendant is required to answer the complaint in writing; ~~, and shall~~

(c)(1)(E) notify the defendant that in case of failure to ~~do so~~ answer in writing, judgment by default will be ~~rendered~~ entered against the defendant; ~~. It shall~~ and

(c)(1)(F) state either that the complaint is on file with the court or that the complaint will be filed with the court within ~~ten~~ 10 days ~~of~~ after service.

(c)(2) If the action is commenced under Rule 3(a)(2), the summons ~~shall~~ must also:

(c)(2)(A) state that the defendant need not answer if the complaint is not filed within 10 days after service; and ~~shall~~

(c)(2)(B) 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~~ must also 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) Acceptance of the summons and complaint.

(d)(1) Duty to avoid expenses. All parties—other than a minor under 14 years old or an individual judicially declared to be incapacitated, of unsound mind, or incapable of conducting the

individual's own affairs—have a duty to avoid unnecessary expenses of serving the summons and complaint.

(d)(2) Request to accept the summons and complaint. Before serving a summons and complaint under paragraph (e)(1), the plaintiff must notify a defendant who has a duty to avoid unnecessary expenses of serving the summons and complaint that an action has been commenced and request that the defendant accept the summons and complaint. The notice and request must:

(d)(2)(A) be in writing and sent to the individual defendant or to the defendant's authorized agent;

(d)(2)(B) be accompanied by:

(d)(2)(B)(i) the complaint and summons;

(d)(2)(B)(ii) the "Notice of Lawsuit and Request to Accept the Summons and Complaint" in the Appendix of Forms attached to these rules,

(d)(2)(B)(iii) the 'Agreement to Accept the Summons and Complaint" in the Appendix of Forms attached to these rules; and

(d)(2)(B)(iv) a prepaid means for returning the Agreement to Accept the Summons and Complaint;

(d)(2)(C) state the date when the request is sent; and

(d)(2)(D) be sent by email, first-class mail or other reliable means.

(d)(3) Time to return agreement; time to answer after acceptance. To accept the summons and complaint, the defendant must return the completed and signed agreement no later than 21 days after the request is sent. The time to answer the complaint begins on the date the defendant returns the agreement.

(d)(4) Effect of acceptance. A defendant who accepts the summons and complaint retains all defenses and objections.

(d)(5) Proof of acceptance. The plaintiff must file with the court the defendant's agreement and a copy of the summons.

~~(d)~~ (e) Method of service. The summons and complaint may be served in any state or judicial district of the United States. Unless ~~waived in writing~~ service is accepted, service of the summons and complaint ~~shall~~ must be by one of the following methods:

~~(d)(1)~~ (e)(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~~ the summons and complaint, service ~~shall be~~ is sufficient if the person serving them ~~same shall~~ states the name of the process and offers to deliver ~~a copy thereof~~ them. Personal service ~~shall~~ must be made as follows:

~~(d)(1)(A)~~ (e)(1)(A) Upon any individual other than one covered by ~~sub~~paragraphs (e)(1)(B), (e)(1)(C) or (e)(1)(D) ~~below~~, by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the individual personally, or by leaving ~~a copy~~ them at the individual's dwelling house or usual place of abode with ~~some~~ a person of suitable age and discretion who resides there ~~residing~~, or by delivering ~~a copy of the summons and the complaint~~ them to an agent authorized by appointment or by law to receive ~~service of~~ process;

~~(d)(1)(B)~~ (e)(1)(B) Upon ~~an infant (being a person~~ a minor under 14 years~~)~~ old by delivering ~~a copy of~~ the summons and ~~the~~ complaint to the ~~infant~~ minor and also to the ~~infant's~~ minor'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~~ minor, or with whom the ~~infant~~ minor resides, or ~~in whose service~~ by whom the ~~infant~~ minor is employed;

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

~~(d)(1)(D)~~ (e)(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,~~ The person to whom the summons and complaint are delivered must promptly deliver them ~~process~~ to the individual ~~served~~;

~~(d)(1)(E)~~ (e)(1)(E) Upon ~~any~~ a corporation not ~~herein~~ otherwise provided for in this rule, ~~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 the agent is one authorized by statute to receive process and the statute so requires. 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~~ a 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~~ the place of business;

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

~~(d)(1)(G)~~ (e)(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)~~ (e)(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)~~ (e)(2)(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)~~ (e)(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)~~ (e)(1)(K) Upon a department or agency of the state of Utah, or upon ~~any~~ a 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)(3)~~ (e)(2) Service in a foreign country. Service in a foreign country ~~shall~~ must be made as follows:

~~(d)(3)(A)~~ (e)(2)(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)~~ (e)(2)(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)~~ (e)(2)(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)~~ (e)(2)(B)(ii) as directed by the foreign authority in response to ~~a letter rogatory or~~ letter of request issued by the court; or

~~(d)(3)(B)(iii)~~ (e)(2)(B)(iii) unless prohibited by the law of the foreign country, by ~~delivery to the individual personally of a copy of~~ delivering the summons and ~~the~~ complaint to the individual personally 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)~~ (e)(2)(C) by other means not prohibited by international agreement as may be directed by the court.

~~(d)(4)~~ (e)(3) Other service.

~~(d)(4)(A) Where~~ (e)(3)(A) If the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, ~~where~~ if service upon all of the individual parties is impracticable under the circumstances, or ~~where~~ if there ~~exists~~ is 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~~ to allow service ~~by publication or~~ by some other means. ~~The~~ An affidavit or declaration supporting ~~affidavit shall~~ the motion must set forth the efforts made to identify, locate, ~~or~~ and serve the party ~~to be served~~, or the circumstances ~~which~~ that make it impracticable to serve all of the individual parties.

