Agenda

Advisory Committee on Rules of Civil Procedure

October 28, 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
Consideration of comments to Rule 43. Evidence. Rule 55. Default.	Tab 2	Tim Shea
Rule 9. Pleading special matters. Rule 26.02. Disclosures in personal injury actions. Rule 58C. Motion to renew judgment.	Tab 3	Tim Shea
Report of the joint committee on the effect of post-judgment proceedings on time to appeal.	Tab 4	Rod Andreason, Paul Burke, Amber Mettler, Alan Mouritsen
Rule 55. Default. (Arbrogast v. River Crossings, 2010 UT 40 ¶50.)	Tab 5	Tim Shea
Rule 15. Amended and supplemental pleadings. (Wright v. P.K. Transport, 2014 UT App 93. ¶¶ 18-22, Voros concurring)	Tab 6	Tim Shea

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

Meeting Schedule:

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

Minutes

Advisory Committee on the Rules of Civil Procedure

September 23, 2015

Draft: Subject to change

Present: John Baxter, Lincoln Davies, Evelyn Furse, Jonathan Hafen, Presiding, Kent Holmberg, James Hunnicutt, Steven Marsden, Terrie McIntosh, Amber Mettler, Leslie Slaugh, Trystan Smith, Paul Stancil, Kate Toomey, Lori Woffinden

Excused: Lyle Anderson, Sammi Anderson, Rod Andreason, James Blanch, Derek Pullan, Barbara Townsend, Heather Sneddon

Staff: Tim Shea

Guests: Lane Gleave, Tyler Gleave

(1) APPROVAL OF MINUTES.

The minutes of May 27, 2015 were approved as prepared.

(2) INTRODUCTION OF MEMBERS

The members of the committee introduced themselves. Mr. Hafen reviewed the principles the committee applies when considering rule changes.

(3) CONSIDERATION OF COMMENTS

The committee considered comments to the following rules:

- Rule 6. Time.
- Rule 8. General rules of pleadings.
- Rule 11. Signing of pleadings, motions, affidavits, and other papers; representations to court; sanctions.
- Rule 50. Judgment as a matter of law in a jury trial; related motion for a new trial; conditional ruling.
- Rule 52. Findings and conclusions by the court; amended findings; waiver of findings and conclusions; correction of the record; judgment on partial findings.
- Rule 59. New trial; altering or amending a judgment.
- Rule 60. Relief from judgment or order.
- Rule 63. Disability or disqualification of a judge.

Mr. Shea said that he had already included the suggested changes to grammar and style. The committee initiated a few further grammar and style changes, but decided

against the clarifications suggested by the commentators. The committee approved recommending the rules, as further amended, to the supreme court for approval.

(4) RULE 41. DISMISSAL OF ACTIONS

Mr. Shea said that the amendments to Rule 41 should have been published with the previous group because the primary amendment is to remove a provision from paragraph (b) that has been moved to Rule 52(e). He also pointed out two changes that would align the rule with its federal counterpart: a stipulated dismissal would no longer need court approval; and plaintiff would be able to voluntarily dismiss before an answer or motion for summary judgment, rather than before an answer or other response to the complaint. The committee discussed whether a motion for summary judgment is an appropriate reference point under the state rules, and decided that it is. The committee approved the amendments to be published for comment.

(5) RULE 4. PROCESS

Mr. Marsden, Mr. Holmgren and Judge Blanch volunteered to examine the issue referred to the committee in *St. Jeor v. Kerr Corporation* and report their recommendations to the committee in November. Mr. Marsden will chair the workgroup.

Mr. Shea reviewed the committee's discussions regarding the proposal to allow service of process under Rule 4 by electronic means. Mr. Gleave's e-service application was demonstrated in January and further discussed May. Mr. Shea was tasked with developing amendments to Rule 4 around the concepts discussed without tying the concepts to any particular application. Mr. Shea said that in his opinion service by mail, waiver of service and Mr. Gleave's application all relied on the same principle: an act by the defendant that indicates acceptance of service and a receipt, ultimately filed with the court, assuring the court that the defendant had actually been served.

