Agenda

Advisory Committee on Rules of Civil Procedure

March 25, 2015

4:00 to 6:00 p.m.

Scott M. Matheson Courthouse

450 South State Street

Judicial Council Room

Administrative Office of the Courts, Suite N31

Welcome and approval of minutes.	Tab 1	Jonathan Hafen
Consideration of comments to Rule 7.	Tab 2	Tim Shea
Rule 43. Evidence.	Tab 3	Tim Shea
Rule 63. Disability or disqualification of a judge.	Tab 4	Tim Shea
Rule 73. Attorney fees.	Tab 5	Tim Shea
Post-trial motions. Rules 50, 52, 59 and 60.	Tab 6	Frank Carney

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

Meeting Schedule:

April 22, 2015

May 27, 2015

September 23, 2015

October 28, 2015

November 18, 2015

Tab 1

Minutes

Advisory Committee on the Rules of Civil Procedure

February 25, 2015

Draft: Subject to change

Present: Sammi Anderson, John Baxter, Scott Bell, James Blanch, Evelyn Furse, Jonathan Hafen, Presiding, Steven Marsden, Terrie McIntosh, Amber Mettler, David Scofield, Todd Shaughnessy, Leslie Slaugh, Paul Stancil, Kate Toomey,

Excused: Lincoln Davies, Trystan Smith, Heather Sneddon, Barbara Townsend. Due to a failure of the telephone conferencing system, Lyle Anderson, Derek Pullan and Lori Woffinden were also excused.

Staff: Tim Shea

(1) APPROVAL OF MINUTES.

The minutes of January 28, 2015 were approved as prepared.

(2) CONFERENCE COMMITTEE TO CONSIDER EFFECT OF POST-TRIAL PROCEEDINGS ON APPEALABILITY OF A JUDGMENT.

Mr. Hafen reported that the Supreme Court has requested that this committee and the Committee on the Rules of Appellate Procedure form a conference committee to consider, in light of the federal rules, the effect of post-trial proceedings on the appealability of a judgment. Paul Burke and Alan Mouritsen from the appellate committee and Rod Andreason and Amber Mettler from this committee have agreed to serve. Mr. Shea will staff the conference committee.

(3) CONSIDERATION OF COMMENTS TO RULE 7, RULE 54, RULE 56 AND RULE 58A.

Mr. Shea reported that he had already made many of the grammar and style changes suggested by Mr. Whittaker.

Rule 7. The committee made the following further changes:

- ¶(b)(1): The commissioners follow Rule 37(a) on discovery disputes, so (b)(2), (b)(3) and (b)(4) are referenced as exceptions.
- ¶(c)(3), (d)(3) and (e)(3): Initial motions and memorandums are limited to 25 pages if the motion is for relief under Rules 12(b), 12(c), 56 or 65A. Otherwise, initial motions and memorandums are limited to 15 pages. Reply memos have 15- and 10-page limits, respectively. Judge Toomey and Judge Shaughnessy opposed the increase.
- ¶(f): Limit the response to 3 pages. After considerable discussion, the committee decided not to add a process for objecting to new evidence in the reply memo and responding to that objection.
- ¶(g): The text governing a request to submit for decision was simplified.
- ¶(i): Remove the phrase “without argument” and impose a one-page page limit. The further change is modeled after URAP 24(j).
- ¶(j)(6)(B): Add a motion that can be acted on without waiting for a response.
- ¶(j)(7): Add a motion that can be acted on without waiting for a response
- ¶(l): New. Add the requirements for a motion that can be acted on without waiting for a response. Develop a list of motions that qualify. Mr. Bell will submit some suggestions.
- ¶(k)(4) and (m)(4): Add requirement for a request to submit for decision, since the motion may not be routed to the judge without one.

After discussion the committee decided not to:

- remove the last two sentences of the committee note as suggested by Mr. Whitaker;
- add "petition" to the list of permitted pleadings as suggested by Mr. Richens.

Rule 54.

The committee decided not to recommend any further changes. Mr. Whittaker's observation that paragraphs (a) and (b) may contradict each other turned out, on further analysis, not to be the case. The committee would like the joint subcommittee of our committee and the appellate rules committee to consider a mechanism for including attorney fees, costs and interest in the judgment. The current paragraph (e) is appropriately deleted because the procedures described are not being followed. There is no intent to prohibit attorney fees, costs and interest from the judgment. The only intent is to remove an out dated mechanism.

Rule 56.

The committee decided not to recommend any further changes. Mr. Pattison argues that the option to deny a motion for summary judgment when facts are unavailable to the non-moving party is improper and not supported by current state law. The committee concluded that the proposed rule using the federal language ("defer considering the motion or deny it") is the equivalent of the current state rule ("the court may refuse the application for judgment or may order a continuance").

Rule 58A.

The committee decided not to recommend any further changes.

The committee approved Rule 54, 56 and 58A, and decided that they should not be submitted to the Supreme Court until Rule 7 is also ready.

(4) SMALL CLAIMS RULE 14. SETTLEMENT OFFERS.

The committee considered this proposal last year, but decided against it. Upon reconsideration the committee believes the proposal is too complex and therefore inappropriate for small claims proceedings. The committee again decided not to recommend the proposed rule.

(5) RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

Mr. Shea reported that the Supreme Court has asked the committee to reconsider its recommendations regarding service by fax and service by email without the prior agreement of the person being served. The committee continues to feel that service by fax is out dated, but agreed that the parties should be able to agree among themselves to a method of service other than those permitted by rule. The committee approved a new paragraph (b)(3)(G) allowing service by "any other method agreed to in writing by the parties."

The committee discussed whether to require the agreement of the person being served before service could be by email. After considering the alternatives, the committee continues to recommend that service by email be permitted without prior agreement. Email is simple, inexpensive and a common feature of everyday professional life. Although most attorneys would probably agree to service by email, the task of obtaining an agreement adds an unnecessary expense, and those who do not agree impose a significant cost on opposing counsel.

The committee approved the draft rule with the further change. Mr. Hafen will present the committee's recommendations to the Supreme Court.

(6) RULE 11. SIGNING OF PLEADINGS, MOTIONS, AFFIDAVITS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS.

The proposed amendment is a technical change to recognize the methods for filing an affidavit under Rule 5. The committee approved the rule for publication for comment.

(7) ADJOURN

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

Tab 2

Rule 7. Pleadings allowed; motions, memorandums, hearings, orders.

(a) Pleadings. Only these pleadings are allowed:

(a)(1) a complaint;

(a)(2) an answer to a complaint;

(a)(3) an answer to a counterclaim designated as a counterclaim;

(a)(4) an answer to a crossclaim;

(a)(5) a third-party complaint;

(a)(6) an answer to a third-party complaint; and

(a)(7) a reply to an answer if ordered by the court.

(b) Motions. A request for an order must be made by motion. The motion must be in writing unless made during a hearing or trial, must state the relief requested, and must state the grounds for the relief requested. Except for the following, a motion must be made in accordance with this rule.

(b)(1) A motion, other than a motion described in paragraphs (b)(2), (b)(3) or (b)(4), made in proceedings before a court commissioner must follow Rule 101.

(b)(2) A request under Rule 26 for extraordinary discovery must follow Rule 37(a).

(b)(3) A request under Rule 37 for a protective order or for an order compelling disclosure or discovery—but not a motion for sanctions—must follow Rule 37(a).

(b)(4) A request under Rule 45 to quash a subpoena must follow Rule 37(a).

(b)(5) A motion for summary judgment must follow the procedures of this rule as supplemented by the requirements of Rule 56.

(c) Name and content of motion.

(c)(1) The rules governing captions and other matters of form in pleadings apply to motions and other papers. The moving party must title the motion substantially as: “Motion [short phrase describing the relief requested].” The motion must include the supporting memorandum. The motion must include under appropriate headings and in the following order:

(c)(1)(A) a concise statement of the relief requested and the grounds for the relief requested; and

(c)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party and argument citing authority for the relief requested.

(c)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the motion.

(c)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the motion may not exceed 25 pages, not counting the attachments, unless a longer motion is permitted by the court. Other motions may not exceed 15 pages, not counting the attachments, unless a longer motion is permitted by the court.

(d) Name and content of memorandum opposing the motion.

(d)(1) A nonmoving party may file a memorandum opposing the motion within 14 days after the motion is filed. The nonmoving party must title the memorandum substantially as: "Memorandum opposing motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(d)(1)(A) a concise statement of the party's preferred disposition of the motion and the grounds supporting that disposition;

(d)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the nonmoving party and argument citing authority for that disposition; and

(d)(1)(C) objections to evidence in the motion, citing authority for the objection.

(d)(2) If the non-moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(d)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the memorandum opposing the motion may not exceed 25 pages, not counting the attachments, unless a longer memorandum is permitted by the court. Other memorandums may not exceed 15 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

(e) Name and content of reply memorandum.

(e)(1) Within 7 days after the memorandum opposing the motion is filed, the moving party may file a reply memorandum, which must be limited to rebuttal of new matters raised in the memorandum opposing the motion. The moving party must title the memorandum substantially as "Reply memorandum supporting the motion [short phrase describing the relief requested]." The memorandum must include under appropriate headings and in the following order:

(e)(1)(A) a concise statement of the new matter raised in the memorandum opposing the motion;

(e)(1)(B) one or more sections that include a concise statement of the relevant facts claimed by the moving party not previously set forth that respond to the opposing party's statement of facts and argument citing authority rebutting the new matter;

(e)(1)(C) objections to evidence in the memorandum opposing the motion, citing authority for the objection; and

(e)(1)(D) response to objections made in the memorandum opposing the motion, citing authority for the response.

(e)(2) If the moving party cites documents, interrogatory answers, deposition testimony, or other discovery materials, relevant portions of those materials must be attached to or submitted with the memorandum.

