Administrative Office of the Courts

Chief Justice Michael D. Zimmerman
Chair Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Timothy M. Shea
Date: February 21, 1996
Re: Meeting materials

Enclosed are the meeting materials for February 28.

The Judicial Council has asked all of the Supreme Court advisory committees to consider the report of the Court Technology Committee, which recommends the extensive use of video technology for the purpose of recording court proceedings. There are only a couple of rules of civil procedure that will require amendment under these recommendations. These rules will come back to the committee for action at a later date. This is an opportunity for the committee to learn about and comment upon the recommendations.

Anticipating the passage of SB 165 completing the consolidation of the courts, there are a few references to the circuit court in the rules that need correction. One of these is contained within a form that I am suggesting be deleted entirely.

The Attorney General has provided draft forms to implement new Rule 65C on post conviction petitions. I have provided the latest version of Rule 65C and the latest version of the legislation so that you can better evaluate the form. The form comes directly from the AG's office, and may have been drafted around earlier versions.

We received just two comments in response to our inquiry concerning the proposed rule on admission pro hac vice. These are enclosed.

Last autumn, the committee was considering amendments to a variety of rules to improve the processing of notice to the loosing party of the entry of judgment. At the request of the committee I reviewed the proposed changes with the clerks of court. I have included a memo

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explaining their objection and their suggested alternative. Basically, the rule proposed by the committee will substantially increase the amount of work required of clerks in processing judgments. The memo outlines their suggested alternative, but I have not redrafted the rule to conform to that suggestion.

Agenda

Supreme Court Advisory Committee on Rules of Civil Procedure

February 28
4:00 to 6:00 p.m.

Administrative Office of the Courts
230 South 500 East Suite 300

Welcome and approval of minutes	Alan Sullivan
Report of Court Technology Committee	Judge Anne Stirba
Court Consolidation; Deleting references to Circuit Court	Tim Shea
Post Conviction Petition Forms	Tim Shea
Admission Pro Hac Vice; Comments	Tim Shea
Mailing Orders and Judgments	Tim Shea

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, February 28, 1996, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Virginia S. Smith, Honorable Ronald N. Boyce, Terry S. Kogan, Thomas R. Karrenberg, Mary Anne Q. Wood, Francis M. Wikstrom, David K. Isom, Terrie T. McIntosh, Honorable Anne M. Stirba, W. Cullen Battle, James R. Soper

EXCUSED: M. Karlyn Hinman, Perrin R. Love, Glen C. Hanni, John L. Young

STAFF: Timothy R. Shea, Julie Fortuna

I. WELCOME AND APPROVAL OF MINUTES

Mr. Sullivan welcomed Committee members to the meeting and thanked Mr. Shea for compiling the agenda for the meeting and getting materials out to the Committee.

Mr. Sullivan added language to page 3 of the December 6, 1995 minutes to indicate that the suggestions made by Mr. Sullivan to Rule 65C were incorporated in the draft, and corrected typographical errors. The Committee approved the December 6, 1995 minutes with Mr. Sullivan's revisions.

Mr. Sullivan received a letter from the Salt Lake County Sheriff's Office indicating that service demands under Rule 4 had dramatically increased since last year and requesting the Committee consider amending Rule 4 to lessen the burden placed on sheriff's office. Mr. Sullivan asked whether the Committee should adopt federal rule of civil procedure 4(d) dealing with service of process. Mr. Sullivan did not believe adopting federal rule 4(d) would alleviate the burden on the sheriff's office because it would not affect collection cases which constitute a large percentage of cases filed in Salt Lake County. However, Mr. Sullivan suggested that the Committee look carefully at federal Rule 4 to see if amendments to Rule 4 are warranted. Mr. Sullivan volunteered to draft a letter to the Salt Lake County Sheriff's Office and recommended putting Rule 4 on the Committee's agenda for review at a future meeting.

Mr. Sullivan suggested the Committee revise the outmoded forms at the back of the Rules. He reminded the Committee that he and Mr. Karrenberg had volunteered to review the forms, but indicated that he would not be able to do so in the near future. Mr. Sullivan reported that a person from his office had reviewed the forms and made some revisions. Mr. Karrenberg suggested that Mr. Sullivan send the revised forms to him and he would have a

draft ready for the Committee's April meeting.

II. REPORT OF COURT TECHNOLOGY COMMITTEE

Mr. Shea referred the Committee to the Court Technology Committee's Final Report to the Utah Judicial Council dated November 20, 1995 ("Report") and indicated that the Report was circulated for the Committee's information and comments. Mr. Shea reported that the Court Technology Committee intended to recommend legislation as outlined in its Report in January of 1997. Mr. Shea indicated that the Court Technology Committee's recommendations affected two rules of civil procedure, Rules 47(d) and (n), and that the proposed amendments would be presented to the Committee for its consideration and recommendation in due course.

Mr. Shea summarized the Report for the Committee. The Report recommends that the current system of court reporters and audio tapes be replaced by live computer assisted transcription by court reporters and video tape and suggests that new courthouses and courthouse remodels accommodate this technology. The Report recommends that capitol cases and first degree felonies be recorded by court reporter, but that all other hearings and trials be recorded by video unless the court, in its discretion, orders otherwise.

Magistrate Boyce disagreed with the Report's recommendations because he thought the use of video was clumsy, slow, and had the potential to encourage appellate courts to make credibility assumptions. Magistrate Boyce indicated that it takes longer to review a video than it does to review a transcript and that citing to a video as the record is more difficult than citing to a transcript. He indicated that Justice Durham did not like to review video for these reasons. Mr. Shea responded that one of the factors that would influence the use of video was whether the ruling was likely to be appealed.

Magistrate Boyce was also concerned that courts were rushing to adopt inferior technology and believed that immediate transcription by voice technology may be available shortly. Mr. Shea indicated that jurisdictions in Kentucky have used video with positive results. Mr. Karrenberg reported that he had a surprisingly good experience with video at a trial because he received a copy of the video the next morning without paying for an overnight transcript. Mr. Karrenberg also indicated that he reviewed the video with ease. Mr. strom indicated that he was comfortable with the use of video as long as parties could stipulate to the use of court reporters if they wanted.

Mr. Shea reported that currently judges have mixed opinions about the use of video because they have little experience with it. On the positive side, judges like the accessibility, reliability and ease of video in that video recorders do not require vacation time or have unexpected absences. Mr. Shea indicated that video is substantially cheaper than the current court reporter system and that the capitol outlay for a video system would amount to slightly more than current court reporter salary and benefit costs for one year.

Ms. Wood asked how video would change the current employment of court reporters. Mr. Shea responded that the number of court reporters would be reduced and that court reporters would be pooled rather than having a one-on-one relationship with a judge.

Magistrate Boyce indicated that the quality of audio on a video decreases substantially with each copy. Mr. Shea responded that the Report envisions four video recorders in the courtroom making four original recordings: one for storage at of off-courthouse site, one to each party, and one for the court record. Mr. Shea indicated that if more copies were needed, more video recorders could be hooked up and that if this process became too cumbersome, judges had discretion to require the presence of a court reporter. Magistrate Boyce voiced concern about how to prevent the public for accessing video tapes.

Mr. Isom asked whether the use of video affected the use of deposition transcripts at trial under Rule 30(d). Mr. Shea responded that Rule 30(d) would not be affected because video systems are designed for play back and the act of play back is recorded.

