Agenda

Advisory Committee on Rules of Civil Procedure

May 28, 2003
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Approval of minutes	Fran Wikstrom
Rule 68. Offer of judgment	Frank Carney Leslie Slaugh
New trial judge after remand	Fran Wikstrom
Small claims rules	Tim Shea
Rule 26. Delete disclosure and discovery plan exemption for self represented litigants	Tim Shea
Rule 4(d). Publication of order to serve by publication	Frank Carney
Rules 54, 62. Enforceability of orders	Frank Carney

Meeting Schedule

August 27
September 24
October 22
November 19 (3rd Wednesday)

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 23, 2003
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, David W. Scofield, Thomas R. Karrenberg, Francis J. Carney, Terrie T. McIntosh, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, W. Cullen Battle, Leslie W. Slaugh, Debora Threedy, Thomas R. Lee, Virginia S. Smith, Honorable Lyle R. Anderson, James T. Blanch

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Janet H. Smith, Glenn C. Hanni, R. Scott Waterfall, Todd M. Shaughnessy, Paula Carr

GUESTS: Matty Branch, Douglas G. Mortensen, Richard Burbridge, Michael Zundel, Robert Wallace, Gregory Saylin

I. WELCOME AND APPROVAL OF MINUTES.

Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the March 26, 2003 meeting were reviewed, and a typographical error on page 5 was pointed out. Thomas Karrenberg moved that the minutes be approved with this change. The motion was seconded by James Blanch, and the minutes were approved as amended.

II. NEW TRIAL JUDGE AFTER REMAND.

Mr. Wikstrom introduced the first matter for consideration, which is a proposed rule that would allow successful appellants to request automatic disqualification of a trial judge in situations where there is a remand after reversal on appeal. Mr. Wikstrom stated that this issue has been before the Committee on two prior occasions, and the decision on those occasions was not to proceed. Four lawyers/guests were present to voice their support for the proposed rule.

A. Proponents of Proposed Rule.

Mr. Wikstrom first introduced Douglas Mortensen, who has submitted various materials to the Committee to support his position. Mr. Mortensen raised three points that he believes show that further consideration of this issue is warranted. His first point is that the proposed rule is strongly supported by successful appellants, and he cited some statistics to support his position that most Utah trial lawyers are in favor of the proposed rule. His second point is that highly successful Utah trial judges routinely recuse after remand, and that the practice has been lauded

by the United States Court of Appeals for the Second Circuit. As support for this point, Mr. Mortensen pointed to an article in the *Salt Lake Tribune* (Aug. 4, 2002) which attributed to federal district court Judge Dale Kimball and Judge David Winder the practice of recusing themselves in cases where they are overturned by a higher court. Mr. Mortensen's third point is that he believes the reasons for opposing such a rule do not stand up under scrutiny, *e.g.*, he does not believe this rule would increase costs, and pointed out that all Utah districts have at least two judges and that he has found no reported cases where juvenile court judges have been reversed.

Mr. Mortensen also addressed several concerns raised in the past. Regarding the issue of potentially having to change venue in order to obtain a judge who has not recused or been disqualified, Mr. Mortensen stated that he has found few reported cases showing reversals in smaller localities, and that the issue should be "prejudice" and not "costs." He also disputed that this proposed rule would impugn the integrity of the trial judge, pointing out that Judge Winder recuses after a reversal. Finally, he disagreed with the argument that this rule is susceptible to abuse and tactical gamesmanship, noting that the proposed rule simply gives latitude to successful appellants to request a new judge if they **choose** to do so.

Mr. Wikstrom then introduced Richard Burbridge, who also supports the proposed rule. Mr. Burbridge stated that he is weighing in on this issue only because of his great respect for the judiciary. He commented that when a trial judge is reversed, the judge must not only be concerned about re-trying the case, but must also be concerned about questions as to whether the judge is now prejudiced because he or she might be angry about the reversal. Mr. Burbridge believes that, to the client, this casts a shadow on the judge's verity. He believes that the proposed rule actually protects and removes pressure from the judge. He stated that the process itself is the most important thing, and that Judge Winder should be used as a benchmark because he recuses for all the right reasons.

Mr. Wikstrom next introduced Robert Wallace. To illustrate why he supports the proposed rule, Mr. Wallace discussed a case where he represented the plaintiff in federal court. Mr. Wallace stated that the trial judge was reversed twice on summary judgment before finally recusing of his own volition after the second remand.[1] Mr. Wallace stated that, after the evidentiary hearing that the judge held pursuant to the second summary judgment motion, both Mr. Wallace and his client had serious concerns about whether the judge viewed the case as seriously as they did. He also stated that the proposed rule is a matter of fairness to litigants, and not an insult to judges.

