Agenda

Advisory Committee on Rules of Civil Procedure

April 26, 2006
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 37. Spoliation of evidence.	Fran Wikstrom
Limited appearance rules. Rules 5, 11, 74, 75.	Jonathan Hafen
SB 148. Punitive damages; discovery of wealth	Tim Shea
Finality of judgments	Leslie Slaugh

Meeting Schedule

May 24, 2006
June 28, 2006
September 27, 2006
October 25, 2006
November 29, 2006 (5th Wednesday)

Committee Web Page: http://www.utcourts.gov/committees/civproc/

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, March 22, 2006
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Terrie T. McIntosh, Leslie W. Slaugh, James T. Blanch, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Janet H. Smith, Jonathan Hafen, Thomas R. Lee, Virginia S. Smith, Judge R. Scott Waterfall, Debora Threedy

EXCUSED: Thomas R. Karrenberg, Todd M. Shaughnessy, Cullen Battle, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, David W. Scofield

STAFF: Tim Shea, Brent Johnson, Matty Branch, Trystan B. Smith

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:07 p.m. Mr. Blanch moved to approve the February 2006 minutes as submitted. The committee unanimously approved the minutes.

II. RULE 63. DISQUALIFICATION.

Mr. Shea and Brent Johnson brought Rule 63 back to the committee. Mr. Johnson indicated the Third District judges asked that Rule 63 be clarified to require a judge to take no further action after being presented with an affidavit alleging bias.

The committee debated a suggested addition to Rule 63(b)(2) which included the term "or proceedings" in the second clause of the subsection's first sentence. Judge Anderson and Mr. Lee indicated concern that the term "or proceedings" may be unclear and ambiguous. Mr. Lee suggested the addition of "court" or "court proceedings" so that practitioners are clear that they can proceed with discovery and other like matters after filing of a disqualification motion.

Mr. Wikstrom suggested adding a new sentence, after the first sentence of subsection (b)(2), which states: "The judge shall take no further action in the case until the motion is decided."

After further debate, the committee decided it would not include "or proceedings" in the first sentence of subsection (b)(2), but unanimously agreed to include the suggested second sentence.

III. RULE 8. DECLARATION UNDER PENALTY OF PERJURY.

Mr. Shea brought Rule 8 back to the committee. The committee again voiced its concern that the current Utah perjury statute would not apply to a declaration.

Mr. Wikstrom suggested the committee not amend Rule 8 until legislation was passed that made the penalty for a false declaration similar to the penalty for a false statement made under oath or affirmation. Currently, a person guilty of making a false declaration would be guilty of Class B misdemeanor as opposed to a Second Degree felony for making a false statement under oath or affirmation.

The committee agreed it would not amend Rule 8. It should be noted the committee did not feel it appropriate to amend Rule 8 allowing a party to substitute a declaration for an affidavit and thereby reduce his criminal exposure for lying given the disparate penalties.

IV. RULE 37. SPOLIATION OF EVIDENCE.

Mr. Wikstrom brought Rule 37 back to the committee.

Mr. Wikstrom elicited comments from the committee concerning the alternative language Mr. Shea drafted regarding the spoliation sanction.

The committee suggested a change in the title to subsection (g) from "Spoliation of evidence" to "Failure to preserve." The committee also suggested modifications to the alternative language.

Mr. Blanch expressed concern that a party's duty to preserve should be interpreted broadly. He expressed concern that if the committee limited a duty to preserve only to that evidence it would have been required to disclose under the rules, that duty may exclude evidence that did not support the party's claim, but was never asked for in discovery. Mr. Blanch suggested broader language such as "it has a duty to preserve" to alleviate this concern.

The committee suggested replacing the second and third sentences to the alternative language and including the phrase "including sanctions under Rule 37(b)" to the first sentence.

Finally, the committee suggested deleting the last sentence to the alternative language.