Mr. Kogan asked what the judicial council was interested in from the Committee. Mr. Shea responded that the judicial council wanted the Committee's comments on the Report by May, particularly on when court reporters should be used as opposed to video, suggestions on the appellate use of tapes, and public access to tapes.

Mr. Sullivan asked Committee members to communicate additional comments to Mr. Shea. Mr. Shea volunteered to draft a letter to the Court Technology Committee that summarized the Committee's responses to the Report.

III. COURT CONSOLIDATION; DELETING REFERENCES TO CIRCUIT COURT

Mr. Sullivan reported that the second phase of court consolidation passed the legislature so that consolidation of the district and the circuit courts in judicial districts one through four would take effect July 1, 1996. Mr. Sullivan indicated that the internal structure of the new consolidated court system varied. The first district will be completely consolidated. The second district will have separate procedures for Weber and Davis counties: Weber will be completely consolidated, Davis will not. The third district will have some judges who will not hear a consolidated calendar and some courts will not be consolidated because they are not equipped to handle large litigation or felonies. Mr. Sullivan indicated that third district judges who were appointed to the bench before July 1, 1991 would have the option of maintaining what has historically been a district court calendar. In the fourth district there will be a civil/domestic/muniçiple and a criminal/felony division with judges rotating every three years and assignments handled through seniority.

To facilitate the consolidation, Mr. Sullivan presented amendments to Rule 1, Rule 63A and form 2 to the Committee for adoption. Mr. Sullivan indicated that Rule 1 was amended so to make the rules of civil procedure apply in all courts, Rule 63A was amended to delete references to circuit court, and Form 2 was deleted.

Mr. Wikstrom moved for the adoption of the amendments made by Mr. Sullivan to Rules 1 and 62(a) and Form 2. Ms. Wood seconded the motion and the Committee voted unanimously in favor of the motion.

IV. POST CONVICTION PETITION FORMS

Mr. Shea reported that the Committee's amendments to Rule 65C would become effective in May after the required comment period expired. Mr. Shea indicated that courts needed the form referenced in the sections (b) and (c) of new Rule 65C and circulated a proposed form to the Committee for comment. Mr. Sullivan asked whether the form would be part of new Rule 65C and suggested that it should. Mr. Shea indicated that the form would be forwarded to the supreme court for approval and the supreme court would decide whether to publish it with the Rules or make it available to courthouses for distribution.

Mr. Sullivan indicated that the form made filing a petition for post conviction relief more cumbersome than the new Rule 65C because the form requested more data than that required by new Rule 65C. Magistrate Boyce indicated that the form was similar to its federal counterpart and helped judges determine whether to dismiss a petition as frivolous. Mr. Sullivan suggested that if the information requested in the form was important, that it be required by new Rule 65C.

Mr. Kogan asked what would occur if an inmate failed to fill out portions of the form if the information was not required by new Rule 65C. Magistrate Boyce responded that a court could either request more information or dismiss the appeal. Mr. Kogan was concerned that the form did not make clear what information was required and what information was for the convenience of the court. Magistrate Boyce indicated that amending the form would result in jurisdictional problems. Judge Stirba indicated that as long as the inmate complied with the requirements of new Rule 65C, they would be entitled to relief. Mr. Soper suggested that petitioners could use the form as guidance and indicated that any form the Committee suggested should be as helpful as possible.

Mr. Sullivan recommended that "Length of" be deleted from number 3 on page 1 of the form because some sentences did not involve confinement. Mr. Sullivan also recommended that the end of the form contain information about when a memorandum of authorities could be filed and what it should contain.

Mr. Wikstrom moved that the Committee forward the form, with Mr. Sullivan's changes, to the supreme court with the notation that the supreme court may, but is not required to, approve it. Ms. Smith seconded the motion. The Committee voted unanimously in favor of the motion.

V. ADMISSION PRO HAC VICE; COMMENTS

Mr. Shea began discussion of the proposed pro hac vice rule by soliciting comments from Committee members. Ms. Smith reported that the Board of Corporate Attorneys disliked the proposed rule because it placed a burden on in-house counsel coming from another state and was perceived as an effort to insulate Utah courts. She indicated that Mr. Sackett's letter, circulated to the Committee, was representative of the Board of Corporate Attorney's opinions.

Magistrate Boyce indicated that Utah should adopt a pro hac vice rule because local counsel's participation is necessary to control courtroom practices. Magistrate Boyce indicated that in the federal system in Utah, local counsel is responsible ethically and professionally for what out-of-jurisdiction council does because liability is imposed on local counsel. Magistrate Boyce reported that if he is having problems with out-of-jurisdiction counsel, he will not accept pleadings unless cosigned by local counsel. Magistrate Boyce indicated that local counsel's participation is also necessary because if out-of-jurisdiction counsel stops participating in the case, local counsel needs to be prepared to go forward with the case. Magistrate Boyce indicated that local counsel is needed to advise out-of-jurisdiction counsel of local rules and practices and calm unnecessarily aggressive litigation tactics tolerated in other jurisdictions.

Mr. Battle indicated that the requirement for local counsel to participate meaningfully may be unenforceable and suggested that Utah require local counsel to appear at all court proceedings. He indicated that Nevada required local counsel to be present at all court proceedings and asked how many other jurisdictions had the same requirement. Mr. Wikstrom indicated that federal district court in Texas required local counsel to be present at all court proceedings. Magistrate Boyce indicated that on occasion he waived the requirement that out-of-jurisdiction counsel be present at court proceedings to save a party time and money. He reported that in the federal system in Utah, out-of-jurisdiction counsel are required to sign an oath that they are familiar with and will adhere to local rules.

Judge Stirba suggested amending subsection (d) in the proposed rule to explicitly provide that certain aspects of Utah counsel's participation are waivable. Magistrate Boyce disagreed because he believed that counsel would attempt to waive local counsel's participation and that local counsel's participation should only be waived for good cause shown. Mr. Sullivan suggested adding "unless otherwise ordered for good cause" to subsection (d) of the proposed rule.

Mr. Isom asked why the fee was $100 for pro hac vice admission. Mr. Shea indicated that $100 fee was arbitrary. Judge Stirba voiced concern about the expense a pro hac vice admission requirement would impose on individuals brought before Utah courts under the long arm statute. She asked whether there was any data on the cost of pro hac vice admission and whether there should be an exception for people brought in under the long arm statute. Mr. Sullivan suggested that the admission fee bear some relationship to

costs actually incurred in admitting out-of-jurisdiction counsel to practice.

Mr. Kogan pointed out that the proposed rule had no statement that pro hac vice admission was required in order to appear before a Utah court. Mr. Sullivan suggested that a mandatory statement requiring pro hac vice admission be added to subsection (a) of the proposed rule.

Mr. Sullivan pointed out that subsection (b) of the proposed rule left admission pro had vice to the court's discretion without setting standards to guide the court's discretion. Magistrate Boyce indicated that formulating standards would not be helpful because courts may not want to admit a person to practice because of a reputation for being obstreperous or dysfunctional in the handling of a case. Mr. Battle indicated that pro hac vice admission should be a privilege.

Mr. Sullivan asked whether the Committee should be concerned about appeals if pro hac vice admission is denied and asked whether, in practice, pro hac vice admissions are denied. Magistrate Boyce reported that an attorney was denied pro hac vice admission to practice before the federal district court because he had lied and refused to obey court orders. Magistrate Boyce indicated an evidentiary hearing was held to deny the attorney's admission.

