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February 16, 1995

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: February Meeting

Dear Committee Members:

The next meeting of the Advisory Committee will be held on Wednesday, February 22, 1995, beginning at 4:00 p.m. The meeting will be held at the usual place, the Council Room of the Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. Please let me know if you will not be able to attend or expect to be late.

I have enclosed for your information a copy of Julie Fortuna's minutes on our last meeting. I urge you to review them before our meeting next week, especially if you were not able to attend our last meeting.

At our February 22 meeting, we will consider the following items:

1. We will ask Terry Kogan and Mary Anne Wood to make a presentation on proposed revisions to Rule 68 on offers of judgment. In last month's packet, I included a memorandum and article from Terry and Mary Anne that proposed an interesting modification to Rule 68 to get around many of the problems we have dealt with in the past. Terry and Mary Anne will make a presentation about how this proposal will work.

2. We will again consider the ten-day summons procedure in Rule 3. In an effort to comply with the Supreme Court's request that we investigate the strengths

and weaknesses of the procedure, we will ask several collection lawyers and constables to address uses and abuses of the procedure.

3. We will again consider the continuing garnishment amendment that we have worked on in relation to Rule 64D. We have asked Virginia S. Smith, Vice President and Managing Legal Counsel for First Interstate Bank of Utah, to advise us on the comments we received on the continuing garnishment procedure during the comment period. Please find enclosed Ginger's letter to me dated February 13, 1995, which addresses these issues. In addition, I have enclosed a letter from the Visser Family Trust, which addresses the continuing garnishment amendment. Finally, in this regard, I have enclosed a letter from the Honorable Robin W. Reese, Presiding Judge of the Third Circuit Court, regarding another issue concerning Rule 64D.

4. We will have an update on revisions to Rule 4. You may recall that we asked Perrin Love to make a recommendation about revisions to the rule, in addition to those relating to service by mail, as requested by the Salt Lake County Sheriff's Office.

5. We will have a report from Jim Soper on any necessary clarifications to Rule 62 on stays of proceedings to enforce a judgment.

6. Finally, we will have a report from Tom Karrenberg and me on our project to revise the forms that follow the rules of civil procedure.

I look forward to seeing all of you on February 22.

Very truly yours,

Alan L. Sullivan

ALS/kr
Enclosure
cc: Timothy Shea, Esq.
Julie Fortuna, Esq.
Virginia S. Smith, Esq.

AGENDA

Utah Supreme Court Advisory Committee on Civil Procedure

February 22, 1995

1. *Welcome and approval of minutes (**A. Sullivan**)*

2. *Rule 64D - Discussion of proposed continuing garnishment amendments (**V. Smith**)*

3. *Rule 68 - Discussion of proposed revisions to the rule relating to offers of judgment (**T. Kogan and M. Wood**)*

4. *Rule 4 - Report on revisions (**P. Love**)*

5. *Rule 62 - Report on proposed revisions (**J. Soper**)*

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, February 22, 1995, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Virginia S. Smith, Mary Anne Q. Wood, Honorable Boyd Bunnell, Terry S. Kogan, James R. Soper, Glen C. Hanni, Terrie T. McIntosh, Honorable Ronald N. Boyce, Perrin R. Love, Jaryl L. Rencher

EXCUSED: Francis M. Wikstrom, M. Karlynn Hinman, John L. Young, David K. Isom, Honorable Michael R. Murphy, Thomas R. Karrenberg, Honorable Anne M. Stirba

STAFF: Timothy R. Shea and Julie Fortuna

VISITORS: none

I. WELCOME AND APPROVAL OF MINUTES

Mr. Sullivan welcomed and introduced Ms. Smith, Vice President and Managing Legal Counsel for First Interstate Bank, as a new Committee member. Mr. Sullivan indicated that Ms. Smith's appointment to the Committee was confirmed by the Utah Supreme Court the morning of February 22, 1995. Mr. Sullivan also welcomed and introduced Mr. Shea to the Committee as Mr. Winchester's replacement from the Administrative Offices of the Court.

Mr. Kogan moved that the January Minutes be approved with one change to indicate that Ms. Hinman was not in favor of the proposed continuing garnishment amendment to Rule 64D. Judge Bunnell seconded the motion and the Committee approved the January Minutes with the indicated change.

II. RULE 64D - DISCUSSION OF PROPOSED CONTINUED GARNISHMENT AMENDMENTS

Mr. Sullivan began discussion by indicating that the proposed continuing garnishment provision to Rule 64D had been drafted by the Committee at the request of the Legislature. Mr. Sullivan indicated that the proposed changes to the Rule had been circulated for comment and the Committee had received two basic kinds of comments, the first dealing with technical issues, and the second questioning the concept of continuing garnishment. Mr. Sullivan indicated that constables had raised due process concerns to which Judge Boyce responded that the federal system has a continuing garnishment provision and has rejected due

process arguments. Ms. Smith indicated she had researched several states' continuing garnishment provisions and agreed with Judge Boyce.

