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SUPREME COURT ADVISORY COMMITTEE ON
CIVIL PROCEDURE

Dear Committee Members:

The next meeting of the committee will be held on Wednesday, October 27, 1993, beginning at 4:00 p.m. As usual, the meeting will convene in the Council Room, Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. I ask you to be prompt so that we can begin and end on time.

Please find enclosed a copy of the minutes of our last meeting, prepared by Colin Winchester. We appreciate Colin's filling in for our usual secretary. Colin provides a great deal of support for our committee, and we always appreciate his efforts.

At our meeting on October 27, we will consider the following:

1. We will consider proposed changes to Rule 30(f), which I have enclosed. I have suggested these changes following up on a comment by Jim Soper at our last meeting that, once and for all, we need to deal with the conflict in the rules over where deposition transcripts are to be filed. As we have discussed before, Rule 30(f), Rule 5(d), and Rule 4-502(4) of the Code of Judicial Administration give conflicting directions as to what the court reporter is supposed to do with a sealed original deposition transcript. There is a similar conflict between Rule 30(f) of the Federal Rules of Civil Procedure and local Rule 204-3(c)(1). The change I propose in the enclosed materials is taken, with some modification, from the proposed changes to the Federal Rules of Civil Procedure.

2. We will have a report from our subcommittee on "continuing garnishment" under Rule 64D. If the members of that

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subcommittee want to circulate draft changes to that rule in advance of the meeting, I encourage them to do so.

3. We will have a report from our subcommittee on the proposed unlawful detainer rule.

4. We will discuss further Judge Murphy's comment from our last meeting concerning changes to Rule 63(b) on disqualification of judges. As you will recall, the problem he raised is that district court judges feel they should have the right to comment on, or dispute, charges of dishonesty or conflict of interest in the event an affidavit of bias is filed by one of the parties. Under the current rule, according to a recent court of appeals' decision, district court judges have no right to do anything other than transfer the case to another judge.

I look forward to seeing all of you on October 27. If you have any questions about the agenda or wish to add anything, please feel free to call me at your convenience.

Very truly yours,



Alan L. Sullivan

ALS/kr
Enclosure

cc: Colin Winchester
Craig Jacobsen

**UTAH SUPREME COURT ADVISORY
COMMITTEE ON CIVIL PROCEDURE**

A G E N D A

October 27, 1993

1. *Welcome and approval of minutes (A. Sullivan).*
2. *Rule 30(f): Filing of Depositions (A. Sullivan).*
3. *Proposed Rule 72: Orders of Restitution (T. McIntosh).*
4. *Rule 64D: Continuing Garnishment (K. Hinman).*
5. *Rule 63(b): Disqualification of Judges (Judge Murphy and A. Sullivan).*
6. *Forms (T. Karrenberg and A. Sullivan).*

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, October 27, 1993, 4:00p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Hon. Anne M. Stirba, Prof. Terry S. Kogan, Hon. Boyd Bunnell, Alan L. Sullivan, Francis M. Wikstrom, Hon. Michael R. Murphy, James R. Soper, Hon. Ronald N. Boyce, Elizabeth T. Dunning, David K. Isom, Perrin R. Love.

EXCUSED: John L. Young, Mary Anne Q. Wood, Thomas R. Karrenberg, M. Karlynn Hinman, Brad R. Baldwin, Allan L. Larsen, Terrie T. McIntosh, Jaryl L. Rencher, Glenn C. Hanni, Hon. Samuel Alba, Robert A. Echard.

STAFF: Colin R. Winchester, Craig T. Jacobsen

VISITORS: Bruce Plenk, Lisa Watts Baskin

I. WELCOME

Mr. Sullivan welcomed the Committee members to the meeting and introduced the Honorable Ann M. Stirba as a new member of the Committee.

II. APPROVAL OF MINUTES

The Committee members moved and approved both the July and September Minutes subject to a few minor changes offered by Mr. Sullivan to the July Minutes.

III. RULES 63(b) (DISQUALIFICATION OF A JUDGE)

As a follow-up to the September meeting, Mr. Sullivan reviewed the concerns raised by trial court judges over the *Barnard v. Murphy* opinion, which may restrict trial judges in the efficient resolution of Rule 63(b) affidavits. Mr. Sullivan reviewed application of Rule 63(b), indicating that to disqualify a judge, a party need merely file an affidavit stating that the judge before whom the action or proceeding is to be heard has a bias or prejudice against the party or the party's counsel. *Barnard v. Murphy* provides that once the affidavit of bias and prejudice has been filed, the judge may withdraw or request another judge to determine the legal sufficiency of the affidavit.