Mr. Wikstrom asked Mr. Shea to prepare a second alternative to the proposed subsection (g) and submit the two alternatives to Colin King for his review and comment.

V. UNBUNDLING IMPACT ON URCP RULES 5, 11, 74, 76.

Mr. Hafen led the discussion regarding unbundling and the impact on the rules of civil procedure. Mr. Hafen began by indicating the Supreme Court asked the committee to review the rules and amend as needed in light of the Court's approval of the amendments to the Utah Rules of Professional Conduct.

The objective of unbundling is to give more people access to legal services who typically could not afford it. Unbundling contains two main components — limited representation and a limited appearance, for example, allowing a lawyer to represent a client at trial, but not during discovery, or solely defending a motion for summary judgment.

Mr. Hafen reviewed the rules of civil procedure and suggested amendments to Rules 5, 11, 74, and the addition of Rule 76 entitled "Limited Appearance." Mr. Wikstrom entertained comments from the committee.

Mr. Lee indicated the last sentence of 11(c) is inconsistent with 11(b)(3) which requires the lawyer to certify that he has sufficient knowledge to make the representations in the pleadings. The proposed 11(c) allows the lawyer to rely on a client's representations.

Mr. Slaugh indicated his concern about limited representation under Rule 11. He wants to allow the scenario where a lawyer can prepare a document and pro se litigant signs it. He used the example of a client who comes into a lawyer's office the day before a statute of limitation runs. In this circumstance, he suggests allowing the lawyer to prepare a pleading and have the client sign it without having to investigate the underlying allegations. Mr. Slaugh suggested the ethical limitations on lawyers are enough and Rule 11 did not need to be amended.

Judge Nuffer countered that ghost writing is unethical in the 10th Circuit. He strongly believed that Rule 11 needs to provide accountability to a ghost writer.

Ms. Threedy expressed concern about the language concerning limited appearances under Rule 5. Her concern centered on how an opposing lawyer, judge, or clerk would know the scope of the limited appearance to fulfill the service requirements. These third parties have no grounds to clarify the relationship between the lawyer and client.

Mr. Carney expressed concern about a lawyer's limited appearance or representation and then subsequently dealing with the product of the lawyer's work, for example, misconduct during a deposition, or addressing a motion to dismiss after a complaint is filed.

Judge Anderson suggested the proposed Rule 76 Limited Appearance should include language stating a party does not have to file a 20-day notice to appear or appoint once the appearance is over.

After extensive discussion, Mr. Wikstrom asked Mr. Hafen to incorporate the suggested changes for the next meeting.

VI. RULE 74. WITHDRAWAL OF COUNSEL.

Judge Anderson brought Rule 74 back to the committee. Judge Anderson expressed his concern that the current rule only prohibits a withdrawal if a motion is pending or a certificate of readiness has been filed. It does not prohibit withdrawal when a trial date has been set pursuant to a duly executed Scheduling Order. The committee questioned whether it wanted to prohibit a lawyer's withdrawal if a trial date had been set, but far enough in the future that new counsel could be prepared to meet the trial date.

Mr. Slaugh moved to adopt language stating "no hearing or trial has been set" and remove all references to "certificate of readiness." After discussion, the committee unanimously approved the changes.

VII. ADJOURNMENT.

The meeting adjourned at 5:47 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, April 26, 2006, at the Administrative Office of the Courts.

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Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a)(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(a)(2) Motion.

(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(a)(2)(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(a)(3) Evasive or incomplete disclosure, answer, or response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(a)(4) Expenses and sanctions.

(a)(4)(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(a)(4)(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(b)(1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b)(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 16(b), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(b)(2)(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b)(2)(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(b)(2)(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(b)(2)(D) order the party or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust;

~~(b)(2)(D)~~ (b)(2)(E) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

~~(b)(2)(E)~~ (b)(2)(F) where a party has failed to comply with an order under Rule 35(a), such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply is unable to produce such person for examination.