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[1]NOTE: With regard to the first reversal, the Tenth Circuit affirmed the trial court's dismissal of all claims except plaintiff's First Amendment free speech claim, holding that summary judgment on that claim was "premature." The trial court was affirmed on its dismissal of plaintiff's Title IX, procedural due process, and substantive due process claims. The Tenth Circuit also affirmed the trial court's dismissal of the free speech claim by plaintiff's parents. The Tenth Circuit's second opinion affirmed the trial court's dismissal of the free speech claim against one defendant, and reversed it as to two other defendants. The Tenth Circuit made special note in this opinion of the trial judge's inappropriate comments at the evidentiary hearing that the judge held to "resolve" issues on summary judgment.

Mr. Wikstrom next introduced Michael Zundel. Mr. Zundel stated that it is his opinion that the proposed rule would act as a safety valve for the system, and that a judge should not feel invested in a case. He commented that there can be problems after a remand and that there ought to be an "out" for the successful appellant. As support for his position, he referred to a case where a judge was reversed on twenty findings of fact that were clearly erroneous. He expressed his belief that the proposed rule is salutory and helpful to the system.

B. Discussion.

Mr. Wikstrom asked for comments and questions from Committee members. The Committee members participated in a lengthy discussion, which included members' comments, and questions directed to Messrs. Mortensen, Burbridge, Wallace and Zundel about issues of concern. The questions and comments included the following:

Leslie Slaugh stated that he is essentially in favor of the proposed rule, and that he does not see why it should be limited to successful appellants. Mr. Karrenberg asked Mr. Mortensen whether this rule would apply in situations where there is a preliminary injunction and, if applied to all litigants, whether the trial judge would know who had requested disqualification. Mr. Mortensen stated that he sees no reason why the rule should not be written so as to apply to all litigants and situations, and that if any litigant can request disqualification, the judge should not know who had requested it. The Committee members discussed these issues.

Mr. Lee, Judge Lyle Anderson and others raised questions and concerns about the potential for gamesmanship and abuse. Judge Anderson gave an example of what he believes is gamesmanship in his district, and said that he is very concerned about this. He also believes that it is suspect that only successful appellants are included in the survey cited. Mr. Lee also had concerns about the survey, and stated that he does not believe that Judge Kimball and Judge Winder always recuse after reversal or remand. Judge Anthony Quinn commented that he clerked for Judge Winder several years ago, and that he could think of cases where Judge Winder did not recuse after reversal.

Cullen Battle noted that the proposed rule appears to apply only to remands after trial, and questioned how to deal with situations where there is a remand for new findings and not necessarily a new trial. Frank Carney commented that a big downside of the proposed rule would be the inefficiencies of having a new judge on potentially every new trial. In response to these comments, Mr. Lee stated that the types of questions and issues that are being raised illustrate why recusal should be limited to the discretion of the trial judge, since there are always nuances.

Mr. Slaugh and others commented that the most persuasive argument for the proposed rule is the one involving perceptions of clients. Mr. Burbridge agreed, stating that this is the place to start and that it is "worthy of this Committee's work to advance the matter and eliminate the perception of clients of unfairness." Mr. Burbridge also stated that he believes that it is an advancement even if the proposed rule is strictly limited to new trials.

The Committee also discussed bias and judges, particularly after reversal on summary judgment. Mr. Wikstrom commented that he believes that advocates are in the poorest position to discuss and decide who is biased, and Mr. Lee commented that he believes it is inappropriate to make a rule that makes it appear that all judges are biased after reversal. Mr. Carney noted that he is aware of a poll that shows that some judges actually are biased after being reversed.

Debora Threedy commented on the issue of delay as a strategic choice by some attorneys, and noted that disqualifying a trial judge assists those who wish to delay. Mr. Karrenberg discounted the issue of delay, and observed that most delay is caused by the trial judge's calender.

After Mr. Wikstrom noted that the proposed civil rule would also apply in the criminal context pursuant to Rule 81, the question was raised as to how many civil cases would be affected by the rule. Judge Anthony Schofield commented that he once checked the percentage of reversals on summary judgment, and found that approximately 50% of summary judgments are reversed. He expressed concern that the proposed rule would further weaken summary judgment as a judicial tool.

The discussion was ended due to the press of time and other matters. Mr. Wikstrom stated, however, that the Committee will address it again at a later time. Messers. Mortensen, Burbridge, Wallace, and Zundel were thanked for taking the time to appear and provide their comments.

III. SMALL CLAIMS RULES.

Tim Shea stated that he has met with court clerks and the Board of District Court Judges about the small claims rules, and that the main concern is how to deal with counterclaims that exceed the small claims limit. He commented that it appeared to him at the last meeting that the Committee was opposed to transferring the counterclaim to district court, while retaining the original action in small claims court. He then asked for comments about the proposed rules.

