Agenda

Advisory Committee on Rules of Civil Procedure

May 23, 2018

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, Chair
Update: Rule 5, Orders served by the court, New CJA Rule 4-511, Mandatory email address, and Rule 10, conforming amendments.	Tab 2	Nancy Sylvester, Clayson Quigley
Rule 109. Automatic temporary domestic orders. New.	Tab 3	Commissioner Michelle Blomquist, Nancy Sylvester, Judge Andrew Stone, Judge Laura Scott
New rule on motions to compel	Tab 4	Brent Johnson
Civil Rule 58A and Appellate Rule 4	Tab 5	Jonathan Hafen, Nancy Sylvester
Civil Rule 24, Appellate Rule 25A, Criminal Rule 12	Tab 6	Nancy Sylvester, Leslie Slaugh, Michael Petrogeorge
Other business		Jonathan Hafen

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

Meeting Schedule:

June 27, 2018

September 26, 2018

October 24, 2018

November 28, 2018

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes April 25, 2018

PRESENT: Chair Jonathan Hafen, Judge Amber Mettler, Judge Kate Toomey, Rod Andreason, Trystan Smith, Michael Petrogeorge, Susan Vogel, Katy Strand (Recording Secretary), Barbara Townsend, Jim Hunnicutt, Lauren DiFrancesco, Judge Andrew Stone, Heather Sneddon, Judge Kent Holmberg, Timothy Pack, Judge Laura Scott, Dawn Hautamaki (phone), Paul Stancil, Judge James Blanch

EXCUSED: Judge Clay Stucki, Leslie Slaugh, Lincoln Davies, Justin Toth

GUESTS: Katie Gregory, Shane Bahr, Patricia Owen

STAFF: Nancy Sylvester

---

(1) WELCOME AND APPROVAL OF MINUTES.

Jonathan Hafen welcomed everyone to the meeting and requested a motion on the March minutes. Judge Toomey moved to approve the minutes, Rod Andreason seconded, and the motion passed unanimously.

(2) RULE 4. STANDARDS FOR ELECTRONIC ACCEPTANCE OF SERVICE: DISCUSSION OF ASSIGNMENT TO SUBCOMMITTEE.

Mr. Hafen and Nancy Sylvester introduced Rule 4 and reminded the committee that Justin Toth, Susan Vogel, Judge Scott and Lauren DiFrancesco comprised the subcommittee that would study this item. The Board of District Court Judges requested that there be some standards placed in Rule 4 with respect to electronic acceptance of service. The Board, along with the Supreme Court, also requested that there be a disclaimer that the person affecting service is not from the court. Judge Stone asked that the standards include what proof of service should look like. He had seen some proofs of service that were misleading, appearing to come from the court, and also being unclear as to whether the person had been served or had accepted service. He also noted that in speaking to an attorney who used one of the providers, the companies do have a good ability to guarantee the identity of the person accepting service, but they have not been including that information in the proof of service. He asked that the standards include the companies' processes for verifying the identity of the party being served. The attorney with whom Judge Stone spoke indicated that this process better engaged litigants than traditional service but cost the same amount.

(3) RULE 5, ORDERS SERVED BY THE COURT, NEW CJA RULE 4-511, MANDATORY EMAIL ADDRESS, AND RULE 10, CONFORMING AMENDMENTS.

Ms. Sylvester reported that the committee had received feedback from the Board of Juvenile Court Judges indicating that requiring the court to serve all orders will not work for them. Katie Gregory

reported the concerns of the Board. The Board was worried about the substantial amount of work required in tracking down contact information for juvenile court litigants, many of whom are pro se. Ms. Gregory pointed out that these individuals have difficulty maintaining an email or point of contact. She also stated that in juvenile court having accurate service is problematic as the case number follows a child forever, and there may be parties who should not be served in the next matter. Currently the courts rely upon the attorneys to determine who should be served. The Board of Juvenile Court Judges would like to have the juvenile courts exempted from this rule, and would probably change their rules to reflect that. Judge Blanch expressed concern that exempting the juvenile court would create a system where no one would be serving the orders, unless the Rules of Juvenile Procedure also changed. Judge Laura Scott pointed out that Rule 4 would also need to be changed.

