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September 20, 1994

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MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: September Meeting

Dear Advisory Committee Members:

Our next meeting will be held on Wednesday, September 28, 1994. We will make an effort to stick to the 4th Wednesday of each month as the regular time for our meetings. We will begin at 4:00 p.m. and we will conclude no later than 6:00 p.m. - so please try to be on time. The meeting will be held at the usual place, the Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah.

If you do not believe you will be able to attend, please let me or my secretary, Kay Rich, know so that we do not wait for you.

I have enclosed for your information a letter from Senator Robert Montgomery and Representative John Valentine, the co-chairs of the Judicial Rules Review Committee. The letter summarizes the joint efforts of the Supreme Court's standing committees on procedure and the Legislature. I believe you will find their report informative.

At our meeting next Wednesday, we will consider the following matters:

1. We will have a status report from Colin Winchester on the rules that we have been working on. He will tell us which rules have been

Supreme Court Advisory Committee
September 20, 1994
Page 2

adopted by the Supreme Court, which have been submitted to the Supreme Court, and which have been out for comment, requiring further work on our part.

2. We will consider again the desirability of adopting the new federal discovery rules in the state system. Pursuant to our discussions at our last meeting, we will invite guests representing different constituencies in the legal community to comment on the new federal rules and their fit in the state system.

3. We will take a moment to discuss our continuing work on Rule 47(e) on peremptory challenges in light of JEB v. Alabama, 62 U.S.L.W. 4219 (4/19/94). I believe it was the view of our committee that we should proceed with changes to the rule on the assumption that peremptory challenges should remain a part of civil practice in Utah. The question is really whether the rule should be amended to establish a procedure for resolution of objections to peremptory challenges. Perrin Love has agreed to work on this project.

4. We will discuss how to go about organizing a thorough investigation of the 10-day summons practice in Utah under Rule 3. As you may recall, the Supreme Court directed us to investigate the area and bring back recommendations, which may include elimination of the 10-day summons feature of Rule 3.

5. We will discuss a potential project for revision of Rule 68 on offers of judgment. At our last meeting, Terry Kogan and Mary Anne Wood mentioned that they might wish to put together a proposal for our consideration. One issue we discussed was whether attorney fees should be included as costs, either for purposes of Rule 68 or as taxable costs to the prevailing party under Rule 54. Another question was whether the term "costs" can be defined to exclude attorney fees but in a way that will improve operation of Rule 68.

6. Once again the Legislature would like us to consider revisions to Rule 63A. I enclose a copy of a letter from Colin Winchester

Supreme Court Advisory Committee
September 20, 1994
Page 3

which, in turn, encloses a provision from the California Code of Civil Procedure on peremptory challenge of judges. We will discuss whether the committee wishes to pursue this suggestion.

7. Finally, we will discuss any new projects that the committee wants to pursue.

If you have any questions about the meeting, please give me a call. Otherwise, I look forward to seeing you on Wednesday, September 28.

Very truly yours,



Alan L. Sullivan

ALS/kr
Enclosure

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

AGENDA

Utah Supreme Court Advisory Committee on Civil Procedure

September 28, 1994

1. Welcome and Status Report on Projects (**Alan Sullivan and Colin Winchester**)
2. Revision to the Discovery Rules: Discussion of Methodology, Study, and Invitations to Guests (**Alan Sullivan and Fran Wikstrom**)
3. Peremptory Challenges (Rule 47(e)): Discussion of Possible Rule Changes (**Alan Sullivan and Perrin Love**)
4. Supersedeas Bonds: Discussion of Supreme Court Request for Study (**Alan Sullivan**)
5. Rule 3: Discussion of Investigation of 10-Day Summons Practice Abuses and Solutions
6. Rule 63A: Peremptory Challenges of Judges
7. New Projects

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, September 28, 1994, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Alan L. Sullivan, Honorable Anne M. Stirba, Thomas R. Karrenberg, Glenn C. Hanni, Terrie T. McIntosh, Colin R. Winchester, James R. Soper, Honorable Boyd Bunnell, Brad R. Baldwin, Francis M. Wikstrom, M. Karlynn Hinman, Perrin R. Love, and Honorable Michael R. Murphy

EXCUSED: David K. Isom, Honorable Ronald N. Boyce, Allan L. Larsen, Jaryl L. Rencher, Robert A. Echard, Honorable Samuel Alba, Mary Anne Q. Wood, Elizabeth T. Dunning, and Terry S. Kogan

STAFF: Julie Fortuna for Craig T. Jacobsen

VISITORS: None

I. WELCOME AND STATUS REPORT ON PROJECTS

Mr. Sullivan welcomed the Committee members to the meeting and announced that both the Utah Legislature and the Utah Supreme Court had requested the Committee to review several rules, including the new federal discovery rules.