Ms. Smith reported that she had followed up on several of the comments the Committee received regarding the proposed continuing garnishment rule and circulated a draft of the proposed rule with suggested changes to the Committee. Ms. Smith indicated she had made several revisions to the proposed continuing garnishment provision along the following lines: (1) 25% limit on disposable earnings applied to continuing garnishments; (2) bringing the proposal in line with the Consumer Credit Protection Act limitations; (3) need to note date and time of service on copy served; (4) with multiple garnishments the second writ begins to run at the end of the first writ; (5) an office of recovery service garnishment takes priority, tolls time, and preserves priority of other pending writs; (6) payment by the garnishee can be made to the court, plaintiff, or plaintiff's attorney.

Mr. Sullivan indicated that the phrase "immediately prior writ" used in Ms. Smith's draft was confusing. Mr. Kogan indicated confusion over how long the garnishment in effect lasted. Mr. Sullivan asked whether there was a right to a subsequent hearing for a subsequent pay period. Ms. Smith indicated the proposed Rule contemplated that any subsequent hearing was in the Judge's discretion and that even if the pay amount was recomputed, there was not necessarily a right to a hearing because there was always a 25% limit, although the issue could be brought to the Court's attention at that time. Ms. Smith further indicated that the proposed rule contemplated that the second garnishment should be treated the same as the first garnishment and any questions about the second garnishment should tie back into the main rule. Judge Boyce indicated if circumstances changed and there was an additional claim of exemption, there may be a right to a hearing.

Ms. McIntosh suggested that the Rule specifically deal with employer prioritization so that employers could track multiple garnishments. Ms. Smith indicated that perhaps the burden of the continuing garnishment rule should be on the creditor to notify the employer rather than forcing the employer to keep track because that was asking a lot of an employer for $10. Ms. Smith also indicated that employers are used to getting $10 every time they garnish a paycheck and that the continuing garnishment rule contemplated a $10 fee per continuing garnishment. Ms. Smith indicated that this practice was in line with other states.

Mr. Sullivan brought to the Committee's attention a letter written by Judge Robin W. Rees. The letter inquired about a situation where a defendant receives a payroll check disbursed from an out-of-state firm or the federal government and the employer refuses to answer interrogatories but submits the garnishment to the Court as ordered. Judge Rees indicated the Court could not release the garnishment to the plaintiff until the proper answer is received from the garnishee. Consequently, the Court's only option is to order the garnishee to appear before the Court to show cause. Judge Rees indicated this is not a viable approach for dealing with out-of-state firms or the federal government since they fail to appear and that it is virtually impossible for plaintiffs to have the Court release the garnishment it is holding despite the fact that the defendant does not object to releasing the garnishment.

Ms. Smith volunteered to take the Committee's and Judge Rees' comments into consideration and attempt to further clarify the proposed rule at the next Committee meeting.

Mr. Sullivan asked Ms. Smith to create any forms that would be helpful in implementing the proposed continuing garnishment provisions. Mr. Sullivan asked Ms. Smith to contact Brad Baldwin for Committee notes accompanying the proposed rule and asked Ms. Smith to add an additional paragraph explaining the Committee's suggested changes, purpose and intent.

Mr. Sullivan asked the Committee to think about whether the proposed Rule with additional changes should be sent out for comment again.

III. RULE 68 - DISCUSSION OF PROPOSED REVISIONS TO THE RULE RELATING TO OFFERS OF JUDGMENT

Mr. Kogan addressed the Committee and indicated he had spoken with Mr. Schwarzer who had authored the article circulated to the Committee addressing fee shifting and Rule 68. Mr. Schwarzer had indicated that in accordance with the Legislature's Contract with America, there was a consensus that it would be disastrous to move to the English system where the prevailing party is awarded attorneys fees and that consequently, increasing attention is being paid to rule 68.

Mr. Kogan indicated that no state court system had adopted Mr. Schwarzer's 1962 proposal. He indicated that California had adopted limited fee shifting and awarded expert witness fees to prevailing parties. Mr. Kogan also indicated that Alaska has adopted a limited fee shifting proposal that he had not had a chance to review.

Mr. Kogan indicated that the Schwarzer proposal proposed two basic changes to Rule 68B. The first change is that costs are available to both plaintiffs and defendants. The second change is that costs include attorneys fees incurred after making an offer of judgment.

Mr. Kogan outlined the four main provisions of the Schwarzer proposal for the Committee. First, recoverable costs are limited to the amount of the judgment (i.e., the plaintiff risks losing the benefit of his judgment and the defendant risks doubling the judgment). Second, recoverable costs are limited to what is needed to make the offeror whole. Third, the period for acceptance is extended from 10 days to 21 days. Fourth, the court has discretion to avoid undue hardship on a party.