Michael Petrogeorge provided language for the new rule which would include memorandum decisions, but not minute entries. Judge Holmberg proposed including a committee note to discuss what can come from a court and what should be included. Judge Stone proposed that anything signed by the court should be served, but only by email with preference that it be done automatically. Jim Hunnicutt reported that commissioners generally give oral recommendations so the parties instantly receive notice. When a commissioner takes a matter under advisement and issues a written recommended order it is the court that mails it out. Ms. Vogel pointed out that pro se litigants don't know if something has happened if they don't get an order. Jonathan Hafen questioned whether receiving everything form the court would be helpful. Susan Vogel believed this would help. Dawn Hautamaki said she wouldn't be concerned about that so long as the clerks did not have to search for whether something needed to be emailed or mailed. Programming to assist with that would be crucial. She expressed concern that attorneys would receive too many emails and would not pay attention to the ones that mattered. Judge Blanch proposed that the email would state that something had happened but not include the actual documents, and this would parallel how financial companies send information. Lauren DiFrancesco argued that this may not be service unless some document was attached. Judge Blanch said we may need to change how we think of service. The system would provide the official document and that would be a better way to view the information. Heather Sneddon pointed out that this is how the federal courts work. Judge Scott proposed having the links and numbers be similar to the federal court.

Lauren DiFrancesco asked what problem the committee was trying to solve. Committee members said the problem to solve is pro se litigants not receiving orders. The question then became whether over-notification would be a bigger problem than parties not being notified.

Mr. Petrogeorge and Ms. Sneddon opined that the courts should over- rather than under-include what is sent. Judge Blanch said the burden would then be on the receiving party to do email filtering. Trystan Smith said for people with a large case load there would be too many emails. Mr. Petrogeorge pointed out that the burden on the recipient is small as they can use rules within their email program to deal with that.

Mr. Hafen asked if the first question was whether the court should move to mandatory email with exceptions, before changing this rule. No one on the committee was opposed to mandatory email.

Mr. Hafen and Ms. Sylvester asked if this should be tabled until MyCase is available. MyCase is a portal that will allow litigants to access their case filings and the docket. This technology will involve in-bound communications, but having the ability to both email court decisions and allow litigants to access their case filings in the docket will be the best option.

Jonathan Hafen proposed inviting those in charge of MyCase to the next meeting so that the committee can have a full picture of the technology before making any decisions.

(4) LEGISLATIVE UPDATES: SB 188 (RULES 4(E), 11(A)(2), 55(B)(1)(D), 63(B)(1)), SB 171 (RULE 24), SB 92 (RULE 73).

Nancy Sylvester informed the committee of SB 188 (2018) and the need for updates to the rules. This bill enacted the Uniform Unsworn Declarations Act, which repealed and replaced Utah Code section 78B-5-705. The bill came from the Uniform Law Commission. Although the act replaced the prior unsworn declaration language with a more robust statutory scheme, no substantive changes were needed in the affected rules, only conforming amendments. Rules 4, 11, 55, and 63 all referred to Utah Code section 78B-5-705. Judge Stone said the rules should reflect the new act, rather than a specific section. The proposed language came directly from the bill: "unsworn declaration as described in Title 78B, Chapter 18a, Uniform Unsworn Declarations Act."

Lauren DiFrancesco moved to approve the changes as set forth in the materials. Judge Mettler seconded the motion and it passed unanimously.

Ms. Sylvester explained that SB 171, which deals with intervention by the Legislature, may impact Rule 24. A subcommittee is already assigned to Rule 24, so that group will be looking at whether to amend the rule based on the bill. Ms. Sylvester did not believe that this was urgent and proposed waiting until the subcommittee had evaluated it.

Ms. Sylvester then explained that SB 92 dealt with the awarding of reasonable attorney fees as provided by Supreme Court rule. Nancy Sylvester did not believe that this required any rule amendments since Rule 73 already addresses this topic.

(5) ADJOURNMENT

The committee adjourned at 6 p.m. The next meeting will be held on May 23, 2018 in the Judicial Council Room of the Matheson Courthouse.

Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Nancy Sylvester
Date: May 18, 2018
Re: Rule 5 and orders served by the court

On May 16, Dawn Hautamaki and I met with the district and juvenile court clerks of court. After describing what we were trying to accomplish with Rules 5 and 10 and new CJA Rule 4-511, the clerks of court concluded that they generally supported the idea of mandatory email addresses and serving orders, but requested that significant programming changes be done to the internal case management systems before any rules were rolled out. The hope behind this was that as much as possible, the court's service of its decisions would be automated. Kim Allard and I will meet offline to work on developing a ramp-up approach to rolling out both mandatory email address use and service of orders by the court. Much of this will need to happen in stages, and, as we discussed at last meeting, it will need to coordinate with the roll-out of MyCase.

Tab 3

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Nancy Sylvester
Date: May 18, 2018
Re: Rule 109

As a reminder, Rule 109 was drafted and vetted by the Judicial Council's Standing Committee on Children and Family Law. Upon the filing of an initial petition, the rule would impose an automatic domestic injunction on the parties to various domestic actions.

The Civil Rules Committee approved Rule 109 as to form at its March meeting. Before recommending to the Supreme Court that the rule circulate for public comment, though, the committee sent the rule to the Board of District Court Judges for input and feedback. The Board looked at three alternatives for paragraph (d)(2), which addresses when the respondent is bound by the terms of the injunction. The Board recommended a middle ground approach to simple notice and Rule 4 service. The injunction would be binding "on the respondent after filing of the initial petition and upon receipt of a signed copy of the injunction."

The Board also recommended removing the modifier "unduly" in paragraph (c)(2)(C): Neither party may do the following in the presence or hearing of the child…say or do anything that would tend to diminish the love and affection of the child for the other party, or ~~unduly~~ involve the child in the issues of the petition."

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / Tel: 801-578-3808 / Fax: 801-578-3843 / email: nancyjs@utcourts.gov

Rule 109. Automatic injunction in certain domestic relations cases.

(a) **Actions in which an automatic domestic injunction enters.** In an action for divorce, annulment, temporary separation, custody, parent time, support, or paternity, an injunction automatically enters when the initial petition is filed. The injunction contains the applicable provisions of this rule.

(b) **General provisions.**

(b)(1) If the action concerns the division of property then neither party may transfer, encumber, conceal, or dispose of any property of either party without the written consent of the other party or an order of the court, except in the usual course of business or to provide for the necessities of life.

(b)(2) Neither party may disturb the peace of the other party or harass, annoy, or bother the other party.

(b)(3) Neither party may commit domestic violence or abuse against the other party or a child.

(b)(4) Neither party may use the other party's name, likeness, image, or identification to obtain credit, open an account for service, or obtain a service.

(b)(5) Neither party may cancel or interfere with telephone, utility, or other services used by the other party.

(b)(6) Neither party may cancel, modify, terminate, change the beneficiary, or allow to lapse for voluntary nonpayment of premiums, any policy of health insurance, homeowner's or renter's insurance, automobile insurance, or life insurance without the written consent of the other party or pursuant to further order of the court.

(c) **Provisions regarding a minor child.** The following provisions apply when a minor child is a subject of the petition.

(c)(1) Neither party may engage in non-routine travel with the child without the written consent of the other party or an order of the court unless the following information has been provided to the other party:

(c)(1)(A) an itinerary of travel dates and destinations;

(c)(1)(B) how to contact the child or traveling party; and

(c)(1)(C) the name and telephone number of an available third person who will know the child's location.

(c)(2) Neither party may do the following in the presence or hearing of the child:

(c)(2)(A) demean or disparage the other party;

(c)(2)(B) attempt to influence a child's preference regarding custody or parent time; or

(c)(2)(C) say or do anything that would tend to diminish the love and affection of the child for the other party, or ~~unduly~~ involve the child in the issues of the petition.

(c)(3) Neither party may make parent time arrangements through the child.

(c)(4) When the child is under the party's care, the party has a duty to use best efforts to prevent third parties from doing what the parties are prohibited from doing under this order or the party must remove the child from those third parties.

(d) **When the injunction is binding.** The injunction is binding

(d)(1) on the petitioner upon filing the initial petition; and

Alternative 1 (d)(2) on the respondent after filing of the initial petition and upon notice of the terms of the injunction in person, through counsel, or otherwise.