~~In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.~~

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission

sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under ~~Paragraphs (A), (B), and (C) of~~ Subdivision (b)(2)(A), (B), (C), and (D) ~~of this rule~~. ~~In lieu of any order or in addition thereto, the court shall require the party failing to act or the party's attorney or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.~~

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Failure to participate in the framing of a discovery plan. If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

(f) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court may order any other sanction~~, including payment of~~

~~reasonable costs and attorney fees, any order permitted under subpart~~ subdivision (b)(2)(A), (B), ~~or~~ (C), and (D) and informing the jury of the failure to disclose.

(g) Failure to preserve evidence. If a party destroys, conceals, alters, tampers with, or fails to preserve and produce a document, tangible item, electronic data, or other evidence which the party had a duty to preserve, the court on motion may make such orders in regard to the party's action as are just, including any order authorized by Subdivision (b)(2)(A), (B), (C), and (D). And the court may instruct the jury regarding an adverse inference or effect of what the evidence would have shown.

Utah State Bar
Ethics Advisory Opinion No. 53
Approved: April 12, 1979

Summary: An attorney may provide limited legal services to persons wishing to handle their own divorces.

Comments: See Utah Opinion 74.

Facts: The question presented is whether or not an attorney can ethically provide legal assistance for persons desiring to handle their own divorces. The attorney provides each client with a manual including instructions and all necessary steps, with appropriate forms. An individual seeking instruction is interviewed by the attorney and the manual forms are discussed as well as the necessary procedures. A determination is made by the attorney in the interview of whether or not a prose proceeding is appropriate, the Committee assumes that all contact ends at that point.

Opinion: A somewhat similar situation was presented to the American Bar Association Ethics Committee in Informal Opinion 1414 (1978). A lawyer had counseled and advised a litigant appearing prose. The lawyer assisted in the preparation of jury instructions, memorandum of authorities and other documents filed with the court. Also, the attorney attended the trial and advised the litigant on "procedural matters." Neither the court nor the other party or parties concerned, nor their attorneys, knew of the previous participation by the attorney or the extent of that participation. The Committee found that the litigant was not, in fact, proceeding prose. The conduct of the attorney constituted a misrepresentation as to the involvement of undisclosed counsel. The Committee found that the conduct was contrary to Canon 1, DR 1-102(A)(4) which states that "[a] lawyer shall not: (4) engage in conduct involving dishonesty", fraud, deceit, or misrepresentation." The instant situation is distinguishable from that in the above cited opinion because the involvement by the attorney is more limited. There is no court appearance or actual preparation of documents by the attorney. Also, the procedure involved in the default divorce is much less complicated than that in a jury trial. This problem was addressed to some extent in Utah Opinion 47, where an attorney was retained by the State of Utah to provide limited legal services to inmates of the Utah State Prison. The attorney was to prepare certain pleadings for the inmates who would the proceed prose. The Committee in that case commented as follows:

"Lastly, the proposed legal representation presents the question of whether or not the attorney may ethically limit his services as proposed and decline to carry through and complete the matters which are presented to him by the inmates. Canon 7, DR 7-101(A)(2) provides that `a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, . . .' The attorney in this situation is protected somewhat, because he will never become an attorney of record. However, he is aiding the inmates and possibly initiating legal action within the court system. Again, this is an area in which the situation must be fully and clearly I explained

to the inmate at the outset so that he will be aware of the limits of services offered . . . the inmate should be fully informed of all the pitfalls of so proceeding [prose]. "

Therefore, it appears that the conduct contemplated herein is proper so long as the exact nature of the services offered is clearly explained to each client.

The Committee was provided with a copy of the manual and forms provided to each client by the attorney. The Committee declines to comment on the legal sufficiency of the manual and/or forms, as this is outside the jurisdiction of said Committee.