(e)(3) If the motion is for relief authorized by Rule 12(b) or 12(c), Rule 56 or Rule 65A, the reply memorandum may not exceed 15 pages, not counting the attachments, unless a longer

memorandum is permitted by the court. Other reply memorandums may not exceed 10 pages, not counting the attachments, unless a longer memorandum is permitted by the court.

(f) Response to objections in the reply memorandum. If the reply memorandum includes an objection to evidence, the nonmoving party may file a response to the objection no later than 7 days after the reply memorandum is filed. The response may not exceed 3 pages.

(g) Request to submit for decision. When briefing is complete or the time for briefing has expired, either party may file a "Request to Submit for Decision, but, if no party files a request, the motion will not be submitted for decision. The request to submit for decision must state the date on which the motion was filed, the date the memorandum opposing the motion, if any, was filed, the date the reply memorandum, if any, was filed, and whether a hearing has been requested.

(h) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing must be separately identified in the caption of the document containing the request. The court must grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(i) Notice of supplemental authority. A party may file notice of citation to significant authority that comes to the party's attention after the party's motion or memorandum has been filed or after oral argument but before decision. The notice may not exceed 1 page. The notice must state the citation to the authority, the page of the motion or memorandum or the point orally argued to which the authority applies, and the reason the authority is relevant. Any other party may promptly file a response, but the court may act on the motion without a response. The response may not exceed 1 page.

(j) Orders.

(j)(1) Decision complete when signed; entered when recorded. However designated, the court's decision on a motion is complete when signed by the judge. The decision is entered when recorded in the docket.

(j)(2) Preparing and serving a proposed order. Within 14 days of being directed by the court to prepare a proposed order confirming the court's decision, a party must serve the proposed order on the other parties for review and approval as to form. If the party directed to prepare a proposed order fails to timely serve the order, any other party may prepare a proposed order confirming the court's decision and serve the proposed order on the other parties for review and approval as to form.

(j)(3) Effect of approval as to form. A party's approval as to form of a proposed order certifies that the proposed order accurately reflects the court's decision. Approval as to form does not waive objections to the substance of the order.

(j)(4) Objecting to a proposed order. A party may object to the form of the proposed order by filing an objection within 7 days after the order is served.

(j)(5) Filing proposed order. The party preparing a proposed order must file it:

(j)(5)(A) after all other parties have approved the form of the order (The party preparing the proposed order must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.);

(j)(5)(B) after the time to object to the form of the order has expired (The party preparing the proposed order must also file a certificate of service of the proposed order.); or

(j)(5)(C) within 7 days after a party has objected to the form of the order (The party preparing the proposed order may also file a response to the objection.).

(j)(6) Proposed order before decision prohibited; exceptions. A party may not file a proposed order concurrently with a motion or a memorandum or a request to submit for decision, but a proposed order must be filed with:

(j)(6)(A) a stipulated motion;

(j)(6)(B) a motion that can be acted on without waiting for a response;

(j)(6)(C) an ex parte motion;

(j)(6)(D) a statement of discovery issues under Rule 37(b); and

(j)(6)(E) the request to submit for decision a motion in which a memorandum opposing the motion has not been filed.

(j)(7) Orders entered without a response; ex parte orders. An order entered on a motion under paragraph (l) or (m) can be vacated or modified by the judge who made it with or without notice.

(j)(8) Order to pay money. An order to pay money can be enforced in the same manner as if it were a judgment.

(k) Stipulated motions. A party seeking relief that has been agreed to by the other parties may file a stipulated motion which must:

(k)(1) be titled substantially as: "Stipulated motion [short phrase describing the relief requested];

(k)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(k)(3) include a signed stipulation in or attached to the motion and;

(k)(4) be accompanied by a request to submit for decision a proposed order that has been approved by the other parties.

(l) Motions that may be acted on without waiting for a response.

(l)(1) The court may act on the following motions without waiting for a response:

(l)(1)(A) motion to permit an over-length motion or memorandum;

(l)(1)(B) motion for an extension of time if filed before the expiration of time;

(l)(1)(C) motion to appear pro hac vice; and

(l)(1)(E) other procedural motions.

(l)(2) A motion that can be acted on without waiting for a response must:

(l)(2)(A) be titled as a regular motion;

(l)(2)(B) include a concise statement of the relief requested and the grounds for the relief requested;

(l)(2)(C) cite the statute or rule authorizing the motion to be acted on without waiting for a reply; and

(l)(2)(D) be accompanied by a request to submit for decision and a proposed order.

(m) Ex parte motions. If a statute or rule permits a motion to be filed without serving the motion on the other parties, the party seeking relief may file an ex parte motion which must:

(m)(1) be titled substantially as: "Ex parte motion [short phrase describing the relief requested];

(m)(2) include a concise statement of the relief requested and the grounds for the relief requested;

(m)(3) cite the statute or rule authorizing the ex parte motion;

(m)(4) be accompanied by a request to submit for decision and a proposed order.

(n) Motion in opposing memorandum or reply memorandum prohibited. A party may not make a motion in a memorandum opposing a motion or in a reply memorandum. A party who objects to evidence in another party's motion or memorandum may not move to strike that evidence. The proper procedure is to include in the subsequent memorandum an objection to the evidence.

(o) Over-length motion or memorandum. The court may permit a party to file an over-length motion or memorandum upon a showing of good cause. The court may act on the motion without waiting for a response. An over-length motion or memorandum must include a table of contents and a table of authorities with page references.

(p) Limited statement of facts and authority. No statement of facts and legal authorities beyond the concise statement of the relief requested and the grounds for the relief requested required in paragraph (c) is required for the following motions:

(p)(1) motion to allow an over-length motion or memorandum;

(p)(2) motion to extend the time to perform an act, if the motion is filed before the time to perform the act has expired;

(p)(3) motion to continue a hearing;

(p)(4) motion to appoint a guardian ad litem;

(p)(5) motion to substitute parties;

(p)(6) motion to refer the action to or withdraw it from alternative dispute resolution under Rule 4-510.05;

(p)(7) motion for a conference under Rule 16; and

(p)(8) motion to approve a stipulation of the parties.

Advisory Committee Notes [Add to existing notes]

The 2015 changes to Rule 7 repeal and reenact the rule. Many of the provisions from the former Rule 7 are preserved in the 2015 version, but there are many changes as well. The committee's intent is to

bring more regularity to motion practice. Some of these features are found in Rule 7-1 of the U.S. District Court for the District of Utah:

- integrate the memorandum supporting a motion with the motion itself;
- describe more uniform motion titles;
- describe more uniform content in the memoranda;
- regulate the process for citing supplemental authority;
- prohibit proposed orders before a decision, except for specified motions;
- move the special requirements for a motion for summary judgment to Rule 56;
- allow a limited statement of facts for specified motions;
- require an objection to evidence, rather than a motion to strike evidence; and
- require a counter-motion rather than a motion in the opposing memorandum.

In *Central Utah Water Conservancy District v. King*, 2013 UT 13 ¶27; the Supreme Court directed the committee to address the problem of undue delay when the parties fail to comply with former Rule 7(f)(2). A major objective of the 2015 amendments is to continue the policy of clear expectations of the parties established in:

- *Butler v. Corporation of The President of The Church of Jesus Christ of Latter-Day Saints*, 2014 UT 41
- *Central Utah Water Conservancy District v. King*, 2013 UT 13;
- *Giusti v. Sterling Wentworth Corp.*, 2009 UT 2;
- *Houghton v. Dep't of Health*, 2008 UT 86; and
- *Code v. Dep't of Health*, 2007 UT 43.

However, the 2015 amendments do so in a manner simpler than the "magic words" required under the former Rule 7(f)(2).

In these cases, the Supreme Court established a policy favoring a clear indication of whether a further document would be required from the parties after a judge's decision. The parties should not be required to guess what, if anything, should come next.

There were three ways to meet the test: a proposed order was submitted with the supporting or opposing memorandum; an order was prepared at the direction of the judge; the decision included an express indication that a further order was not required. The 2015 amendments remove a proposed order from the process in most circumstances. The trend under the former rule was to include in every order an indication that nothing further was required even when the order expressly directed a party to prepare a further order. Or orders were being prepared in some manner other than as described in the rule, yet the order did not expressly state than nothing further was required. The order technically was not complete, but everyone proceeded as if it were.

The 2015 amendments continue the policy of a bright-line test for a completed decision but do not rely on conditions that might or might not be met. The one condition that can be counted on is the judge's signature. Under the former rule, a completed decision was imposed by operation of law when the order

was prepared in one of the recognized ways. The 2015 rule imposes a completed decision by operation of law when the document memorializing the decision is signed. Under the former rule, the judge's silence meant that something further was required, unless the order was prepared in one of the ways described in Rule 7. The presumption in the 2015 amendments is the opposite: silence means that nothing further is required from the parties. Judges can expressly require an order confirming a decision if one is needed in a particular case.

The committee recognizes the many different forms a judge's decision might take. The committee discussed defining "order," but decided against the attempt. There are too many variations. If written, the document might be titled "order," "ruling," "opinion," "decision," "memorandum decision," etc. The decision might not be written; an oral directive is an order. A clerk's minute entry of an oral decision is, when signed by the judge, treated the same as a written order. The committee decided instead to modify a phrase of long standing from Rule 54(b)—"a decision, however designated"—in this rule and in Rule 58A. In this rule, however a judge's decision may be designated, that decision is complete when the judge signs the document memorializing the decision. Whether there is a right to appeal is determined by whether the decision—or subsequent order confirming the decision—is a judgment. That analysis is governed by Rule 54. When the judgment is entered is governed by Rule 58A. If the order is not a judgment, the time in which to petition for permission to appeal under Rule of Appellate Procedure 5 is calculated from the date on which an order confirming an earlier decision is entered, but only if the judge directs that a confirming order be prepared. If the judge does not direct that a confirming order be prepared, the time is calculated from the date on which the decision, however designated, is entered.