~~(d)(4)(B)~~ (e)(3)(B) If the motion is granted, the court ~~shall~~ will order service of ~~process~~ the complaint and summons by means reasonably calculated, under all the circumstances, to apprise the ~~interested parties of the pendency~~ defendant of the action ~~to the extent reasonably possible or practicable~~. The court's order ~~shall also~~ must specify the content of the process to be served and the event ~~or events as of which service shall be deemed complete~~ upon which service is complete. Unless service is by publication, a copy of the court's order ~~shall~~ must be served ~~upon the defendant~~ with the process specified by the court.

~~(d)(4)(C) In any proceeding where~~ (e)(3)(C) If the summons is required to be published, the court ~~shall~~, upon the request of the party applying for ~~publication~~ service by other means, must designate ~~the newspaper in which publication shall be made. The newspaper selected shall be~~ a newspaper of general circulation in the county ~~where such~~ in which publication is required ~~to be made~~.

~~(e)~~ (f) Proof of service.

~~(e)(1) If service is not waived, the~~ (f)(1) The person effecting service ~~shall~~ must file proof ~~with the court. The proof of service must state~~ of service stating the date, place, and manner of service, including 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 sheriff's, constable's or marshal's deputy, the proof of service ~~shall~~ must be ~~made~~ by affidavit or declaration under penalty of Utah Code Section 78B-5-705.

~~(e)(2)~~ (f)(2) Proof of service in a foreign country ~~shall~~ must 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)~~ (e)(2)(C), proof of service ~~shall~~ must include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

~~(e)(3)~~ (f)(3) Failure to ~~make~~ file 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 5

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900
Fax 801-578-3999

September 14, 2015

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

You have already decided that, since a domestic judgment can be renewed by motion and a foreign judgment can 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 phrase "sent to the most current address" at least implies service by mail.

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.

If the committee endorses the concept of acceptance of service, those procedures could be followed here.

Rule 26.2 requires a conforming amendment in line 42.

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 Rule 58C.

Rule 26.2. Disclosures in personal injury actions.

(a) Scope. This rule applies to all actions seeking damages arising out of personal physical injuries or physical sickness.

(b) Plaintiff's additional initial disclosures. Except to the extent that plaintiff moves for a protective order, plaintiff's Rule 26(a) disclosures shall also include:

(b)(1) A list of all health care providers who have treated or examined the plaintiff for the injury at issue, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment.

(b)(2) A list of all other health care providers who treated or examined the plaintiff for any reason in the 5 years before the event giving rise to the claim, including the name, address, approximate dates of treatment, and a general description of the reason for the treatment.

(b)(3) Plaintiff's Social Security number (SSN) or Medicare health insurance claim number (HICN), full name, and date of birth. The SSN and HICN may be used only for the purposes of the action, including compliance with the Medicare, Medicaid, and SCHIP Extension Act of 2007, unless otherwise ordered by the court.

(b)(4) A description of all disability or income-replacement benefits received if loss of wages or loss of earning capacity is claimed, including the amounts, payor's name and address, and the duration of the benefits.

(b)(5) A list of plaintiff's employers for the 5 years preceding the event giving rise to the claim if loss of wages or loss of earning capacity is claimed, including the employer's name and address and plaintiff's job description, wage, and benefits.

(b)(6) Copies of all bills, statements, or receipts for medical care, prescriptions, or other out-of-pocket expenses incurred as a result of the injury at issue.

(b)(7) Copies of all investigative reports prepared by any public official or agency and in the possession of plaintiff or counsel that describe the event giving rise to the claim.

(b)(8) Except as protected by Rule 26(b)(5), copies of all written or recorded statements of individuals, in the possession of plaintiff or counsel, regarding the event giving rise to the claim or the nature or extent of the injury.

(c) Defendant's additional disclosures. Defendant's Rule 26(a) disclosures shall also include:

(c)(1) A statement of the amount of insurance coverage applicable to the claim, including any potential excess coverage, and any deductible, self-insured retention, or reservations of rights, giving the name and address of the insurer.

(c)(2) Unless the plaintiff makes a written request for a copy of an entire insurance policy to be disclosed under Rule 26(a)(1)(D), it is sufficient for the defendant to disclose a copy of the declaration page or coverage sheet for any policy covering the claim.

(c)(3) Copies of all investigative reports, prepared by any public official or agency and in the possession of defendant, defendant's insurers, or counsel, that describe the event giving rise to the claim.

(c)(4) Except as protected by Rule 26(b)(5), copies of all written or recorded statements of individuals, in the possession of defendant, defendant's insurers, or counsel, regarding the event giving rise to the claim or the nature or extent of the injury.

(c)(5) The information required by Rule ~~9(l)~~ 9(m).

Advisory Committee Note

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 6

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah

450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900
Fax 801-578-3999

September 14, 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 7

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone 801-578-3900
Fax 801-578-3999

August 4, 2015

To: Civil Rules Committee and Appellate Rules Committee
From: Rod Andreason, Paul Burke, Amber Mettler, Alan Mouritsen, Tim Shea
Re: Effect of post-judgment proceedings on time to appeal

Introduction

The supreme court invited the two advisory committees to form a joint workgroup to examine the policies influencing whether post-judgment proceedings should extend the time in which to file a notice of appeal. Amber Mettler and Rod Andreason were appointed from the civil rules committee, and Alan Mouritsen and Paul Burke were appointed from the appellate rules committee.

Effect of post-judgment proceedings on time to appeal under state and federal rules

URAP 4 is similar to its federal counterpart, recognizing the following motions as extending the time to appeal until 30 days after the order disposing of the motion:

- a motion for judgment;
- a motion to amend or make additional findings of fact;
- a motion to alter or amend the judgment; and
- a motion for a new trial.

