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March 19, 1996

Members of the Utah Supreme Court
Advisory Committee on Civil Procedure

Dear Advisory Committee Members:

The next meeting of the Advisory Committee on Civil Procedure will be held on Wednesday, March 27, 1996 beginning at 4:00 p.m. As usual, the meeting will be held in the Council Room of the Administrative Offices of the Courts, 230 South 500 East, Suite 300, Salt Lake City, Utah 84102. I urge you to be prompt so that we can begin and end on time.

Please find enclosed for your review a copy of the minutes, prepared by Julie Fortuna, from the last meeting. Thanks to Julie for providing this service to us every month.

At our March meeting, we will discuss the following issues:

1. We will consider a new draft of our pro hac vice rule, which has been revised by Tim Shea in accordance with our discussion last time.

2. We will consider a new draft of rules relating to the mailing of signed orders and judgments under Rule 58(a), and Rule 60 and Rule 77(d). As you will see, Tim Shea has enclosed with this letter a couple of alternatives to coincide with our discussion of this topic last time.

3. We will discuss whether Rule 4 should be modified to coincide with changes made in the corresponding federal rule. This is a topic that we began more than a year ago and, due to the press of other work, have not returned to. Please find enclosed (again) an excellent memorandum from Perrin Love which focuses our attention on the appropriate questions for discussion.

4. We will consider a request by Judge Tim Hanson for modification to Rule 64C on attachments. This issues relates to the limitations on the amount of

the bond. Please find enclosed a copy of Ginger Smith's letter to me of November 30, 1995 which conveys Judge Hanson's concerns.

5. Finally, we will have a progress report from our subcommittee on forms. This subcommittee, as recently reconstituted, consists of Tom Karrenberg and Cullin Battle.

I look forward to seeing all of you on March 27.

Very truly yours,

Alan L. Sullivan

ALS/js
cc: Timothy M. Shea, Esq. (with enclosures)
Julie Fortuna, Esq. (with enclosures)

Agenda

Advisory Committee on Rules of Civil Procedure

March 27, 1996
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
Appearance Pro Hac Vice	Tim Shea
Mailing Orders and Judgments	Tim Shea
Rule 4; Service of Process	Perrin Love
Rule 64C; Amount of Bond	Virginia Smith
Forms	Cullen Battle
	Tom Karrenberg

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 Procedure Committee
From: Timothy M. Shea
Date: March 15, 1996
Re: Pro Hac Vice

I redrafted the rule to incorporate the suggestions made at the last meeting. These included:

- ◊ Admission PHV required before appearing
- ◊ Standards for granting or denying the application
- ◊ Waiver of the requirements imposed on local counsel
- ◊ A more reasonable fee

One item I have in my notes is that admission PHV should be presumed unless good cause is shown to the contrary. I have not yet made that change. Upon consideration, it appeared to me that the need for competent counsel may be felt more by the court than by the opposing party. Yet the court may not be in a position to show cause why admission should be denied. If the committee still feels that admission should be presumed, I can redraft the rule to that end, but for now the burden is on the applicant to show cause for admission.

I have added a provision that requires admission PHV prior to practicing before an administrative agency in an adjudicative hearing. This is a feature in some of the other jurisdictions.

I have proposed placing the rule within the Supreme Court Rules of Professional Practice. There is no advisory committee with responsibility for these rules. The rule would fall within Article 3, Professional Conduct. Because the rule affects the practice of law, and because the Supreme Court has constitutional authority to regulate the practice of law in Utah, I recommend the rule be promulgated by the Supreme Court rather than by the Judicial Council. Because the rule would affect several different types of cases in different courts and agencies,

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and because multiple rules tend to diverge over time, I recommend placement of a single rule in a body of rules with broad applicability. The Supreme Court Rules of Professional Practice are published as part of Michie's Utah Court Rules Annotated and so are generally available to out of state lawyers. To conform to the format of this set of rules, I have added an "Intent" and an "Applicability" section to the draft.

The following is a summary of my research on application fees. Only a few of the states have set fees. Most of the examples are from the federal district courts. In many cases, the amount of the fee is not established in the rule, but by some agency within the court. Often the frequency of payment is not mentioned in the rule. One of the rules expressly mentions the discretion of the court to waive the fee; one rule expressly prohibits waiver. The rest are silent on the issue of waiver.