COMMENTS TO RULE 7

~~Line 6: hyphenate "cross-claim"~~

~~Lines 7-8: Hyphenate "third-party"~~

~~Line 7: Missing a semicolon at the end of the line~~

~~Line 9: Change "permitted" to "ordered," as a request to file a reply is nearly always made by the Defendant. See 5 Wright & Miller, Federal Practice & Procedure § 1185 (noting that while "theoretically it is permissible for the plaintiff to request the court for leave to reply on his or her own behalf," it is normally "the defendant who will seek to compel the plaintiff to reply to the answer").~~

~~Lines 10-12: consider deleting the comma between "writing" and "unless" as it divides the first condition in two and isn't necessary to clarify the meaning of the sentence.~~

Line 13: Consider replacing the final period with a colon so that it's clearer that "the following" refers to (b)(1)-(5).

Lines 14-15: It is my understanding that court commissioners currently follow the procedures of UCJA 4-502 rather than Rule 101 with respect to discovery motions. Perhaps this should be made clear either here or in the notes to Rule 37 or 101.

~~Lines 17, 20, & 22: Delete "statement of"~~

Lines 21-22: Delete, as a motion to quash a subpoena is a motion for protective order (as made clear by the notes to Rule 45).

Lines 16-20: Consider consolidating these, for example: "A request under Rule 26 for extraordinary discovery and a request under Rule 37 for a protective order or for an order compelling disclosure or discovery must follow the expedited discovery procedures of Rule 37(a)."

~~Line 24: delete comma between "rule" and "supplemented" and replace with "as."~~

Line 25: replace with "(c) Written motion" or "(c) Briefing of motion" or "(c) Filing of motion."

Lines 26-27: Delete "The rules governing captions and other matters of form in pleadings apply to motions and other papers" as it is redundant with Rule 10(a)(1) ("All pleadings and other papers filed with the court must contain a caption…").

Lines 29-30: delete "which shall include the supporting memorandum" as it is redundant with the requirements of (c)(1)(A)-(B).

Lines 30 & 46: replace "may not" to "must not"

~~Lines 31, 46, 66: Replace "the appendix" with "exhibits"~~ ("attachments")

Line 41: replace with "(d) Response"

Lines 42, 60 & 62: replace "memorandum opposing" with "response to"

Line 44: replace with "response substantially as: "Response to motion [short"

Lines 47 & 58: replace "memorandum" with "response"

Line 59: Replace with "(e) Reply."

Lines 61, 64: delete "memorandum"

Lines 65, 66, 79 replace "memorandum" with "reply"

~~Lines 80-83: what about objections to evidence cited in the reply memorandum & responses to those objections? Also, does an objection to evidence in the reply affect the completeness of the briefing for purposes of filing a Request to Submit?~~

Line 84: consider adding “Except for those papers described in (c)-(f) and (i) of this rule, a paper addressing the motion must not be filed unless permitted by the court.” Also consider addressing when briefing is complete.

Lines 91-93: Consider adding “or by filing a written request for hearing within 3 days of filing the request to submit.” Currently, the rule reads as though a separate request for hearing is not allowed.

Line 109: Consider moving “however designated” between “motion” and “is complete”

Line 110: consider adding “it is complete and” between “when” and “recorded” to remove any possible confusion that an unsigned minute entry recorded in the docket is “entered.”

~~Line 112: change “shall” to “must”~~

~~Lines 127, 131, 135: move semicolons and period to end of parentheses—see Chicago Manual of Style 6.103 (advising that an opening parenthesis should be preceded by a semicolon only if it is a number marker such as (a) or (1), and that a period follows the closing parenthesis if the material in parentheses is part of the sentence outside of the parentheses).~~

Lines 138-39: consider deleting “except as follows” and changing “decision. A” to “decision, but a”

Line 146: replace “memorandum opposing” with “response to”

Line 150: consider changing “can be enforced” to “is enforceable”

Line 161-62: consider changing “a motion to be filed without serving the motion on the other parties” to “a motion to be granted without awaiting the response of other parties”

Lines 170-75: consider moving the first sentence into (c)(3) and replace “memorandum opposing a motion or in a reply memorandum” with "response or reply.” Consider moving the second and third sentences to the notes, as the proper procedure is laid out in (d)(1)(C), (e)(1)(C), and (f).

Lines 176-79: Consider setting a number of pages rather than requiring all memoranda—a 10-page reply does not need tables of contents and authorities if a 15-page memorandum in opposition does not. Perhaps insert “exceeding 15 pages” between “memorandum" and “must”

Lines 180-193: consider deleting entirely, as it seems likely that the appropriate amount of detail will be provided in these motions with or without this provision. Alternatively, consider moving into (c) as (c)(3) or (4).

Lines 267-270: I’m not sure this squares with the language of (j)(1)—the rule does not state that the decision is not final if the judge signs a decision that calls for a further order to be prepared. This may lead to confusion as demonstrated by Merchant v. Gray, 2007 WY 208, ¶¶ 5-10, 173 P.3d 410 (Wyo. 2007) (holding that an order that resolved the issues in the case was a final order notwithstanding the judge’s direction in the order for a separate judgment to be prepared). It may be wise to state the exception in (j)(1).

Line 272: Consider adding an explanation to the effect of “if a decision is announced but not signed by the judge and no party is directed to prepare an order, the prevailing party or any party interested in finality may prepare an order.”

Nathan Whittaker

The prohibition in Rule 7(m) against a separate motion to strike evidence does not take into account the fact that frequently supporting affidavits and other evidentiary material are voluminous or otherwise raise numerous issues which require a separate motion to strike to properly address. In such cases, there is simply not enough space in 15 pages to present the facts and procedural history, both argue the facts and law, and then also argue whether the alleged facts are admissible or otherwise implicate other evidentiary issues.

And I second the comment which stated that the facts section of a memorandum should not be included in the page count --whether that page count be 10 or 15 pages.

We hear the repeated refrain from Utah appellate decisions that a party has waived any objection to an affidavit because no motion to strike was made. So long as the appellate courts are going to deem issues not raised at the trial level waived, prohibiting a separate motion to strike hobbles the ability of a party to effectively address the issues raised by an opponent's evidentiary submissions and effectively invites a party to engage in sandbagging in presenting evidence.

Restated, a party will know that they can through the clever use of evidence supporting a motion put the opposing party in the position of having to argue the facts and the law or argue that the facts are not admissible, and forego any substantial legal argument on the merits. This is not an improvement.

And when considered in light of the 2011 amendments, which severely constrain written discovery in Tier I cases and limit a party to a 3 hour deposition, the concerns recited above about limiting the ability of a party to contest the other party's evidence become even more critical.

Case in Tier II or III will have the luxury of interrogatories, lengthier document requests and much more generous deposition time to inquire into the merits of the other party's evidentiary assertions. But cases in Tier I, which are dominated by working people defending against debt collectors who all too frequently are making unfounded claims, or working people who have been ripped off by a dishonest car dealer, will find it even more difficult to defend or prosecute these cases.

To a person making $12 or $20 or $30 an hour a $10,000 claim can be every bit as life changing as a $500,000 claim can be to a person with an income well into the six figures. We should not move toward the English system where litigation in the courts is (like polo), for the most part, the province of the upper class.

Article I, Section 11 of the Utah Constitution states that the courthouse door is open to be open to everyone. The presumption that in civil cases the dollar value of a claim should be the dominant factor in deciding how much process is due a person runs afoul of the fundamental principles of the Utah Constitution.

In that light, prohibiting separate motions to strike is another step in unduly constraining access to the courthouse by those who are too often the subject of deceptive practices by interests with much greater financial means.

Posted by Ronald Ady January 16, 2015 05:05 PM

~~The page limitations in rule 7 (R. 7(c)(1), (d)(1), & (e)(1)) refer to "the appendix," but nowhere is "the appendix" defined. What is to be included in "the appendix"? any exhibits to the motion or memorandum?~~

The page limitations in the current rule (10 pages for initial memoranda and 5 pages for reply memos) apply only to the argument and not to any introduction, statement of issues, statement of facts, or the conclusion. We would like to see the current page limitations stay the same. The statement of facts can be the longest part of the brief, particularly for summary judgment motions. If the statement of facts exceeds 5 pages (which will often be the case), the party will have less than 10 pages to make its argument and set out the relevant legal authority. This is especially true under the proposed rule because the motion and memorandum, which previously were two separate documents, are now combined, so the motion takes away from the page limit for the memorandum. We think changing the page limitations as proposed will result in many more motions for over-length motions and memos.

~~The provision for reply memoranda says that the reply memo should include "one or more sections that include a concise statement of the relevant facts claimed by the moving party and argument citing authority rebutting the new matter." R. 7(e)(1)(B). The moving party's statement of facts is supposed to be included in the moving papers. R. 7(c)(1)(B). We don't see any reason to include it again in the reply memo. Doing so would only reduce further the 5 available pages. We think what was probably intended~~

here was any relevant facts not previously set out, that is, facts that respond to the opposing party's statement of facts. But that is not clear from the way the proposed rule is currently drafted.

The proposed rule follows the federal local rule by doing away with motions to strike evidence. It allows the opposing party to object to evidence in the moving party's moving papers (R. 7(d)(1)(C)), and allows the moving party to object to evidence in the opposing party's opposition (R. 7(e)(1)(C)). It also allows the nonmoving party to file a response to an objection made in a reply memo. R. 7(f). But there is no provision for the nonmoving party to object to new evidence that the moving party may present for the first time in the reply memo, and proposed rule 7(e)(2) contemplates such evidence. Without such a provision, the moving party can rely on new, inadmissible evidence in its reply memorandum, and there is no way for the nonmovant to challenge the evidence, since proposed rule 7(m) does away with motions to strike evidence in a motion or memorandum.