However, FRAP 4 also recognizes in certain circumstances a motion for attorney fees and a motion for relief under FRCP 60 as extending the time to appeal, but the state rule does not. We recommend appropriate amendments to adopt the federal model.

FRAP 4 was amended in 1993 to recognize a motion for attorney fees as extending the time to appeal, but only if the judge expressly provides for that result. In the same set of amendments, a motion for relief under Rule 60 also was recognized as extending the time to appeal, but only if the motion was filed within 10 days—later extended to 28 days—after the judgment.

The distinction in state law that requires attorney fees to be resolved before a judgment is final was established in *ProMax Development Corp. v. Raile*, 2000 UT 4, 998 P.2d 254. Most recently, in *Migliore v. Livingston Financial*, 2015 UT 9, ¶ 20, the supreme court applied the principles in *ProMax* to require that an order to show cause for Rule 11 sanctions entered before or contemporaneously with a judgment had to be resolved before the judgment is final.

Whether to include a motion under Rule 60 as extending the time to appeal seems never to have been considered by either committee. Whether to include a motion for attorney fees seemed precluded by *ProMax* until the supreme court invited us to re-examine these distinctions and to make recommendations.

Federal model recommended

Our competing objectives are to broadly extend the principle of judicial economy, which also benefits the parties, by allowing a single appeal to resolve as many issues between the parties as possible, yet not delay the appeal while collateral issues are being resolved in the trial court. The federal rule has struck an appropriate balance, and both committees support state rules that parallel the federal rules, unless there are reasons to differ.

Attorney fees

Although attorney fees are collateral to the factual and legal disputes in the cause of action, whether to appeal a judgment sometimes hinges on the amount owed, which in turn depends in part on the amount of costs, attorney fees, and financial penalties. The supreme court recognized this motivation in *ProMax*, citing *Meadowbrook v. Flower*, 959 P.2d 115 (Utah 1998).

FRAP 4 and FRCP 58 address the point by giving to the trial court judge the discretion to treat a motion for attorney fees as extending the time to appeal. The judge can decide, based on the circumstances of the case, whether a single appeal of all issues, including attorney fees, would serve judicial economy or whether the time needed to determine attorney fees would deny a party justice by delaying the appeal for an inordinate amount to time.

We sought the assistance of the administrative office of the courts to search the district court database for post-judgment claims for attorney fees. In fiscal year 2014 there were only 75. We surmised that, given the *ProMax* decision, attorney fees were being determined, for the most part, before the judgment is entered and so not showing up in a search for post-judgment activity. A second query confirmed this hypothesis, showing 399 pre-judgment claims for attorney fees.

Casetype	Pre-Judgment	Post-Judgment	Total
Adoption	3		3
Civil Rights	1		1
Civil Stalking	2	1	3
Conservatorship	2		2
Contracts	60	12	72
Custody and Support	15		15
Debt Collection	41	7	48
Divorce/Annulment	118	24	142
Estate Personal Representative		2	2
Eviction	7	2	9
Grandparent Visitation	10		10
Guardianship	7	2	9
Interpleader	4		4
Judgment by Confession		1	1
Lien/Mortgage Foreclosure	8		8
Minor's Settlement	3	1	4
Miscellaneous	38	8	46
Other Probate	1		1
Paternity	19	5	24

Casetype	Pre-Judgment	Post-Judgment	Total
Personal Injury	16	1	17
Property Damage	10		10
Property Rights	10	2	12
Protective Orders	5	1	6
Small Claims Trial De Novo	5	1	6
Separate Maintenance		1	1
Trust	7	1	8
UCCJEA Child Custody Jurisdiction	1	2	3
UIFSA	1		1
Writs	1		1
Wrongful Lien	3	1	4
Wrongful Termination	1		1
Total	399	75	474

Effect of change

By adopting the federal model regarding the effect of post-judgment claims for attorney fees, we believe judgments will be entered more quickly after the decision on the merits, whether by verdict or by summary judgment. We also believe the amendments will help to protect the appellate rights of parties and avoid the cost of premature appeals.

Under *ProMax* and *Meadowbrook* a judgment is not final until the claim for attorney fees has been resolved. An appeal filed before a claim for attorney fees has been resolved is premature and will be dismissed.

Under the federal rule and our proposed amendments, a claim for attorney fees ordinarily does not extend the time to appeal, but the trial court judge has the discretion to order that it does. And, under the federal rule, filing a notice of appeal does not deprive the trial court of jurisdiction to decide the motion for attorney fees—regardless of whether the motion is filed before or after the notice of appeal. As was noted in *Neroni v. Becker*, No. 13-3909, 2015 WL 1810508, at *1 (2d Cir. Apr. 22, 2015)

> First, the district court properly exercised jurisdiction over the defendants' application for attorneys' fees. "We have consistently held that '[w]henever a district court has federal jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney's fees.' " *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 225 (2d Cir.2004) (quoting *In re Austrian & Ger. Bank Holocaust Litig.*, 317 F.3d 91, 98 (2d Cir.2003)). Moreover, "notwithstanding a pending appeal, a district court retains residual jurisdiction over collateral matters, including claims for attorneys' fees." *Id*. Thus, the Neronis' argument that the district court lacked jurisdiction to rule on the defendants' fee application because a judgment and notice of appeal had been already filed is without merit.

Thus a party considering an appeal would be well-advised to file the notice of appeal within 30 days after entry of the judgment, even if there is a pending claim for attorney fees. The appellant who waits does so at its peril because the process for a motion under Rule 7 usually requires more than 30 days and the judge might not extend the time to appeal.

