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MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: January Meeting

Dear Committee Members:

The next meeting of the Advisory Committee will be held on Wednesday, January 25, 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 will be late.

At our January 25 meeting, we will consider the following items:

1. We will ask Colin Winchester to provide us with an update on any legislative issues of which our committee should be aware.
2. We will consider proposed revisions to Rule 68 - Offers of Judgment. You may recall that we asked committee members Terry Kogan and Mary Anne Wood to consider whether the definition of the term "costs" in that rule should be clarified or expanded and whether the committee is interested in allowing recovery of some or all of the prevailing party's attorneys' fees. Attached you will find a memorandum to me from Terry and Mary Anne, together with an article that proposes an interesting modification to federal Rule 68.
3. We will again consider the 10-day summons procedure set forth in Rule 3. The Supreme Court has asked us to investigate the benefits of the rule and any abuses in its operation. Accordingly, we have invited several guests from interested groups to discuss these matters with us.

MEMBERS OF THE UTAH SUPREME COURT
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4. We will have an update on revisions to Rule 4. You will 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 January 25.

Very truly yours,



Alan L. Sullivan

ALS/kr
Enclosure

cc: Colin R. Winchester, Esq. (w/encl.)
Julie Fortuna, Esq. (w/encl.)

AGENDA

Utah Supreme Court Advisory Committee on Civil Procedure

January 25, 1995

1. *Welcome, approval of minutes, and membership discussion (A. Sullivan)*
2. *Legislative update (C. Winchester)*
3. *Rule 3: Discussion of elimination and modification of the ten-day summons procedure (A. Sullivan)*
4. *Rule 68: Offer of judgment/modification of the "costs" concept and recovery of attorney fees by the prevailing party (T. Kogan)*
5. *Rule 64D: Review and discussion of public comments*
6. *Rule 4: Revisions of the rule to conform to service-by-mail provisions in federal rule (P. Love)*
7. *Rule 62: Stay of proceedings (J. Soper)*

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, January 25, 1995, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Terry S. Kogan, Terrie T. McIntosh, Honorable Boyd Bunnell, Francis M. Wikstrom, M. Karlynn Hinman, John L. Young

EXCUSED: Glen C. Hanni, David K. Isom, Perrin R. Love, Honorable Michael R. Murphy, James R. Soper, Mary Anne Q. Wood, Honorable Samuel Alba, Honorable Ronald N. Boyce, Thomas R. Karrenberg, Honorable Anne M. Stirba

STAFF: Colin R. Winchester and Julie Fortuna

VISITORS: Bruce Plenk, Utah Legal Services; Paul Allred, Attorney for Bank One; Ralph C. Petty

I. WELCOME, APPROVAL OF MINUTES, AND MEMBERSHIP DISCUSSION

Mr. Sullivan welcomed Committee members and visitors to the meeting. The December Minutes were approved with one change to reflect that Rule 63 rather than Rule 64D was being republished.

Mr. Sullivan indicated that Committee membership was not accurately reflected in the minutes and reported that he had spoken with several people listed as excused who were no longer part of the Committee, including Brad R. Baldwin, Elizabeth T. Dunning, Robert A. Echard, Alan L. Larsen, and Jaryl L. Rencher.

Mr. Sullivan thanked Mr. Winchester warmly for his service to the Committee and wished him luck in his new position as the Kane County Attorney in Kanab.

II. LEGISLATIVE UPDATE

Mr. Winchester briefly addressed the Committee indicating no legislative proposals affected the Utah Rules of Civil Procedure.

III. RULE 3: DISCUSSION OF ELIMINATION AND MODIFICATION OF THE TEN-DAY SUMMONS PROCEDURE

Mr. Sullivan introduced Mr. Plenk from Utah Legal Services and Mr. Allred, an attorney for Bank One, to the Committee as guest speakers on the 10-day summons rule. Mr. Sullivan began the discussion by indicating that the Utah Supreme Court had asked the Committee to review the 10-day summons rule and would consider a proposal to eliminate it if appropriate. Mr. Sullivan recounted discussions within the Committee on the topic and voiced concerns that the 10-day summons rule had been used as a scare tactic by predatory creditors and had resulted in people answering complaints that were never filed and thus dismissed. Mr. Sullivan stated that no other jurisdiction had a 10-day summons rule except Minnesota which had recently eliminated it.