Presumably, objections to evidence in a memorandum are included in the page limit for the memo. If so, that also counsels in favor of more generous page limitations. The whole 5 pages of a reply memo could easily be taken up with objections to the non-moving party's evidence and responses to the non-moving party's objections to the movant's evidence.

Utah Association for Justice

By Edward B. Havas and Paul M. Simmons

Posted by Utah Association for Justice, by Ed Havas and Paul Simmons January 16, 2015 02:03 PM

Rule 7(j)(2):

The first sentence says that "a party shall within 14 days prepare a proposed order confirming the court's decision...." As written, it is unclear what the triggering event is for the 14-day deadline. To avoid confusion, we request that the Court amend the Rule to explicitly state the triggering event. For example, if the triggering event is the entry of the court's decision, the Rule would be amended to say that "a party shall within 14 days of the entry of the court's decision prepare a proposed order confirming the decision...."

Posted by Victoria Katz January 12, 2015 10:37 AM

Many statutes state a case needs to be filed with a petition. The Rule 7 change seems to mandate only a complaint. Will labeling an initial pleading a Petition be allowed?

Posted by Waine Riches December 17, 2014 03:37 PM

The 15 page limitation should not include the fact section. the current rule only counts the argument section and this should be continued. Often times the fact section takes up a significant number of pages which then hinders the ability to present the argument.

Posted by David A Van Dyke December 11, 2014 09:59 AM

Rule 7 has been changed so that the trigger for the time to reply to a motion is the filing of that motion, rather than the service of the motion. As it stands the court's e-filing system is not programmed to notify the parties of a paper filing at the courthouse from a pro se party. If the pro se party neglects to timely serve a copy of the paper, the other party (whether represented or pro se) may be at a time disadvantage if/when that party gets notice of the filing. It may be wise to delay this particular change until the courts can resolve this technical issue.

Posted by Chip Shaner December 10, 2014 03:21 PM

Rule 7(j)(5)(A)

It doesn't seem wise to allow approval as to form in person or on the phone as there is nothing in writing to confirm it.

Posted by Justin Caplin December 10, 2014 12:32 PM

Comments to proposed Rule 7:

1. Thank you for combining the motion and memorandum in one document. This change should eliminate waste and streamline the motion process.

2. Rule 7(b) – and by extension Rule 37(a) and Rules of Judicial Administration Rule 4-502. I recommend you include in the 7(b) list a discovery statement pursuant to Rules of Judicial Administration Rule 4-502. Of course, that raises the separate issue of what is a Rule 40592 discovery statement? Is it a motion at all? It is a "request for an order" as referenced in Rule 7(b). Perhaps this might be a good time to also address the difference between a 4-502 discovery statement and a Rule 37 motion.

3. Rule 7(c). I believe it's good to get away from the current rule's "10 pages of argument" formulation, which resulted in sometimes endless amounts of so-called non-argument. But I wonder if the 15 page total swings the pendulum too far the other way. It is a burden on parties and courts to request additional pages and often a court does not rule on the request before the deadline to file the document. Federal local rule DUCivR 7-1(3) allows a bit more flexibility with different types of motions and by excluding certain items from the page count. You may want to consider adopting language from DUCivR 7-1(3). On one hand, it would add complexity to the rule, but on the other, it would help reinforce that motions should follow a distinct pattern of sections. Also, allowing additional pages for Rule 12 and 56 motions should eliminate a foreseeable wave of ex parte motions for over-length briefs under proposed Rule 7(n).

4. Rule 7(e). The 5 page limitation on a reply brief seems excessively tight if a moving party is required to include in those pages a full response to facts contained in the opposition memorandum. I believe the "5 pages of argument" in the reply formulation was more difficult to abuse than the "10 pages of argument" formulation with original memoranda. Please do not require parties to respond to both facts and legal arguments in only 5 pages. Please increase this to 10 pages or exclude from the 5 page limitation a moving party's response to fact sections.

5. Rule 7(f). While you place a 5 page limit on a reply brief, there is apparently no size limitation whatsoever on the non-moving party's response to objections in the reply. Rule 7(f) should adopt the size limitations of Rule 7(e).

6. Rule 7(g). I recommend striking "and the moving party must" from the first sentence. It has always baffled me why the rule requires the moving party to file a request to submit for decision (RTS), even if the non-moving party files an RTS. What if following briefing the moving party elects to no longer pursue the motion? The final sentence of the subsection contemplates non-compliance by stating that "if no party files a request, the motion will not be submitted for decision." If this is the consequence, why even mandate the moving party to file a RTS in the first place? Federal local rule DICivR7-3 has a more rational formulation of the rule that does not mandate either party to file a RTS.

7. Rule 7(i). The last sentence of this rule states that "the response must comply with this paragraph." But what in the paragraph is the response to comply with? The instructions do not have a page limit. Is the response also required to cite to page numbers in the motion or memo? If so, that seems strange. It seems the response should succinctly address items in the notice of supplemental authority.

8. Rule 7(j)(1). From the Advisory Comm. Notes, I see you contemplated how to address this, but I'm still confused by what it means if a court rules on a motion from the bench but there is no signature.

I'm sometimes left wondering what it means to have a signature at all. I've seen decisions recorded in the docket (i.e., visible on XChange) but does that constitute a judge's signature? Is it possible to have a decision that is entered for years without a completed decision? In other words, can the second sentence of this subsection apply independent of the first sentence?

9. Rule 7(j)5)(A). How is the party supposed to indicate the means by which approval was received? Should this be a notation next to an e-signature? Or if another person provides a signature by fax, is the party supposed to interlineate on that document before filing that it was received by fax? I am assuming this refers to the practice of placing information next to an /s/ e-signature. If so, I recommend some guidance in the rules for how authority to sign e-signatures for others should be documented.

10. Rule 7(j)(5)(B). Is the party that circulates the proposed order supposed to file the certificate of service at the time of service, or only in the event that a party objects to the proposed order?

11. Rule 7(j)(6)(c). The current version of Rule 37(b) does not appear to be an expedited statement of discovery issues. Did you describe this citation to 37(b) correctly?

Posted by Victor Sipos December 2, 2014 05:46 PM

~~For Rule 7, line 123, I suggest saying "within 7 days after the PROPOSED order . . . ." That would avoid confusion as to whether the objection deadline extends to after the court signs the order.~~

~~For Rule 7, line 217, there is an extra "of the" that needs to be deleted.~~

Posted by Wayne Klein December 2, 2014 08:28 AM

The language in Rule 7(e)(1) which limits reply memoranda "to rebuttal of new matters raised in the memorandum opposing the motion" is confusing. Presumably a memorandum in opposition will address the arguments presented in an opening memorandum, and a reply is allowed to respond to those arguments. What are "new matters" as contemplated by the Rule? Is the rule meant to limit reply memoranda unless a memorandum in opposition raises some "new" argument not raised in the opening memorandum? If this is the intent of the Rule, and it seems to be, it will eliminate an opportunity for the moving party to distill the issues for the reviewing court, which I think is a bad idea.

Posted by Robert Keller December 1, 2014 11:13 AM

~~It is not clear what the appendix is. Is it the exhibits attached to the motion?~~ Also, the rule allows parties to rebut facts or object to evidence in the motion or opposition. It is unclear to me whether these sections count against the page limit. I don't think it should count against the page limit allowed for argument. If a party has a lengthy statement of facts the entire page limit will be reached just responding to the facts. Or if a party attaches many exhibits, the entire page limit will be reached simply objecting to the evidence. It seems to me there will be a lot of requests for over-length memoranda.

The federal rule (DUCivR 7-1(a)(3)) is more clear on what is counted against the page limit. If the intent is to bring motion practice in conformity with the federal rule, language mirroring that rule regarding page limitations would make more sense to me than a vague reference to "the appendix."

Posted by Daniel Young December 1, 2014 10:30 AM

Page Limitation on Motions: Proposed Rules 7(c), (d).

Changing the page limitation from 10 pages of argument to 15 pages total, "not counting the appendix," is overly restrictive and impairs the ability to effectively present and brief issues to trial courts. I don't know what the appendix is, but from the wording everything counts against the page limitation: including case caption, introduction, fact statement/background, argument, and conclusion. Moreover,

now that the motion and memo are collapsed in the same document (an otherwise welcome change) the rule is not leaving enough pages to effectively brief motions to the trial court. This is particularly true for dispositive motions which often require the recitation of numerous facts or allegations, e.g., summary judgment or motions to dismiss.

An additional problem with this change is that evidentiary objections and issues must now be placed in the body of the motion and not a separate motion to strike. See Utah R. Civ. P. 7(d)(1)(C) (proposed). This will restrict the ability to adequately address evidentiary issues and cut into precious space needed for the merits.

It would make more sense to simply follow the local federal rule on motion practice and limit all motions to 10 pages "exclusive of any of the following items: face sheet, table of contents, statement of precise relief sought and grounds for relief, concise introduction and/or background section, statements of issues and facts, and exhibits." DUCivR 7-1(a)(3).

Adopting the rule as proposed will make ex parte applications for over-length memoranda the rule rather than the exception.

Reply Memoranda Page Limitation: Proposed Rule 7(e):

For the same reasons, the 5 page limit for reply memoranda is not sufficient. Many times you are forced to spend several pages of the reply cleaning up inaccuracies and addressing alleged fact disputes put forward by the non-moving party. Counting this against the page limitation would deprive attorneys of the opportunity to set the record straight and reward shotgun oppositions. Additionally, if the opposition memorandum is stuffed with evidentiary problems, it will force attorneys to spend precious space addressing those problems. See Utah R. Civ. P. 7(d)(1)(C) (proposed). Again, I think the answer is to follow the federal local rule for reply memoranda: 5 pages "exclusive of any of the following items: face sheet, table of contents, concise introduction, statements of issues and facts, table of exhibits, and exhibits." DUCivR 7-1(b)(2).