Mr. Winchester indicated that the Committee had reviewed Rules 30(f) (certification), 45 (subpoenas), and 6a (execution and supplemental proceedings), that they had been out for public comment and would be before the Utah Supreme Court on October 12, 1994. Mr. Winchester indicated that the Utah Supreme Court would probably adopt the rules on November 1, 1994. Mr. Winchester also indicated that 63(b) (disqualification of judges) and 64(d) (garnishment) were reviewed by the Committee prior to their summer break and that they had been circulated for public comment on October 1, 1994. He indicated that the comment period would last through mid-November and that the rules would be back before the Committee in December.

Mr. Winchester suggested that the Committee review the small claims forms which were drafted in 1992 and have been available for use by the general public since that time. Mr. Sullivan suggested that the Committee also review the forms to the civil rules as they have not been reviewed for quite some time. Mr. Karrenberg indicated that he would review the forms and make recommendations to the Committee.

II. REVISION TO THE DISCOVERY RULES INCLUDING METHODOLOGY, STUDY, AND INVITATIONS TO GUESTS

Mr. Sullivan opened this discussion, reporting that the Utah Supreme Court had asked the Committee to carefully study the new federal discovery rules and make recommendations. Mr. Sullivan reported that he had spoken with Magistrate Boyce who indicated that a number of federal courts have not adopted the new federal discovery rules or have adopted them in part. Mr. Sullivan also indicated that the Federal Rules Committee was going to review the federal discovery rules in March of 1995.

Mr. Sullivan recommended that the Committee consult with interest groups within the bar, including Ellen Maycock (domestic) and the Utah Attorney General (habeas corpus and post conviction actions), to discuss the impact of the federal discovery rules. Mr. Sullivan also suggested that the Committee hear from Norm Younker (Utah Trial Lawyers), Rocky Anderson (Litigation Section Chair), Leslie Lewis (Board of Judges), the Board of Circuit Judges, and the Utah Defense Association. Judge Stirba and Mr. Wikstrom asked that the Committee consider the discovery rules' impact on probate. Judge Stirba recommended that the Committee ask the Federal Bar Association to poll its members regarding the new federal discovery rules and Mr. Love recommended that the Committee get input from the Federal Rules Committee. Mr. Wikstrom suggested that the Committee hear from Bob Campbell (Federal Rules Advisory Committee).

Mr. Sullivan indicated that there is a great deal of inconsistency in the application of the discovery rules at the federal level, at which point various discussions were held among the members of the Committee regarding their individual experiences with the discovery rules in federal court. Mr. Sullivan recommended that the Committee put a group of people together to speak to the Committee on this issue and indicated that he would follow up on the suggestions of the Committee.

III. PEREMPTORY CHALLENGES UNDER RULE 47(e) AND POSSIBLE RULE CHANGES

Mr. Sullivan reported that the Chief Justice had suggested that the Committee review this area in light of concerns raised by *JEB v. Alabama* where the Supreme Court found that peremptory challenges motivated by gender grounds were unconstitutional. Judge Stirba indicated that a similar case styled *Batson v. Kentucky* dealt with race.

Judge Stirba indicated that although no formal procedure exists to deal with peremptory challenges that are challenged as unconstitutional, if a challenge is made that the other side believes is gender-based, the burden shifts to the person making the peremptory challenge to show that the challenge is not gender-based, and then the burden shifts to the other side to establish otherwise. Judge Stirba indicated that she had never had to deal with a claim of unconstitutionality of peremptory challenges. Judge Bunnell indicated that in San Juan County peremptory challenges are often challenged as unconstitutional on the basis of race concerning Native American heritage.