Alternative 2 (d)(2) on the respondent after filing of the initial petition and upon service of a copy of the injunction with the initial petition.

Alternative 3 (d)(2) on the respondent after filing of the initial petition and upon receipt of a signed copy of the injunction.

[(e) **Copy of the injunction or this rule.** A copy of the injunction or this rule shall be served on the respondent and all joined parties with the initial petition.] (This paragraph would only be necessary if Alternative 1 is adopted.)

(f) **When the injunction terminates.** The injunction remains in effect until the final decree is entered, the petition is dismissed, the parties otherwise agree in a writing signed by all parties, or further order of the court.

(g) **Modifying or dissolving the injunction.** A party may move to modify or dissolve the injunction.

(g)(1) Prior to a responsive pleading being filed, the court shall determine a motion to modify or dissolve the injunction as expeditiously as possible. The moving party must serve the nonmoving party at least 48 hours before a hearing.

(g)(2) After a responsive pleading is filed, a motion to modify or to dissolve the injunction is governed by Rule 7 or Rule 101, as applicable.

(h) **Separate conflicting order.** Any separate order governing the parties or their minor children will control over conflicting provisions of this injunction.

(i) **Applicability.** This rule applies to all parties other than the Office of Recovery Services.

Tab 4

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: May 18, 2018
Re: Motions to compel compliance with a decree, order, or judgment

The Forms Committee has proposed a change to the procedure for enforcing court orders. The proposal is basically to get rid of orders to show cause and do everything through regular motion practice. My understanding is that this process will be especially helpful when License Paralegal Practitioners begin practicing.

Rule _____ Motions to compel compliance with a decree, order, or judgment.

Intent:

Applicability:

This rule shall apply to courts of record.

Statement of the Rule:

(1) Motion. A party who seeks to enforce an order, a decree, or a judgment of a court against an opposing party shall proceed by motion under rule 7 of the Utah Rules of Civil Procedure or by motion under rule 101 of the Utah Rules of Civil Procedure if the motion will be heard by a commissioner.

(2) Affidavit. The motion must be accompanied by at least one supporting affidavit. Each supporting affidavit must be based on personal knowledge and must set forth admissible facts and not mere conclusions. At least one supporting affidavit must state the title and date of entry of the order, decree, or judgment the moving party seeks to enforce.

(3) Contents of motion. The motion must state whether the moving party is requesting that the opposing party be held in contempt and, if such a request is made, recite that the sanctions for contempt may include, but are not limited to, a fine of $1000 or less, a jail commitment of 30 days or less, or a jail commitment until the opposing party performs an act required by the court.

(4) Service. If the party is seeking sanctions, the moving party must serve the motion and all supporting affidavits in the manner prescribed for service of a summons and complaint, unless the moving party shows good cause for service to be made by mailing or delivery to the opposing party's counsel of record and the court so orders.

(5) Expedited response. The party filing the motion may request an expedited schedule for responding to the motion and for holding a hearing. The court shall grant the request if it clearly appears from specific facts shown by affidavit that immediate and irreparable injury, loss, or damage will result to the moving party if the process is not expedited.

(6) Hearing on the motion. If a hearing is requested, the court shall conduct a scheduling hearing to determine

(6)(A) whether an opposing party contests the allegations made by the moving party,

(6)(B) whether an evidentiary hearing is necessary,

(6)(C) the specific issues to be resolved through an evidentiary hearing, and

(6)(D) the estimated length of any such evidentiary hearing. If the opposing party does not contest the allegations made by the moving party, the court may proceed at the first appearance as the circumstances require.

(7) Evidentiary Hearing. At the evidentiary hearing on the motion, the moving party shall bear the burden of proof on all allegations that are made in support of the order.

(8) Limitations. A motion under this rule may not be used to obtain an original order or judgment. A motion under this rule may not be used to obtain a temporary restraining order or to establish temporary orders in a divorce case.

Tab 5

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: May 18, 2018
Re: Civil Rule 58A and Appellate Rule 4

At a recent meeting with the Supreme Court, the Court initiated a discussion with Jonathan Hafen, Paul Burke, and staff to the Civil and Appellate Rules Committees regarding the interplay of Appellate Rule 4(b)(1)(F) and Civil Rule 58A(f) and the Court of Appeals' interpretation of those rules in *McQuarrie v. McQuarrie*, 2017 UT App 209.