Mr. Kogan explained several hypotheticals as follows: In hypothetical number 1, the defendant offers the plaintiff $25,000 to settle the case. The plaintiff rejects defendant's offer. The plaintiff wins a $20,000 judgment. The defendant's post-offer costs are $10,000. In this situation, under the Schwarzer proposal, the defendant can recover $5,000. He incurred $10,000 in costs minus a $5,000 benefit and so recovers $5,000.

In hypothetical number 2, defendant offers plaintiff $25,000 to settle. Plaintiff refuses the settlement. The plaintiff receives a judgment in the amount of $20,000 and the defendant incurs post-offer costs in the amount of $30,000. In this situation, even though the defendant would be entitled to $25,000 because costs were $30,000 minus the $5,000 benefit, he could only recover the amount of the judgment, $20,000.

In hypothetical number 3, plaintiff offers $25,000 in settlement. Defendant rejects the settlement offer. Plaintiff receives judgment in the amount of $20,000. In this situation the plaintiff may not recover since the judgment is more favorable to the offeree than the offer made.

In hypothetical number 4, plaintiff offers $15,000. Defendant rejects the settlement. The plaintiff gets $20,000 judgment and the plaintiff has post-offer costs of $10,000. In this situation, the plaintiff is entitled to $25,000.

Judge Boyce indicated concern about adopting the Schwarzer proposal because litigation is not predictable and that awarding attorneys fees would become punitive even through the parties litigate in good faith. Judge Boyce indicated that there were no jury trials in England so that litigation could be predicted with more certainty. Mr. Sullivan indicated that England allows for narrow discovery so that attorneys fees are lower. Mr. Kogan suggested that if litigants use the court system, they have a strong obligation to assess the value of their case and to conduct continual cost benefit analysis to decide when the case should settle. Judge Boyce indicated that parties would avoid the problem altogether by opting into the ADR program so that they could not be penalized. Judge Boyce voiced concern that the judicial system would turn into a criminal court system.

Judge Boyce voiced concern over civil rights disincentive implications. Mr. Kogan indicated that the proposal contemplated judicial discretion and a judge could choose not to impose undue hardship on a party. Judge Boyce inquired whether the judgment included interest and taxable costs to which Kogan answered he did not know. Mr. Love inquired about the effect of counterclaims. Mr. Kogan responded that he did not know the answer to that.

Judge Boyce raised concern that cases should not settle out of fear rather than conviction and that the Schwarzer proposal contained an underlying assumption that a party could predict the outcome of litigation and that if a party misjudged the litigation, heavy penalties would be incurred. Judge Boyce voiced concerns over increased malpractice costs because lawyers may be sued over failing to properly predict judgment amounts. Judge Boyce indicated concern that if the Schwarzer proposal was adopted, malpractice insurance would triple.

Mr. Hanni inquired whether Schwarzer's proposal stated how to calculate court costs. Ms. Wood suggested attorneys fees would be calculated according to existing jurisprudence. Judge Boyce raised concern that there would be more court involvement in fights over fees.

Mr. Kogan indicated that the Schwarzer proposal would not apply where a statute already fee shifts nor would it apply to class actions. Mr. Love asked whether the Schwarzer proposal applied to situations where a contract provided for fees. Mr. Love suggested that the rule contain an opt-out ability where both parties could stipulate that the rule would not apply.

Judge Bunnell asked whether the Schwarzer proposal applied only to money judgments or if it extended to other kinds of judgments. Mr. Kogan indicated that it did.

Mr. Sullivan indicated that the Legislature had been approached to adopt the English system but had rejected it because they perceived it penalized plaintiffs and discouraged

pioneering claims as well as pioneering defenses. Mr. Sullivan indicated concern that parties would not go forward with policy issues because they could not afford it. Mr. Sullivan suggested that the Schwarzer proposal goes halfway and gives more incentive to parties to settle.

Mr. Hanni indicated that he thought the proposal put tremendous pressure on plaintiffs and did not put much pressure on defendants or defendant insurance groups.

Mr. Sullivan raised concerns that the proposal may be too complicated and asked whether the Committee should be dealing in an issue that could be perceived as substantive. Mr. Sullivan suggested that it may be more appropriately dealt with statutorily than in rule. Mr. Rencher suggested that the Committee maintain a clearing house on questions. Mr. Kogan asked Committee members to contact him at the law school if they had further questions. Mr. Kogan indicated that Mr. Schwarzer was available for a conference call.

Mr. Sullivan thanked Mr. Kogan for his time and suggested that the Committee continue its discussion at the next meeting.