Utah State Bar
Ethics Advisory Opinion No. 74
Approved: February 13, 1981

Summary: An attorney may give advice to a litigant who is proceeding prose and may prepare or assist in the preparation of pleadings. But when the attorney gives any additional advice or assistance, he has an obligation to notify the court and opposing counsel of his representation.

Comments: See also, Utah Opinions 47 and 53.

Facts: The following fact situation has been presented to the Ethics Committee: A person comes to an attorney's office and brings with him a copy of a complaint which has been served upon him. The attorney then advises this person that before a formal appearance can be entered in his behalf, it is necessary that a substantial retainer be paid. The individual then indicates that he is not in a financial position to pay such a retainer and wants to proceed with his case pro se. However, he wants to have an answer filed to protect his position.

The questions presented in this situation are two fold:

1. The propriety of an attorney preparing a responsive pleading showing the party to be appearing pro se, giving this pleading to the party and letting him do with it what he chooses, and;

2. Is the attorney obligated to advise a court and opposing counsel of his assistance in the preparation of these pleadings and of any legal advice which he has given.

Opinion: The answer to both questions is determined by the extent of the legal advice the attorney gives to the litigant. There is nothing improper in an attorney giving initial advice to a litigant who is proceeding pro se nor is it improper for an attorney to prepare or assist in the preparation of pleadings.

However, when the attorney gives any additional assistance and the litigant continues to inform the court that he is proceeding pro se, he has engaged in misrepresentation by professing to be without representation. The attorney who engages in this conduct is involved in the litigant's misrepresentation contrary to DR 1-102(A)(4) of the Revised Rules of Professional Conduct of the Utah State Bar which provides:

"A lawyer shall not: . . .

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

A determination of whether or not the attorney's conduct is improper will depend upon the particular facts involved in each situation. The extent of an attorney's participation on behalf of the litigant who appears to the court and other counsel as being without professional representation is the determining factor. Minimal participation by the attorney is not improper. However, extensive undisclosed participation by an attorney that permits the litigant falsely to appear as being without substantial professional assistance is improper for the reasons noted above.

Rule 75. Limited appearance.

(a) An attorney acting pursuant to an agreement with a client for limited representation that complies with the Utah Rules of Professional Conduct may enter an appearance limited to one or more of the following purposes:

(a)(1) filing a pleading or other paper;

(a)(2) filing or arguing a specific motion or motions;

(a)(3) conducting one or more specific discovery procedures;

(a)(4) acting as counsel for a particular hearing, including a trial, pretrial conference, or an alternative dispute resolution proceeding;

(a)(5) acting as counsel for an appeal; or

(a)(6) with leave of the court, for a specific issue or a specific portion of a trial or hearing, or any other matter.

(b) To enter a limited appearance the attorney shall file and serve as soon as practical prior to commencement of the appearance a Notice of Limited Appearance signed by the attorney and the client. The Notice shall specifically describe the purpose and scope of the appearance. The clerk shall enter on the docket the attorney's name and a brief statement of the limited appearance. The Notice of Limited Appearance and all actions taken pursuant to it are subject to Rule 11.

(c) Any party may move to clarify the description of the purpose and scope of the limited appearance.

(d) A party on whose behalf an attorney enters a limited appearance shall enter a general appearance.

Rule 74. Withdrawal of counsel.

(a) If a motion is not pending and a certificate of readiness for trial has not been filed, an attorney may withdraw from the case by filing with the court and serving on all parties a notice of withdrawal. The notice of withdrawal shall include the address of the attorney's client and a statement that no motion is pending and no certificate of readiness for trial has been filed. If a motion is pending or a certificate of readiness for trial has been filed, an attorney may not withdraw except upon motion and order of the court. The motion to withdraw shall describe the nature of any pending motion and the date and purpose of any scheduled hearing.