Motions to Strike/Objections: Proposed Rule 7(m)

~~Under proposed Rule 7(m), objections to evidentiary issues may only be raised in a "subsequent memorandum." As a result, there is no procedure for addressing evidentiary issues when you do not get a subsequent memorandum – i.e., you are the opposing party without the last word. For example, on summary judgment a party may put additional facts and evidence in a reply if the new evidence is for rebuttal. See Clegg v. Wasatch County, 2010 UT 5, ¶ 31, 227 P.3d 1243; see also Utah R. Civ. P. 7(e)(2) (proposed) (authorizing submission of discovery materials with a reply memorandum). If this new evidence is not admissible, the rule is unclear on the remedy. There is no subsequent memorandum for the opposing party. Without the availability of a motion to strike, and the "motion" being the only method to get a request in front of the trial court, see Utah R. Civ. P. 7(b) (proposed), it appears that the opposing party is in a no-man's land in getting the issue before the court other than raising it orally for the first time at a hearing – a risky proposition.~~

Also, the rule should be clear that the limitation in Rule 7(m) relates to evidentiary issues and does not prohibit motions to strike for procedural deficiencies. For example, if a party includes in its reply memorandum new arguments, the remedy is a motion to strike the reply. See Stevens v. LaVerkin City, 2008 UT App 129, ¶¶ 30-31, 183 P.3d 1059 (explaining that party should file a motion to strike new argument in a reply); UPC, Inc. v. ROA General, Inc., 1999 UT App 303, ¶ 63, 990 P.2d 945 (affirming trial court's grant of motion to strike reply memorandum containing new argument). I assume the committee did not intend to end this practice. Perhaps clarification somewhere else in the rule would be helpful, for example a sentence after the first sentence in subsection 7(e)(1) that "If the reply raises new arguments and issues the opposing party may move to strike those new arguments and issues."

Bryan J. Pattison | Attorney at Law

Durham Jones & Pinegar, P.C.

Tab 3

Rule 43. Evidence.

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

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

Advisory Committee Note

Federal Rule of Civil Procedure 43 has permitted testimony by contemporaneous transmission since 1996. State court judges have been conducting telephone conferences for many decades. These range from simple scheduling conferences to resolution of discovery disputes to status conferences to pretrial conferences. These conferences tend not to involve testimony, although judges sometimes permit testimony by telephone or more recently by video conference with the consent of the parties. The 2015 amendments are part of a coordinated effort by the Supreme Court and the Judicial Council to authorize a convenient practice that is more frequently needed in an increasingly connected society and to bring a level of quality to that practice suitable for a court record.

This rule, which grants the judge the discretion to permit testimony by contemporaneous transmission, must be read in conjunction with Code of Judicial Administration Rule 4-106, which establishes the standards for contemporaneous transmission. That rule is drafted with the principles that all participants, whether in the courtroom or in another location, are able to see and hear each other; the public is able to see and hear all participants; a lawyer and client are able to communicate confidentially; and there is a verbatim record of the hearing. The technology will be digital cameras, high definition monitors and audio distributed through the courtroom public address system. Participants should not have to huddle around a speakerphone or laptop computer.

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

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

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

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

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

Tab 4

Timothy M. Shea
Appellate Court Administrator

Andrea R. Martinez
Clerk of Court

Supreme Court of Utah
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March 19, 2015

To: Civil Rules Committee
From: Tim Shea
Re: Rule 63

There have been three requests to amend Rule 63.

First, the rule needs to be amended to remove any doubt about whether a response to a motion to disqualify a judge is permitted. This amendment is found on line 25. I have included in line 10 a requirement for a request to submit for decision because it is frequently mentioned that motions are not submitted without one, but this is contrary to URCrP 29(c)(1)(D).

Second, it has been observed that a person should not be precluded from filing a second motion to disqualify a judge if the grounds on which the motion is based did not exist at the time of the first motion. This amendment is found on lines 21 – 22.

Finally, David Scofield has asked the committee to consider whether Rule 63 should include the grounds for disqualification found in 28 U.S.C. 455. I have attached the federal statute, and I have proposed amendments on lines 37 – 53 that are intended to incorporate the federal grounds. The statute is very poorly worded—indeed, paragraph (b)(4) seems to be wholly contained within the scope of paragraph (b)(5)(iii)—and I have tried to include the substantive provisions in simpler text. But even this is a rather tortured construction.

Rule 63. Disability or disqualification of a judge.

(a) Substitute judge; Prior testimony. If the judge to whom an action has been assigned is unable to perform their duties ~~required of the court under these rules~~, then any other judge of that district or any judge assigned pursuant to Judicial Council rule is authorized to perform those duties. The judge to whom the case is reassigned may ~~in the exercise of discretion~~ rehear the evidence or some part of it.

(b) ~~Disqualification~~ Motion to disqualify; affidavit.

~~(b)(1)(A)~~ (b)(1) A party to ~~any~~ an action or the party's attorney may file a motion to disqualify a judge. The motion ~~shall~~ must be accompanied by a certificate that the motion is filed in good faith and ~~shall~~ must be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest. The motion must also be accompanied by a request to submit for decision.

~~(b)(1)(B)~~ (b)(2)) The motion ~~shall~~ must be filed after commencement of the action, but not later than 21 days after the last of the following:

~~(b)(1)(B)(i)~~ (b)(2)(A) assignment of the action or hearing to the judge;

~~(b)(1)(B)(ii)~~ (b)(2)(B) appearance of the party or the party's attorney; or

~~(b)(1)(B)(iii)~~ (b)(2)(C) the date on which the moving party learns of or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based.

If the last event occurs fewer than 21 days ~~prior to~~ before a hearing, the motion ~~shall~~ must be filed as soon as practicable.

~~(b)(1)(C)~~ (b)(3) Signing the motion or affidavit constitutes a certificate under Rule 11 and subjects the party or attorney to the procedures and sanctions of Rule 11. No party may file more than one motion to disqualify in an action, unless the second or subsequent motion is based on grounds that did not exist at the time of the earlier motion.

~~(b)(2)~~ **(c) Reviewing judge.**

(c)(1) The judge ~~against whom~~ who is the subject of the motion ~~and affidavit are directed shall~~ must, without further hearing or a response from another party, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge. The judge ~~shall~~ may take no further action in the case until the motion is decided. If the judge grants the motion, the order ~~shall~~ will direct the presiding judge of the court or, if the court has no presiding judge, the presiding officer of the Judicial Council to assign another judge to the action or hearing. The presiding judge of the court, any judge of the district, any judge of a court of like jurisdiction, or the presiding officer of the Judicial Council may serve as the reviewing judge.

~~(b)(3)(A) If~~ (c)(2) The reviewing judge must assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so if the reviewing judge finds that the motion and affidavit are timely filed, filed in good faith and ~~legally sufficient, the reviewing judge shall assign another judge to the action or hearing or request the presiding judge or the presiding officer of the Judicial Council to do so~~ the judge who is the subject of the motion:

(c)(2)(A) has a personal bias or prejudice about a party or the judge's impartiality might reasonably be questioned;

(c)(2)(B) has personal knowledge of disputed facts about the matter;

(c)(2)(C) served as lawyer in the matter;

(c)(2)(D) practiced law with a lawyer who, during the association, served as a lawyer in the matter;

(c)(2)(E) or a lawyer with whom the judge practiced law has, during the association, been a material witness in the matter;

(c)(2)(F) while serving in governmental employment expressed an opinion concerning the merits of the matter or participated as counsel, adviser or material witness in the matter;

(c)(2)(G) or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is:

(c)(2)(G)(i) a party to the proceeding or an officer, director or trustee of a party;

(c)(2)(G)(ii) a lawyer in the proceeding;

(c)(2)(G)(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(c)(2)(G)(iv) known by the judge likely to be a material witness in the proceeding.

~~(b)(3)(B)~~ (c)(3) In determining issues of fact or of law, the reviewing judge may consider any part of the record of the action and may request of the judge who is the subject of the motion ~~and affidavit~~ an affidavit ~~responsive~~ responding to questions posed by the reviewing judge.

~~(b)(3)(C)~~ (c)(4) The reviewing judge may deny a motion not filed in a timely manner.

Tab 5

Rule 73. Attorney fees.

(a) Time in which to claim. ~~When attorney fees are authorized by contract or by law, a request for attorney fees shall be supported by affidavit or testimony unless the party~~ Unless an attorney claims attorney fees ~~in accordance with the schedule in subsection~~ under paragraph (d) or ~~in accordance with~~ Utah Code Section 75-3-718 ~~and no objection to the fee has been made~~ to claim attorney fees, an attorney must file a motion for attorney fees within 7 days after the entry of the judgment or order upon which the claim is based.

(b) Supporting affidavit. ~~An affidavit supporting a request for or augmentation of attorney fees shall set forth~~ Unless the attorney claims attorney fees under paragraph (d) or Utah Code Section 75-3-718, the motion must be supported by an affidavit or declaration setting forth:

(b)(1) the basis for the award;

(b)(2) a reasonably detailed description of the time spent and work performed, including for each item of work the name, position (such as attorney, paralegal, administrative assistant, etc.) and hourly rate of the persons who performed the work;

(b)(3) factors showing the reasonableness of the fees;

(b)(4) the amount of attorney fees previously awarded; and

(b)(5) if the ~~affidavit is in support of~~ attorney fees are for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney ~~is not sharing~~ will not share the fee ~~or any portion thereof~~ in violation of Rule of Professional Conduct 5.4.