Ms. Smith suggested the proposed pro hac vice rule have an exception for in-house attorneys. Magistrate Boyce strongly opposed such an exception because he had experienced problems with in-house attorneys from other jurisdictions refusing to become familiar with local rules.

Mr. Soper suggested that the proposed pro hac vice rule require the local attorney to certify that he/she knows he/she is undertaking responsibility for the ethical conduct of an out-of-jurisdiction attorney. Mr. Karrenberg suggested the Committee draft an appropriate form.

Magistrate Boyce indicated that the Ninth Circuit requires a form be submitted to apprise the court of any disciplinary actions involving the out-of-jurisdiction counsel. Mr. Isom indicated the eighteen month requirement in proposed (c)(4) was too short and suggested that it be lengthened to three or five years. Judge Stirba asked whether it was appropriate to require disclosure of private disciplinary action. Mr. Sullivan suggested requiring disclosure of all public disciplinary action taken within the prior five years.

Magistrate Boyce asked whether the proposed pro hac vice rule should apply to criminal proceedings and suggested that it should be a rule of judicial administration. Mr. Shea indicated that the Rules of Judicial Administration were beyond the Committee's jurisdiction. Mr. Sullivan asked the Committee to think about whether they believed the proposed rule should be applied in criminal proceedings as well as civil proceedings.

Mr. Sullivan asked whether the Committee had any other suggestions for the proposed pro hac vice rule. Mr. Karrenberg indicated that he had never had a problem with the federal pro hac vice rule. Mr. Sullivan indicated that if any Committee member was interested in a specific aspect of the proposed pro hac vice rule that they present a draft of their idea to Mr. Shea.

Mr. Sullivan asked Mr. Shea to compose another draft of the proposed pro hac vice rule. He suggested that: 1) the draft begin with a statement that unless out of state counsel complies with the provisions of the rule and is granted admission to practice before the court pro hac vice, the attorney cannot practice before the court; 2) Mr. Shea attempt to formulate a standard by which a judge's discretion to admit counsel pro hac vice is measured; and 3) the draft incorporate Judge Stirba's comments in proposed subparagraph (d) by inserting "unless otherwise ordered for cause, Utah counsel shall do the following". Mr. Sullivan also asked Mr. Shea to investigate the real costs of administering a pro hac vice rule to determine whether $100 was an exorbitant amount to charge for admission.

VI. MAILING ORDERS AND JUDGMENTS

Mr. Shea began discussion by pointing out that Rule 77 is inconsistent with the Rules of Judicial Administration. He indicated that unlike the federal system, the state system has no routine mechanism to ensure that orders are circulated to parties. Mr. Shea had been advised that because of the volume of cases in state court such a mechanism would be cost prohibitive. Mr. Shea indicated that rule 4-504 of the Rules of Judicial Administration was being followed 15% of the time and that if it were being followed 100% of the time, court clerks could do nothing else.

Mr. Shea indicated that Rule 77(d) had been amended to require a prevailing party to present the clerk with a copies of an order submitted for signature, a certificate of mailing, and addressed stamped envelopes. Mr. Shea indicated that Rule 60 had been amended to provide that the failure of a party to comply with proposed Rule 77(d) was grounds for setting aside a judgment and re-entering it to give a party thirty days to appeal. Mr. Shea indicated that these amendments were a cumbersome way to solve the problem of a party's appeal time running without that party's knowledge. Mr. Shea also advised the Committee that the proposed procedure was unworkable because there were not enough court clerks to implement it.

Mr. Shea suggested placing the burden of notice on the prevailing party, rather than the clerk of the court. Mr. Karrenberg suggested that proposed Rule 60 incorporate a final cutoff date so that the possibility of appeal was not infinite. Mr. Battle asked how long the prevailing party would have to send out notice of the entry of judgment and asked whether a prevailing party who missed the deadline could petition the court to vacate and re-enter the order.

Mr. Sullivan asked Mr. Shea to draft a proposed rule taking the Committee's comments into account.

V. CONCLUSION

Mr. Sullivan asked Committee members to let he or Mr. Shea know of issues that needed to be put on the agenda for discussion at future Committee meetings. There being no further business, Mr. Sullivan adjourned the Committee until the next meeting scheduled for 4:00 p.m., Wednesday, March 27, 1996 at the Administrative Office of the Courts.

Rule 1. General provisions.

(a) Scope of rules. These rules shall govern the procedure in the [~~Supreme Court, the district courts, the circuit courts, and the justice~~] courts of the state of Utah in all actions, suits, and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as governed by other rules promulgated by this court or enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action.

(b) Effective date. These rules shall take effect on January 1, 1950; and thereafter all laws in conflict therewith shall be of no further force or effect. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

Rule 63A. Change of judge as a matter of right.

(a) Notice of change. Except in small claims proceedings, in any civil action commenced after April 15, 1992 in any district [~~or circuit court~~], all parties joined in the action may, by unanimous agreement and without cause, change the judge assigned to the action by filing a notice of change of judge. The parties shall send a copy of the notice to the assigned judge and the presiding judge. The notice shall be signed by all parties and shall state: (1) the name of the assigned judge; (2) the date on which the action was commenced; (3) that all parties joined in the action have agreed to the change; (4) that no other persons are expected to be named as parties; and (5) that a good faith effort has been made to serve all parties named in the pleadings. The notice shall not specify any reason for the change of judge. Under no circumstances shall more than one change of judge be allowed under this rule in an action.

(b) Time. Unless extended by the court upon a showing of good cause, the notice must be filed within 90 days after commencement of the action or prior to the notice of trial setting, whichever occurs first. Failure to file a timely notice precludes any change of judge under this rule.

(c) Assignment of action. Upon the filing of a notice of change, the assigned judge shall take no further action in the case. The presiding judge shall promptly determine whether the notice is proper and, if so, shall reassign the action. If the presiding judge is also the assigned judge, the clerk shall promptly send the notice to the Chief Justice, who shall determine whether the notice is proper and, if so, shall reassign the action.

(d) Nondisclosure to court. No party shall communicate to the court, or cause another to communicate to the court, the fact of any party's seeking consent to a notice of change.

(e) Rule 63 unaffected. This rule does not affect any rights under Rule 63.

~~[Form 2. Allegation of Jurisdiction~~

~~(a) Circuit Court:~~

~~(1) That the defendant is a resident of ..... County (designating the county in which the court is situated).~~

~~(2) That the amount (or value of the property) claimed is less than $20,000, exclusive of costs.~~

~~(b) Justice Court.~~

~~(1) That the defendant is a resident of ..... County (designating the county in which the court is situated).~~

~~(2) That the amount (or value of the property) claimed is less than $2,000, exclusive of costs.~~]

DRAFT: STANDARD PETITION FORM: 12/6/95

UTAH POST-CONVICTION REMEDIES ACT
STANDARD PETITION FORM

UTAH CODE ANN. § 78-35A-101
PROCEDURES FOR RELIEF CONTAINED IN RULE 65C OF UTAH RULES OF CIVIL PROCEDURE

_____ DISTRICT COURT FOR THE COUNTY OF _____

NAME OF PETITIONER:_____

ADDRESS:_____

NAME OF RESPONDENT (STATE OF UTAH IF CONVICTED OF FELONY; POLITICAL SUBDIVISION IF A MISDEMEANOR OR ORDINANCE):_____
_____

BEFORE COMPLETING THIS FORM, PLEASE READ IT CAREFULLY.