Court	Fee Amount	Frequency	Citation
California	$50	?	Title 3, Division IV, Rule 983(c)
USDC SD CA	$20	Once	Rule 4.5
Delaware	$100	?	Supreme Court Rules 71 and 72
DC	$10	Application	Crim Rule 115; App Rule 49
USDC ND FL	Set by Judicial Conf.	?	Rule 4
USDC ND GA	As prescribed	?	Rule 110-2
USDC SD GA	As prescribed	?	Rule 402
USDC SD IL	$25	Once	Rule 1; 29
USDC KS	$10	Annual	Rule 83.5.4
USDC MN	Set by Court	?	Local Rule 83.5
USDC ED MS	As prescribed	?	Rule 12.01
USDC WD MS	$25	Application	Rule 1
USDC NH	$30	Application	Local Rule 83.2
NJ	Set by Supreme Court	Annual	Rule 1:21-2
USDC ND NY	$30	?	Local Rule 83.1
USDC WD NY	$30	Application	Local Rule 83.1
USDC RI	$25	?	Rule 5
USDC UT	As prescribed	?	Rule 103-1

Rule 11-302. Admission Pro Hac Vice.

Intent:

To provide a uniform method for the qualification of out of state counsel to practice before the courts and agencies of Utah.

Applicability:

This rule shall apply to any attorney who is not an active member of the Utah State Bar appearing as counsel before a court of record or not of record or before an administrative agency in an adjudicative proceeding as defined by Section 63-46b-2.

Statement of the Rule:

(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 shall be admitted pro hac vice in accordance with this rule prior to appearing as counsel in:

(1) a court of record or not of record; or

(2) an adjudicative proceeding before an administrative agency.

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

(1) the familiarity of counsel with Utah rules of evidence and procedure, including applicable local rules and agency rules;

(2) the availability of counsel to opposing parties;

(3) the presence of counsel at hearings;

(4) whether counsel is employed by the party as in-house counsel;

(5) compliance of counsel with the rulings and orders of the court or agency;

(6) whether counsel has been disciplined in any other jurisdiction within the prior 5 years;

(7) whether personal jurisdiction in the case is through application of Utah Code Annotated Section 78-27-20 through Section 78-27-26; and

(8) any other relevant information.

(c) The attorney seeking admission pro hac vice shall complete under oath and submit to the clerk of the court or agency 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 $20, which shall be made payable to and forwarded by the court or agency to the Utah State Bar. Fees paid under this rule shall used for attorney discipline investigations and proceedings. At a minimum, the application form shall include:

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

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

(4) a statement whether, in any state, the applicant:

(A) is currently suspended or disbarred from the practice of law;

(B) has been disciplined within the prior 5 years; or

(C) is the subject of any pending disciplinary proceedings;

(5) a statement that the applicant:

(A) submits to the disciplinary authority and procedures of the Utah State Bar;

(B) is familiar with the rules of procedure and evidence, including applicable local rules and agency rules;

(C) will be reasonably available for depositions, hearings, and conferences; and

(D) will comply with the rulings and orders of the court or agency;

(6) 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

(E) any other information relevant to the standards for the admission of the applicant.

(d) Unless otherwise ordered for good cause, 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 or agency.

(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 or agency in which the attorney appears, and rules of the Utah Judicial Council.

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: March 15, 1996
Re: Mailing Orders and Judgments

Introduction

Leslie Slaugh has observed that Rules of Civil Procedure 58A and 77 and Code of Judicial Administration 4-504 in large part create duplicative obligations to provide the non-prevailing party with a copy of an order or judgment. The recommendation of the clerks of court, agreed to by the advisory committee at our last meeting, is to place the responsibility with the prevailing party due to the inability to meet the additional workload if the responsibility falls exclusively to the clerks. In the course of the debate on this issue, the committee is looking also at a procedure to protect the right of appeal of the non-prevailing party in the event the order or judgment is not mailed as contemplated.

Enclosed are redrafts of Rules of Civil Procedure 58A and 77 and Code of Judicial Administration Rule 4-504 that focus the responsibility to mail copies of orders and judgments on the prevailing party rather than the clerks. Also enclosed is a redraft of Rule of Civil Procedure 60 designed to protect the right of appeal in the face of a failure by the prevailing party to mail the order or judgment. On this latter issue, I have prepared an alternative approach that amends Rule of Appellate Procedure 4.

Prevailing party to mail orders and judgments

As proposed by the committee at the last meeting, the amendment of URCP 58A expands the obligation of the prevailing party to include mailing orders and judgments. Under current law, the prevailing party has the obligation to mail a copy of judgments. The clerk mails a copy of orders and judgments, but only if the prevailing party provides copies, envelopes,

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etc., to the clerk. The proposed amendments delete the obligation of the clerks, which means placing the responsibility for mailing orders as well as judgments on the prevailing party. The collective effect of the rule changes will be to rely exclusively upon the prevailing party to mail the order or judgment to the non-prevailing party. Clerks will continue to provide a conformed copy of the signed order or judgment to the prevailing party upon request.

Protecting right of appeal upon failure to mail order or judgment

As regards the effort to protect the right of appeal of the non-prevailing party should the prevailing party fail to mail the order or judgment, there are two alternatives from which to choose. The first is the approach suggested at the last meeting: to amend URCP 60 to create a new motion to vacate and reenter the order or judgment. The time to appeal would run from the new entry date. The relief would be available if the prevailing party failed to mail the order as required by URCP 58A and the non-prevailing party had no other notice of the entry of the order. The relief would be limited. The movant could not reopen the provisions of the order or judgment -- at least not under this new procedure -- but could only have a new entry date established.