Mr. Shea recommends that service by mail and waiver of service be eliminated. Instead the rule should provide for acceptance of service. Delivery of the complaint and summons could be by Mr. Gleave's application or it could be by first class mail—as is currently permitted for waiver of service—by email or by any other method. The complaint and summons would be accompanied by an appropriate form describing the action and the consequences of accepting and not accepting service. The defendant would be asked to complete and return the form indicating acceptance, which the plaintiff would file.

Mr. Slaugh said that he agrees with the concept, but pursuing acceptance should not be required. Others agreed that pursuing acceptance of service should be optional. There are circumstances when service needs to be immediate, and the plaintiff should be

permitted to have the complaint and summons personally served without first requesting that the defendant accept service. Mr. Shea will make that change. He asked whether the committee was nevertheless comfortable with imposing on all parties the obligation to avoid unnecessary expense in service of process. The federal rule imposes that obligation only on the defendant. The committee agreed that all parties should avoid unnecessary expenses, but the expense of personal service is sometimes necessary.

Mr. Marsden said that under the federal provision for waiver of service, the plaintiff can recover the cost of personal service after refusal to waive even if the plaintiff does not prevail on the case. Mr. Shea will include a similar provision in the next draft.

Ms. Woffinden said that the date from which to calculate the answer due date is too uncertain. The committee agreed that the date from which to calculate the answer due date should be the date the defendant indicates signature, but only if the plaintiff files the form with the court.

The committee agreed in concept to pursue this course of action. Mr. Shea will draft further amendments keeping with the conclusions thus far, and he will draft a suitable form. Mr. Shea said that the rule is also being amended to require that the proof of service include a copy of the summons.

(6) RULES 9, 26.2 AND 58C

Mr. Shea said that the committee had discussed these amendments in the spring. Rule 9(k) is being deleted because it does not conform to the Judgment Renewal Act, and Rule 26.2 requires a conforming amendment. The committee had asked for a rule describing the process for a motion to renew a judgment even though the statute already describes a process. Litigants should be able to look to the rules for answers to questions about process, and, if the act is declared unconstitutional because the legislature did not follow constitutionally required procedures in adopting it, the rule will nevertheless govern.

Mr. Shea proposes a new rule, Rule 58C. Mr. Slaugh suggested deleting proposed paragraph (c), which would allow the judge to require service personal service. The act permits sending the motion to the debtor's last known address. The court already has personal jurisdiction, so service under Rule 4 is not needed. Mr. Shea said that Judge Anderson had requested this discretion, not to give the court jurisdiction, but to be assured that the debtor had actual notice. After discussion the committee decided to delete paragraph (c) and change paragraph (b) to require that the motion be sent to the debtor's last known address. The affidavit supporting the motion will include a description of the creditor's efforts to find the debtor's correct address.

After discussion, the committee decided to retain the provision requiring that the motion include a copy of the judgment being renewed.

Mr. Shea will draft the further changes and present them to the committee.

(7) RULE 26.1

Mr. Slaugh recommends that the deadline for making disclosures in family law cases be the same as in other civil litigation. Mr. Hunnicutt agreed and said that this is the current practice. The committee approved the amendments to be published for comment.

(8) EXAMINATION OF 2015 AMENDMENTS TO THE CIVIL RULES

Professor Stancil, Professor Davies, Mr. Hunnicutt and Judge Furse volunteered to review the 2015 amendments to the federal rules of civil procedure and report their recommendations to the committee in November. Professor Stancil will chair the workgroup.

(9) FUTURE MEETINGS

In addition to the regular meeting schedule, the committee decided to meet on December 16, 2015 and June 22, 2016.

(10) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 6:00.

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

October 15, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 43. Evidence

Rule 43 has been published for comment, and we received none. It is ready for your recommendations to the supreme court.

Rule 43 is part of a larger effort to enable participation in hearings by contemporaneous transmission from a different location. Similar amendments are being considered for the Rules of Criminal Procedure and the Rules of Juvenile Procedure.

Although there were no comments to this rule, comments to a rule in the Code of Judicial Administration recommended eliminating the requirement for advanced audio-video that had been planned. Courtrooms are still being retrofitted according to those standards, but the rule would not require it. There was concern that, if the rule required specific technology, judges would not be able to use anything else, even if a simple telephone conference would otherwise be appropriate in the circumstances.