1. Name and location of court that entered the judgment being challenged and case number:_____
_____

2. Date of judgment being challenged:_____

3. Length of sentence:_____

4. Nature of offense involved (all counts):_____
_____
_____
_____
_____

5. What was your plea (check one)
(a) Not guilty _____
(b) Guilty _____
(c) No Contest _____
(d) Guilty and Mentally ill _____
(e) Not guilty by reason of insanity _____

6. If you entered a plea of guilty to one count of the information, and a not guilty plea to another count of the information, please give details:_____

_____

_____

_____

_____

7. If you pled not guilty or not guilty by reason of insanity, did you have a jury trial or a trial before a judge:

(a) Jury ____

(b) Judge ____

8. Did you testify at the trial:

Yes ____ No ____

9. Did you appeal from the conviction or sentence:

Yes ____ No ____

10. If you did appeal, answer the following:

(a) Name of appellate court and case number:_____

(b) Result:_____

(c) Date of results and citations, if known:_____

_____

(d) Grounds raised:_____

_____

_____

(e) If you sought further review from this appeal, please answer the following:

(1) Name of Court and case number:_____

(2) Result:_____

(3) Date of result and citation, if known:_____

(4) Grounds raised:_____

11. If you did not file an appeal from your conviction or sentence, why not?_____

_____

_____

_____

12. Other than your direct appeal from your conviction or sentence, have you filed any post-conviction petitions, applications, or motions with respect to this conviction or sentence in any court, state or federal?

13. If your answer is "yes" give the following information:
(a) Name of court and case number:_____
_____
(b) Nature of proceeding:_____
(c) Grounds raised:_____
_____
_____

Did you receive an evidentiary hearing on your post-conviction petition, application, or motion:
Yes _____ No _____
Appeal of the decision, if any, with case number and court and results:_____
_____
_____

14. If you filed a second petition, application, or motion, please give the same information.

(a) Name of court and case number:_____
_____
(b) Nature of proceeding:_____
(c) Grounds raised:_____
_____
_____

15. Did you receive an evidentiary hearing on your petition, application, or motion:
Yes _____ No _____

16. Appeal of the decision, if any, and the results:_____
_____
_____

17. If you previously filed a post-conviction petition, application, or motion, please explain the differences, if any, between the grounds or facts alleged in this petition and the grounds or facts raised in the previous petition?_____

_____

_____

_____

18. State *concisely* every ground on which you claim that you are entitled to post-conviction relief. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach additional pages stating additional grounds and *facts* supporting same.

CAUTION: *You may be barred from presenting additional grounds in any future post-conviction petition if you fail to present any grounds that you could present here but do not.*

For your information, the following is a list of the most frequently raised grounds for relief in post-conviction proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. In addition, you may be entitled to raise other grounds not listed below. You should raise in this petition all available grounds (relating to this conviction or sentence) on which you base your allegation that you are being held in custody unlawfully.

Do not check any of the listed grounds. If you believe that any of these grounds apply to you, you must allege facts. The petition will be returned to you if you merely check a ground and fail to list necessary facts or attach supporting documentation, if available.

(a) Conviction obtained by plea of guilty that was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a jury that was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Conviction under a unconstitutional statute or constitutionally protected conduct.

(k) Denial of right to appeal.

A. GROUND ONE:_____

_____

SUPPORTING FACTS (*state briefly without citing law or making argument):*_____

_____

_____

_____

_____

_____

_____

_____

_____

B. GROUND TWO:_____

_____

SUPPORTING FACTS (*state briefly without citing law or making argument):*_____

_____

_____

_____

_____

_____

_____

_____

_____

C. GROUND THREE:_____

_____

SUPPORTING FACTS (*state briefly without citing law or making argument):*_____

_____

_____

_____

D. GROUND FOUR:

SUPPORTING FACTS (*state briefly without citing law or making argument):*

19. If any of the grounds listed above were not previously presented in any other court, state or federal, please state *briefly* which grounds were not presented and your reasons for not presenting them:

20. Do you have any post-conviction petition, appeal, or motion now pending in any court, state or federal, relating to the judgment being challenged:
Yes _____ No _____

21. If so, please give name of court, subject of petition, appeal, or motion, and case number:

22. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment being challenged.

(a) At preliminary hearing:

(b) At arraignment and plea:

(c) At trial:_____

_____

(d) At sentencing:_____

_____

(e) On appeal:_____

_____

(f) In any post-conviction proceeding:_____

_____

(g) On appeal from any post-conviction proceeding:_____

_____

23. Do you have any future sentence to serve after you complete the sentence imposed by the judgment being challenged:_____

_____

If so, give name and location of the court that imposed the sentence to be served in the future:_____

_____

REQUIRED ATTACHMENTS

24. Attach the following documents to this petition:

CAUTION: If you do not attach the required forms or provide an explanation why you cannot provide the copies, this petition will not be filed and will be returned to you. You may then lose your right to file a petition if the statute of limitations expires before you file another petition.

(a) the judgment and commitment;
(b) a copy of any decision issued by an appellate court from the direct appeal;
(c) a copy of any previously-filed petition for post-conviction relief, including any decision issued as a result;
(d) affidavits, copies of records, or other documentary evidence that supports your claim;
(e) an affidavit of impecuniosity and certificate from the Inmate Accounting Office, if you are requesting a waiver of the filing fee.

PETITIONER'S VERIFICATION UNDER OATH

I DECLARE UNDER PENALTY OF PERJURY THAT THE INFORMATION I HAVE PROVIDED IN THIS PETITION FOR POST-CONVICTION RELIEF IS TRUE AND CORRECT.

_____
Signature of petitioner

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 19____

_____
Notary Public
Residing in _____

My Commission Expires

_____

OR

CERTIFICATION OF ATTORNEY
(If petitioner is represented by attorney)

I CERTIFY THAT I AM THE ATTORNEY FOR PETITIONER, _____, AND THAT THIS PETITION COMPLIES WITH RULE 11, UTAH RULES OF CIVIL PROCEDURE.

_____
ATTORNEY FOR PETITIONER/DATE
BAR NUMBER _____
ADDRESS:

_____

_____
TELEPHONE:

_____

Rule 65C. Post conviction relief.

NOTE: This rule renumbers and amends Rule 65B(b).

(a) Scope. [~~Any person committed by a court to imprisonment in a state prison, other correctional facility or county jail who asserts that the commitment resulted from a substantial denial of rights may petition the court for relief under this paragraph. This paragraph (b) shall govern proceedings based on claims relating to original commitments and commitments for violation of probation or parole. This paragraph (b) shall not govern proceedings based on claims relating to the terms or conditions of confinement.~~] This rule shall govern proceedings in all petitions for post-conviction relief filed under Utah Code Ann. 78-35a-101 et. seq., Post-Conviction Remedies Act.