In *McQuarrie*, the husband appealed a district court order that awarded the wife attorney fees with the amount to be determined at a later date. The wife moved for summary disposition because, she argued, the husband did not appeal from a final order. The Utah Court of Appeals dismissed the appeal. The court held that:

1. Under Appellate Rule 4(b)(1)(F), if a notice of appeal is filed after entry of a judgment but before the entry of an order resolving a post-judgment motion for attorney fees, the notice of appeal will relate forward to the date the motion for fees is resolved. Utah R. Civ. P. 58A(f) is meant to address those situations in which a party files a post-judgment motion for attorney fees.
2. But an order that by its own terms awards attorney fees with an amount to be determined at a later date is not final and appealable because it contemplates additional actions by the parties in order to resolve issues still in dispute. There was no final, appealable order, so the Court did not have jurisdiction over the appeal.

As Mr. Burke put it to the Court, there currently exists "a trap for the diligent" in these two rules since, in a situation like *McQuarrie*, a party would have no choice but to appeal from the attorney fees order because it's not clear whether the time for appeal has started to run. The proposed solution to this issue is to clarify that "under Rule of Appellate Procedure 4, the time in which to file the notice of appeal runs from the disposition of the motion or claim if the court extends the time to appeal before the expiration of the time prescribed by Rule of Appellate Procedure 4."

Mr. Burke also suggested that this committee look at extending the time a party has to file a request for attorney fees from 14 to 28 days in Rule 73.

For background purposes, I've attached a 2015 memo that discusses the genesis for the 2016 amendments to these two rules.

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 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;

(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 attorney fees. A motion or claim for attorney fees filed pursuant to Rule 73 does not affect the finality of a judgment for any purpose, but under Rule of Appellate Procedure 4, the time in which to file the notice of appeal runs from the disposition of the motion or claim if the court extends the time to appeal before the expiration of the time prescribed by Rule of Appellate Procedure 4.

(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.

(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.

(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:

(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.

(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.

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

The clerk must sign the judgment for the specified sum.

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

(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;

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

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

(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

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, the time for all parties to appeal from the judgment runs from the entry of the dispositive order:

(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;

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

(b)(1)(F) A motion or claim for attorney fees under Rule 73 of the Utah Rules of Civil Procedure if the court extends the time to appeal before the expiration of the time prescribed by paragraphs (a) and (b) of this rule; or

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

(b)(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in 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 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 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.

Effective November 1, 2016.

Tab 6

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Rules Committee
From: Nancy Sylvester
Date: May 21, 2018
Re: Civil Rule 24, Appellate Rule 25A, Criminal Rule 12

A subcommittee consisting of representatives from the Appellate, Criminal, and Civil Procedures Committees has been studying how to better coordinate Civil Rule 24, Appellate Rule 25A, and Criminal Rule 12 and intervention by executive branch attorneys when the constitutionality of a statute or ordinance is challenged. This effort launched prior to SB 171 passing. SB 171 permits intervention by the Legislature when the constitutionality of a state statute, the validity of legislation, or any action of the Legislature is challenged.

The proposed rules in these materials incorporate both the originally contemplated amendments and SB 171 amendments. The Criminal Procedures Committee rejected the SB 171 amendments with respect to Criminal Rule 12, opining that the statute should control. Although the subcommittee is still looking at this issue, I think it would be helpful to have this committee start to weigh in.

Rule 24. Intervention.

(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and ~~he~~ the applicant is so situated that the disposition of the action may as a practical matter impair or impede ~~his~~ the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(d) Constitutionality of statutes and ordinances.

(d)(1) If a party challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact as described in paragraphs (d)(1)(A), (d)(1)(B), and (d)(1)(C). The court shall permit the state to be heard upon timely application.

(d)(1)(A) **Form and Content**. The notice shall (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCP 24(d)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute.

(d)(1)(B) **Timing**. The party shall serve the notice on the Attorney General on or before the date the party files the paper challenging the constitutionality of the statute.