Terrie McIntosh asked why there is a Rule 11 provision, since the parties are usually pro se and do not understand Rule 11. Mr. Shea responded that there was a need for some type of sanction, and that this has been kept as simple as possible. Mr. Slaugh commented that Rule 11 is specifically excluded from small claims actions, and Mr. Battle questioned how pro se parties can be held to the same standards as lawyers. With response to the "standards" question, Mr. Shea stated that small claims court is the collection arm of some businesses and that those businesses know exactly what they are doing. Mr. Slaugh stated that while there should be some latitude for pro se parties, under recent Utah Supreme Court opinions, repeat pro se litigants should be held to the same standards as lawyers.

Mr. Wikstrom asked for a show of hands on those who believe that the small claims rules should include some provision similar to Rule 11, and a majority of the Committee agreed that it should. After further discussion regarding pro se litigants, Mr. Battle moved to include the following provision in the small claims rules: "Legal contentions must be asserted in good faith." Mr. Carney seconded the motion, and it was approved by a majority of the Committee.

The next issue raised was use of both "business days" and "calendar days" as terms in the rules. After discussion and explanation of the reason for the distinctions, a majority of the Committee agreed that the use of both terms should be retained. Mr. Slaugh next expressed concern that the use of the term "summons" in Rule 3 suggests that a separate summons is needed. Mr. Shea stated that the affidavit and summons are contained in one document, *i.e.*, the party completes the affidavit and the court clerk completes the summons. Mr. Shea agreed that this may be confusing and that the term "and summons" will be deleted.

The Committee then discussed whether a small claims action should be bifurcated when a counterclaim exceeding the statutory limit is filed. Mr. Slaugh stated that he believes that everything should be transferred to district court, but expressed concern that this will lead to the filing of frivolous counterclaims. Mr. Battle and Mr. Blanch commented that if everything is transferred to district court, Rule 11 would then apply. Issues were also raised about the res judicata effect if the case is bifurcated. Mr. Shea stated that under Supreme Court rulings, even if there is a previous small claims ruling, a counterclaim can be filed in district court.

IV. SERVICE BY MAIL.

Mr. Battle introduced Gregory Saylin, who has requested an opportunity to present his concerns about the service by mail provision in the rules. Mr. Saylin stated that his concerns have arisen in light of the new Utah SPAM statute, and the fact that class actions are being filed under that new statute. He stated that some Utah lawyers have mailed hundreds of complaints to out-of-state law firms, and that many out-of-state attorneys are taking the position that their clients have not been served since the proof of service required is return of receipt, and the receipt has not been signed by an authorized person. (Ms. McIntosh commented that, in many cases, receipts are being signed by employees in a law firm's mail room.)

Mr. Battle noted that the problem is that the Utah rules contemplate that service must be on an agent or someone authorized to receive service, but someone working in a mail room does not know this, and there is no way to know it from the wrappings of the documents mailed. Since plaintiffs' attorneys have no idea whether the person signing the receipt is authorized to do so, they are simply filing for default when no answer is filed. Mr. Battle suggested that the receipt should be required to state "**YOU ARE BEING SERVED**" in bold letters.

Noting the press of time, Mr. Wikstrom stated that this issue is only being raised today. There is no intention to resolve it at this time, and it will be addressed again at a later time.

V. RULE 68: OFFER OF JUDGMENT.

Mr. Wikstrom informed the Committee that the issue of Rule 68's Offer of Judgment has been raised in a legislative committee. He asked for volunteers to contact Representative John Dougall, and inform Representative Dougall of the issues that the Committee has been discussing with regard to Rule 68. Judge Anderson, Mr. Slaugh, and Mr. Carney volunteered to contact Representative Dougall. They will report back to the Committee on the discussion.

Judge Schofield suggested adding Steve Densley of Strong & Hanni to the group, since Mr. Densley has been involved in this issue.

VI. RULE 26: DELETION OF DISCLOSURE AND DISCOVERY PLAN EXEMPTION FOR SELF-REPRESENTED LITIGANTS.

Mr. Shea briefly raised an issue that has been presented to the Committee concerning Rule 26's exemption for pro se litigants. Under Rule 26, there is no requirement of initial disclosures or an attorneys planning meeting in cases which involve a pro se party. This exemption is opposed by some pro se litigants. It was agreed that this issue will be held over to the May 28, 2003 Committee meeting.

VII. AUGUST 27, 2003 MEETING.

Mr. Wikstrom announced that Committee members should plan to attend a previously unscheduled Committee meeting which will be held Wednesday, August 27, 2003. This meeting will likely be needed in order to consider comments on the proposed rules' amendments.