(b) Commencement and venue. [~~Except for challenges to parole violation proceedings, the~~] The proceeding shall be commenced by filing a petition [~~, together with a copy thereof,~~] with the clerk of the district court in the county in which the [~~commitment leading to confinement~~] judgment of conviction was [~~issued~~] entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses. [~~Petitions challenging parole violation proceedings shall be commenced by filing a petition together with a copy thereof, with the clerk of the district court in the county in which the petitioner is located.~~]

(c) Contents of the petition. The petition shall set forth all claims that the petitioner has in relation to the legality of the [~~commitment~~] conviction or sentence. Additional claims relating to the legality of the [~~commitment~~] conviction or sentence may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

(1) [~~the place where~~] whether the petitioner is [~~restrained~~] incarcerated and, if so, the place of incarceration;

(2) the name of the court [~~by~~] in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(3) in plain and concise terms, all of the facts [~~on the basis of which the petitioner claims a substantial violation of rights as the result of the commitment~~] that form the basis of the petitioner's claim to relief;

(4) whether [~~or not~~] the judgment of conviction, the sentence, or the commitment for violation of probation [~~or parole~~] has been reviewed on appeal, and, if so, the number and [~~caption or~~] title of the appellate proceeding, the issues raised on appeal, and the results of the [~~review~~] appeal;

(5) whether the legality of the [~~commitment~~] conviction or sentence has [~~already~~] been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the [~~reasons for the denial of relief in the prior proceeding~~] results of the prior proceeding; and

(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(d) Attachments to the petition. [~~The~~] If available to the petitioner, the petitioner shall attach to the petition:

(1) affidavits, copies of records [~~or~~] and other evidence [~~available to the petitioner~~] in support of the allegations;

(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(3) [~~The petitioner shall also attach to the petition~~] a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the [~~commitment,~~] conviction or sentence; and

(4) a copy of all relevant orders and memoranda of the court.

[~~If copies of pertinent pleadings, orders, and memoranda are not attached, the petition shall state why they are not attached.~~]

(e) Memorandum of authorities. The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(f) Assignment [~~by the presiding judge~~]. On the filing of the petition, the clerk shall promptly assign and deliver it to the [~~assigned judge of the court in which it is filed. Except for challenges to parole violation proceedings, the presiding judge shall if possible assign the proceeding to the~~] judge who [~~issued the commitment~~] sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(g)(1) [~~Dismissal~~] Summary dismissal of [~~frivolous~~] claims. [~~On~~] The assigned judge shall review [~~of~~] the petition, and, if it is apparent to the court that [~~the issues presented in the petition have already~~] any claim has been adjudicated in a prior proceeding, or if [~~for any other reason~~] any claim in the petition [~~shall appear~~] appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(2) A petition is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(A) the facts alleged do not support a claim for relief as a matter of law;

(B) the claims have no arguable basis in fact; or

(C) the petition challenges the sentence only and the sentence has expired prior to the filing of the petition.

(3) If a petition is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.

(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(h) Service of petitions. If, on review of the petition, the court concludes that all or part of the petition [~~is not frivolous on its face~~] should not be summarily dismissed, the court shall designate the portions of the petition that are not [~~frivolous~~] dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum [~~and a copy of any memorandum~~]

by mail upon the [~~attorney general and the county attorney~~] respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(i) [~~Responsive pleading~~] Answer or other response. Within [~~twenty~~] 30 days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the [~~attorney general and county attorney~~] respondent, or within such other period of time as the court may allow, the [~~attorney general or county attorney~~] respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within [~~twenty~~] 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(j) Hearings. After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. [~~Upon motion for good cause, the court may grant leave to either party to take discovery or to extend the date for the hearing. Prior to the hearing, the court may order either the petitioner or the state or county to obtain any relevant transcript or court records.~~] The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(1) consider the formation and simplification of issues;

(2) require the parties to identify witnesses and documents; and

(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(k) Presence of the petitioner at hearings. The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(l) Discovery; Records. Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(m) Orders; Stay.

(1) If the court [~~rules in favor of the petitioner~~] vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order [~~with respect to the validity of the challenged commitment and with respect to rearraignment, retrial, resentencing, custody, bail or discharge~~]. [~~The court shall enter findings of fact and conclusions of law, as appropriate, following any evidentiary hearing or any hearing on a dispositive motion. Upon application of the attorney general or the county attorney, or upon its own motion, the court may stay release of the petitioner pending appeal of its order.~~] If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(n) Costs. The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. [~~If the petitioner is unable to pay the costs of the proceeding, the petitioner may proceed upon an affidavit of impecuniosity, in which event the court may direct that the costs be paid by the county in which the complainant was originally charged.~~] If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the

Department of Corrections, Section 64-13-23 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(o) Appeal. Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Committee Note. This rule replaces former paragraph (b) of Rule 65B. It governs proceedings challenging a conviction or sentence, regardless whether the claim relates to an original commitment, a commitment for violation of probation, or a sentence other than commitment. Claims relating to the terms or conditions of confinement are governed by paragraph (b) of the Rule 65B. This rule, as a general matter, simplifies the pleading requirements and contains two significant changes from procedure under the former rule. First, the paragraph requires the clerk of court to assign post-conviction relief to the judge who sentenced the petitioner if that judge is available. Second, the rule allows the court to dismiss frivolous claims before any answer or other response is required. This provision is patterned after the federal practice pursuant to 28 U.S.C. § 2254. The advisory committee adopted the summary procedures set forth as a means of balancing the requirements of fairness and due process on the one hand against the public's interest in the efficient adjudication of the enormous volume of post-conviction relief cases.

The requirement in paragraph (l) for a determination that discovery is necessary to discover relevant evidence that is likely to be admissible at an evidentiary hearing is a higher standard than is normally used determining motions for discovery.

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: LWB ₵
₵ 01-22-96 11:13 AM ₵

POST-CONVICTION PROCEDURE

1996 GENERAL SESSION

STATE OF UTAH

Sponsor: John L. Valentine

AN ACT RELATING TO JUDICIAL CODE; PROVIDING POST-CONVICTION REMEDIES BY REPLACING PRIOR REMEDIES; PROVIDING THE GROUNDS FOR POST-CONVICTION RELIEF; SETTING THE BURDEN OF PROOF; STATING THE GROUNDS FOR PRECLUSION OF RELIEF; AMENDING PERIOD OF LIMITATION PROVISIONS; PROVIDING THE EFFECT OF GRANTING RELIEF; PERMITTING APPOINTMENT OF COUNSEL UPON REQUEST; CLARIFYING THE RIGHT TO APPEAL; BARRING POST-CONVICTION PETITIONS WITHIN 30 DAYS OF EXECUTION; PROVIDING APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES; AND SETTING THE EFFECTIVE DATE OF THE CHAPTER.

This act affects sections of Utah Code Annotated 1953 as follows:

ENACTS:

78-35a-101, Utah Code Annotated 1953

78-35a-102, Utah Code Annotated 1953

78-35a-103, Utah Code Annotated 1953

78-35a-104, Utah Code Annotated 1953

78-35a-105, Utah Code Annotated 1953

78-35a-106, Utah Code Annotated 1953

78-35a-108, Utah Code Annotated 1953

78-35a-109, Utah Code Annotated 1953

78-35a-110, Utah Code Annotated 1953

78-35a-202, Utah Code Annotated 1953

RENUMBERS AND AMENDS:

78-35a-107, (Renumbered from 78-12-31.1, as repealed and reenacted by Chapter 82, Laws of

Utah 1995)

78-35a-201, (Renumbered from 78-12-31.2, as enacted by Chapter 133, Laws of Utah 1979)

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78-35a-101** is enacted to read:

CHAPTER 35a. POST-CONVICTION REMEDIES ACT

Part 1. General Provisions

78-35a-101. Short title.

This act shall be ĥ [~~know~~] KNOWN ĥ as the "Post-Conviction Remedies Act."

