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February 16, 1994

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MEMBERS OF THE UTAH SUPREME COURT  
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: February Meeting

Dear Committee Members:

The next meeting of the Committee will be held on Wednesday, February 23, 1994, beginning at 4:00 p.m. We will meet at the usual place, in the Council Room, Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. Our meeting will last about an hour and a half. Please be on time so that we can begin and end on time.

At this month's meeting we will deal with the following issues:

1. We will discuss the Committee's feelings about proceeding with major revisions to the discovery rules. This was an item that we intended to get to last month, but ran out of time. I will ask Fran Wikstrom to lead the discussion on the subject. The options are probably (a) waiting a period of time before making any changes to the state rules in order to evaluate the new federal discovery system, or (b) charging ahead now to make some or all of the changes already adopted by the federal rules.

2. We will discuss proposed changes to Rule 3 on the 10-day summons procedure. I enclose letters from Colin Winchester, Clark Arnold and Richard Carling relating to this topic. One question we must answer is whether we need to consider making changes to Rule 3, or whether we should defer to the Bar Commission's task force on collection practices.

3. We will consider the proposed committee notes to Rule 30(f), which I have prepared for your review. Please find those proposed committee notes enclosed.

MEMBERS OF THE UTAH SUPREME COURT  
ADVISORY COMMITTEE ON CIVIL PROCEDURE  
February 16, 1994  
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4. We will consider proposed revisions to Rule 45 discussed at our last meeting, together with any committee notes that Perrin Love was able to put together between last meeting and this. You will probably be receiving those materials in a separate package.

5. We will consider proposed revisions to Rule 63(b) on disqualification of judges. I have enclosed for your consideration a proposed revision to Rule 63(b) which represents a significant departure from current practice. I put together this draft based upon our discussion at last month's meeting.

6. Please find enclosed a revised draft of Rule 69 that incorporates a number of the changes that we discussed last time. My thanks to Brad Baldwin for putting these together so quickly.

I look forward to seeing all of you on February 23.

Very truly yours,



Alan L. Sullivan

ALS/kr

Enclosures

cc: Craig T. Jacobsen, Esq.  
Colin R. Winchester, Esq.

UTAH SUPREME COURT ADVISORY COMMITTEE  
ON CIVIL PROCEDURE

AGENDA

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February 23, 1994

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1. Welcome and approval of minutes (A. Sullivan)
2. Legislative update (C. Winchester)
3. Rule 3: Discussion of proposed changes to provisions relating to the 10-day summons procedure (C. Winchester; C. Arnold; R. Carling)
4. Discovery rules revisions (F. Wikstrom)
5. Rule 30(f): Review of proposed committee notes to the proposed revisions
6. Rule 63(b): Discussion of proposed revisions to provisions on disqualification of judges (A. Sullivan)
7. Rule 45: Status report on revisions (P. Love)

## MINUTES

### Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, February 23, 1994, 4:00 p.m.  
Administrative Office of the Courts

Alan L. Sullivan, Presiding

**PRESENT:** Terry S. Kogan, Hon. Boyd Bunnell, David K. Isom, Alan L. Sullivan, John Young, Terrie T. McIntosh, Francis M. Wikstrom, Mary Anne Q. Wood, Perrin R. Love, Hon. Ronald N. Boyce

**EXCUSED:** Brad R. Baldwin, Glenn C. Hanni, M. Karlynn Hinman, Thomas R. Karrenberg, Colin R. Winchester, James R. Soper, Elizabeth T. Dunning, Allan R. Larsen, Jaryl L. Rencher, Hon. Michael R. Murphy, Robert A. Echard, Hon. Samuel Alba and Hon. Anne M. Stirba

**STAFF:** Craig T. Jacobsen

**VISITORS:** Richard Carling and Clark Arnold

#### I. WELCOME and MINUTES

Mr. Sullivan welcomed everyone to the meeting, including Richard Carling and Clark Arnold. He indicated that he saw no changes that needed to be made to the minutes from the December and January meetings and asked for a motion to approve the minutes. Professor Terry Kogan moved to approve the minutes. The motion was seconded and the Committee unanimously approved the December and January minutes.