VIII. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, May 28, 2003, at the Administrative Office of the Courts.

Rule 68. Offer of judgment.

(a) Unless otherwise specified, an offer to allow judgment to be entered in accordance with the offer made more than 10 days before trial is an offer to resolve all claims between the parties to the date of the offer, including damages, equitable relief, costs, interest and, if permitted by law or contract, attorney fees. If the adjusted award for the offeree is not more favorable than the offer, the offeror is not liable for costs, interest or attorney fees incurred by the offeree after the offer and the offeree shall pay the offeror's costs and interest incurred after the offer, and, if permitted by law or contract, the offeror's reasonable and necessary attorney fees incurred after the offer. In the interests of justice, the court may suspend the application of this rule if the bad faith of the offeror was a substantial factor in the offeree's failure to accept the offer.

(b) An offer to allow judgment to be entered in accordance with the offer shall be in writing, shall remain open for at least 10 days and shall be served on the offeree under Rule 5. Acceptance of the offer shall be in writing and served on the offeror under Rule 5. Upon acceptance, either party may file the offer and acceptance with a proposed judgment under Rule 58A.

(c) "Adjusted award" means the amount awarded by the finder of fact plus the offeree's costs and interest incurred before the offer and, if permitted by law or contract, the offeree's reasonable and necessary attorney fees incurred before the offer. If the offeree's attorney fees are contingent upon payment of damages, the court shall pro rate the total reasonable and necessary attorney fees on a daily basis from the date the offeree retained counsel.

Summary Of Cases Remanded

Result	2001	2002
Affirmed in part / Reversed in part / Remanded	8	6
Affirmed in part / Vacated in part / Remanded		2
Reversed / Remanded	43	55
Vacated / Remanded	1	11
Vacated / Reserved / Remanded		1
Total Remanded	52	75

Case Type	2001	2002
Civil	34	38
Criminal	17	34
Juvenile	1	3
Total	52	75

Court	2001	2002
Box Elder		3
Cache Co	1	
Carbon		1
Farmington	4	1
Grand	1	3
Iron		1
Juab	1	1
Juvenile	1	3
Kane		1
Layton	1	
Murray	2	2
Salt Lake	23	46
Sandy	1	1
Sanpete	1	1
Summit	2	1
Tooele	2	2
Uintah		1
Utah	4	4
Wasatch	1	1
Washington	2	1
Weber	4	1
West Valley	1	
Total	52	75

Small Claims Rules

Rule 1. ~~Scope, purpose, and forms~~ General provisions.

(a) These rules constitute the ~~"~~simplified rules of procedure and evidence~~"~~ in small claims cases required by Utah Code Section 78-6-1 and shall be referred to as the Rules of Small Claims Procedure. They are to be interpreted to carry out the statutory purpose of small claims cases, dispensing speedy justice between the parties.

(b) These rules apply to the initial trial and any appeal under Rule 12 of all actions pursued as a small claims action under Utah Code Section 78-6-1 et~~.~~ seq.

(c) If the Supreme Court has approved a form for use in small claims actions, parties must file documents substantially similar in form to the approved form.

(d) By presenting a document, a party is certifying that to the best of the party's knowledge it is not being presented for an improper purpose, the legal contentions are made in good faith, and the factual contentions are supported by evidence. If the court determines that this certification has been violated, the court may impose an appropriate sanction upon the attorney or party.

Rule 2. Beginning the case.

(a) A case is begun by plaintiff filing ~~a Small Claims Affidavit (Form A)~~ with the clerk of the court either:

(1) an affidavit stating facts showing the right to recover money from defendant; or

(2) an interpleader affidavit showing that plaintiff is holding money claimed by two or more defendants.

(b)The affidavit qualifies as a complaint under Utah Code Section 78-27-25.

~~(b)~~(c) Unless waived upon filing an affidavit of impecuniosity, the appropriate filing fee must accompany the small claims affidavit.

~~(c) A separate form of Affidavit (Form C) is available for an "interpleader action" – action in which plaintiff is holding money that is claimed by two or more other parties.~~ (d) In an interpleader action, plaintiff must pay the money into the court at the time of filing the affidavit or acknowledge that it will pay the money to whomever the court directs.

(e) Upon filing the affidavit, the clerk of the court shall schedule the trial and issue the summons for the defendant to appear.

Rule 3. Service of the affidavit.

(a) After filing the affidavit and receiving a trial date, plaintiff must serve the affidavit and summons on defendant. To serve the affidavit, plaintiff must either:

(1) have the affidavit served on defendant by a sheriff's department, constable, or person regularly engaged in the business of serving process and pay for that service; or

(2) have the affidavit delivered to defendant by a method of mail or commercial courier service that requires defendant to sign a ~~document indicating~~ receipt and provides for return of that ~~document~~ receipt to plaintiff.