Mr. Plenk summarized Committee discussions on the 10-day summons rule beginning in September of 1987 and concluded that over a two and a half year period of time, every time the Committee reviewed the 10-day summons rule it recommended abolishment on the grounds that the rule was unique and subject to collection abuses. He believed the same concerns were still relevant. In addition, Mr. Plenk believed the 10-day summons rule was confusing because although titled a 10-day summons, the time to answer is twenty days. Mr. Plenk also voiced concern that the 10-day summons rule had a dun aspect because collection agencies use it to get a debtor's attention without intending court action. Mr. Plenk indicated that the Fair Debt Collections Act ("FDCA") prohibits issuing court-like documents that are not court documents. Mr. Plenk indicated that he believed the use of the 10-day summons rule had radically declined and that there was no reason to continue it.

Mr. Winchester reported statistics compiled about the use of 10-day summonses in circuit courts from July 1, 1993 through June 30, 1994. In Murray Circuit Court, 13,000 actions were filed, 90% of which were collection matters mostly utilizing 10-day summonses. In Salt Lake Circuit Court, 15,600 complaints were filed, 70% of which were collection matters, and fewer than 10% of these used 10-day summonses. In Sandy Circuit Court, 7,000 complaints were filed, 90% of which were collection matters mostly utilizing 10-day summonses. In West Valley Circuit Court, 14,000 complaints were filed, 90% of which were collection matters mostly utilizing 10-day summonses.

Mr. Sullivan raised the scenario of using a 10-day summons to find a debtor so that a filing fee is avoided if a defendant is unable to be located and served. Mr. Plenk responded that he believed collection agencies generally knew whether the debtor could be located. Mr. Kogan stated he believed the 10-day summons rule had dun-type implications and other ways existed to find people than using court documents. Speaking in favor of 10-day summonses, Mr. Allred indicated that if the 10-day summons was used to find a person, once you found the person, the problem was solved. He also indicated that West One avoids confusion by not titling a 10-day summons, "Ten Day Summons." Mr. Plenk indicated he had less concern with 10-day summons if they are called 20-day summons.

Mr. Sullivan indicated that one of the problems with the 10-day summons rule is that answers are filed to complaints that are never filed and thus dismissed. Mr. Winchester

indicated that in Salt Lake Circuit Court approximately ten such answers are filed a month. The answers are kept for one year and then discarded.

Mr. Kogan again raised concerns that the 10-day summons rule was used to coerce payment of a debt without having to pay a filing fee. Mr. Allred indicated that avoiding filing fees is a legitimate concern because filing fees in the circuit court range from \$35 to \$55 and range from \$75 to \$100 in the district court. Mr. Allred indicated that collection agencies may not abuse the process as much as Mr. Plenk thought because they have to pay a constable to serve 10-day summonses. Mr. Petty also indicated that constables will not serve a summons without a complaint.

Mr. Allred presented a scenario to the Committee where he believed the 10-day summons rule was effective. The scenario included an attorney and his son who were jointly liable on a credit card. The son incurred a large debt under the credit card without the knowledge of the attorney. Mr. Allred used a 10-day summons to give the attorney a chance to pay the debt without a lawsuit, which he believed benefited the attorney.

Mr. Plenk indicated that he believed some debtors would pay a debt upon being served with a summons that would not pay otherwise and that it could be both good and bad for the state to serve as the final dun letter. Mr. Sullivan indicated that if a debtor pays upon receiving a 10-day summons he saves himself a filing fee. Mr. Plenk inquired what percentage of 10-day summonses result in payment of a debt without filing a complaint.

Mr. Plenk indicated that he believed three to four attorneys file a high percentage of 10-day summonses in Murray and in Sandy and that the Committee would benefit from hearing from them. Mr. Plenk voiced concern that the Committee was not hearing from unethical attorneys using 10-day summonses. Mr. Plenk asked the Committee to consider high volume collection agencies and indicated that CMA is the main player in Murray and that the Committee should contact Kevin Richards or Mr. Rounds. Mr. Plenk also indicated that Allstate did a high volume of collection work in Sandy, and that Kirk Cullimore may now represent them. Mr. Young suggested that the Committee talk to constables.

Mr. Sullivan raised the issue of how to alert a defendant that a complaint has not been filed and thus no answer required. Mr. Plenk voiced concern that when serviced with a 10-day summons, a debtor does not receive a civil number which makes it difficult to get information.