Under our proposed amendments, if the notice of appeal is filed within 30 days after the judgment, the appellant is protected regardless of the judge's decision. If the judge

does not extend the time to appeal, the notice nevertheless was filed within 30 days of the judgment as required by URAP 4(a). If the judge does extend the time to appeal, the earlier-filed notice becomes effective on the date of the order under URAP 4(b)(2)—renumbered as paragraph (b)(3) in our proposal. In either event, the notice of appeal can be amended to include any errors claimed in the award of attorney fees.

Attorney fees as a result of sanctions

We recommend treating the determination of attorney fees that are the result of sanctions the same as any other. The process for determining the amount of fees imposed as a result of sanctions can be abbreviated, as described below, but the effect on the timeliness of an appeal should be the same. Consequently, the exemption found in FRCP 54(d)(2)(E) is not contained in our proposals for URCP 54 or URCP 73. Although different from the federal rule, our recommended approach is ultimately simpler. We also believe the federal exemption goes too far, leaving important procedural questions unanswered.

FRCP 54(d)(2)(E) exempts the balance of the section, which establishes the timing and procedures for motions for attorney fees, from "claims for fees and expenses as sanctions for violating these rules…." What timing and procedures do apply are not stated. Whether a trial court judge has the discretion under FRCP 58(e) to extend the time to appeal as part of a claim for attorney fees as a sanction is an open question because Rule 58(e) requires as a condition of that discretion "a timely motion for attorney's fees …made under Rule 54(d)(2)," which expressly does not apply to claims for attorney fees as a sanction.

Relief under Rule 60

FRAP 4 treats a motion for relief under FRCP 60 similarly to other post-trial motions directed at the judgment: to extend the time to appeal, the motion must be filed within 28 days after the judgment. When the federal rule was amended in 1993 the advisory committee noted:

> [The amendment] eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4).

The federal appellate rule was amended in 2009 to recognize the longer time—28 days—allowed by the civil rules in which to file these motions.

Treating a motion under URCP 60 filed within 28 days after the judgment the same as a timely motion under URCP 59 makes eminent sense. We see no reason not to follow the federal lead.

Rule 11 sanctions and other miscellaneous post-judgment proceedings

Migliore answers the question whether an order to show cause for Rule 11 sanctions needs to be resolved before a judgment is final. More generally, it raises the questions: What other post-judgment proceedings might there be? And should they be resolved before a judgment is final?

To try to answer the first question we again sought the assistance of the administrative office of the courts to search the district court database for post-judgment motions generally. In fiscal year 2014 there were almost 1900 of them, about 200 of

which arguably would qualify to extend the time to appeal under current law. (Given the inventiveness with which attorneys title motions, it is sometimes difficult to tell.)

The results of the research show the futility of trying to describe in a rule these further proceedings and the effect they might have on the timeliness of an appeal. We recommend that the state rules go only so far as the federal rules and no farther. This means that, although *Migliore* was based on applying the attorney-fee rule from *ProMax*, and we recommend that Utah adopt the federal approach for attorney fees, we nevertheless recommend against any changes to recognize Rule 11 sanctions—or any of the other 1900 types of proceedings pending at the time of the judgment—as extending the time to appeal. Some of these proceedings will fall within the current and expanded rules that extend the time to appeal, but most will not.

Thus, *Migliori* continues to stand for the principle that an order to show cause for Rule 11 sanctions entered before or contemporaneously with a judgment must be resolved before the judgment is final. Whether the post-judgment "motion to determine subjective intent" that we found in our research has the same effect may have to await development by caselaw.

Summary

We recommend amending URAP 4 to recognize motions for relief under URCP 60 and the determination of attorney fees as extending the time in which to appeal in the same circumstances as those described in the federal rule.

Process for claiming attorney fees

We also take this opportunity to recommend improving the process for claiming attorney fees, adopting not only the federal policy respecting claims for attorney fees, but also much of the process. The effect is to modify another aspect of *Meadowbrook*. In *Meadowbrook*, the court stated "there must come a time of closure, or finality, in a case when a claim for attorney fees must be raised or waived. That time is the signed entry of final judgment." *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 118 (Utah 1998). We recommend that, as in the federal district courts, a party have up to 14 days after entry of judgment to claim attorney fees.

As part of a broader effort to remove from the Code of Judicial Administration rules governing civil, criminal and appellate procedures, the judicial council in 2003 repealed four rules governing attorney fees: Code of Judicial Administration Rule 4-505; Rule 4-505.1; Rule 6-501; and Rule 6-502. The supreme court simultaneously adopted Rule of Civil Procedure 73. The federal rules govern the process for claiming attorney fees as part of Rule 54.

If one considers the chronology of events in civil litigation, attorney fees, like costs, should be part of Rule 54 on judgments, arguing in favor of moving the attorney fee provisions in the state rules. However, leaving the process for claiming attorney fees in Rule 73 serves the interest of stability in the rules. After discussing the competing interests, we recommend continuing to use Rule 73 as the vehicle for claiming attorney fees, and we recommend adopting some of the federal provisions that establish a better process.

- The state rule does not have a maximum time in which to claim attorney fees; the federal rule requires that attorney fees be claimed no later than 14 days after the judgment.
- The state rule requires that the affidavit supporting the claim describe the "basis" for the award; we favor the more specific federal rule requiring that

the motion describe the "judgment and the statute, rule, or other grounds" for the award. To this we recommend adding "contract."

- The federal rule authorizes the court to require disclosure of "the terms of any agreement about fees" and to determine liability for fees independent of the amount; the state rule includes only agreements about fee-sharing and a statement that the attorney will not share fees in violation of Rule of Professional Conduct 5.4.
- The federal rule expressly allows the court to determine liability for attorney fees independent of determining the amount; the state rule is silent.