(c) Fees claimed in complaint. If ~~a party requests~~ an attorney claims attorney fees ~~in accordance with the schedule in subsection~~ under paragraph (d), the ~~party's~~ complaint ~~shall~~ must state the basis for attorney fees, state the amount of attorney fees allowed by the schedule, cite the law or attach a copy of the contract authorizing the award, and, if the attorney fees are for services rendered to an assignee or a debt collector, a statement that the attorney will not share the fee ~~or any portion thereof~~ in violation of Rule of Professional Conduct 5.4.

(d) Schedule of fees. Attorney fees awarded under the schedule may be augmented only for considerable additional efforts in collecting or defending the judgment and only after further order of the court.

Amount of Damages, Exclusive of Costs, Attorney Fees and Post-Judgment Interest, Between	and:	Attorney Fees Allowed
0.00	1,500.00	250.00
1,500.01	2,000.00	325.00
2,000.01	2,500.00	400.00
2,500.01	3,000.00	475.00
3,000.01	3,500.00	550.00
3,500.01	4,000.00	625.00

Amount of Damages, Exclusive of Costs, Attorney Fees and Post-Judgment Interest, Between	and:	Attorney Fees Allowed
4,000.01	4,500.00	700.00
4,500.01	or more	775.00

Advisory Committee Notes

Tab 6

Trial and Post-Trial Motions

Francis J. Carney
March 12, 2015

I wish the Advisory Committee to consider several aspects of our rules on trial and post-trial motions. Short papers on each of these issues follow.

The relevant state and federal rules are attached. FJC Materials 2- 9.

1. Names- do we want to update the names of the motion "for directed verdict" and motion "JNOV" as the federal rules did some years ago? FJC Materials 10

2. Timing- all the federal rules are to be **filed** on a certain date; our state rules have a confusing mix of events: served or "made" or "move." FJC Materials 11-12.

3. All of our post-trial motions (except Rule 60) motions are to be made within 14 days of entry of judgment. The federal rules were amended in 2009 to allow a more realistic 28 days. (Note that these deadlines are jurisdictional and *cannot* be extended by stipulation or order.) Do we want to do likewise? FJC Materials 13.

4. We have a procedural trap in our state rule 50(b); namely, that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence. The federal rules have eliminated this trap, and we should consider doing so as well. FJC Materials 14- 18.

5. In general terms, the rewrite of the federal trial and post-trial motions rules make them clearer than our state rules. We may want to consider adopting the federal versions; my idea on how this might look is attached. FJC Materials 19- 25.

FJC

Rules on Trial and Post-Trial Motions
March 12, 2015

UTAH RULES OF CIVIL PROCEDURE[1]

Rule 6. Time

(b) Extending time.

(b)(1) When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(b)(1)(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b)(1)(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(b)(2) A court must not extend the time to act under Rules 50(b) and (c), 52(b), 59(b), (d) and (e), and 60(b).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) Motion for directed verdict; when made; effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict **made at the close of all the evidence** is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than **14 days** after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within **14 days** after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: conditional rulings on grant of motion.

(c)(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether

[1]All added emphasis is mine.

it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(c)(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than **14 days** after entry of the judgment notwithstanding the verdict.

(d) Same: denial of motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 52. Findings by the court; correction of the record.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than **14 days** after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(c)(1) by default or by failing to appear at the trial;

(c)(2) by consent in writing, filed in the cause;

(c)(3) by oral consent in open court, entered in the minutes.

(d) Correction of the record. If anything material is omitted from or misstated in the transcript of an audio or video record of a hearing or trial, or if a disagreement arises as to whether the record

accurately discloses what occurred in the proceeding, a party may move to correct the record. The motion must be filed within 10 days after the transcript of the hearing is filed, unless good cause is shown. The omission, misstatement or disagreement shall be resolved by the court and the record made to accurately reflect the proceeding.

Rule 59. New trials; amendments of judgment.

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than **14 days** after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has **14 days** after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 21 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than **14 days** after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than **14 days** after entry of the judgment.

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and

errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 90 days after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 6(B) EXTENDING TIME.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions. **A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)**.

RULE 50. JUDGMENT AS A MATTER OF LAW IN A JURY TRIAL; RELATED MOTION FOR A NEW TRIAL; CONDITIONAL RULING

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than **28 days** after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than **28 days** after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting

or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than **28 days** after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

RULE 52. FINDINGS AND CONCLUSIONS BY THE COURT; JUDGMENT ON PARTIAL FINDINGS

(a) Findings and Conclusions.

(1) In General. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) For an Interlocutory Injunction. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) For a Motion. The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) Effect of a Master's Findings. A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) Findings of fact, whether based on oral or other evidence, must not be set aside unless Setting Aside the Findings. clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than **28 days** after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as

required by Rule 52(a).[2]

RULE 59. NEW TRIAL; ALTERING OR AMENDING A JUDGMENT

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than **28 days** after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than **28 days** after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than **28 days** after the entry of the judgment.

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

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[2]This is the equivalent to Utah Rule of Civil Procedure 41(b) ("The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence").

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within **a reasonable time**—and for reasons (1), (2), and (3) no more than **a year** after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) . . .

Names of Trial Motions

Rule 50 describes the motions for a "directed verdict" and for "judgment notwithstanding the verdict."

Do we want to revise the antiquated and anachronistic names of these motions-- as the federal courts did more than twenty years ago-- to motions "for judgment as a matter of law" and "renewal of motion for judgment as a matter of law."

The note to the 1991 federal rule amendment is useful:

> *The revision abandons the familiar terminology of "direction of verdict" for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.*

Timing for Post-Trial Motions: Filed/Served/Move/Made

State	Federal
Rule 50: Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict. Rule 50(b)- . . . Not later than fourteen days after the entry of judgment, a party who has moved for a directed verdict may **move** to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion for directed verdict.	Rule 50- Judgment as a Matter of Law (b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged — the movant may **file** a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.
Rule 59 New trials; amendments of judgment. (b) Time for motion. A motion for a new trial shall be **served** not later than 14 days after the entry of the judgment.	Rule 50(d)- Time for Rule 59 New Trial Motion (d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be **filed** no later than 10 days after the entry of the judgment.
	(b) Time to File a Motion for a New Trial. A motion for a new trial must be **filed** no later than 10 days after the entry of judgment.
(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be **served** not later than 14 days after entry of the judgment.	A motion to alter or amend a judgment must be **filed** no later than 10 days after the entry of the judgment.

Rule 60. Relief from judgment or order. The motion shall be **made** within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken.	Rule 60. Relief from Judgment or Order (c)(1) Timing. A motion under Rule 60(b) must be **made** within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
Rule 52. Findings by the court. (b) Amendment. Upon motion of a party **made** not later than 14 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly.	Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings (b) Amended or Additional Findings. On a party's motion **filed** no later than 10 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly.

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Timing for Post-Trial Motions: 14 or 28 days?

All post-trial motions (with the exception of Rule 60 motions to alter or amend judgment) must be "made/moved/served" within **14 days** of entry of the judgment.

The federal rules were changed in 2009 to allow **28 days** on all such motions. This is the federal Advisory Committee Note:

> *Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits any expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.*

Do we want to similarly extend the deadline for these motions in state practice? The considerations are the same for state practice as they are for federal.

-4-
The Trap in Rule 50 on JNOV

It is the rule that a motion for directed verdict challenging the legal sufficiency of the evidence must be made at close of the opponent's case and also *renewed* at the close of all the evidence under Rule 50(b):

> *Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict* ***made at the close of all the evidence*** *is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 14 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 14 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.*

The theory behind the requirement was to permit the party subject to the motion a chance to produce what is needed to fix the "gap" in the sufficiency of the evidence. Failure to renew it at the close of all the evidence barred the party from making a motion for JNOV on "lack of legal sufficiency" grounds. Wright & Miller has a good discussion of this point:

> *Prior to the 2006 amendment of the Federal Rule, it was long established that a post-verdict motion under Rule 50(b) for judgment as a matter of law could not be made unless a previous Rule 50(a) motion for judgment as a matter of law was made by the moving party at the close of all the evidence. The purpose of requiring a renewed motion for judgment as a matter of law at that time was to give the opposing party an opportunity to cure the defects in proof that otherwise might preclude the party from taking the case to the jury. A large sample of illustrative and relatively recent cases is set out in the note below.*
>
> *Because this requirement was a potential trap for the unwary, the federal courts fortunately took a liberal view of what constituted a motion for judgment as a matter of law at the close of all the evidence in deciding whether there was a sufficient foundation for the later motion under Rule 50(b). The note below contains numerous examples of the mechanisms used by the courts to employ the liberal view of what constitutes an end of trial motion for judgment as a matter of law. Other courts, however, were less willing to excuse noncompliance with the requirement of the rule and applied it in a more demanding fashion.*

. . .

Before the rule was amended in 2006, when the movant failed inexcusably to raise an objection to the sufficiency of evidence in a motion for judgment as a matter of law at the close of all the evidence, some courts denied all review, although others reviewed, but only for clear error. . . This review was exceedingly narrow, and only unusual circumstances justified allowing a motion at the close of the plaintiff's case to stand in place of a motion at the close of all the evidence.

The 2006 amendments were designed to render all of this confusion and technicality moot. The amendments revised Rule 50(b) to permit renewal after verdict of any Rule 50(a) motion for judgment as a matter of law. This abolished the earlier requirement that a motion for judgment as matter of law had to be made at the close of all the evidence. However, the district court only can grant the Rule 50(b) motion on the grounds advanced in the preverdict motion, because the former is conceived of as only a renewal of the latter . . . .

9B Fed. Prac. & Proc. Civ.3d § 2537.