#### II. LEGISLATIVE UPDATE

Mr. Sullivan updated the Committee on activities in the Legislature that related to the Committee's prior or continuing efforts. He reported that the work done by the Terrie McIntosh subcommittee was sailing through with no perceived difficulties. Mr. Sullivan reviewed Colin Winchester's report that the Legislature apparently agrees that the continuing garnishment provision should remain a procedural rule. Mr. Sullivan indicated that the Legislature tabled the proposal that would require the use of recycled paper for all court filings. Finally, Mr. Sullivan gave a brief update on the efforts of Jim Beadles in the Legislature, which had been discussed in other Committee meetings.

#### III. RULE 3

Mr. Sullivan reviewed his conversation with Clark Arnold regarding Rule 3. Mr. Arnold had raised concerns regarding certain pitfalls to Rule 3, specifically, his

perception that attorneys are commencing actions through the use of the ten-day summons and then never informing the defendant that the action has been dismissed for failure to file a complaint as required by the rule. Mr. Winchester has communicated with the Third District Court and been informed that the court is also experiencing problems related to Rule 3. Mr. Sullivan referred the Committee to the letter from Mr. Winchester to Mr. Sullivan dated February 1, 1994, which was included in materials sent by Mr. Sullivan to the Committee prior to the meeting. As he had recounted in the January meeting, Mr. Sullivan again noted that he had asked Mr. Arnold for suggestions on how to alleviate the perceived problems. Mr. Sullivan's response was also enclosed in the materials sent to the Committee prior to the meeting. Mr. Sullivan then thanked Mr. Clark for attending the meeting and asked him if he would discuss his suggestions with the Committee. Mr. Arnold discussed two possibilities to prevent the problems he perceives with the ten-day summons. Mr. Arnold's first suggestion would be to eliminate the ten-day summons altogether as a means to commence a lawsuit. Mr. Arnold's second suggestion would be to amend Rule 3 to require that a letter of notification be sent to defendants served with a ten-day summons in those instances when a complaint is not filed and the action is deemed dismissed. Mr. Arnold went on to relate his own experience with Rule 3 and the unfair burden it had placed on one of his clients.

Mr. Sullivan concurred that the ten-day summons is an odd provision and that the Committee's previous research had revealed that it was also a unique provision. Thereafter, the Committee launched into a very in-depth discussion over the merits of the ten-day summons. Richard Carling, who had been invited to the meeting to discuss the merits of the ten-day summons from the perspective of a collection attorney, explained his view of the benefits of the ten-day summons. Mr. Carling suggested that the ten-day summons is a tool to reduce court clutter and saves creditors from expending filing fees in instances where debtors are difficult to locate and serve. The Committee posed numerous questions to Mr. Carling, including how to prevent the ten-day summons from being used as a collection letter. Mr. Carling responded that, in his opinion, the fair debt collection statute and supporting case law would deem such uses to be punishable by the Bar and the courts. He further indicated that improper use of the ten-day summons may be actionable by defendants who had been victimized from such use. Mr. Carling went on to state that many of the problems under discussion have arisen from the unauthorized practice of law, and in particular, the unauthorized practice of law by collection agencies. Mr. Carling reported the efforts of the Utah State Bar Collections Practice Task Force to find solutions to these problems.

Several Committee members voiced opinions and suggestions to resolve the issue presented by the ten-day summons. Judge Boyce indicated that the unauthorized practice of law by collection agencies could be resolved by making it a crime for attorneys to assist collection agencies to practice in an unauthorized manner. Professor Kogan suggested that another resolution would be to do away with the ten-day summons, given that it appears to be a vehicle fraught with possibilities to abuse the judicial process. Mr. Carling disagreed, reiterating adamantly that the ten-day summons is a good tool when dealing with elusive creditors.

After further discussion, Mr. Sullivan noted that the last time the Committee reviewed Rule 3, there had been sentiment within the Committee to eliminate the ten-day summons. However, the Supreme Court had rejected such a proposal and would likely respond similarly to renewed efforts to dispose of the ten-day summons. Judge Boyce suggested that the Committee request direction from the Court, notifying the Court that the issue has been raised again by members of the Bar. The Committee's consensus was that Judge Boyce's idea was excellent. After additional discussion, Mr. Sullivan stated that he would communicate the Committee's sentiments to the Court.