(b) Alternative 1. An attorney who has entered a limited appearance under Rule 75 is automatically withdrawn from the case upon the conclusion of the purpose or proceeding identified in the Notice of Limited Appearance. An attorney who seeks to withdraw before the conclusion of the purpose or proceeding shall proceed under subdivision (a)

(b) Alternative 2. An attorney who has entered a limited appearance under Rule 75 may withdraw from the case by filing and serving a notice of withdrawal upon the conclusion of the purpose or proceeding identified in the Notice of Limited Appearance. An attorney who seeks to withdraw before the conclusion of the purpose or proceeding shall proceed under subdivision (a)

~~(b) If~~ (c) Unless an attorney withdraws under subdivision (b) if an attorney withdraws, dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, the opposing party shall serve a Notice to Appear or Appoint Counsel on the unrepresented party, informing the party of the responsibility to appear personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days after filing the Notice to Appear or Appoint Counsel unless the unrepresented party waives the time requirement or unless otherwise ordered by the court.

~~(c)~~ (d) Substitution of counsel. An attorney may replace the counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel and the client. Court approval is not required if new counsel certifies in the

notice of substitution that counsel will comply with the existing hearing schedule and deadlines.

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

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

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

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

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

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

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

(c) Limited representation of a client. An attorney who assists an otherwise self-represented person to draft a pleading is presenting the pleading within the scope of this rule. The attorney shall include on the pleading the information required by Rule 10 even if the attorney does not sign the pleading. [Note: What of changes made after the lawyer is done?]

~~(c)~~ (d) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the

conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

~~(c)(1)~~ (d)(1) How initiated.

~~(c)(1)(A)~~ (d)(1)(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees.

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

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

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

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

~~(c)(2)(3)~~ (d)(2)(C) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

~~(d)~~ (e) Inapplicability to discovery. Subdivisions (a) through ~~(c)~~ (d) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

Rule 5. Service and filing of pleadings and other papers.

(a) Service: When required.

(a)(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(a)(2) No service need be made on parties in default except that:

(a)(2)(A) a party in default shall be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear shall be served with all pleadings and papers;

(a)(2)(C) a party in default for any reason shall be served with notice of any hearing necessary to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason shall be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) pleadings asserting new or additional claims for relief against a party in default for any reason shall be served in the manner provided for service of summons in Rule 4.

(a)(3) In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made and by whom.

(b)(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. If an attorney has entered a limited appearance under Rule 75, service shall be made (Alternative 1 - upon the attorney and the party for the duration of the limited appearance.) (Alternative 2 – upon the party.) Service upon the attorney or upon a party shall be made by delivering a copy or by

mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.

(b)(1)(A) Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or, if consented to in writing by the person to be served, delivering a copy by electronic or other means.

(b)(1)(B) Service by mail is complete upon mailing. If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of service, service shall be by delivery or other method of actual notice. Service by electronic means is complete on transmission if transmission is completed during normal business hours at the place receiving the service; otherwise, service is complete on the next business day.

(b)(2) Unless otherwise directed by the court:

(b)(2)(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(b)(2)(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(b)(2)(C) an order or judgment prepared by the court shall be served by the court.

(c) Service: Numerous defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service

completed by the person effecting service. Rule 26(i) governs the filing of papers related to discovery.

(e) Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.

PUNITIVE DAMAGES - DISCOVERY OF WEALTH

2006 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Gregory S. Bell

House Sponsor: Scott L Wyatt

LONG TITLE

General Description:

This bill requires that before discovery of a party's wealth or financial condition is conducted, a prima facie case must be made that an award of punitive damages is reasonably probable.

Highlighted Provisions:

This bill:

- requires a prima facie case that an award of punitive damages is reasonably probable before discovery is permitted concerning a party's wealth or financial condition.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78-18-1, as last amended by Chapter 2, Laws of Utah 2005

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78-18-1** is amended to read:

78-18-1. Basis for punitive damages awards -- Section inapplicable to DUI cases -- Division of award with state.

(1) (a) Except as otherwise provided by statute, punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others.