Because of that change, I have substantially amended lines 19-24 in the committee note.

Rule 43. Evidence.

(a) Form. In all trials, the testimony of witnesses shall be taken ~~orally~~ in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. ~~All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.~~ For good cause and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Evidence on motions. When a motion is based on facts not ~~appearing of~~ in the record, the court may hear the matter on affidavits, ~~presented by the respective parties, but the court may direct that the matter be heard wholly or partly on~~ declarations, oral testimony or depositions.

Advisory Committee Note

Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since 1996. State court judges have been conducting telephone conferences for many decades. These range from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial conferences. These conferences tend not to involve testimony, although judges sometimes permit testimony by telephone or more recently by video conference with the consent of the parties. The 2016 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a convenient practice that is more frequently needed in an increasingly connected society and to bring a level of quality to that practice suitable for a court record.

As money is available, audio-video equipment is being installed to allow all participants to see and hear each other; the public to see and hear all participants; a lawyer and client to communicate confidentially; and to make a verbatim record of the hearing. The technology will be digital cameras, high definition monitors and audio distributed through the courtroom public address system. The rule does not limit contemporaneous transmission to this new technology, but, where it is in place, participants will no longer have to huddle around a speakerphone or laptop computer.

Rule 43 does not require the judge to permit remote testimony in any circumstance, even if all parties consent, but it does give the judge the authority to permit remote testimony, sometimes even in the face of a party's objection. There are due process limits to remote testimony, and these must be observed in all circumstances. But, absent a due process or other constitutional limit, a reviewing court will generally not find error if remote testimony is within the scope of the rule. See generally, *Constitutional and statutory validity of judicial videoconferencing,* 115 A.L.R.5th 509 (2004) and *Permissibility of testimony by telephone in state trial*, 85 A.L.R.4th 476 (1991).

Testimony by contemporaneous transmission is almost always a second-best option compared to testimony in the courtroom by a witness who is physically present. In that we agree with the 1996 comment to FRCP 43:

> The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

But we disagree that "ordinarily depositions, including video depositions, provide a superior means of securing the testimony …." Live remote testimony—in which the parties have the opportunity for direct and cross examination and in which the demeanor of a witness is viewed first-hand by the trier of fact—seems far superior to reading or viewing a deposition. We concur instead with the opinion of *Bustillo v. Hilliard*, 16 Fed. Appx. 494 (7th Cir. 2001), in which the plaintiff in a civil rights action was compelled to participate in the trial by videoconference. In the court's words:

> Bustillo participated in the trial; he testified, presented evidence, examined adverse witnesses, looked each juror in the eye, and so on. Jurors saw him (and he, them) in two dimensions rather than three. Nothing in the Constitution or the federal rules gives a prisoner an entitlement to that extra dimension, if for good reasons the district judge concludes that trial can be conducted without it.
>
> Id at 495.

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

October 15, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 55. Default

Rule 55 has been published for comment, and I have attached those that we received. It is ready for your recommendations to the supreme court.

Rule 55 was amended by the supreme court on an expedited basis because clerks were entering default judgments without sufficient evidence of a "sum certain." Most of the comments were to the effect that the amendment requiring evidence is not needed, but the court has already determined that it is.

One of the comments recommends that a declaration as well as an affidavit proving the amount owed be permitted. I believe that is the effect of Section 78B-5-705, so I recommend adding a declaration to the affidavit or verified complaint.

Another comment recommends specifying that the affidavit or declaration be that of the party, not the lawyer. The workgroup that drafted the expedited amendment assumed that the affidavit or declaration would be by a person with first-hand knowledge of the stated facts—the person who would be on the witness stand if the facts had to have been proved at a hearing. It might be a party; it might be the party's accountant. Presumably the lawyer will make that determination before filing. I think the circumstances will be too varied to describe who the affiant should be.

A comment suggested itemizing the gross claim and the debits and credits to yield the net claim. Basically an affidavit or declaration that shows the arithmetic. There are costs and benefits to this proposal. The calculation of the claimed amount is more transparent, but is perhaps unnecessary if plaintiff states that it has information supporting the claimed amount.