Judge Murphy overviewed to the Committee members his experiences as the presiding judge of the Third District Court and the difficulty he faces in administering Rule 63(b), particularly in pro bono cases. Judge Stirba recited a personal experience in which a litigant filed a Rule 63(b) affidavit that asserted grossly inaccurate allegations, leaving her

with no method to rebut the allegations or correct the record. Judge Stirba indicated that to this day, the record continues to reflect serious allegations of racial prejudice against her.

The Committee members then discussed in some detail the Rule 63(b) concept of "legal sufficiency" of an affidavit of bias. Judge Murphy reiterated that the voicing of his concerns is not an effort to pursue some personal agenda. Many judges feel that Rule 63(b) presents two main problems: (1) the Rule is extremely difficult to administer; and (2) judges are unable to respond to inaccurate allegations. In support of Judge Murphy, Magistrate Boyce asserted that he views the Rule to be a serious problem and very clumsy. Magistrate Boyce indicated that the ideal procedure would permit the trial judge to make an initial determination on the sufficiency of the affidavit of bias with an ability by the parties to appeal to the presiding judge. Magistrate Boyce also stated that the ideal procedure would permit the trial judge to respond to the allegations to complete the record. Judge Murphy expressed his concern that whatever the Committee does, there should never be a rule that creates the presumption of a perfunctory denial of a request for recusal. However, Magistrate Boyce cautioned that it is just as wrong for a judge to step down without cause as it is to continue to preside over a case when recusal is appropriate.

Mr. Sullivan offered his opinion that Rule 63(b) is a bad rule. Supporting his opinion, Mr. Sullivan stated that in light of the thrust of the rule, it seems inconsistent that the rule allows only one challenge of bias. Moreover, Mr. Sullivan concurred with the other opinions that the Rule should not permit disqualification based on an un rebutted affidavit. Professor Kogan stated that the Rule should provide some vehicle to permit correction of an inaccurate record, but that the presumption to disqualify should remain in the Rule to avoid unproductive cat fights. The Committee members then discussed other possible ways to modify the Rule. Mr. Sullivan and Magistrate Boyce discussed the possibility of modeling the Rule after the comparable federal rule. Mr. Sullivan also suggested that the Committee could take a state-by-state survey to determine how other states address the issue. Judge Murphy reiterated that the issue determined in *Murphy v. Barnard*, 212 Utah Adv. R. 19, may go up to the Utah Supreme Court.

Mr. Wikstrom asked whether any of the Committee members were aware of the magnitude of the problem. Judge Murphy responded that the Third District Court sees 20 to 50 Rule 63(b) challenges each year. Mr. Sullivan asked if any Committee member knew how many Rule 63(b) challenges are filed in the rural districts. Judge Bunnell responded that such challenges were very numerous. Magistrate Boyce indicated that in his experience, the bulk of such challenges come from taxpayers and criminals acting pro se. Judge Murphy stated that in the Third District, only about 10% of the challenges come from pro se litigants.

The Committee also discussed the problem that arises when the Rule 63(b) challenge is asserted by an attorney. This raised the implication that the judge being challenged could not preside over any future cases litigated by the challenging attorney. Professor Kogan stated that this result is certainly an argument against a presumption for disqualification.

Closing the discussion on Rule 63(b), Mr. Sullivan asked the Committee members if they had any problem with performing a state-by-state analysis of the procedures for disqualifying judges. The Committee members supported this approach.

III. PROPOSED RULE 72 (ORDERS OF RESTITUTION)

Mr. Sullivan turned the Committee's attention to proposed Rule 72. He indicated that Mr. Plenk had attended the meeting to assist in the discussion. Mr. Sullivan reviewed the background leading up to the Committee's work on the Rule. Mr. Sullivan indicated that the state's current eviction procedure is unclear and that Mr. Plenk had pointed out the resulting inconsistent outcomes of eviction proceedings. Mr. Sullivan also expressed the Committee's ongoing concern of invading substantive law. He reviewed to the Committee his communications with the Supreme Court and its authorization for the Committee to go forward with its work on the Rule. He stated that those individuals working on the Rule have already completed a couple of drafts. He then turned the time over to Mr. Plenk to report the progress that has been made on the drafts.