It was the general consensus of the Committee that no rule change was needed with respect to Rule 47(e). Judge Stirba indicated that a procedure could be adopted in the judge's bench book.

Mr. Sullivan recommended that the Committee look at other states to see what they have done before leaving Rule 47(e). Ms. Hinman volunteered to report on the status of other states at the Committee's next meeting. Mr. Love volunteered to write a letter to the Chief Justice explaining the Committee's conclusions.

IV. SUPREME COURT REQUEST FOR STUDY ON SUPERSEDEAS BONDS

Mr. Sullivan and Judge Stirba indicated that the Utah Supreme Court had asked the Committee to review the rules on supersedeas bonds and determine whether the procedure could be made more simple and less expensive for the appellant. Discussion by the Committee was held about which rule governed supersedeas bonds, what the rule meant, and whether it was an appellate rule and thus outside the Committee's responsibilities. Judge Stirba recommended that the Committee change the rule to clean it up although she found the rule substantively sufficient.

Mr. Sullivan recommended that the Committee research other states to determine the ease with which appeals may be taken and collateral secured. Mr. Winchester volunteered to research other states and Mr. Soper volunteered to look at the rule carefully in light of the problems and ambiguities discussed by the Committee and to draft some alternatives. Among the items discussed by the Committee were whether allowing an appellant to post cash could leave the appellee undersecured in the case of bankruptcy or whether the court had too much or too little discretion in the matter.

V. RULE 63(a), PEREMPTORY CHALLENGE OF JUDGES

Mr. Sullivan introduced this item by inquiring whether the Committee felt it should revisit Rule 63(a). Mr. Sullivan recalled that the Committee had considered this rule several times. Mr. Hanni moved that the Committee not reconsider the rule. Ms. Hinman seconded the motion. Judge Stirba asked whether Rule 63(a) was working, and Judge Murphy indicated that he had seen no abuses of the rule and that no judges were without work. Judge Murphy also indicated that there had been very few 63(a) preemptory challenges. All Committee members present voted in favor of not reconsidering Rule 63(a), except Mr. Karrenberg who was opposed.

VI. INVESTIGATION OF TEN-DAY SUMMONS, PRACTICE ABUSES AND SOLUTIONS UNDER RULE 3

Mr. Sullivan indicated that the Committee had studied the ten-day summons rule on several occasions and concluded that it was a unique rule that no other jurisdiction had adopted. Mr. Sullivan recommended that the Committee investigate any existing abuses and report on viable alternatives, including deleting it from the existing rules. Mr. Winchester suggested that the Committee check on debt collection abuses and consider having Bruce Plenk discuss such abuses. Mr. Winchester also suggested that the Committee

consider limiting the rule to money judgments less than \$10,000 as the rule has some benefit in small debt collection actions. Mr. Sullivan recommended that the investigation be put on the agenda for November and that Circuit Judge Ann Milne should speak to the Committee about abuses. Judge Murphy suggested that Judge Robin Reese may also have some insight into the issue.

VII. NEW PROJECTS

Mr. Love suggested that the Committee consider standardizing taxable costs. Judge Stirba volunteered to provide the Committee with a recent decision addressing the issue at the Committee's next meeting. Mr. Love volunteered to contact Mr. Kogan and Ms. Wood and ask them to report on this issue. Mr. Winchester volunteered to bring a Court list of proper and improper taxable costs.

It was suggested that the Committee review Rule 15 relating to relation back amendments to see whether the state should adopt the new amendments to the federal rule. Mr. Love volunteered to make written recommendations regarding Rule 15 to circulate at the Committee's next meeting.

Judge Stirba recommended that the Committee consider Rule 6(b) regarding when affidavits in support of memoranda may be filed. She indicated that there is some ambiguity between Rule 6(b) and Local Rule 4-501. Judge Stirba volunteered to look at this issue and make a recommendation.

VIII. CONCLUSION

Mr. Sullivan reminded the Committee that the Committee meets on the fourth Wednesday of every month but that, due to the holiday season, the next two meetings would be held on October 26th and December 7th. There being no further business, Mr. Sullivan adjourned the Committee until the next meeting.