One of the comments asks about the due process requirements if the affidavit or declaration proves an amount greater than is claimed in the complaint. I believe that the plaintiff would be entitled to the lesser of the two amounts. If plaintiff wants a judgment for the higher amount and can prove the higher amount, it can amend the complaint under Rule 15 to claim the higher amount, and serve the defendant with the amended complaint.

Rule 55. Default.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party.

(b) Judgment. Judgment by default may be entered as follows:

(b)(1) By the clerk. When the plaintiff's claim against a defendant is for a sum certain, upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if:

(b)(1)(A) the default of the defendant is for failure to appear;

(b)(1)(B) the defendant is not an infant or incompetent person;

(b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and

(b)(1)(D) the plaintiff, through a verified complaint, ~~or~~ an affidavit or a declaration under penalty of Section 78B-5-705 submitted in support of the default judgment, sets forth facts necessary to establish the amount of the claim, after deducting all credits to which the defendant is entitled, and verifies the amount is warranted by information in the plaintiff's possession.

(b)(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment against the state or officer or agency thereof. No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

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

October 15, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Judgment renewal

I have made the further edits you requested to Rule 58C. I have confirmed that sending the notice "to the most current address known" for the judgment debtor is the phrase used in the statute. I believe that this rule and Rule 9 and Rule 26.2 are ready to be published for comment.

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 what efforts the creditor has made to determine whether it is the debtor's correct address.

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

(d) 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 Section 78B-2-311.

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
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

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

October 15, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Arbogast Family Trust v. River Crossings, 2010 UT 40

Several years ago, a majority of the Supreme Court supported a rule amendment to include in the Rules of Civil Procedure Standard 16 of the Standards of Professionalism and Civility, which encourages notice of impending default judgment before seeking a default judgment. The topic was on the agenda on December 15, 2010, but the committee didn't reach it and we've never returned to it. I've attached the amendment I proposed last time.

Quoting from Justice Durrant's concurring opinion:

> ¶50 The Utah Standards of Professionalism and Civility were enacted to advance "the hallmarks of a learned profession dedicated to public service." I believe that incorporating Standard 16 into the Utah Rules of Civil Procedure would contribute greatly to this goal. Accordingly, while I agree with the majority, I would support an amendment of the Utah Rules of Civil Procedure that would incorporate the notice requirements set forth in Standard 16, and would refer this issue to our Advisory Committee on the Rules of Civil Procedure for study and recommendation.

Chief Justice Durham and Justice Parrish concurred in Associate Chief Justice Durrant's concurring opinion, thereby forming a majority on this point.

Standard 16 says:

> 16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

If the committee favors an amendment, I recommend against treating represented parties more favorably than self-represented parties.

Rule 55. Default.

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter the default of that party. Unless the requesting party's legitimate rights could be adversely affected, 7 days before requesting entry of default, the requesting party must notify the defaulting party in writing that, unless the party pleads or otherwise defends the action, entry of a default judgment is imminent.

(b) Judgment. Judgment by default may be entered as follows:

(b)(1) By the clerk. When the plaintiff's claim against a defendant is for a sum certain, upon request of the plaintiff the clerk shall enter judgment for the amount claimed and costs against the defendant if:

(b)(1)(A) the default of the defendant is for failure to appear;

(b)(1)(B) the defendant is not an infant or incompetent person;

(b)(1)(C) the defendant has been personally served pursuant to Rule 4(d)(1); and

(b)(1)(D) the plaintiff, through a verified complaint, ~~or~~ an affidavit or a declaration under penalty of Section 78B-5-705 submitted in support of the default judgment, sets forth facts necessary to establish the amount of the claim, after deducting all credits to which the defendant is entitled, and verifies the amount is warranted by information in the plaintiff's possession.