(d)(1)(C) **Service**. The party shall serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the addresses below, and file proof of service with the court. For service by email, the "Subject" of the email shall be "Rule 24(d) Notice" and the notice and attachments shall be in a searchable pdf format.

Email: notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(d)(2) If a party challenges the constitutionality of a county or municipal ordinance in an action in which the district attorney, county attorney, or municipal attorney has not appeared, the party raising the question of constitutionality shall notify the district attorney, county attorney, or municipal attorney of such fact. The court shall permit the county or municipality to be heard upon timely application.

(d)(3) Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the notice.

(e) **Intervention by the Legislature**. Intervention by the Legislature shall be in accordance with Utah Code Section 36-12-7. Notice to the Legislature of a claim that challenges the constitutionality of a state statute, the validity of legislation, or any action of the Legislature shall be in accordance with Utah Code Section 67-5-1.

Rule 12. Motions.

(a) Motions. An application to the court for an order shall be by motion, which, unless made during a trial or hearing, shall be in writing and in accordance with this rule. A motion shall state succinctly and with particularity the grounds upon which it is made and the relief sought. A motion need not be accompanied by a memorandum unless required by the court.

(b) Request to Submit for Decision. If neither party has advised the court of the filing nor requested a hearing, when the time for filing a response to a motion and the reply has passed, either party may file a request to submit the motion for decision. If a written Request to Submit is filed it shall be a separate pleading so captioned. The Request to Submit for Decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If no party files a written Request to Submit, or the motion has not otherwise been brought to the attention of the court, the motion will not be considered submitted for decision.

(c) Time for filing specified motions. Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion.

(c)(1) The following shall be raised at least 7 days prior to the trial:

(c)(1)(A) defenses and objections based on defects in the indictment or information ;

(c)(1)(B) motions to suppress evidence;

(c)(1)(C) requests for discovery where allowed;

(c)(1)(D) requests for severance of charges or defendants;

(c)(1)(E) motions to dismiss on the ground of double jeopardy ; or

(c)(1)(F) motions challenging jurisdiction, unless good cause is shown why the issue could not have been raised at least 7 days prior to trial.

(c)(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah Code Section 76-3-402(1) shall be in writing and filed at least 14 days prior to the date of sentencing unless the court sets the date for sentencing within ten days of the entry of conviction. Motions for a reduction of criminal offense pursuant to Utah Code Section 76-3-402(2) may be raised at any time after sentencing upon proper service of the motion on the appropriate prosecuting entity.

(d) Motions to Suppress. A motion to suppress evidence shall:

(d)(1) describe the evidence sought to be suppressed;

(d)(2) set forth the standing of the movant to make the application; and

(d)(3) specify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them.

If an evidentiary hearing is requested, no written response to the motion by the non-moving party is required, unless the court orders otherwise. At the conclusion of the evidentiary hearing, the court may provide a reasonable time for all parties to respond to the issues of fact and law raised in the motion and at the hearing.

(e) A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

(f) Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

(g) A verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

(h) If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be

continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

(i) **Motions challenging the constitutionality of statutes and ordinances**.

(i)(1) If a party in a court of record challenges the constitutionality of a statute in an action in which the Attorney General has not appeared, the party raising the question of constitutionality shall notify the Attorney General of such fact as described in as described in paragraphs (i)(1)(A), (i)(1)(B), and (i)(1)(C). The court shall permit the state to be heard upon timely application.

(i)(1)(A) **Form and Content**. The notice shall (i) be in writing, (ii) be titled "Notice of Constitutional Challenge Under URCrP 12(i)," (iii) concisely describe the nature of the challenge, and (iv) include, as an attachment, the pleading, motion, or other paper challenging the constitutionality of the statute.

(i)(1)(B) **Timing**. The party shall serve the notice on the Attorney General on or before the date the party files the paper challenging the constitutionality of the statute.

(i)(1)(C) **Service**. The party shall serve the notice on the Attorney General by email or, if circumstances prevent service by email, by mail at the addresses below, and file proof of service with the court. For service by email, the "Subject" of the email shall be "Rule 12(i) Notice" and the notice and attachments shall be in a searchable pdf format.