The federal Advisory Committee Note to the 2006 amendments makes clear that removing this procedural trap was the intent of the amendments:

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. *Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. . . .*

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.

. . .

(Emphasis added.)

So federal Rule 50(b) now reads:

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

But our Utah Rule 50(b) still requires the motion to be renewed at the close of all the evidence:

> *Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict* ***made at the close of all the evidence*** *is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict . . . .*

(Emphasis added.)

I know of no Utah case on point, but there are plenty of federal cases (pre-amendment) that dinged an appellant on this[1], and the rule seems clear that the motion must be renewed at the close of all the evidence.

Do we want to change this?

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[1] *See, e.g., Davoll v. Webb,* 194 F.3d 1116, 1136 (10th Cir. 1999); *Anderson v. United Tel., 933 F.2d 1500, 1503 (10th Cir. 1991).*

major life activity, and with respect to the issue of their qualifications, that the plaintiffs have not established as a matter of law that any of the plaintiffs have met all of the qualifications and requirements of the employer." *Id.* at 3665. Denver then put on its defense, which included calling numerous witnesses. At the close of all the evidence, plaintiffs moved for judgment as a matter of law but Denver did not.

***1136** [28] A failure to move for a directed verdict on a particular issue will bar appellate review of that issue. *See FDIC v. United Pac. Ins. Co.*, 20 F.3d 1070, 1076 (10th Cir.1994) ("Defendant's failure to raise the bond coverage issue in its directed verdict motion precludes us from reviewing the sufficiency of the evidence to support the jury's bond coverage finding"); *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1551 (10th Cir.1989) ("Failure to move for a directed verdict on this ground ... precludes Defendant from challenging the sufficiency of the evidence of crashworthiness negligence on appeal."); *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1478 (10th Cir.1985). Similarly, "[a]s a general rule, a defendant's motion for directed verdict made at the close of the plaintiff's evidence is deemed waived if not renewed at the close of all the evidence; failure to renew that motion bars consideration of a later motion for judgment n.o.v."*Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1455 (10th Cir.1987) (citing cases). "Failure to renew the motion thus prevents a defendant from challenging the sufficiency of the evidence on appeal." *Id.; see also* 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2536 (2d ed. 1994) ("It is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for judgment as a matter of law was made in the trial court. Indeed a motion at the close of plaintiff's case will not do unless it is renewed at the close of all the evidence.").

Denver did not move for judgment as a matter of law on whether plaintiffs were qualified for vacant positions at the close of the evidence, and never moved for judgment as a matter of law on the undue hardship issue. Denver does not contend otherwise, nor does it claim that it should be excepted from the general rule precluding appellate review. We therefore decline to consider its sufficiency of evidence claims.

C. Evidentiary Issues

[29][30] Denver asserts the district court erred in four of its evidentiary and discovery rulings. Specifically, Denver contests (1) the district court's prohibition of the term "affirmative action" and like phrases at trial; (2) the introduction of one of Denver's responses to a request for an admission; (3) the admission of Dr. Kleen's testimony; and (4) the denial of Denver's motion to extend expert witness discovery and for examination of plaintiffs pursuant to Fed.R.Civ.P. 35. We review a district court's evidentiary rulings and rulings on motions in limine for an abuse of discretion. *See McCue v. Kansas Dept. of Human Resources*, 165 F.3d 784, 788 (10th Cir.1999); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1092 (10th Cir.1997). We review de novo a district court's interpretation of the Federal Rules of Evidence. *See Reeder v. American Econ. Ins. Co.*, 88 F.3d 892, 894 (10th Cir.1996).

1. *Prohibition on "Affirmative Action" and Like Terms*

[31] We first address whether the district court erred in granting plaintiffs' motion in limine prohibiting Denver from using terms like "affirmative action," "special rights," and "preferences." In granting that motion, the district court stated, "[w]ith regard to the issues of defendants using language at trial that plaintiffs were seeking preferences or affirmative action or special rights, defendants are precluded from using such language because it would simply muddy the waters and obfuscate the issues, and its prejudicial effect might outweigh its probative value." Aplt.App. at 2767. On appeal,

50(a), "[a] motion for a directed verdict shall state the specific grounds therefor." A motion for judgment n.o.v. cannot assert new matters not presented in the motion for directed verdict. *Dow Chemical Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 486 (10th Cir.1990); *United States v. Fenix & Scisson, Inc.*, 360 F.2d 260, 265 (10th Cir.1966), *cert. denied*,386 U.S. 1036, 87 S.Ct. 1474, 18 L.Ed.2d 599 (1967).

[4] This court has recognized that in satisfying the requirements of Rule 50, technical precision is unnecessary. *Fenix & Scisson*, 360 F.2d at 266. Because the requirement of Rule 50 that a directed verdict motion must precede a motion for judgment n.o.v. is " 'harsh in any circumstance [ ],' " a directed verdict motion should not be reviewed narrowly but rather in light of the purpose of the rules to secure a just, speedy, and inexpensive determination of a case. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2537, at 597 n. 32 (1971) (quoting *Mosley v. Cia. Mar. Adra S.A.*, 362 F.2d 118, 121-22 (2d Cir.1966), *cert. denied*,385 U.S. 933, 87 S.Ct. 292, 17 L.Ed.2d 213, 385 U.S. 933, 87 S.Ct. 296, 17 L.Ed.2d 213 (1966)); *see also National Indus., Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1549 (11th Cir.1986) (taking liberal view because "rule is a harsh one"). As the Fourth Circuit has noted, "rigid application of this rule is inappropriate ... where such application serves neither of the rule's rationales-protecting the Seventh Amendment right to trial by jury, and ensuring that the opposing party has enough notice of the alleged error to permit an attempt to cure it before resting." *FSLIC v. Reeves*, 816 F.2d 130, 138 (4th Cir.1987); *see also McCarty v. Pheasant Run, Inc.* 826 F.2d 1554, 1556 (7th Cir.1987) (modern rationale of rule is opposing party should have opportunity to rectify deficiencies in evidence presented to jury before it is too late); *Miller v. Rowan Cos.*, 815 F.2d 1021, 1024 n. 4, 1025 (5th Cir.1987) (aims of rule include avoiding trapping plaintiff after submittal to jury because he cannot then cure defects in proof and securing fair trial); *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1429 (9th Cir.1986) (purpose of directed verdict motion is to provide notice of claimed evidentiary insufficiencies and preserve issue of sufficiency of evidence as question of law); *Sharon Steel Corp.*, 781 F.2d at 1549 (purpose of directed verdict requirement is to avoid ambushing court and opposing party after the verdict so that only remedy is completely new trial) (citing *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018, 1025 (5th Cir.1979)); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 831-32 (3d Cir.1983) (same) (citing *Wall v. United States*, 592 F.2d 154 (3d Cir.1979)).

Here, UTC moved for a directed verdict on the blacklisting claim after Anderson had presented his case at trial. At the close of all the evidence, UTC again moved for a directed verdict on the blacklisting claim. In this directed verdict motion, UTC specifically argued there was insufficient ***1504** evidence to support a claim for civil blacklisting under section 44-119. Following the jury verdict, UTC filed a motion for judgment n.o.v. and a motion for new trial on the grounds the evidence was insufficient to support the civil blacklisting claim. Because UTC raised insufficiency of the evidence on the blacklisting claim as specific grounds for both the motion for directed verdict and the motion for judgment n.o.v., we hold UTC has complied with the requirements of Rule 50.

Anderson argues Rule 50 demands that UTC must have stated in the directed verdict motion the evidence is insufficient to prove the element of a criminal blacklisting conviction. Although Rule 50(a) requires a motion for directed verdict to state the "specific grounds," the rule does not define how specific the grounds must be. We are convinced that UTC's directed verdict motion satisfies the rule's requirement. To be sure, a more specific motion may be upheld. *See, e.g., Acosta*, 717 F.2d at 832; *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175, 179 n. 2 (5th Cir.1983), *cert. denied*,464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984). However, a significant number of the cases interpreting Rule 50's specificity requirement have accepted less specificity in directed verdict motions. *See, e.g., Sharon Steel*, 781 F.2d at 1548-49

FJC Notes on Rule 50

I have entirely rewritten Rule 50, taking verbatim the present federal rule 50. This proposal:

1. Simplifies the language in accordance with the federal rule.

2. Eliminates the archaic terms "directed verdict" and "motion for JNOV" and conforms our state rule to the 1991 federal amendment of using "motion for judgment as a matter of law" and "renewal of motion for judgment as a matter of law."

3. Eliminates the trap of the technical requirement to renew the MDV at the literal close of all the evidence.

4. Make it clear that the operative event is to "file" the motion, not "move" as it now states in 50(b).

5. Extends the 10 day deadline for filing the JNOV/RMJML (which, under Rule 6(b) cannot be extended) to a more realistic 28 days, as in the federal rules.

6. The standard for granting the motions are intended to remain the same.

Proposed State Rule 50

Rule 50. Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion

addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) Effect of a Conditional Ruling. Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Proposed Advisory Committee Note

The 2015 amendment to Rule 50 adopts the changes previously adopted by the Federal Rules of Civil Procedure. As noted in the 1991 federal Advisory Committee Note,

> The revision abandons the familiar terminology of “direction of verdict” for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it

> might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.

The standards for granting the motion remain unchanged. The time for making the motion has been extended to 28 days after entry of judgment. Finally, in accordance with the 2006 federal rules amendment, the amended rule removes the technical requirement that the motion be renewed at the literal close of all the evidence, a requirement that the Committee determined was an unnecessary trap for the unwary.

FJC Notes on Rule 59

Rule 59, in its federal version, differs substantially from the state rule. Therefore, I have preserved the present state rule 59 with only the changes noted in red. I am not clear whether we want to change *all* the time deadlines, so I have left some of them with question marks.

Proposed Rule 59

Rule 59. New trials; amendments of judgment.