Claiming attorney fees as a consequence of the outcome in the litigation should continue to be by motion. However, if the court has previously established liability for attorney fees, the process for determining the amount is appropriately simpler than the usual motion process. With liability established—for example, in an order on a discovery dispute or an order for sanctions—the amount can be fixed by filing an affidavit and allowing an objection. In URCP 73, therefore, we recognize two procedures distinguished by whether the court has previously entered an order establishing liability for attorney fees. If it has, the amount probably will be determined soon after the order that creates the obligation, but the final deadline remains 14 days after the judgment.

Process to add costs and attorney fees to the judgment

The civil rules committee asked that, as part of this examination, we consider the best process for adding attorney fees and costs to a judgment. The supreme court has amended URCP 54 effective November 1, 2015, to remove paragraph (e):

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

When published for comment, removing this paragraph was seen by some as eliminating costs and interest from the judgment. That was never the committee's intent. Paragraph (e) simply describes a process—one that is not being followed; it does not establish rights.

Pre-judgment and post-judgment interest are governed by statute or contract. The interest rates are known at the time of the judgment, and they should be included when the judgment is first entered. Costs are not necessarily known when the judgment is first entered and must be added to the judgment afterward. Thus the quaint requirement for "a blank left in the judgment for that purpose." Although not included in paragraph (e), attorney fees also fall into this category of later-known amounts that affect the judgment principal. The simplest method for including costs and attorney fees in a judgment is to amend the judgment.

Since there would already have been a process to determine the liability for and the amount of costs and attorney fees, the judgment creditor should be able simply to file an amended judgment without a Rule 59 motion. Expressly recognizing an amended judgment as the means of adding costs and attorney fees raises the question of whether the amended judgment extends the time to appeal. The answer for attorney fees under the federal rules and under our recommendations is that the trial court judge has the discretion to make that decision. We recommend extending the same policy to a

determination of costs, although this is different from state caselaw. See *Nielson v. Gurley*, 888 P.2d 130 (Utah App 1994).

Costs typically are much less than attorney fees, and so should seldom be a factor in deciding whether to appeal. But costs can sometimes be significant. More important, both costs and attorney fees have the effect of amending the judgment, and we see value in applying a consistent rule to that circumstance. Under current law, a timely notice of appeal can be amended to include later-added costs. Permitting the trial court judge to extend the time to appeal achieves a similar result. As with attorney fees, the default is that a claim for costs does not extend the time to appeal, but the trial court judge could order that result.

Effect of our recommendations on civil rules already proposed for amendment

Independent of this effort, the civil rules committee has proposed amendments to Rule 54 and Rule 58A that have been approved by the supreme court but will not be effective until November 1, 2015. We recommend further amendments to Rules 54 and 58A, and we present as the baseline the rules as they will be on November 1.

The civil rules committee also is considering amendments to Rules 50, 52, 59 and 60 that will modify the process for post-trial motions. Those changes do not affect the principles discussed here, nor do our recommendations require further amendment of those rules.

Summary of amendments

Rule of Appellate Procedure 4. Adds to the list of post-judgment proceedings that extend the time to appeal:

- a motion for relief under URCP 60, if filed within 28 days after judgment; and
- a determination of attorney fees under URCP 73 if the court so orders.

Rule of Civil Procedure 54. Adds a provision for amending a judgment to include costs and attorney fees.

Rule of Civil Procedure 58A. Exempts from the requirement for a separate document an order awarding attorney fees. As in the federal court, a separate document is not required because the order is not a judgment. However, to include the award in the judgment, the party must file an amended judgment which does fall within the separate document requirement.

Includes a provision similar to that of federal Rule 58(e) that ordinarily a determination of costs or attorney fees does not extend the time to appeal but allows the trial judge to order otherwise. Includes costs as well as attorney fees. Includes attorney fees awarded as a sanction.

Rule of Civil Procedure 73. Establishes the deadline and the procedures for claiming attorney fees. Similarities with federal Rule 54(d):

- claim fees by motion;
- deadline for filing is 14 days after the judgment;
- state the grounds for the award;
- disclose the terms of any agreement about attorney fees if ordered by the court;
- state the amount claimed; and
- establishes court authority to decide liability independent of amount.

Differences:

- describe factors supporting the reasonableness of the claim if reasonableness is applicable;
- support the claim by affidavit or declaration describing for each item of work the name, position and hourly rate of the persons who performed the work; and
- if liability for fees has been previously determined, the amount can be determined by affidavit or declaration alone.

Encl: Rule of Appellate Procedure 4
Rule of Civil Procedure 54
Rule of Civil Procedure 58A
Rule of Civil Procedure 73

Rule 4. Appeal as of right: when taken.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Time for appeal extended by certain motions.

(b)(1) If a party timely files in the trial court any of the following motions, the time for all parties to appeal from the judgment runs from the entry of the order disposing of the motion:

(b)(1)(A) A motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(b)(1)(B) A motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(b)(1)(C) A motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(D) A motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure; ~~or~~

(b)(1)(E) A motion for relief under Rule 60 of the Utah Rules of Civil Procedure if the motion is filed no later than 28 days after the judgment is entered; or

(b)(1)(F) A motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(b)(2) If a party files a motion or claim for attorney fees under Rule 73 of the Utah Rules of Civil Procedure or a claim for costs under Rule 54 of the Utah Rules of Civil Procedure and if the trial court extends the time to appeal under Rule 54, the time for all parties to appeal from the judgment runs from the entry of the order disposing of the motion or claim.

(b)(3) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in ~~Rule 4~~ paragraph (b), shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in ~~Rule 4~~ paragraph (b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) Filing prior to entry of judgment or order. A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal is docketed in the court in which it was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(e) Motion for extension of time.