(b) The affidavit must be served at least ~~thirty~~ 30 calendar days before the trial date. Service by mail or commercial courier service is complete on the date the receipt is signed by defendant.

(c) Proof of service of the affidavit must be filed with the court no later than ~~ten calendar~~ 10 business days after service. If service is by mail or commercial courier service, plaintiff must file a proof of service ~~(Form D)~~. If service is by a sheriff, constable, or person regularly engaged in the business of serving process, proof of service must be filed by the person completing the service.

(d) Each party shall serve on all other parties a copy of all documents filed with the court other than the counter affidavit. Each party shall serve on all other parties all documents as ordered by the court. Service of all papers other than the affidavit and counter affidavit may be by first class mail to the other party's last known address. The party mailing the papers shall file proof of mailing with the court no later than 10 business days after service. If the papers are returned to the party serving them as undeliverable, the party shall file the returned envelope with the court.

Rule 4. Counter affidavit.

(a) ~~If defendant claims plaintiff owes defendant money, defendant~~ Defendant may file with the clerk of the court a counter affidavit stating facts showing the right to recover money from plaintiff.

(b) Unless waived upon filing an affidavit of impecuniosity, the appropriate filing fee must accompany the counter affidavit ~~(Form B)~~.

(c) Any counter affidavit must be filed at least ~~fifteen~~ 15 calendar days before the trial. The ~~court~~ clerk of the court will mail a copy of the counter affidavit to plaintiff at the address provided by plaintiff on the affidavit.

~~(d) In a case filed in district court, if the counter affidavit alleges that plaintiff owes defendant more than the monetary limit for small claims procedures, the entire case will proceed as a regular civil case.~~

~~(e) In a case filed in justice court, if the counter affidavit alleges that plaintiff owes defendant more than the monetary limit for small claims procedures, the entire case must be transferred to district court and will proceed as a regular civil case.~~

~~(f) Defendant must pay both parties' additional filing fees imposed as a result of the case proceeding as a regular civil case. If necessary, defendant must arrange for transfer of the case.~~

(d) A counter affidavit for more than the monetary limit for small claims actions may not be filed under these rules.

Rule 6. Pretrial.

(a) No ~~formal~~ discovery may be conducted ~~but the parties are urged to exchange information prior to the trial~~.

(b) Written motions and responses may be filed prior to trial. Motions may be made orally or in writing at the beginning of the trial. ~~No motions will be heard prior to trial.~~

(c) One postponement of the trial date ~~("continuance")~~ per side may be granted by the ~~court~~ clerk of the court. To request a ~~continuance~~ postponement, a party must file a ~~request~~ motion for ~~continuance (Form E)~~ postponement with the court at least 5 business days before trial. The clerk will give notice to the other party. ~~A Request for Continuance must be received by the court at least five calendar days before trial.~~ A ~~continuance~~ postponement for more than ~~forty-five~~ 45 calendar days may be granted only by the judge. The court may require the party requesting the postponement to pay the costs incurred by the other party.

Rule 7. Trial.

(a) All parties must bring to the trial all documents related to the controversy regardless of whose position they support. ~~Possible documents include medical bills, damage estimates, receipts, rental agreements, leases, correspondence, and any contracts on which the case is based.~~

(b) Parties may have witnesses testify at trial and bring documents. To require attendance by a witness who will not attend voluntarily, a party must ~~"~~subpoena~~"~~ the witness. The clerk of the court or a party's attorney may issue a subpoena pursuant to Utah Rule of Civil Procedure 45. The party requesting the subpoena is responsible for service of the subpoena and payment of any fees. A subpoena must be served at least ~~five calendar~~ 5 business days prior to trial.

(c) The judge will conduct the trial and question the witnesses. The trial will be conducted in such a way as to give all parties a reasonable opportunity to present their positions. The judge may allow parties or their counsel to question witnesses.

(d) The judge may receive the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their business affairs. The rules of evidence shall not be applied strictly. The judge may allow hearsay that is probative, trustworthy and credible. Irrelevant or unduly repetitious evidence shall be excluded.

(e) After trial, the judge shall decide the case and direct the entry of judgment. No written findings are required. ~~The small claims judgment (Form F or G) with the notice of Entry of judgment completed shall be provided to each party by the court if all parties are present at trial or by the prevailing party if fewer than all parties are present.~~ The clerk of the court will serve all parties present with a copy of the judgment.

(f) ~~Filing fees and costs~~ Costs will be awarded to the prevailing party and to plaintiff in an interpleader action unless the judge otherwise orders.

Rule 8. Dismissal.