IV. RULE 4 - REPORT ON REVISIONS

Mr. Sullivan began discussion by indicating that the Salt Lake County Sheriff's Office had previously addressed the Committee and reported that it was having difficultly serving the number of civil summonses it was receiving and asked the Committee to consider adopting a rule to permit service by mail. The Sheriff's Office suggested tracking the federal rule. Mr. Sullivan indicated that the Utah rule was several generations behind its federal rule counterpart.

Mr. Perrin indicated that the pre-91 federal rule allowed service by mail. It provided that the summons contain an acknowledgment and that if the acknowledgment was not sent back then personal service had to be effected. In 1991 that rule was dropped and the waiver rule was adopted which provided that a defendant was required to waive service. Specifically, upon receipt of a letter requesting a defendant to waive service, a defendant has 30 days to file a waiver and then 30 additional days from the time he files the waiver to answer the complaint. If the defendant is out of the country, the defendant has 60 days to answer the complaint. If the defendant refuses and the plaintiff is forced to effect personal service, the plaintiff may apply to recover costs. Costs are assessed only if the plaintiff can prove that the defendant received a letter requesting waiver.

Mr. Perrin indicated that Utah Rule of Civil Procedure 4 could go either way: service by mail plus acknowledgment or waiver. Mr. Love submitted a memorandum to the Committee analyzing the pre-1991 federal rule, the post-1991 federal rule, and the current Utah rule. Mr. Love indicated it was unclear how much either choice would ease the burden on the Salt Lake County Sheriff's Office because in many instances plaintiffs would choose personal service rather than incur the additional delay allowed when effecting service by mail. Mr. Love also indicated that any changes to Rule 4 needed to take into account the 10-day Summons Rule under Rule 3.

Judge Boyce indicated that service by mail was used fairly frequently in the federal court but indicated that that may be because in federal court many defendants are out of the district

which makes personal service cumbersome. Judge Boyce indicated that the pre-91 federal rule was designed to eliminate marshal service and worked effectively. Judge Boyce indicated that the post-91 rule experience has been short but seemed to do well. Judge Boyce indicated that California has a form of mail service that works fairly well. Judge Boyce has also noticed that when requesting service by mail, defendants are unsure whether to respond and so they respond in order to avoid a default even though they are not required to.

Ms. Wood suggested that the 120 days within which a plaintiff is required to serve a filed complaint be extended or the time to answer the request to waive be shortened because problems are incurred in trying to serve someone who is attempting to avoid service. Judge Boyce indicated that currently the 120-day cutoff is a matter of court discretion and that a plaintiff has the option to extend the deadline beyond the 120 days. Ms. Smith indicated that service by mail may not be used by creditors due to the extended time line. Mr. Sullivan indicated that a high percentage of suits filed were collection matters and that adopting a choice of service by mail may not change the sheriff's burdens.

Mr. Sullivan suggested that the Committee look at Mr. Love's memorandum and carefully consider whether reason exists to amend the rule. Mr. Love volunteered to look at Rule 4 in other jurisdictions.

V. RULE 62 - REPORT ON PROPOSED REVISIONS

Mr. Soper addressed the Committee and indicated that the proposed revisions related to staying a judgment by posting a bond when an appeal is filed. Mr. Soper indicated that confusion existed about whether cash could be posted in lieu of a bond under Rule 62(i) and under what circumstances. Mr. Soper indicated that the state rule was similar to the federal counterpart except the federal rule contained no provisions (i) or (j).

Mr. Soper indicated that subparts (i) and (j) were confusing and in redrafting them he was concerned about three issues: whether individuals could post commercial-type bonds, whether the court had jurisdiction over the surety, and providing a process to deal with a surety if something happened during the course of the appeal. Mr. Soper circulated a handout with his proposed revisions for the Committee to review.

Mr. Sullivan inquired whether there were outstanding research issues. Mr. Soper indicated that there were outstanding research issues, depending on what the Committee wanted to do. Mr. Soper indicated that the federal counterpart dealt issues raised by subparts (i) and (j) in case law and that federal judges have significant discretion in dealing with issues raised by these subparts. Judge Bunnell reminded the Committee that when dealing with supersedeas bonds it is important for the judge to have discretion to deal with unique situations. Mr. Soper indicated that the Committee may be in favor of doing the same thing as the federal rule. Mr. Sullivan inquired about a situation where a surety declares bankruptcy and asked what preference is incurred, the status of the claim, and whether it was voidable. Mr. Soper indicated he had not researched the issue, but volunteered to research it for the Committee's next meeting.

Mr. Sullivan suggested that the Committee consider these issues at the next meeting and asked Committee members to contact Mr. Soper with questions and/or comments.

VI. CONCLUSION

Mr. Sullivan thanked the Committee members for their time and indicated that the next meeting would be held on March 22, 1994 at 4:00. There being no further business, Mr. Sullivan adjourned the Committee until the next meeting.