#### IV. RULES REVISIONS

Mr. Sullivan stated that he has been asked by numerous individuals whether the State will enact rule changes similar to the new federal rules. Turning the table over to Fran Wikstrom, Mr. Sullivan indicated the need to discuss what steps, if any, should be taken. Mr. Wikstrom reviewed prior efforts undertaken by the subcommittee on the discovery rules. He reminded the Committee of Justice Zimmerman's report and attendance at prior Committee meetings to discuss possible changes to the State's discovery rules. Mr. Wikstrom indicated that the subcommittee had decided to wait to see what rule changes would be enacted at the federal level. He also reported on the Litigation Section's poll, which revealed very strong opposition to changes in the discovery rules. Judge Boyce stated that the new federal rules are working very well. Mr. Wikstrom proposed that the Committee be cautious in moving rapidly to make changes to the State's rules, given the strong opposition to the changes. Mr. Wikstrom suggested that a little time would allow the Bar's perception to cement one way or the other. The Committee then discussed in detail whether the new rules are working at the federal level. Judge Boyce was extremely enthusiastic about the new rules, indicating that they are working much better than he had anticipated. Judge Boyce also responded to questions as to how the rules are working in other districts. Judge Boyce indicated that there have been mixed reviews.

Mr. Sullivan again asked the Committee members how they thought the Committee should proceed. John Young concurred with Mr. Wikstrom's view to move cautiously, waiting to see whether a consensus develops among the local Bar. Mr. Young indicated that he did not think the local Bar was ready yet for massive changes to the State rules. Professor Kogan pointed out that there may be a few of the new federal rules that are worthy of independent review by the Committee. David Isom opposed a "wait and see" approach, believing that the federal rule changes are so important that the Committee should move ahead, even if opinion has not yet solidified. After further general discussion, Professor Kogan asked Mr. Wikstrom if he had any proposed timeframe for considering changes to the State's discovery rules. Mr. Wikstrom responded that he had not expected to hear positive reports such as Judge Boyce's so early in the process period. He indicated that such enthusiasm may permit perhaps significant work to commence during the summer. Mary Anne Wood suggested that Mr. Wikstrom's and Mr. Isom's timeframes may be harmonious, given the time it takes to implement proposals for changes to rules. Mr. Wikstrom responded that it would not take much time to complete proposals if the Committee adopted the federal rule changes wholesale, without drafting new rules. After

further discussion, including a straw poll, Mr. Sullivan suggested that Mr. Young and Mr. Wikstrom begin a study as to how and when to proceed, hinting that it would be wonderful if there could be some report at the next meeting. Mr. Young responded that they would give it their best effort. Mr. Sullivan also asked Mr. Wikstrom and Judge Boyce if they would compile data as to acceptance, rejection and other sentiments towards the new federal rules, including articles, reports, etc. The Committee also discussed the benefit of soliciting and receiving early input from others on the issues raised by adopting new discovery rules.

**V. RULE 30(f)**

Mr. Sullivan reported as to the status of proposed Rule 30(f). Mr. Sullivan reviewed the Committee notes that he had prepared. The Committee unanimously approved Mr. Sullivan's Committee notes.

**VI. RULE 63(b)**

Mr. Sullivan reported on the status of Rule 63(b) and discussed with the Committee his draft on the provisions for disqualification of judges. Mr. Sullivan stated that his draft permitted the judge who was the subject of an affidavit of bias to give up the case or file a response. Professor Kogan concurred that the draft permitted both a recusal and an answer to protect the record. The Committee responded very favorably to Mr. Sullivan's draft, discussing minor changes. Mr. Sullivan indicated that he would make a revision to his draft and send it out so that the Committee could consider it prior to the next meeting in hopes of being able to vote on it at the next meeting.

**VII. STATUS REPORT ON VARIOUS RULES**

Mr. Sullivan indicated that the comment period on Rules 30(f), 45, 69 and 72 had run and that the Committee could finalize and submit them to the Supreme Court. He also indicated that Rules 64(D) and 63(b) could be sent out for comment.

**VIII. CONCLUSION**

Mr. Sullivan thanked the Committee for its work. There being no further business, Mr. Sullivan adjourned the Committee until the next meeting, scheduled for Wednesday, March 23, 1994 at 4:00 p.m.