(a) Except in interpleader cases, if plaintiff fails to appear at the time set for trial, plaintiff's claim will be dismissed ~~with prejudice unless the judge otherwise orders~~.

(b) If defendant has filed a counter affidavit and fails to appear at the time set for trial, defendant's claim will be dismissed ~~with prejudice unless the judge otherwise orders~~.

~~(c) The prevailing party shall send all other parties a copy of the small claims judgment (Form F or G) with the notice of entry of judgment completed and file the completed copy with the court.~~

(c) A party may move to dismiss its claim at any time before trial.

(d) Dismissal is without prejudice unless the judge otherwise orders. The appearing party shall serve the order of dismissal on the non-appearing party.

Rule 9. Default judgment.

(a) If defendant fails to appear at the time set for trial, the court may grant plaintiff judgment in an amount not to exceed the amount requested in plaintiff's affidavit.

(b) If defendant has filed a counter affidavit and plaintiff fails to appear at the time set for trial, the court may grant defendant judgment in an amount not to exceed the amount requested in defendant's counter affidavit.

(c) ~~Any party granted a default judgment shall promptly send a copy of a completed Notice of Default judgment (Form H) to the other party and file the original with the court.~~ The appearing party shall serve the default judgment on the non-appearing party.

(d) In an interpleader action, if a defendant fails to appear, a default judgment may be entered against the non-appearing defendant.

Rule 10. Set aside of default judgments and dismissals.

(a) ~~Within thirty calendar days from the mailing of the notice of default judgment or the date of dismissal, a~~ A party may request that the default judgment or dismissal be set aside by filing a ~~request~~ motion to set aside ~~judgment (Form I)~~ within 30 calendar days after mailing of the judgment or dismissal. If the court receives a timely ~~request~~ motion to set aside the default judgment or dismissal and good cause is shown, the court may grant the ~~request~~ motion and reschedule a trial. The court may require the ~~requesting~~ moving party~~'s payment of~~ to pay the costs incurred by the other party ~~in obtaining the default judgment or dismissal~~.

(b) The ~~thirty day~~ period for ~~requesting the~~ moving to set aside ~~of~~ a default judgment or dismissal may be extended by the court for good cause if the ~~request~~ motion is made in a reasonable time.

Rule 11. Collection of judgments.

(a) Judgments may be collected under the Utah Rules of Civil Procedure.

~~(b) Upon full payment of the judgment including post-judgment costs and interest, the prevailing party shall promptly file a satisfaction of judgment (Form J) with the court.~~

~~(c) The court may enter a Satisfaction of Judgment at the request of a party after ten calendar days notice to all parties.~~ (b) Upon payment in full of the judgment, including post-judgment costs and interest, the judgment creditor shall file a satisfaction of judgment with the court. Upon receipt of a satisfaction of judgment from the judgment creditor, the clerk of the court shall enter the satisfaction upon the docket. The judgment debtor may file a satisfaction of judgment and proof of payment. If the judgment creditor fails to object within 10 business days after notice, the court may order the judgment satisfied. If the judgment creditor objects to the proposed satisfaction, the court shall rule on the matter and may conduct a hearing.

(c) If the judgment creditor is unavailable to accept payment of the judgment, the judgment debtor may pay the amount of the judgment into court and serve the creditor with notice of payment in the manner directed by the court as most likely to give the creditor actual notice,

which may include publication. After 30 calendar days after final notice, the debtor may file a satisfaction of judgment and the court may conduct a hearing. The court will hold the money in trust for the creditor for the period required by state law. If not claimed by the judgment creditor, the clerk of the court shall transfer the money to the Unclaimed Property Division of the Office of the State Treasurer.

Rule 12. Appeals.

(a) Either party may appeal a ~~small claims~~ final order or judgment within ~~ten~~ 10 business days ~~(not counting weekends and holidays) of receipt of~~ after notice of entry of judgment or order or after denial of a motion to set aside the judgment or order, whichever is later.

(b) To appeal, the appealing party must file a notice of appeal ~~(Form K)~~ in the court issuing the judgment ~~and mail a copy to each party~~. ~~The~~ Unless waived upon filing an affidavit of impecuniosity, the appropriate fee must accompany the notice of appeal.

(c) On appeal, a new trial will be held ~~("trial de novo")~~ in accordance with these rules.

(d) The district court shall issue all orders governing the trial de novo. The trial de novo of a justice court adjudication shall be heard in the district court nearest to and in the same county as the justice court from which the appeal is taken. The trial de novo of the small claims department of the district court shall be held at the same district court.

(e) A judgment debtor may stay the judgment during appeal by posting a supersedeas bond with the district court. The stay shall continue until entry of the final judgment or order of the district court.

(f) Within 10 business days after filing the notice of appeal, the justice court shall transmit to the district court the notice of appeal, the district court fees, a certified copy of the register of actions, and the original of all papers filed in the case.

