MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

JANUARY 22, 2014

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

STAFF: Timothy M. Shea, Nathan Whittaker

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

GUESTS: Teena Green, Frank Pignanelli, Renee Stacy

I. APPROVAL OF MINUTES

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

II. RULE 30

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. FEDERAL RULES MEETING

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

IV. RULE 5

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. RULE 43

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

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

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

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

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

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

VI. FINAL JUDGMENT RULE

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

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

VII. ADJOURNMENT

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

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

KIPP AND CHRISTIAN, P.C.

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Michael F. Skolnick

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

November 8, 2013

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

Re: Court Reporters Licensing Act - Proposed Amendments

To whom it may concern:

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

Very truly yours,

KIPP AND CHRISTIAN, P.C.

Michael F. Skolnick

MFS:nt

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

Telephone: 801.270.5800

October 9, 2013

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

Re: Court Reporting laws

To Whom it May Concern:

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

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

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

Thank you for your attention to this matter.

Sincerely,

C. Michael Lawrence
Attorney at Law

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

DOWNEY & STRAUSS
Attorneys at Law
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Bobbie Downey: Admitted in CA
Susan Strauss: Admitted CO, NY and UT

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

October 21, 2013

Re: Court Reporting Laws

To Whom it May Concern:

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

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

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

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

Sincerely,

Susan Lee Strauss, Esq.

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

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ANDREA M. KEYSAR
ANNA NELSON
ISAAC K. JAMES
JEREMY S. STUART
COLE L. BINGHAM

STEPHEN G. MORGAN (1940-2007)

October 23, 2013

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

Re: Court Reporting Laws

To Whom It May Concern:

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

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

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

Thank you.

Very truly yours,

MORGAN MINNOCK RICE & JAMES

Dennis R. James

DRJ/lwa

VANCOTT

TIMOTHY W. BLACKBURN

email: tblackburn@vancott.com

October 22, 2013

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

ESTABLISHED 1874

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

Re: Court Reporting Laws

TO WHOM IT MAY CONCERN:

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

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

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

Thank you for your attention to this matter.

Sincerely,

Timothy W. Blackburn

TWB:dh

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RICHARDS BRANDT MILLER NELSON
A Professional Law Corporation

November 6, 2013

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

RE: *Court Reporting Laws*

To Whom It May Concern:

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

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

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

Thank you for your attention to this matter.

Sincerely,

RICHARDS BRANDT MILLER NELSON

Lynn S. Davies
Managing Partner

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October 23, 2013

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

Re: Court Reporting Laws

To Whom it May Concern:

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

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

Thank you for your attention to this matter.

Very truly yours,

STRONG & HANNI

By _____
Paul M. Belnap

PMB/bn

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November 6, 2013

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

Re: Court Reporting Laws

To Whom it May Concern:

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

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

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

I appreciate your attention to this matter.

Sincerely,

Alan W. Mortensen

AWM/kh

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

Renee:

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

Regards,
George

George A. Hunt
Lawyer
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Salt Lake City, Utah 84111
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WILLIAMS HUNT
LAWYERS

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

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

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

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

-Appreciate the friendship and professional relationship with [lawyer]

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

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

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

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

Opening Statement—Hon. Judge Derek P. Pullan

Federal Civil Rules Committee Hearing

Phoenix, Arizona

January 9, 2014

Judge Campbell and Members of the Committee:

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

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

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

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

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

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

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

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

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

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

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

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

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

[13] *Id.*

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

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

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

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

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

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

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

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

I welcome any questions.

[18] *Supra* notes 5 and 17.