Mr. Plenk suggested that the 10-day rule could be regulated by the FDCA or some other means where attorneys who misuse the 10-day summons are subject to a penalty or some other form of punishment.

Mr. Young indicated that a bar ethics opinion dated January 26, 1994 dealt with unauthorized practice of collection agencies but ethical considerations were not within its scope.

Mr. Plenk indicated that the 10-day summons form needed to be changed. Mr. Sullivan agreed.

Mr. Sullivan thanked Mr. Allred and Mr. Plenk for addressing the Committee and indicated the Committee would consider their comments.

IV. RULE 68: OFFER OF JUDGMENT/MODIFICATION OF THE "COSTS" CONCEPT AND RECOVERY OF ATTORNEY FEES BY THE PREVAILING PARTY

Mr. Kogan addressed the Committee and solicited comments on the article he circulated entitled *Fee Shifting Offers of Judgment --An Approach to Reducing the Cost of Litigation* by William W. Schwarzer. Mr. Sullivan indicated he believed it was an interesting and attractive proposal and asked Mr. Kogan to address the Committee about how it worked. Mr. Kogan volunteered to take time at the next Committee meeting to explain the proposal with overheads and hypotheticals.

V. RULE 64D: REVIEW AND DISCUSSION OF PUBLIC COMMENTS

Mr. Sullivan began discussion by recalling that the legislature had originally asked the Committee to draft a continuing garnishment procedure into Rule 64D believing the Committee was better able to accomplish this task than the legislature. Brad Baldwin chaired the Committee at that time.

Mr. Winchester reported that all comments on Rule 64D had been submitted and directed the Committee's attention to a one-page memorandum summarizing the comments. He indicated that John Valentine who chairs the Judicial Rules Committee thanked the Committee for its work on Rule 64D, suggested that a 25% limit may be appropriate for continuing garnishments, and also made some suggestions for how the Rule 64D could be made clearer. Mr. Winchester reported that Craig Ludwig, court clerk for the third district, circulated 64D to his supervisors, suggested that the Rule 64d require date and time of service notification on the copy served, and that the rule indicate whether a garnishment is good from the day it is served or from the day garnishment beings.

Ms. Hinman reported that she was not in favor of Rule 64D because it forced a creditor to garnish wages to ensure its place in line when it might not otherwise garnish. She also voiced concern over whether Rule 64D encouraged bankruptcy in situations where multiple garnishments existed because a debtor would become discouraged. Mr. Plenk concurred with Ms. Hinman's concerns, but indicated that continuing garnishment may cost the debtor less because a debtor would get garnished once and work it out. Mr. Petty voiced concern that Rule 64D encouraged creditors to play hardball. Mr. Plenk indicated that 64D may encourage unlawful side deals with an employer.

Mr. Petty inquired whether Rule 64D violated due process because no hearing or notice is provided every pay period that is garnished. Mr. Kogan agreed that there needed to be an ability to request notice. Mr. Plenk indicated that the debtor only needed a right to request a hearing if the garnishment changed.

Mr. Petty informed the Committee that Rule 64D resulted in less revenue for the Courts with the same overhead. Mr. Sullivan indicated that this resulted in less money being

owed by the debtor. Mr. Petty indicated that saving the debtor money shifts the expense and the risk to the employer because the employer is forced to determine which garnishment arrived first. Mr. Sullivan indicated that the same risk existed under current Rule 64D. Mr. Plenk indicated that Rule 64D resulted in constables losing money. Mr. Wikstrom indicated that Rule 64D was more efficient because debtors only had to answer interrogatories once. Mr. Plenk indicated that the Committee may be worrying about nothing because if an employee received multiple garnishments, they would be fired.

Mr. Sullivan indicated that conceptual problems existed with Rule 64D and more Committee members needed to be present for a full discussion to take place. Mr. Sullivan volunteered to form a new subcommittee to make recommendations to the Committee as the previous subcommittee no longer existed and indicated he would contact Brad Baldwin about the proposed changes to Rule 64D.

VI. CONCLUSION

Mr. Sullivan suggested that the Committee adjourn until more members were present. There being no further business, Mr. Sullivan adjourned the Committee until the next regularly scheduled meeting to be held on February 22 at 4:00 p.m.