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(a)(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(a)(3) Accident or surprise, which ordinary prudence could not have guarded against.

(a)(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(a)(7) Error in law.

(b) Time for motion. A motion for a new trial shall be **filed** ~~served~~ not later than **28** ~~14~~ days after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be **filed** ~~served~~ with the motion. The opposing party has **??** ~~14~~ days after such **filing** ~~service~~ within which to **file** ~~serve~~ opposing affidavits. The time within which the affidavits or opposing affidavits shall be **filed** ~~served~~ may be extended for an

additional period not exceeding **??** ~~21~~ days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than **??** ~~14~~ days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be **filed** ~~served~~ not later than **28** ~~14~~ days after entry of the judgment.

FJC Notes on Rule 60

Like Rule 59, Rule 60 in its federal version differs substantially from the state rule. I have therefore preserved the present state rule 60 with only the minor change noted in red.

Proposed Rule 60

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be **filed** ~~made~~ within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FJC Notes on Rule 52

Only minor changes are needed here.

Proposed Rule 52

Rule 52. Findings by the court; correction of the record.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party **filed** ~~made~~ not later than 14 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be **filed** ~~made~~ with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) Waiver of findings of fact and conclusions of law. Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

(c)(1) by default or by failing to appear at the trial;

(c)(2) by consent in writing, filed in the cause;

(c)(3) by oral consent in open court, entered in the minutes.

(d) Correction of the record. If anything material is omitted from or misstated in the transcript of an audio or video record of a hearing or trial, or if a disagreement arises as to whether the record accurately discloses what occurred in the proceeding, a party may move to correct the record. The motion must be filed within **10 days** (?) after the transcript of the hearing is filed, unless good cause is shown. The omission, misstatement or disagreement shall be resolved by the court and the record made to accurately reflect the proceeding.

Rule 50. Motion for ~~a directed verdict and for judgment notwithstanding the verdict~~ judgment as a matter of law.

~~(a) Motion for directed verdict; when made; effect.~~ ~~A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.~~

~~(b) Motion for judgment notwithstanding the verdict.~~ ~~Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 14 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 14 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.~~

~~(c) Same: conditional rulings on grant of motion.~~

~~(c)(1) If the motion for judgment notwithstanding the verdict, provided for in Subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.~~

~~(c)(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 14 days after entry of the judgment notwithstanding the verdict.~~

~~(d) Same: denial of motion.~~ ~~If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the~~

~~event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.~~

(a) Motion for judgment as a matter of law. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the moving party to judgment. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(a)(1) resolve the issue against the party; and

(a)(2) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(b) Renewing the motion after trial; alternative motion for a new trial. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the moving party may file a renewed motion for judgment as a matter of law. A renewed motion for judgment as a matter of law may include a motion for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(b)(1) allow judgment on the verdict, if the jury returned a verdict;

(b)(2) order a new trial; or

(b)(3) direct the entry of judgment as a matter of law.

(c) Granting the renewed motion; conditional ruling on a motion for a new trial.

(c)(1) If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(c)(2) Conditionally granting the motion for a new trial does not affect the judgment's finality. If the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial. If the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a losing party's new-trial motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the motion for judgment as a matter of law; reversal on appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Advisory Committee Notes

The 2015 amendment to Rule 50 adopts the changes previously adopted by the Federal Rules of Civil Procedure. As noted in the 1991 federal Advisory Committee Note,

> The revision abandons the familiar terminology of "direction of verdict" for several reasons. The term is misleading as a description of the relationship between judge and jury. It is also freighted with anachronisms some of which are the subject of the text of former subdivision (a) of this rule that is deleted in this revision. Thus, it should not be necessary to state in the text of this rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been. The term "judgment as a matter of law" is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-trial motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.

The standards for granting the motion remain unchanged. The time for making the motion has been extended to 28 days after entry of judgment. Finally, in accordance with the 2006 federal rules amendment, the amended rule removes the technical requirement that the motion be renewed at the close of all the evidence, a requirement that the committee determined was an unnecessary trap for the unwary.

Rule 52. Findings and conclusions by the court; amended findings and conclusions; waiver; correction of the record; judgment on partial findings.

(a) ~~Effect~~ Findings and conclusions.

(a)(1) In all actions tried upon the facts without a jury or with an advisory jury, the court ~~shall~~ must find the facts specially and state ~~separately~~ its conclusions of law ~~thereon, and judgment shall be entered pursuant to Rule 58A; in~~ separately.

(a)(2) In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law ~~which constitute the grounds of~~ that support its action. ~~Requests for findings are not necessary for purposes of review.~~

(a)(3) A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(a)(4) Findings of fact, whether based on oral or ~~documentary~~ other evidence, ~~shall~~ must not be set aside unless clearly erroneous, and reviewing court must give due regard shall be given to the ~~opportunity of the~~ trial court's opportunity to judge the credibility of the witnesses.

(a)(5) The findings of a master, to the extent that the court adopts them, ~~shall~~ must be considered as the findings of the court. ~~It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.~~

(a)(6) The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ~~ground~~ reasons for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ~~ground~~ reason.

(b) ~~Amendment~~ Amending the findings. Upon motion of a party made not later than ~~14~~ 28 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may ~~be made with~~ accompany a motion for a new trial ~~pursuant to~~ under Rule 59. ~~When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.~~

(c) ~~Waiver of~~ Waiving findings ~~of fact~~ and conclusions ~~of law~~. Except in actions for divorce, the parties may waive findings of fact and conclusions of law ~~may be waived by the parties to an issue of fact~~:

(c)(1) by default or by failing to appear at the trial;

(c)(2) by consent in writing, filed in the ~~cause~~ action;

(c)(3) by oral consent in open court, entered in the minutes.

(d) ~~Correction of~~ Correcting the record. If anything material is omitted from or misstated in the transcript of an audio or video record of a hearing or trial, or if a disagreement arises as to whether the

record accurately discloses what occurred in the proceeding, a party may move to correct the record. The motion must be filed within ~~10~~ 14 days after the transcript of the hearing is filed, unless good cause is shown. The omission, misstatement or disagreement ~~shall~~ will be resolved by the court and the record made to accurately reflect the proceeding. NOTE TO COMMITTEE: See URAP 11(h).

(e) Judgment on partial findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by paragraph (a).

Rule 59. New trials; ~~amendments of~~ a judgment.

(a) Grounds. ~~Subject to the provisions of~~ Except as limited by Rule 61, a new trial may be granted to ~~all or any of the parties and on all or part of the issues,~~ any party on any issue for any of the following ~~causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment~~ reasons:

(a)(1) ~~I~~irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which ~~either~~ a party was prevented from having a fair trial~~.~~;

(a)(2) ~~M~~misconduct of the jury~~; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct~~, which may be proved by the affidavit of any ~~one~~ of the jurors~~.~~;

(a)(3) ~~A~~accident or surprise, which ordinary prudence could not have guarded against~~.~~;

(a)(4) ~~N~~newly discovered material evidence, ~~material for the party making the application,~~ which ~~he~~ could not, with reasonable diligence, have been discovered and produced at the trial~~.~~;

(a)(5) ~~E~~excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice~~.~~;

(a)(6) ~~I~~insufficiency of the evidence to justify the verdict ~~or other decision~~, or that ~~it~~ the verdict is against law~~.~~; or

(a)(7) ~~E~~error in law.

(b) Time for motion. A motion for a new trial ~~shall be served not~~ must be filed no later than ~~14~~ 28 days after the entry of the judgment.

~~(c) Affidavits; time for filing.~~ When the ~~application~~ motion for a new trial is made under ~~Subdivision~~ paragraph (a)(1), (2), (3), or (4), it ~~shall~~ must be supported by affidavit. ~~Whenever~~ If a motion for a new trial is ~~based upon~~ supported by affidavits ~~they shall be served~~ the affidavits must be filed with the motion. ~~The opposing party has 14 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 21 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits~~.

(c) Further action after non-jury trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(d) ~~On~~ New trial on initiative of court. ~~Not~~ No later than ~~14~~ 28 days after the entry of the judgment the court ~~of~~ on its own ~~initiative~~ may order a new trial for any reason ~~for which it might have granted~~ that would justify a new trial on motion of a party~~, and in the order shall specify the grounds therefor~~. After

giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion.

(e) Order. The order granting a motion for a new trial must state the reasons for the new trial

~~**(e)**~~ **(f) Motion to ~~alter or~~ amend a judgment.** A motion to ~~alter or~~ amend the judgment ~~shall be served not~~ must be filed no later than ~~14~~ 28 days after the entry of the judgment.

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. ~~Clerical~~ The court may correct a clerical mistake~~s in judgments, orders or other parts of the record and errors therein~~ or a mistake arising from oversight or omission~~ may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders~~ whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. ~~During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter~~ After a notice of appeal has been filed and while the appeal is pending the mistake may be ~~so~~ corrected only with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon ~~such~~ just terms ~~as are just~~, the court may ~~in the furtherance of justice~~ relieve a party or ~~his~~ its legal representative from a ~~final~~ judgment, order, or proceeding for the following reasons:

(b)(1) mistake, inadvertence, surprise, or excusable neglect;

(b)(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(b)(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;

(b)(4) the judgment is void;

(b)(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(b)(6) any other reason justifying relief from the operation of the judgment.

(c) Timing and effect of the motion. The motion ~~shall~~ must be made within a reasonable time and for reasons in paragraph (b)(1), (2), or (3), not more than 90 days after the entry of the judgment~~,~~ or order~~,~~ or the date of the proceeding ~~was entered or taken~~. ~~A motion under this Subdivision (b)~~ The motion does not affect the finality of a judgment or suspend its operation.

(d) Other power to grant relief. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

~~Advisory Committee Notes~~