Email: notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(i)(2) If a party challenges the constitutionality of a county or municipal ordinance in an action in which the district attorney, county attorney, or municipal attorney has not appeared, the party raising the question of constitutionality shall notify the district attorney, county attorney, or municipal attorney of such fact. The court shall permit the county or municipality to be heard upon timely application.

(i)(3) Failure of a party to provide notice as required by this rule is not a waiver of any constitutional challenge otherwise timely asserted. If a party does not serve a notice as required under paragraphs (d)(1) or (d)(2), the court may postpone the hearing until the party serves the notice.

(j) **Intervention by the Legislature**. Intervention by the Legislature shall be in accordance with Utah Code Section 36-12-7. Notice to the Legislature of a claim that challenges the constitutionality of a state statute, the validity of legislation, or any action of the Legislature shall be in accordance with Utah Code Section 67-5-1.

Rule 25A. Challenging the constitutionality of a statute or ordinance.

(a) **Notice to the Attorney General or the district, county, or municipal attorney; penalty for failure to give notice.**

(a)(1) When a party challenges the constitutionality of a statute in an appeal or petition for review in which the Attorney General has not appeared, every party must serve its principal brief and any subsequent brief on the Attorney General on or before the date the brief is filed.

(a)(2) When a party challenges the constitutionality of a county or municipal ordinance in an appeal or petition for review in which the responsible county or municipal attorney has not appeared, every party must serve its principal brief and any subsequent brief on the district, county, or municipal attorney on or before the date the brief is filed.

(a)(3) If an appellee or cross-appellant is the first party to challenge the constitutionality of a statute or ordinance, the appellant must serve its principal brief on the Attorney General or the district, county, or municipal attorney no more than 7 days after receiving the appellee's or the cross-appellant's brief and must serve its reply brief on or before the date it is filed.

(a)(4) Every party must serve its brief on the Attorney General by email or, if circumstances prevent service by email, by mail at the addresses below, ~~or mail at the following address~~ and ~~must~~ file proof of service with the court. For service by email, the "Subject" of the email must be "Rule 25(A)(a) Service" and the brief must be in a searchable pdf format.

Email:

notices@agutah.gov

Mail:

Office of the Utah Attorney General

Attn: Utah Solicitor General

350 North State Street, Suite 230

~~320 Utah State Capitol~~
P.O. Box 142320
Salt Lake City, Utah 84114-2320

(a)(5) If a party does not serve a brief as required by this rule and supplemental briefing is ordered as a result of that failure, a court may order that party to pay the costs, expenses, and attorney fees of any other party resulting from that failure.

(j) **Intervention by the Legislature**. Intervention by the Legislature shall be in accordance with Utah Code Section 36-12-7. Notice to the Legislature of a claim that challenges the constitutionality of a state statute, the validity of legislation, or any action of the Legislature shall be in accordance with Utah Code Section 67-5-1.

(b) **Notice by the Attorney General, legislative general counsel, or district, county, or municipal attorney; amicus brief.**

(b)(1) Within 14 days after service of the brief that presents a constitutional challenge the Attorney General or other government attorney will notify the appellate court whether it intends to file an amicus brief. The Attorney General or other government attorney may seek up to an additional 7 days' extension of time from the court. Should the Attorney General or other government attorney decline to file an amicus brief, that entity should plainly state the reasons therefor.

(b)(2) If the Attorney General or other government attorney declines to file an amicus brief, the briefing schedule is not affected.

(b)(3) If the Attorney General or other government attorney intends to file an amicus brief, that brief will come due 30 days after the notice of intent is filed. Each governmental entity may file a motion to extend that time as provided under Rule 22. On a governmental entity filing a notice of intent, the briefing schedule established under Rule 13 is vacated, and the next brief of a party will come due 30 days after the amicus brief is filed.

(c) **Call for the views of the Attorney General or district, county, or municipal attorney.** Any time a party challenges the constitutionality of a statute or ordinance,

the appellate court may call for the views of the Attorney General or of the district, county, or municipal attorney and set a schedule for filing an amicus brief and supplemental briefs by the parties, if any.

(d) **Participation in oral argument.** If the Attorney General, legislative general counsel, or district, county, or municipal attorney files an amicus brief, the Attorney General, legislative general counsel, or district, county, or municipal attorney will be permitted to participate at oral argument.