(b) The limitations, standards of evidence, and standards of conduct of Subsection (1)(a) do not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle or motorboat while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6a-502.

(c) The award of a penalty under Section 78-11-15 or 78-11-16 regarding shoplifting is not subject to the prior award of compensatory or general damages under Subsection (1)(a) whether or not restitution has been paid to the merchant prior to or as a part of a civil action under Section 78-11-15 or 78-11-16.

(2) Evidence of a party's wealth or financial condition shall be admissible only after a finding of liability for punitive damages has been made.

(a) Discovery concerning a party's wealth or financial condition may only be allowed after the party seeking punitive damages has established a prima facie case on the record that an award of punitive damages is reasonably likely against the party about whom discovery is sought and, if disputed, the court is satisfied that the discovery is not sought for the purpose of harassment.

(b) Subsection (2)(a) does not apply to any claim for punitive damages arising out of the tortfeasor's operation of a motor vehicle or motorboat while voluntarily intoxicated or under the influence of any drug or combination of alcohol and drugs as prohibited by Section 41-6a-502.

(3) (a) In any case where punitive damages are awarded, the judgment shall provide that 50% of the amount of the punitive damages in excess of $20,000 shall, after an allowable deduction for the payment of attorneys' fees and costs, be remitted by the judgment debtor to the state treasurer for deposit into the General Fund.

(b) For the purposes of this Subsection (3), an "allowable deduction for the payment of attorneys' fees and costs" shall equal the amount of actual and reasonable attorneys' fees and costs incurred by the judgment creditor minus the amount of any separate judgment awarding attorneys' fees and costs to the judgment creditor.

(c) The state shall have all rights due a judgment creditor until the judgment is satisfied, and stand on equal footing with the judgment creditor of the original case in securing a recovery.

(d) Unless all affected parties, including the state, expressly agree otherwise or the application is contrary to the terms of the judgment, any payment on the judgment by or on behalf of any judgment debtor, whether voluntary or by execution or otherwise, shall be applied in the following order:

(i) compensatory damages, and any applicable attorneys fees and costs;

(ii) the initial $20,000 punitive damages; and

(iii) the balance of the punitive damages.

From: "Leslie Slaugh" <slaughl@provolawyers.com>
To: "Blanch, James" <JBlanch@parsonsbehle.com>, "Tim Shea" <tims@email.utcourts.gov>, "Wikstrom, Fran" <FWikstrom@parsonsbehle.com>
Date: 3/23/06 11:01AM
Subject: RE: finality of judgments

The Court of Appeals issued another decision today which indicates that Rule 7 is not being understood by some practitioners. Code v. Utah Dept. of Health, 2006 UT App 113. Perhaps we should revisit that issue. I suggest the following:

Rule 7

(f) Orders and Judgments.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders and judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, if an order or judgment is necessary to implement the court's decision the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

Comments.

I see no need for the definition of "order" in the first sentence of Rule 7(f)(1).

The second sentence of the current Rule 7(f)(1) conflicts with current Rule 62(a):

Rule 54(a) states: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies."

Current Rule 7(f)(1) would permit the immediate enforcement of a non-final "order." If an "order" is final, it is already included in the definition of "judgment"; therefore, the only real application of the current Rule 7(f)(1) is to permit enforcement of non-final orders.

Rule 62(a) provides: "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." This seems to imply that only final judgments may be enforced through execution.

The proposed amendment to Rule 62(a) eliminates the requirement of finality. If that amendment is approved by the Supreme Court, non-final orders would be enforceable, and there would be no need for the current language regarding enforcement in Rule 7(f)(1).