Mr. Plenk reported that he had met with another attorney, James Deans, whose practice consists almost entirely of eviction proceedings on behalf of landlords. Mr. Plenk indicated that he and Mr. Deans had gone through several drafts, attempting to incorporate the Committee's suggestions from the June 23 meeting. He expressed his openness to any suggestions from the Committee members. Mr. Sullivan asked the Committee members for their comments. Magistrate Boyce stated that there should be some title distinction between Rule 72 and the rules governing replevin procedure. Mr. Plenk responded that he had been referring to Rule 72 as the rule of "restitution." Judge Murphy asked whether the Committee had received any input from the circuit judges or the court commissioners. Mr. Plenk responded that to date he had not received input from either and acknowledged that most eviction proceedings take place in Circuit Court. He also stated that the commissioners don't normally hear detainer/retainer cases.

Mr. Wikstrom expressed a concern about private process servers evicting tenants. Mr. Plenk responded that an earlier draft had used the language "sheriff" or "constable" as the authorized authorities to perform the evictions. Mr. Plenk indicated that he is comfortable with the evictions being performed by either a sheriff or constable. Judge Murphy expressed the importance of maintaining consistency and referred the Committee members to Rule 4(d), which refers to service being permitted by sheriffs or constables. Magistrate Boyce expressed his opinion that requiring evictions to be performed by a sheriff or constable places an undue burden on sheriffs in urban areas. He stated that large cities often permit bonded entities to perform evictions. Otherwise, the public bears the cost to perform the evictions. Mr. Wikstrom responded, pointing out the significance of throwing people out of their homes, and that the evictions would much more likely be peacefully performed if done by somebody with a badge. Mr. Sullivan stated that he had discussed this issue with Mr. Deans in great detail. Their conclusion had been that where process is intrusive in nature, it is better to have trained people perform the process. Mr. Sullivan asked Mr. Plenk to address the issue. Mr. Plenk stated that although he was no fan of constables, he would prefer that evictions be performed by a licensed and bonded person.

He did not feel that the volume of eviction proceedings has created an undue burden on constables and sheriffs. Magistrate Boyce reiterated his concern of using Class I peace officers to perform evictions.

The Committee members further discussed the issue of who should perform the evictions. Mr. Sullivan stated that it seemed to be the Committee's consensus that the persons performing evictions should be trained and bonded (i.e., sheriffs and constables). Mr. Sullivan identified other issues that he sees in the most recent draft, including the provisions pertaining to storage of property, in language related to service and contents of the eviction order. Mr. Sullivan expressed his concern that the order should include a direction that the detainer is required to leave the premises within three days or face a forcible removal. Mr. Sullivan also stated that the rule should clearly indicate who can serve the order as opposed to who can enforce the order. Finally, Mr. Sullivan stated that the draft needed to be rewritten for gender neutrality.

Mr. Sullivan suggested that Mr. Plenk work on drafting forms to accompany the Rule, and that he would take a crack at redrafting the Rule for the next meeting. Judge Stirba raised the question of how to elicit comments from those that will be affected by the changes to the Rule. Mr. Sullivan stated that his preference would be to take one more crack at redrafting the Rule and accompanying forms, and then make a list of who ought to be informed of the proposed changes to the Rule. Judge Stirba asked whether there are lawyers in addition to those already mentioned who are highly involved in eviction proceedings. Mr. Plenk indicated that he and Mr. Deans could identify them, but that there were not many.

Mr. Sullivan asked whether the Committee members had any other comments. He then thanked Mr. Plenk for attending the meeting for his work.

IV. RULE 30(f) (FILING OF DEPOSITIONS)

Mr. Sullivan jokingly indicated that an attempt to clarify the procedure for filing depositions had been on the Committee's agenda since 1902. He stated that there are many conflicting provisions on how to file depositions properly. Mr. Sullivan then began a discussion on the draft of a new Rule 30(f) that he had sent to the Committee members. The Committee proceeded to discuss the new draft in extensive detail. Following the discussion, Mr. Sullivan indicated that he would rewrite the draft to include the changes that had been discussed by the Committee.

V. RULE 64(d) (CONTINUING GARNISHMENT)

Mr. Sullivan indicated that the Committee would not address this item on the agenda due to the absence of certain Committee members.

VI. FORMS

Mr. Sullivan stated that he had perused various forms and was shocked to discover that many of the forms had not changed since the 1940's. He reported that some forms actually violate the current rules. He cited certain examples. A discussion ensued as to whether forms were helpful to today's litigation. Mr. Sullivan expressed his view that the Committee should address this issue and that it should be a priority. The Committee concurred. Mr. Sullivan stated that he would appoint a subcommittee to begin work on the forms immediately.

VII. OTHER BUSINESS

The Committee discussed other ongoing projects. Mr. Sullivan requested that if any Committee member had an issue to be brought before the Committee, that he or she should do so.

VIII. CONCLUSION

There being no further business, Mr. Sullivan adjourned the Committee until the next meeting, scheduled for Wednesday, December 1, 1993.