(g) Upon the entry of the judgment or final order of the district court, the clerk of the district court shall transmit to the justice court which rendered the original judgment notice of the manner of disposition of the case.

(h) The district court may dismiss the appeal and remand the case to the justice court if the appellant:

(1) fails to appear;

(2) fails to take any step necessary to prosecute the appeal; or

(3) requests the appeal be dismissed.

Rule 4-801. Transfer of small claims cases.

Intent:

To establish a procedure for the transfer of small claims cases to the appropriate justice court.

Applicability:

This rule shall apply to the courts of record and not of record.

Statement of the Rule:

(1) Small claims actions filed in a court of record may be assigned to a judge pro tempore, if one has been appointed under Rule 11-202 to adjudicate small claims actions. If no judge pro tempore has been appointed to adjudicate small claims actions, the case may be transferred to a justice court with jurisdiction under Utah Code Section 78-5-104.

(2) At the time of the transfer, the court shall also transfer the filing fee, less the portion dedicated to the judges' retirement trust fund.

(3) If there is no justice court with territorial jurisdiction of the small claims action and no judge pro tempore, a district judge of the court shall hear and determine the action. ~~The appeal shall be as provided in Rule 4-803.~~

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: May 21, 2003
Re: Application of URCP to self-represented litigants

In the materials for the last meeting I included a letter and "complaint" from Chuck Eddy requesting, among other things, that the Rules of Civil Procedure be amended to make the disclosure and discovery rules fully applicable to self-represented litigants. I've already responded to Mr. Eddy that this committee is not in a position to respond to requests other than for rule changes. It appears that Mr. Eddy has submitted this request on previous occasions, but, at my suggestion, this is the first time he has submitted it to the Committee.

When the disclosure and discovery amendments were under consideration several years ago, Mr. Eddy was the only person to respond requesting that the provisions exempting self-represented litigants from certain parts of those changes be removed. Specifically, self represented litigants are exempt from the initial disclosure requirements of Rule 26(a)(1) and the "meet and confer" and discovery plan requirements of Rule 26(f). URCP 26(a)(2)(A)(iv). Mr. Eddy argued then and maintains the position that these are important procedural rights being denied to self-represented litigants. To implement his request, Rule 26(a)(2)(A)(iv) would be deleted.

Mr. Eddy represents that self-represented litigants are also exempt from pretrial conferences under Rule 16. I believe this is incorrect. Because Rule 26(f) does not apply, the provision in Rule 26(f)(4), permitting a party to request a scheduling and management conference also does not apply, but Rule 16 has independent authority by which any party, represented or not, can request a pretrial conference. URCP 16(a) and (b).

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

Rule 4. Process.

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

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(4) Other service.

(A) Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties.

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

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

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The Final Judgment Rule: Appealability and Enforceability Go Hand in Hand
Kent O. Roche
Utah Bar Journal May 2003

Most practitioners readily recognize the final judgment rule as a cornerstone of appellate practice. We understand that the rule, now embodied in Rule 3(a) of our appellate rules, allows appeals to be taken as a matter of right1 only from "final orders and judgments."2 But the final judgment rule is more than a rule of appellate practice; it has important ramifications for lawsuits at the district court level. Specifically, the final judgment rule requires that a money judgment be final before it can be enforced through a writ of execution or one of the other post-judgment writs allowed by our civil rules. Unfortunately, as illustrated by the following example, the district court ramifications of the rule do not seem to be as well understood as the rule's appellate court ramifications.

Our firm was recently retained by an out-of-state bank to try to set aside a $5.5 million default judgment that had been entered against the bank in a state court proceeding. The default judgment against the bank was not a final judgment in that it did not adjudicate all of the claims asserted by all of the parties in the case and had not been certified as a final judgment under Rule 54(b) of the civil rules.3 Despite this fact, while our motion to set aside the default judgment was pending before the district court, our opposing counsel proceeded with efforts to collect the default judgment by executing on the bank's assets. When we advised opposing counsel that it was improper to execute on a non-final judgment and requested that he voluntarily cease his execution efforts, he denied our request by quoting the following provision of Rule 62(a):

> Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

When preparing our motion to quash opposing counsel's execution efforts, I mistakenly believed that the rules themselves would contain language allowing us to demonstrate that opposing counsel's reliance upon Rule 62(a) was misplaced. However, the desired answer was not to be found in the rules themselves. Rule 54(a) got us frustratingly close, in that it purports to define the term "judgment" "as used in these rules [as] includ[ing] a decree and any order from which an appeal lies." From my perspective, this definition is ambiguous at best in that its use of the word "includes" rather than "means" or "includes only" would allow opposing counsel to argue that, as used in Rule 62(a), the term "judgment" includes, but is not limited to, final judgments.