Section 2. Section **78-35a-102** is enacted to read:

78-35a-102. Replacement of prior remedies.

(1) This chapter establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or

(c) actions taken by the Board of Pardons and Parole.

Section 3. Section **78-35a-103** is enacted to read:

78-35a-103. Applicability -- Effect on petitions.

Except for the limitation period established in Section 78-35a-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996.

Section 4. Section **78-35a-104** is enacted to read:

78-35a-104. Grounds for relief.

(1) Unless precluded by Section 78-35a-106 or 78-35a-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United

States Constitution or Utah Constitution;

(b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution; or

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received.

(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity.

Section 5. Section **78-35a-105** is enacted to read:

78-35a-105. Burden of proof.

The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The respondent has the burden of pleading any ground of preclusion under Section 78-35a-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

Section 6. Section **78-35a-106** is enacted to read:

78-35a-106. Preclusion of relief.

(1) A person is not eligible for relief under this chapter upon any ground that:

(a) may still be raised on direct appeal or by a post-trial motion;

(b) was raised or addressed at trial or on appeal;

(c) could have been but was not raised at trial or on appeal;

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or

(e) is barred by the limitation period established in Section 78-35a-107.

(2) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

Section 7. Section **78-35a-107**, which is renumbered from Section 78-12-31.1 is renumbered and amended to read:

[~~78-12-31.1~~]. 78-35a-107. Post-conviction relief statute of limitations.

(1) A petitioner is entitled to relief [~~pursuant to Rule 65B(b), Utah Rules of Civil Procedure,~~] only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action [~~in a petition for post-conviction relief pursuant to Rule 65B(b), Utah Rules of Civil Procedure,~~] accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.

[~~(3) These time limitations do not apply to a petitioner's claims:~~]

[~~(a) that his sentence has expired; or~~]

[~~(b) that the committing court acted outside of its jurisdiction when it entered the~~

~~conviction.~~]

[~~(4)~~] (3) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

[~~(5) This section does not apply to motions to correct a sentence pursuant to Rule 22, Utah Rules of Criminal Procedure.~~]

(4) Sections 78-12-35 and 78-12-40 do not extend the limitations period established in this section.

Section 8. Section **78-35a-108** is enacted to read:

78-35a-108. Effect of granting relief.

(1) If the court grants the petitioner's request for relief, it shall either:

(a) modify the original conviction or sentence; or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2) (a) If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

(c) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.

Section 9. Section **78-35a-109** is enacted to read:

78-35a-109. Appointment of counsel.

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

Section 10. Section **78-35a-110** is enacted to read:

78-35a-110. Appeal -- Jurisdiction.

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78-2-2 or 78-2a-3.

Section 11. Section **78-35a-201**, which is renumbered from Section 78-12-31.2 is renumbered and amended to read:

Part 2. Death Penalty Provisions

[~~78-12-31.2~~]. 78-35a-201. Bar on filing petition within 30 days of execution.

[~~Within 30 days:~~]

No post-conviction remedies may be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds therefor are based on facts or circumstances which developed or first became known within that period.

Section 12. Section **78-35a-202** is enacted to read:

78-35a-202. Appointment of counsel in death penalty cases.

(1) A person who has been sentenced to death and who has exhausted all legal and appellate remedies shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent defendants.

(2) (a) If a defendant requests the court to appoint counsel, the court shall determine whether the defendant is indigent. The court shall make findings regarding the defendant's indigency on the record. If defendant is indigent, the court shall promptly appoint counsel who is qualified to represent defendants on appeal in death penalty cases as required by Rule (8)(c), Utah Rules of Criminal Procedure.

(b) Before a defendant may reject the offer of counsel, the court shall advise the defendant

on the record of the consequences of such a rejection.

(3) Costs of counsel and other reasonable litigation expenses incurred in providing the representation provided for in this section shall be paid from state funds by the Department of Finance according to rules established pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

Legislative Review Note as of 12-21-95 12:57 PM

A limited legal review of this bill raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel

Administrative Office of the Courts

Chief Justice Michael D. Zimmerman
Chair Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Boards of Judges; Supreme Court Rules Advisory Committees
From: Timothy M. Shea
Date: December 8, 1995
Re: Admission Pro Hac Vice

The Supreme Court Advisory Committee on Rules of Civil Procedure has drafted a proposed rule to govern the admission of attorneys pro hac vice. Before the committee debates the proposal, the committee chair, Alan Sullivan, has asked for the observations of the judges and the other advisory committees regarding 1) the content of the proposed rule and 2) the appropriate placement of the rule within the Supreme Court body of rules. Because the rule affects the ability to practice law in Utah, the rule should probably be promulgated by the Supreme Court rather than the Judicial Council.

Regarding the former issue, the draft is based upon a study of rules governing admission pro hac vice from about 10 other states and the Federal District Court of Utah. Regarding the latter issue, however the content of the rule evolves, the final version could be placed in:

- ◊ each of the rules of civil, criminal, juvenile, and appellate procedures (Note that the Rules of Appellate Procedure already contain a rule governing admission pro hac vice, URAP 40(d).);
- ◊ the Rules for the Integration and Management of the Utah State Bar, which Michie will publish in the next publication of Utah Court Rules Annotated; or
- ◊ the Chapter 11 of the Code of Judicial Administration.

There may be other locations that promote uniform practice and accessibility to the rule.

The civil procedures committee will debate the proposal on January 24. If you would like to make suggestions, please do so by submitting them to me by January 16.

encl.
copy: John Baldwin
Alan Sullivan

Rule ##. Admission Pro Hac Vice.

(a) An attorney who is not an active member of the Utah State Bar but who is admitted to practice law in another state or in any court of the United States or Territory or Insular Possession of the United States may be admitted pro hac vice in accordance with this rule.

(b) Admission pro hac vice under this rule is discretionary with the court in which the application for admission is made. Admission pro hac vice may be revoked by the court upon its own motion or the motion of a party if, after notice and a hearing, the court determines that admission pro hac vice is inappropriate. Admission pro hac vice shall be denied or, if granted, shall be revoked if the court determines that the process is being used to circumvent the normal admission requirements.

(c) The attorney seeking admission pro hac vice shall complete under oath and submit to the clerk of the court an application form available from the clerk. The applicant shall complete a separate application for each case in which the applicant wants to appear. The fee for each application is $100, which shall be deposited in the account of the Utah State Bar and used for attorney discipline investigations and proceedings. At a minimum, the application shall include:

(1) the name, address, telephone number, fax number, bar identification number(s), and state(s) of admission of the applicant;

(2) the case name and number of the case in which the applicant is seeking to appear as the attorney of record or, if the case has not yet been filed, a description of the parties;

(3) the case name, case number, and court of other cases pending or closed within the prior 6 months in any court of Utah in which the applicant appears pro hac vice;

(4) a statement whether in any state the applicant is currently suspended or disbarred, the applicant has been disciplined within the prior 18 months, or there are any disciplinary proceedings pending against the applicant;

(5) the name, address, Utah State Bar identification number, telephone number, and written consent of an active member of the Utah State Bar to serve as associate counsel; and

(6) a statement that the applicant submits to the disciplinary authority and procedures of the Utah State Bar.