(b)(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

(c) Setting aside default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment against the state or officer or agency thereof. No judgment by default shall be entered against the state of Utah or against an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

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

October 15, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rules 15 and 13

In Wright v. P.K. Transport, 2014 UT App 93. ¶¶ 18-22, Judge Voros requests that we consider amending Rule 15 to incorporate the provisions of FRCP 15(c) regarding relation-back of an amended pleading when the amended pleading adds a new party. Judge Mortensen of the Fourth District Court has requested that we include in Rule 15 a requirement that the proposed amended pleading accompany the motion for permission to amend a pleading.

Somewhere back in the mists of time we had tied Rule 13 to Rule 15 because in 2009 FRCP 13 deleted (abrogated) paragraph (f)—our paragraph (e)—regarding omitted counterclaims. The comment to the federal amendment correctly observes that "An amendment to add a counterclaim will be governed by Rule 15."

The remaining amendments adopt the simplified text of the federal rules.

Rule 15. Amended and supplemental pleadings.

(a) Amendments before trial.

(a)(1) A party may amend ~~his~~ its pleading once as a matter of course ~~at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time~~ within:

(a)(1)(A) 21 days after serving it ~~is served~~; or

(a)(1)(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(a)(2) ~~Otherwise~~ In all other cases, a party may amend ~~his~~ its pleading only ~~by leave of~~ with the court's permission or ~~by written consent of~~ the ~~adverse party; and leave shall be freely given~~ opposing party's written consent. The party must attach its proposed amended pleading to the motion to permit an amended pleading. The court should freely give permission when justice ~~so~~ requires.

(a)(3) ~~A party shall plead in response to an amended pleading~~ Any required response to an amended pleading must be filed within the time remaining ~~for response~~ to respond to the original pleading or within 14 days after service of the amended pleading, whichever ~~period may be the longer, unless the court otherwise orders~~ is later.

(b) Amendments ~~to conform to the evidence~~ during and after trial.

(b)(1) When an issue~~s~~ not raised ~~by~~ in the pleadings ~~are~~ is tried by the parties' express or implied consent ~~of the parties~~, ~~they shall~~ it must be treated in all respects as if ~~they had been~~ raised in the pleadings. ~~Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but~~ A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure ~~so~~ to amend does not affect the result of the trial of ~~these~~ that issue~~s~~.

(b)(2) If, at trial, a party objects that evidence is ~~objected to at the trial on the ground that it is~~ not within the issues ~~made by~~ raised in the pleadings, the court may ~~allow~~ permit the pleadings to be amended ~~when the presentation of the merits of the action will be subserved thereby~~. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the ~~admission of such~~ evidence would prejudice ~~him in maintaining his~~ that party's action or defense ~~up~~on the merits. The court ~~shall~~ may grant a continuance~~, if necessary,~~ to enable the objecting party to meet ~~such~~ the evidence.

(c) Relation back of amendments. ~~Whenever~~

(c)(1) An amendment to a pleading relates back to the date of the original pleading when:

(c)(1)(A) the law that provides the applicable statute of limitations allows relation back;

(c)(1)(B) ~~the claim or defense asserted in the amended pleading~~ the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set ~~forth~~ out—or

attempted to be set ~~forth~~ out ~~—~~ in the original pleading~~, the amendment relates back to the date of the original pleading~~; or

(c)(1)(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(b) for serving the summons and complaint, the party to be brought in by amendment:

(c)(1)(C)(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(c)(1)(C)(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(c)(2) Notice to the attorney general. When the state of Utah or a Utah officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the Utah Attorney General or to the officer or agency.

(d) Supplemental pleadings. ~~Upon~~ On motion ~~of a party~~ and reasonable notice, the court may, ~~upon reasonable notice and upon such terms as are~~ on just terms, permit ~~him~~ a party to ~~serve~~ file a supplemental pleading setting ~~forth~~ out any transaction~~s~~, ~~or~~ occurrence~~s~~, or event~~s~~ ~~which have~~ that happened ~~since~~ after the date of the pleading ~~sought~~ to be supplemented. ~~Permission may be granted~~ The court may permit supplementation even though the original pleading is defective in ~~its statement of~~ stating a claim ~~for relief~~ or defense. ~~If the court deems it advisable that the adverse~~ The court may order that the opposing party plead to the supplemental pleading~~, it shall so order, specifying the time therefor~~ within a specified time.