Fortunately for our client, the desired answer had been provided by the Utah appellate courts. In Cheves v. Williams, 993 P.2d 191 (Utah 1999), the Utah Supreme Court unequivocally stated that a final judgment was necessary before a judgment creditor could execute on the judgment:

> Rule 62(a) provides that "[e]xecution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment." Utah R. Civ. P. 62(a). Rule 69(a) then provides that "[a] writ of execution is available to a judgment creditor to satisfy a judgment or other order requiring the delivery of property or the payment of money by a

judgment debtor." Id. 69(a). The obvious implication of both these provisions is that there exists a previously issued final judgment not stayed pending appeal. Cf. Redding & Co. v. Russwine Constr. Corp., 417 F.2d 721, 727 (D.C. Cir. 1969) (noting that "[a]n execution ordinarily may issue only upon a final judgment").

Id. at 204-05 (emphasis added). Similarly, in D'Aston v. Aston, 844 P.2d 345 (Utah Ct. App. 1992), the Utah Court of Appeals stated that "[i]t is undisputed that a writ of execution may only be issued on a 'final' judgment ...." Id. at 349 (emphasis added). These precedents thus stand for the general propositions that appealability and enforceability go hand in hand and that, consequently, a non-final money judgment is neither appealable nor enforceable.

Even though the foregoing case law allowed us to refute opposing counsel's arguments for continuing with his efforts to execute on the non-final default judgment, I submit that practitioners' understanding of these important legal principles would be greatly improved by enacting clarifying amendments to our rules of civil procedure. One suggestion would be to amend the first sentence of Rule 54(a) to read as follows: "'Judgment' as used in these rules means a decree and any order from which an appeal lies." (emphasis added) In my mind, an even better amendment would be to define "judgment" by expressly referencing the final judgment rule of Rule 3(a) of the appellate rules. My specific suggestion: "Unless otherwise clearly indicated, the term 'judgment,' as used in these rules, means a final decree, a final order, or a final judgment within the meaning of Rule 3(a) of the Utah Rules of Appellate Procedure."

Another possible approach to clarifying our rules would be to amend Rule 62(a), as well as other applicable rules,4 so as to specifically require a final judgment or a final order. Because a practitioner reviewing our rules to decide whether she can execute on a non-final default judgment or a non-final summary judgment may locate Rule 62(a) but may well overlook Rule 54(a)'s controlling definition of "judgment," I would recommend that we take the "belt and suspenders approach" and enact clarifying amendments to both rules.

Footnotes

1. Rule 5(a) of the appellate rules allows a party to petition the appellate court for permission to appeal from a non-final or interlocutory order or judgment.

2. Rule 3(a) contains an exception to the final judgment rule that allows non-final judgments to be appealed if "otherwise provided by law." An example of a non-final judgment that is appealable as of right is an order denying a motion to compel arbitration; Section 78-31a-19 of the Utah Arbitration Act expressly makes such an order appealable. See Pledger v. Gillespie, 982 P.2d 572, 576 (Utah 1999). It should also be noted that neither the appellate rules nor the civil rules expressly define a final judgment. By negative implication, Rule 54(b) of the civil rules defines a final judgment as "any order or other form of decision, however designated, which adjudicates ... all the claims [and] the rights and liabilities of ... all the parties." The Utah Supreme Court has stated that "[a] judgment is final when it ends the controversy between the parties litigant." Salt Lake City Corp. v. Layton, 600 P.2d 538, 539 (Utah 1979).

3. Rule 54(b) gives a district court discretion to certify a non-final or interlocutory order or judgment as a final judgment in limited circumstances. To be eligible for certification, the case must involve more than one claim for relief and/or multiple parties (i.e., more than the normal

one plaintiff and one defendant), and the order or judgment in question must completely adjudicate one of the multiple claims or all of the claims involving one of the multiple parties. The court must also expressly determine that there is no just reason for delaying the entry of the requested final judgment and must expressly direct the entry of the same. See Kennecott Corp. v. Utah State Tax Commission, 814 P.2d 1099 (Utah 1991).

4. These rules would include, at a minimum, Rule 69 (covering writs of execution) and Rule 64D (covering writs of garnishment).

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules ~~includes~~ means a decree ~~and any~~ or order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, ~~which~~ that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

(c)(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(c)(2) Judgment by default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs.

(d)(1) To whom awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for

review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(d)(2) How assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court ~~in which the judgment was rendered~~.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

~~(3) [Deleted.]~~

~~(4) [Deleted.]~~

(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.

Rule 62. Stay of proceedings to enforce a judgment.

(a) Stay upon entry of judgment. Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the final judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

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