(d) Utah counsel associated with an attorney admitted pro hac vice shall:

(1) participate meaningfully in the preparation and trial of the case;

(2) appear at all hearings;

(3) sign the first pleading filed;

(4) continue in the case unless another active member of the Utah State Bar is substituted as associate counsel;

(5) be available to opposing counsel and the court for communication regarding the case and the service of papers; and

(6) have the responsibility and authority to act for the client in all proceedings if the nonresident attorney fails to appear or fails to respond to any order of the court.

(e) An attorney admitted pro hac vice shall comply with and is subject to Utah statutes, rules of the Utah Supreme Court, including the Rules of Professional Conduct and the Rules of Lawyer Discipline and Disability; rules of the court in which the attorney appears, and rules of the Utah Judicial Council.

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January 11, 1996

Supreme Court Advisory Committee
on Rules of Civil Procedure
c/o Brent Johnson, Acting General Counsel
Administrative Office of the Courts
230 South 500 East
Salt Lake City, Utah 84102

Dear Advisory Committee:

Re: Proposed Rule on Admission Pro Hac Vice

As a member of the Supreme Court Advisory Committee on the Rules of Professional Conduct, I was recently made aware of the December 8, 1995, draft of a new rule that would govern *pro hac vice* admissions to Utah courts. I offer these comments as an individual lawyer and not in my capacity as a member of that committee.

I have no idea of the situations that may have given rise to this proposal, and it may address some legitimate concerns. However, there are two aspects of the rule that are particularly troubling to some attorneys--particularly those who represent clients with business in several states. That is, the perspective from which I evaluate the usefulness of the proposed rule: a corporate lawyer who represents a major Utah corporation in a variety of jurisdictions throughout the country. From this vantage point, I consider the rule as I would be faced with it in pursuing a case on behalf of a corporate client in another state in which I do not hold a bar membership.

Those aspects of the rule that require identification of the attorney and a variety of other information as set forth in §§ (c)(1) - (c)(6) are perfectly reasonable. Perhaps the most important and laudable aspect of the rule (if this provision isn't already in effect) is the explicit requirement that the "foreign" attorney comply with the Utah Rules of Professional Conduct and the Rules of Lawyer Discipline and Disability and be subject to the disciplinary authority and procedures of the Utah State

Bar.

These requirements should provide a sound basis for assuring that Utah's legal system is not compromised. However, these considerations must be balanced with a recognition of the contracting world of commerce and human transactions. Utah should not try to insulate itself from the evolutionary changes that tend to move across political boundaries. I believe that the practice of law throughout the country, in this age of multi-state and multi-national corporations, should become more universal not less so. The proposed rule strikes me as incorporating some of the most egregious aspects of provincialism that have been implemented over the years by a variety of bar associations and courts. Utah is already a relative pariah among the other states with respect to reciprocal permanent admissions. As I understand it, Utah recognizes no other jurisdiction's bar admissions for its own purposes and, reciprocally, a Utah lawyer—no matter how experienced and accomplished—cannot move to another state and become a member of that state's bar without passing a bar examination.

The proposed rule seems to carry this provincialism even a step further in § (d), which requires a Utah lawyer to "participate meaningfully in the preparation and trial of the case; appear at all hearings and . . . continue in the case unless another active member of the Utah State Bar is substituted as associated counsel." It is not unusual practice for experienced corporate counsel to handle all aspects of a case in a jurisdiction where he is not a permanent member of the bar with little more than an introduction by local counsel. To require local counsel's "meaningful" participation and to require his appearance at all hearings has all the appearances of a traditional featherbedding requirement. It is unseemly for Utah lawyers to adopt rules that essentially tells the rest of the legal world that only Utah lawyers are capable of practicing before Utah courts and that they must hand-hold every foreign lawyer at each step of the way by appearing at all hearings and "participating meaningfully."

I have no problem with rules that require the initial introduction of a foreign attorney by a local attorney and the requirement that such local counsel be available for procedural matters such as the service of papers. Beyond that, the artificial insertion of local counsel in to the merits and substance of a case will often cause duplicative and unjustified extra costs for a litigant in Utah who wishes to use its own out-of-state corporate counsel or out-of-state outside counsel. For Utah to take this narrow, provincial approach to the practice of law does not reflect well on the state as a participant in a national and global economy and society.

Similarly, the $100-per-application fee for *pro hac vice* admissions is

unreasonable. It seems petty and punitive. It does not reflect any reasonable connection between the occasional foreign attorney who requires disciplinary action and the literally hundreds of competent attorneys from throughout the nation who participate in cases before the Utah courts. Surely there must be a more equitable, targeted way to fund the handful of cases involving foreign attorneys that require bona fide attorney discipline investigations. This fee seems out of line and only adds to the impression that Utah wishes to erect a wall around the borders of the state to make it more difficult for non-Utah parties to be represented by their counsel of choice in Utah proceedings. I would be offended by facing such a fee and the artificial imposition of a local hand-holder were I to encounter such requirements in another state.

Because this is an important issue for companies that have nationwide commercial and other activities that may involve Utah litigation, I also request the opportunity to appear before the Committee to discuss the matter at the January 24 meeting.

Respectfully submitted,

Gary G. Sackett

GGS:dt

ETH-SCT\PROHAC.L

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January 8, 1996

Brent M. Johnson
Administrative Office of the Courts
Acting General Counsel
230 South 500 East, #300
Salt Lake City, Utah 84102

Re: *Supreme Court Advisory Committee on Rules of Appellate Procedure - Admission Pro Hac Vice of December 8, 1995*

Dear Brent:

Thank you for your letter regarding the proposal to amend the Appellate Procedure Rule on appearance of counsel *pro hac vice.*

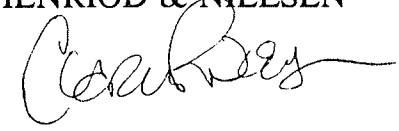
While on cursory view, I do not have any criticism of the language of the proposal, I recognize that the language is fashioned after the federal counterpart. I believe that unilaterally adding this proposal to our appellate rules and replacing a current appellate rule requires some committee discussion of the philosophical differences in the two rules. It is my opinion that the federal rule is more liberal than the traditional Utah practice in the matter of association *pro hac vice.* Whether or not that is the intent or the actual assessment of others, I think needs to be discussed before replacing the current provision in Utah Rules of Appellate Procedure 40(d).

Also, I don't believe that the complete text of the proposed rule should be placed in each of the different sets of rules. Rather, the text ought to be place in a centrally applicable rule, such as administration rules, which can then be referred to by the other rules, as appropriate.

Thank you for the opportunity of commenting on this rule and please let me know if there is further information that you feel I should provide with regard to my comment.

Respectfully,

HENRIOD & NIELSEN



Clark R. Nielsen

CRN:pj

Administrative Office of the Courts

Chief Justice Michael D. Zimmerman
Chair Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Timothy M. Shea
Date: February 21, 1996
Re: Mailing orders and judgments

The committee requested that I meet with the clerks of court to discuss with them the proposed changes regarding responsibility for mailing signed orders and judgments. That meeting occurred in November 1995.

The clerks observe that the current law requiring attorneys to provide copies of orders for the clerk to distribute is followed about 15% of the time. If the current law were followed all of the time, the clerks could not keep up with the additional work. Further, the proposed amendment will require the clerk to review submitted orders for compliance. This is a necessary step for the rule to be effective, but it represents yet more addiitonal work.