IN THE UTAH COURT OF APPEALS

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Nicole H. Code fka Nicole L. Handrahan, Plaintiff and Appellant, v. Utah Department of Health and Utah School for the Deaf and Blind, Defendants and Appellees.	MEMORANDUM DECISION (For Official Publication) Case No. 20050255-CA F I L E D (March 23, 2006) 2006 UT App 113

Second District, Ogden Department, 040905007
The Honorable Ernest W. Jones

Attorneys: Brad C. Smith and Benjamin C. Rasmussen, Ogden, for Appellant
Mark L. Shurtleff, Debra J. Moore, and Brent A. Burnett, Salt Lake City, for Appellees

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Before Judges Bench, McHugh, and Orme.

ORME, Judge:

¶1 We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record[,] and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). We conclude we lack jurisdiction over this appeal because Appellant's notice of appeal was untimely.

¶2 Under rule 3 of the Utah Rules of Appellate Procedure, an appeal is allowed from "final orders and judgments." Utah R. App. P. 3(a). The rules also specify that the notice of appeal must be filed "within 30 days after the date of entry of the judgment or order appealed from." Utah R. App. P. 4(a). Thus, the thirty-day period begins with the entry of a judgment or other final order.

¶3 "[F]or a judgment to be final and start the time for appeal to run, there must be a judgment which is definite and

unequivocal in finally disposing of the matter." Utah State Bldg. Bd. v. Walsh Plumbing Co., 16 Utah 2d 249, 399 P.2d 141, 144 (1965). The district court's Memorandum Decision here was just such a disposition, explicitly dismissing Appellant's claim. "The Utah Supreme Court has recognized that an order is final where 'the effect of the order . . . was to determine substantial rights . . . and to terminate finally the litigation' . . . ." Harris v. IES Assocs., Inc., 2003 UT App 112,¶56, 69 P.3d 297 (first and second omissions in original) (citation omitted). The parties' substantive rights in this case were definitively and unequivocally determined by the Memorandum Decision; the decision's unambiguous language was clearly intended to end the litigation.

¶4 At the end of its signed Memorandum Decision, after setting forth its thorough legal analysis, the district court concluded: "For the reasons stated above, the Court dismisses Plaintiff's claim." No further order was invited or contemplated by the terms of the Memorandum Decision, nor is such even implied by the decision's language. Cf. State v. Leatherbury, 2003 UT 2,¶9, 65 P.3d 1180 ("[W]here further action is contemplated by the express language of the order, it cannot be a final determination susceptible of enforcement.") (emphasis added). Thus, Appellant had thirty days from the date the Memorandum Decision was entered--January 10, 2005--to file her notice of appeal. The notice was not filed, however, until March 8, 2005--long after the thirty-day period had ended. We therefore lack jurisdiction to hear this appeal. See Serrato v. Utah Transit Auth., 2000 UT App 299,¶7, 13 P.3d 616, cert. denied, 21 P.3d 218 (Utah 2001).

¶5 Appellant disagrees, arguing that the relevant date to determine timeliness of the appeal is February 25, 2005, the date the district court signed the order of dismissal that she eventually submitted. The subsequent order, however, did not restart the time for appeal because the order did not alter the substantive rights of the parties in any way; it did nothing more than reiterate the dismissal already fully effectuated by the Memorandum Decision.[1] See Foster v. Montgomery, 2003 UT App 405,¶18, 82 P.3d 191 ("Where a judgment is reentered, and the subsequent judgment does not alter the substantive rights affected by the first judgment, the time for appeal runs from the

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[1]The order, in its entirety, simply states: "This matter came before the Court on Defendant's Motion to Dismiss pursuant to Utah R. Civ. P. 12(b)(6). The Court having been fully apprised of this matter and having issued its Memorandum Decision dated 10 January 2005, and based there[on], the Court orders that Plaintiff's claims are dismissed with prejudice."

first judgment.") (internal quotations and citation omitted), cert. denied, 90 P.3d 1041 (Utah 2004).