(e)(1) The trial court, upon a showing of good cause, may extend the time for filing a notice of appeal upon motion filed before the expiration of the time prescribed by paragraphs (a) and (b) of this rule. Responses to such motions for an extension of time are disfavored and the court may rule at any time after the filing of the motion. No extension shall exceed 30 days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(e)(2) The trial court, upon a showing of good cause or excusable neglect, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. The court may rule at any time after the filing of the motion. That a movant did not file a notice of appeal to which paragraph (c) would apply is not relevant to the determination of good cause or excusable neglect. No extension shall exceed 30 days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(f) Motion to reinstate period for filing a direct appeal in criminal cases. Upon a showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the sentencing court and serve the prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that the defendant was deprived of the right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

(g) Motion to reinstate period for filing a direct appeal in civil cases.

(g)(1) The trial court shall reinstate the thirty-day period for filing a direct appeal if the trial court finds by a preponderance of the evidence that:

(g)(1)(A) The party seeking to appeal lacked actual notice of the entry of judgment at a time that would have allowed the party to file a timely motion under paragraph (e) of this rule;

(g)(1)(B) The party seeking to appeal exercised reasonable diligence in monitoring the proceedings; and

(g)(1)(C) The party, if any, responsible for serving the judgment under Rule 58A(d) of the Utah Rules of Civil Procedure did not promptly serve a copy of the signed judgment on the party seeking to appeal.

(g)(2) A party seeking such reinstatement shall file a written motion in the trial court within one year from the entry of judgment. The party shall comply with Rule 7 of the Utah Rules of Civil Procedure and shall serve each of the parties in accordance with Rule 5 of the Utah Rules of Civil Procedure.

(g)(3) If the trial court enters an order reinstating the time for filing a direct appeal, a notice of appeal must be filed within 30 days after the date of entry of the order.

Advisory Committee Note

Paragraph (f) was adopted to implement the holding and procedure outlined in Manning v. State, 2005 UT 61, 122 P.3d 628.

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree or order that adjudicates all claims and the rights and liabilities of all parties or any other order from which an appeal of right lies. A judgment should not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims and/or involving multiple parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, cross claim, or third party claim—and/or when multiple parties are involved, the court may enter judgment as to one or more but fewer than all of the claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and may be changed at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Costs.

(d)(1) To whom awarded. Unless a statute, these rules, or a court order provides otherwise, costs should be allowed to the prevailing party. Costs against the state of Utah, its officers and agencies may be imposed only to the extent permitted by law.

(d)(2) How assessed. The party who claims costs must within 14 days after the entry of judgment file and serve a verified memorandum of costs. A party dissatisfied with the costs claimed may, within 7 days after service of the memorandum of costs, object to the claimed costs.

(d)(3) Memorandum filed before judgment. A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, is deemed served and filed on the date judgment is entered.

(e) Amending the judgment to add costs or attorney fees. If the court awards costs under paragraph (d) or attorney fees under Rule 73 after the judgment is entered, to include the award in the judgment, the party must file and serve an amended judgment including the costs or attorney fees, and the court will enter the amended judgment unless another party objects within 7 days after the amended judgment is filed.

Advisory Committee Notes

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

(a) Separate document required. Every judgment and amended judgment must be set out in a separate document ordinarily titled "Judgment"—or, as appropriate, "Decree."

(b) Separate document not required. A separate document is not required for an order disposing of a post-judgment motion:

(b)(1) for judgment under Rule 50(b);

(b)(2) to amend or make additional findings under Rule 52(b);

(b)(3) for a new trial, or to alter or amend the judgment, under Rule 59; or

(b)(4) for relief under Rule 60; or

(b)(5) for attorney fees under Rule 73.

(c) Preparing a judgment.

(c)(1) Preparing and serving a proposed judgment. The prevailing party or a party directed by the court must prepare and serve on the other parties a proposed judgment for review and approval as to form. The proposed judgment shall be served within 14 days after the jury verdict or after the court's decision. If the prevailing party or party directed by the court fails to timely serve a proposed judgment, any other party may prepare a proposed judgment and serve it on the other parties for review and approval as to form.

(c)(2) Effect of approval as to form. A party's approval as to form of a proposed judgment certifies that the proposed judgment accurately reflects the verdict or the court's decision. Approval as to form does not waive objections to the substance of the judgment.

(c)(3) Objecting to a proposed judgment. A party may object to the form of the proposed judgment by filing an objection within 7 days after the judgment is served.

(c)(4) Filing proposed judgment. The party preparing a proposed judgment must file it:

(c)(4)(A) after all other parties have approved the form of the judgment; (The party preparing the proposed judgment must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.)

(c)(4)(B) after the time to object to the form of the judgment has expired; (The party preparing the proposed judgment must also file a certificate of service of the proposed judgment.) or

(c)(4)(C) within 7 days after a party has objected to the form of the judgment. (The party preparing the proposed judgment may also file a response to the objection.)

(d) Judge's signature; judgment filed with the clerk. Except as provided in paragraph (h) and Rule 55(b)(1), all judgments must be signed by the judge and filed with the clerk. The clerk must promptly record all judgments in the docket.

(e) Time of entry of judgment.

(e)(1) If a separate document is not required, a judgment is complete and is entered when it is signed by the judge and recorded in the docket.

(e)(2) If a separate document is required, a judgment is complete and is entered at the earlier of these events:

(e)(2)(A) the judgment is set out in a separate document signed by the judge and recorded in the docket; or

(e)(2)(B) 150 days have run from the clerk recording the decision, however designated, that provides the basis for the entry of judgment.

(f) Award of costs or attorney fees. Ordinarily the time for appeal is not extended by a determination of costs or attorney fees, but the court may order that the time to appeal runs from entry of the order of award. To accomplish this result, the court must act before a notice of appeal has been filed and becomes effective.