The clerks have recommended an alternative, which has not yet been incorporated into the draft rules. Rather than delete the requirement that the prevailing party give notice of the order to rely exclusively upon the clerks, delete the requirement that the clerks give notice of the order and rely exclusively upon the prevailing party. Amend Rule 60 as suggested with appropriate further changes to show this recommended change in responsibility between the prevailing party and the clerks.

230 South 500 East / Suite 300 / Salt Lake City, Utah 84102 / 801-578-3808 / Fax: 801-578-3843 / E-mail: timmys@courtlink.utcourts.gov

Rule 58A. Entry.

(a) Judgment upon the verdict of a jury. Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) Judgment in other cases. Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) When judgment entered; notation in register of actions and judgment docket. A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

[~~(d) Notice of signing or entry of judgment. The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.~~]

[~~(e)~~] (d) Judgment after death of a party. If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

[~~(f)~~] (e) Judgment by confession. Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

[~~Advisory Committee Note. Paragraph (d) is intended to remedy the difficulties suggested by Thompson v. Ford Motor Co., 14 Utah 2d 334, 384 P.2d 109 (1963).~~]

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a

party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;

(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action;

(5) the judgment is void;

(6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(7) any other reason justifying relief from the operation of the judgment.

(c)(1) If a party fails to receive an order or judgment and if:

(A) the party responsible to do so failed to comply with Rule 77(d); or

(B) the clerk failed to mail the copy of the order provided, then the party without notice may file a motion to vacate and reenter the judgment.

(2) Upon finding the conditions of this subdivision to have been met, the court shall vacate the order or judgment. The court shall enter a new order or judgment upon the same terms as the vacated order or judgment. Any act required to be done within a time after entry of the order or judgment or after notice thereof shall be calculated from entry of the new order or judgment.

(d) The motion shall be made within a reasonable time [~~and for reasons~~]. Motions under (b) (1), (2), (3), or (4)[~~,~~] and motions under (c) shall be made not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under [~~this~~] Subdivision (b) does not affect the finality of a judgment or suspend its operation.

(e) This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court.

(f) The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

Advisory Committee Note. Subdivision (c) is intended to give relief to a party who is left without adequate relief, usually loss of the right to appeal or petition for review, because the party did not receive the order or judgment as contemplated by Rule 77(d). The issues that would be presented to the court in a motion under subdivision (c) are straightforward: Did the party filing the motion get a copy of the order or judgment? Did the party responsible for complying with Rule 77(d) do so? Did the clerk mail the copy as required? The certificates provided for in Rule 77(d) should be presumptive proof, subject to the moving party presenting sufficient evidence to the contrary. The relief permitted in subdivision (c) is automatic but limited. The party cannot, under subdivision (c), modify the content of the order, only the effective date. The moving party need not present a defense to the action because there can be no relief from the provisions of the order or judgment. Relief from the provision of the order or judgment must be obtained under some other subdivision.

A false certificate of compliance as required by Rule 77 should be analyzed under Rule 60(b)(3).

Rule 77. District courts and clerks.

(a) District courts always open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) Trials and hearings; orders in chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers without the attendance of the clerk or other court officials and at any place within the state, either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the county wherein the matter is pending without the consent of all the parties to the action affected thereby.

(c) Clerk's office and orders by clerk. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d)(1) Notice of orders or judgments. At the time of [~~presenting~~] filing any written order or judgment [~~to the court~~] for signing, the party seeking such order or judgment shall deposit with the clerk [~~sufficient copies thereof for mailing as hereinafter required~~]:

(A) a copy for each party not in default for failure to appear, counsel for that party, and any other person to whom the order or judgment is to be mailed;

(B) for each copy, a preaddressed envelope with sufficient postage prepaid;

(C) a fully prepared certificate of mailing for the signature of the clerk listing the persons to whom the order or judgment is to be mailed; and

(D) a certificate of compliance with this rule.

(2) The clerk shall not accept a written order or judgment for signing unless the items required by this subdivision are included.

(3) If the order or judgment is filed with the judge, as permitted under Rule 5(e), the party shall deposit the items required by this rule with the clerk and present the certificate of compliance to the judge with the order or judgment.

(4) Immediately upon the entry of an order or judgment the clerk shall [~~serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and,~~] conform the copies provided under subsection (d)(1) and mail a conformed copy to each person for whom the clerk has a preaddressed, postage prepaid envelope. The clerk shall sign and file the certificate of mailing and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. [~~Lack of notice of the~~

~~entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed.~~]

(e) No fee where copies furnished. In every case where a copy of the pleadings[~~,~~] or other papers is to be certified, neither the sheriff, constable nor clerk shall charge or receive any fee for making such copy when the same is furnished to the officer by the party.

Rule 4-504. Written orders, judgments and decrees.

Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.

Applicability:

This rule shall apply to all civil proceedings in courts of record except small claims.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

[~~(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.~~]

(5) (4) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) (5) Except where otherwise ordered, all judgments and decrees shall contain, if known, the judgment debtor's address or last known address and social security number.

(7) (6) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

(8) (7) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) (8) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or

plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

(10) (9) Nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.

Harvey THOMPSON, Plaintiff and Appellant,
vs.
FORD MOTOR COMPANY, Defendant and Respondent

No. 9807
SUPREME COURT OF UTAH
384 P.2d 109, 14 Utah 2d 334
August 13, 1963

COUNSEL

Barton & Klemm, Salt Lake City, for appellant.
Christensen & Jensen, Salt Lake City, for respondent.

JUDGES

HENRIOD, C. J., and CROCKETT, McDONOUGH and WADE, JJ., concur.
AUTHOR: CALLISTER

OPINION

CALLISTER, Justice. Personal injury action. Plaintiff appeals from a summary judgment in favor of defendant, Ford Motor Company, and against the plaintiff, no cause of action, for the reason that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff, on this appeal, contends the lower court erred because there existed genuine issues of fact as to his negligence and, if any, whether or not it was the proximate cause of the accident.

We find ourselves unable to determine this appeal upon its merits. The depositions of the plaintiff and two other persons were taken (upon whose behalf we do not know). These depositions reach us in sealed envelopes -- the notary public's seal still intact. Thus, it is apparent that they were never marked and introduced into evidence nor read by the trial judge.

Both parties quote extensively from these depositions in their briefs. Probably they each had copies[1] and probably these were used at the hearing upon the motion for summary judgment. However, this we cannot assume. In fact, we must assume that the testimony contained in the deposition was not presented to or considered by the lower court.[2]

This court cannot, of course, break into the sealed envelopes and read these depositions and there is nothing in the record proper which would enable us to determine the issues presented.

For the reasons indicated above we do not reach the merit of the question as to whether the ruling that plaintiff was guilty of contributory negligence as a matter of law was correct. Nevertheless, in view of the fact that this case is remanded for further proceedings, we deem it appropriate to observe that, upon the basis of the facts which seem to have been assumed, it appears to us that there is such lack of certainty as to plaintiff's attention to the truck, and whether he was close enough to control it, that a jury question exists as to whether the truck was left 'unattended' within the meaning of our statute.[3]

Summary judgment set aside and case remanded for proceedings not inconsistent with this opinion. No costs awarded.

OPINION FOOTNOTES

1. The correctness of which copies is not known.-

2. Rosander v. Larsen, 14 Utah 2d 1, 376 P.2d 146; Reliable Furniture v. Fidelity and Guaranty Insurance Underwriters, Inc., 14 Utah 2d 169, 380 P.2d 135.

3. 41-6-105, U.C.A.1953.