¶6 Appellant additionally argues that the January 10 order was not final because further action was required by rule 7 of the Utah Rules of Civil Procedure, which provides that "the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision." Utah R. Civ. P. 7(f)(2). This, however, is simply the default rule that applies to those situations where responsibility for preparation of the court's order has not been "otherwise directed by the court."[2] Id. When the court issues its own Memorandum Decision, which explicitly and unambiguously dismisses the underlying claim without inviting submission of a further order, it leaves nothing more to be done. Such clear action by the trial court necessarily serves under rule 7(f)(2) as direction from the court that the prevailing party need not draft an order, and thus renders the Memorandum Decision final and appealable.

¶7 Accordingly, we dismiss for lack of jurisdiction.

_____
Gregory K. Orme, Judge

¶8 I CONCUR:

_____
Russell W. Bench,
Presiding Judge

McHUGH, Judge (concurring):

¶9 I concur in the main opinion. I write separately to address the possible confusion created by the conflict between the controlling precedent and the Utah Rules of Civil Procedure. The

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[2]Appellant's reliance on the plain language of rule 7 is paradoxical at best, as Appellant was not "the prevailing party" and did not submit her proposed order "within fifteen days after the court's decision." Utah R. Civ. P. 7(f)(2). Nor did the district court "direct[]" Appellant, rather than the prevailing party, to submit an order. Id.

cases from this court and the Utah Supreme Court that are cited by the majority hold that a decision of the trial court that fully determines the substantive rights of the parties is final for purposes of appeal absent express language to the contrary. See State v. Leatherbury, 2003 UT 2,¶9, 65 P.3d 1180; Harris v. IES Assocs., 2003 UT App 112,¶56, 69 P.3d 297.

¶10 However, rule 7(f) of the Utah Rules of Civil Procedure provides, in relevant part:

> (f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. . . .
>
> (f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

Utah R. Civ. P. 7(f)(1)-(2) (emphasis added).[1]

¶11 Thus, while the clear precedent from Utah appellate courts holds that a decision of the trial court is final for purposes of appeal unless the written decision expressly requires further action, see Leatherbury, 2003 UT 2 at ¶9; Harris, 2003 UT App 112 at ¶56, rule 7(f) contemplates that a subsequent order will be entered after every decision unless the court directs otherwise, see Utah R. Civ. P. 7(f). The presumption under the Utah Supreme

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[1]The substance of what is now rule 7(f) of the Utah Rules of Civil Procedure was previously contained in the Utah Code of Judicial Administration. See Utah R. Jud. Admin. 4-501 to 4-509 (noting that rule 4-504 was repealed effective November 1, 2003, and replaced with a comparable provision in the Utah Rules of Civil Procedure). Effective November 1, 2003, subpart (f) was added to rule 7 of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 7 & amendment notes (providing that the 2003 amendment, which added subpart (f), became effective November 1, 2003).

Court authority is in favor of finality, while the presumption in rule 7(f) is that a further order is required. Although the case law specifically addresses the issue of finality for purposes of appeal, while the rule is concerned with appropriate procedure, the interaction between the two can lead to confusion for practitioners.

¶12 The timely filing of a notice of appeal is jurisdictional. See Serrato v. Utah Transit Auth., 2000 UT App 299,¶7, 13 P.3d 616. Consequently, correctly assessing the time at which a decision becomes final for purposes of appeal is critical. Because the procedure set forth in rule 7(f) may lull practitioners into the mistaken belief that a decision of the trial court does not become final for purposes of appeal until an order is entered, clarity in the initial memorandum decision is essential. I believe the better practice for all concerned is for the decision to state expressly either that "no further order is necessary" or that the prevailing party "shall prepare an order implementing this court's decision."

¶13 I agree with the majority that the Memorandum Decision here completely resolved the substantive rights of the parties, dismissed the complaint, and did not expressly require any further action. Yet, I am sympathetic to the difficulty in assessing the proper moment when the decision becomes final for purposes of appeal when the trial court is silent on that issue.

_____

Carolyn B. McHugh, Judge