(g) Notice of judgment. The party preparing the judgment shall promptly serve a copy of the signed judgment on the other parties in the manner provided in Rule 5 and promptly file proof of service with the court. Except as provided in Rule of Appellate Procedure 4(g), the time for filing a notice of appeal is not affected by this requirement.

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

~~(h)~~ (i) Judgment by confession. If a judgment by confession is authorized by statute, the party seeking the judgment must file with the clerk a statement, verified by the defendant, as follows:

~~(h)(1)~~ (i)(1) If the judgment is for money due or to become due, the statement must concisely state the claim and that the specified sum is due or to become due.

~~(h)(2)~~ (i)(2) If the judgment is for the purpose of securing the plaintiff against a contingent liability, the statement must state concisely the claim and that the specified sum does not exceed the liability.

~~(h)(3)~~ (i)(3) The statement must authorize the entry of judgment for the specified sum.

The clerk must sign the judgment for the specified sum.

~~(i)~~ (j) Abstract of judgment. The clerk may abstract a judgment by a signed writing under seal of the court that:

~~(i)(1)~~ (j)(1) identifies the court, the case name, the case number, the judge or clerk that signed the judgment, the date the judgment was signed, and the date the judgment was recorded in the registry of actions and the registry of judgments;

~~(i)(2)~~ (j)(2) states whether the time for appeal has passed and whether an appeal has been filed;

~~(i)(3)~~ (j)(3) states whether the judgment has been stayed and when the stay will expire; and

~~(i)(4)~~ (j)(4) if the language of the judgment is known to the clerk, quotes verbatim the operative language of the judgment or attaches a copy of the judgment.

Advisory Committee Note

2015 amendments

The 2015 amendments to Rule 58A adopt the requirement, found in Rule 58 of the Federal Rules of Civil Procedure, that a judgment be set out in a separate document. In the past, problems have arisen

when the district court entered a decision with dispositive language, but without the other formal elements of a judgment, resulting in uncertainty about whether the decision started the time for appeals. This problem was compounded by uncertainty under Rule 7 about whether the decision was the court's final ruling on the matter or whether the prevailing party was expected to prepare an order confirming the decision.

The 2015 amendments of Rule 7, Rule 54 and Rule 58A are intended to reduce this confusion by requiring "that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment." See Advisory Committee Notes to 1963 Amendments to Fed. R. Civ. P. 58. Courts and practitioners are encouraged to use appropriate titles with separate documents intended to operate as judgments, such as "Judgment" or "Decree," and to avoid using such titles on documents that are not appealable. The parties should consider the form of judgment included in the Appendix of Forms. On the question of what constitutes a separate document, the Committee refers courts and practitioners to existing case law interpreting Fed. R. Civ. P. 58. For example, *In re Cendant Corp.*, 454 F.3d 235, 242-244 (3d Cir. 2006) offers three criteria:

1) the judgment must be set forth in a document that is independent of the court's opinion or decision;

2) it must contain ordering clauses stating the relief to which the prevailing party is entitled, and not merely refer to orders made in other documents or state that a motion has been granted; and

3) it must substantially omit recitation of facts, procedural history, and the reasons for disposing of the parties' claims.

While "some trivial departures" from these criteria—such as a one-sentence explanation of reasoning, a single citation to authority, or a reference to a separate memorandum decision—"must be tolerated in the name of common sense," any explanation must be "very sparse." *Kidd v. District of Columbia*, 206 F.3d 35, 39 (D.C. Cir. 2000).

The concurrent amendments to Rule 7 remove the separate document requirement formerly applicable to interlocutory orders. Henceforward, the separate document requirement will apply only to judgments, a change that should reduce the tendency to confuse judgments with other orders. Rule 7 has also been amended to modify the process by which orders on motions are prepared. The process for preparing judgments is the same.

Under amended Rule 7(j), a written decision, however designated, is complete—is the judge's last word on the motion—when it is signed, unless the court expressly requests a party to prepare an order confirming the decision. But this should not be confused with the need to prepare a separate judgment when the decision has the effect of disposing of all clams in the case. If a decision disposes of all claims in the action, a separate judgment is required whether or not the court directs a party to prepare an order confirming the decision.

~~Rule 58A is similar to Fed. R. Civ. P. 58 in listing the instances where a separate document is not required. The state rule differs from the federal rule regarding an order for attorney fees. Fed. R. Civ. P. 58 includes an order for attorney fees as one of the orders not requiring a separate document. That~~

~~particular order is omitted from the Utah rule because under Utah law a judgment does not become final for purposes of appeal until the trial court determines attorney fees. See *ProMax Development Corporation v. Raile*, 2000 UT 4, 998 P.2d 254. See also Utah Rule of Appellate Procedure 4, which states that the time in which to appeal post-trial motions is from the disposition of the motion.~~

State Rule 58A is ~~also~~ similar to Fed. R. Civ. P. 58 in determining the time of entry of judgment when a separate document is required but not prepared. This situation involves the "hanging appeals" problem that the Supreme Court asked this Committee to address in *Central Utah Water Conservancy District v. King*, 2013 UT 13, ¶27. Under the 2015 amendments, if a separate document is required but is not prepared, judgment is deemed to have been entered 150 days from the date the decision—or the order confirming the decision—was entered on the docket.

2016 amendments

The 2016 amendments adopt in paragraph (f) the policy of the Federal Rules of Civil Procedure governing the finality of a judgment when there is a claim for attorney fees, effectively overturning *ProMax Development Corp. v. Raile*, 2000 UT 4, 998 P.2d 254 and *Meadowbrook v. Flower*, 959 P.2d 115 (Utah 1998). Paragraph (f) clearly extends that new policy to costs as well as attorney fees, a question on which the federal rules are ambiguous.

Under *ProMax* and *Meadowbrook* a judgment was not final until the claim for attorney fees had been resolved. An appeal filed before a claim for attorney fees had been resolved was premature and would be dismissed. Under the 2016 amendments, a claim for attorney fees or costs ordinarily does not extend the time to appeal, but the trial court judge has the discretion to order that it does.

As the Advisory Committee said of the 1993 amendment of Federal Rule of Civil Procedure 58:

> Particularly if the claim for fees involves substantial issues or is likely to be affected by the appellate decision, the district court may prefer to defer consideration of the claim for fees until after the appeal is resolved. However, in many cases it may be more efficient to decide fee questions before an appeal is taken so that appeals relating to the fee award can be heard at the same time as appeals relating to the merits of the case. This revision permits, but does not require, the court to delay the finality of the judgment for appellate purposes under revised Fed. R. App. P. 4 (a) until the fee dispute is decided. To accomplish this result requires entry of an order by the district court before the time a notice of appeal becomes effective for appellate purposes.

Under the federal model, filing a notice of appeal does not deprive the trial court of jurisdiction to decide the motion for attorney fees—regardless of whether the motion is filed before or after the notice of appeal. As was noted in *Neroni v. Becker*, No. 13-3909, 2015 WL 1810508, at *1 (2d Cir. Apr. 22, 2015):

> First, the district court properly exercised jurisdiction over the defendants' application for attorneys' fees. "We have consistently held that '[w]henever a district court has federal jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney's fees.' " *Tancredi v. Metro. Life Ins. Co.*, 378 F.3d

220, 225 (2d Cir. 2004) (quoting *In re Austrian & Ger. Bank Holocaust Litig.*, 317 F.3d 91, 98 (2d Cir. 2003)). Moreover, "notwithstanding a pending appeal, a district court retains residual jurisdiction over collateral matters, including claims for attorneys' fees." *Id*. Thus, the Neronis' argument that the district court lacked jurisdiction to rule on the defendants' fee application because a judgment and notice of appeal had been already filed is without merit.

Thus a party considering an appeal would be well advised to file the notice of appeal within 30 days after entry of the judgment, even if there is a pending claim for attorney fees. The appellant who waits does so at its peril because the process for a motion under Rule 7 usually requires more than 30 days and the judge might not extend the time to appeal.

Under the 2016 amendments, if the notice of appeal is filed within 30 days after the judgment, the appellant is protected regardless of the judge's decision. If the judge does not extend the time to appeal, the notice nevertheless was filed within 30 days of the judgment as required by Rule of Appellate Procedure 4(a). If the judge does extend the time to appeal, the earlier filed notice becomes effective on the date of the order under Rule of Appellate Procedure 4(b)(3). In either event, the notice of appeal can be amended to include any errors claimed in the award of attorney fees.

Although the 2016 amendments change a policy of long standing in the Utah state courts, the amendments will help to protect the appellate rights of parties and avoid the cost of premature appeals.

Rule 73. Attorney fees.

(a) Time in which to claim. ~~When attorney fees are authorized by contract or by law, a request for attorney fees shall be supported by affidavit or testimony~~ Attorney fees must be claimed by filing a motion for attorney fees no later than 14 days after the judgment is entered unless the party claims attorney fees in accordance with the schedule in ~~subsection (d)~~ paragraph (f) or in accordance with Utah Code Section 75-3-718 and no objection to the fee has been made.

(b) Content of motion. ~~An affidavit supporting a request for or augmentation of attorney fees shall set forth~~ The motion must:

(b)(1) ~~the basis for~~ specify the judgment and the statute, rule, contract, or other grounds entitling the party to the award;

(b)(2) ~~a reasonably detailed description of the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work~~ disclose, if the court orders, the terms of any agreement about fees for the services for which the claim is made;

(b)(3) specify factors showing the reasonableness of the fees, if applicable;

(b)(4) specify the amount of attorney fees claimed and any amount previously awarded; and

(b)(5) disclose if the ~~affidavit is in support of~~ attorney fees are for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney ~~is not sharing~~ will not share the fee ~~or any portion thereof~~ in violation of Rule of Professional Conduct 5.4.

(c) Supporting affidavit. The motion must be supported by an affidavit or declaration that reasonably describes the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work.

(d) Liability for fees. The court may decide issues of liability for fees before receiving submissions on the value of services. If the court has established liability for fees, the party claiming them may file an affidavit and a proposed order. The court will enter an order for the claimed amount unless another party objects within 7 days after the affidavit and proposed order are filed.

~~(c)~~ (e) Fees claimed in complaint. If a party ~~requests~~ claims attorney fees ~~in accordance with the schedule in subsection (d)~~ under paragraph (f), the ~~party's~~ complaint ~~shall~~ must state the basis for attorney fees, state the amount of attorney fees allowed by the schedule, cite the law or attach a copy of the contract authorizing the award, and, if the attorney fees are for services rendered to an assignee or a debt collector, a statement that the attorney will not share the fee ~~or any portion thereof~~ in violation of Rule of Professional Conduct 5.4.

~~(d)~~ (f) Schedule of fees. Attorney fees awarded under the schedule may be augmented only for considerable additional efforts in collecting or defending the judgment and only after further order of the court.

Amount of Damages, Exclusive of Costs, Attorney Fees and Post-Judgment Interest, Between	and:	Attorney Fees Allowed
0.00	1,500.00	250.00
1,500.01	2,000.00	325.00
2,000.01	2,500.00	400.00
2,500.01	3,000.00	475.00
3,000.01	3,500.00	550.00
3,500.01	4,000.00	625.00
4,000.01	4,500.00	700.00
4,500.01	or more	775.00

Advisory Committee Notes