The alternative is to amend URAP 4 to provide that "excusable neglect" includes the lack of actual notice coupled with the failure of the prevailing party to mail a copy of the order or judgment as required by URCP 58A. URAP 4 currently provides a process by which a party may seek an extension of the time in which to file an appeal. The current limit is an additional 30 days from the original deadline to appeal. The committee should consider what is a reasonable maximum time in which to file a motion under either approach.

Under either approach, compliance of the prevailing party with URCP 58A is the central issue. Rule 58A requires the prevailing party to mail the order or judgment "promptly." This is an imprecise standard and, in the context of a motion under the proposed changes to URCP 60 or URAP 4, may be difficult to apply. Suppose, for example, the mailing occurs 15 days after entry, and the non-prevailing party files a motion, based on noncompliance with Rule 58A, to extend the time for filing the appeal or to vacate and reenter the judgment. Since the non-prevailing party still had 15 days in which to appeal, should the trial court grant the motion? Trial courts can establish parameters for what is "prompt" mailing, but how much prejudice should the appellant suffer before the motion is granted? The alternative is to build a more precise standard, such as to require the mailing no more than 3 business days after receipt of the order by the prevailing party or 7 days after entry, whichever is later.

Expanding time to appeal is limited under case law

Eliminating the duplication of mailing orders and judgments is a relatively straightforward issue capable of resolution by simple amendments to the URCP 58A, URCP 77, and CJA 4-504. Providing a mechanism by which the non-prevailing party can enlarge the time in which to appeal based upon the failure of the prevailing party to mail a copy of the order is more

difficult. There is a line of cases in Utah holding that expansion of the time in which to appeal, being jurisdictional in nature, will be very closely scrutinized. The suggested amendments, either to URCP 60 or to URAP 4, are an attempt to achieve through rule amendments what the courts have been unwilling to do in case law.

In Nielson v. Gurley, 888 P.2d 130 (Utah App. 1994), the court held: "Where a belated entry merely constitutes an amendment or modification not changing the substance or character of the judgment, such entry is merely a nunc pro tunc entry which relates back to the time the original judgment was entered, and does not enlarge the time for appeal; but where the modification or amendment is in some material matter, the time begins to run from the time of the modification or amendment." citing Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947).

In State v. Montoya, 825 P.2d 676 (Utah App. 1991), the Court of Appeals reached the same conclusion as in Nielsen based upon reasoning similar reasoning. The court stated: "It appears the only purpose of the [amended] order was to open the door to an appeal even though the statutory period had long since passed. We find no merit to this procedure and deem such manipulation of the judicial system highly inappropriate."

The proposed amendment of URCP 60 contemplates that no substantive amendment of the judgment would be made and so would not, under caselaw, be effective in expanding the time in which to appeal. The draft rule contains an express provision to the contrary, which I believe would be sufficient to circumvent Nielsen and Montoya, at least within the limited application of the new rule, but the policy of the rule change is contrary to the policy of the case law.

Former URCP 73, the precursor to the current URAP 4, on its face permitted the district court the discretion to enlarge the time to appeal only "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment...." In Anderson v. Anderson, 3 Utah 2d 277, 282 P.2d 845 (1955), the court held inapplicable relief granted under the general "excusable neglect" standard of Rule 6(b) and Rule 60(b). See also Holbrook v. Hodson, 24 Utah 2d 120, 466 P.2d 843 (1970). These cases probably have limited applicability since the limiting language of former URCP 73 has been removed, and the current URAP 4 states that the district court may enlarge the time in which to appeal based upon excusable neglect. The proposed amendment to URAP 4 expressly includes failure of the prevailing party to mail the order or judgment as meeting the test of excusable neglect, but does not exclude other grounds that may exist.

Theoretically, the need expressly to mention the failure to mail the order or judgment as satisfying the excusable neglect standard of URAP 4 is not needed; it is a result that should be within the discretion of the trial court. However, the Utah Supreme Court has held: "When the question of 'excusable neglect' arises in a jurisdictional context ... as opposed to a nonjurisdictional context ..., the standard contemplated thereby is necessarily a strict one."

Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952 (Utah 1984). In Prowswood the Court either held or discussed as being insufficient in the jurisdictional context: counsel too busy; mistaken interpretation of a rule of procedure; death of the partner assigned to the case with the resulting workload increase upon the surviving partner; and change of employment by counsel. If it is important to achieve the result, that is, to ensure the timeliness of the appeal in the face of no mailing or late mailing of the order or judgment, it may be necessary to make the grounds express.

Modifying a line of cases through a legislative enactment -- in this case a rule change -- is a well recognized approach to an issue, but historically the courts of Utah have been very strict in their interpretation of rules that would ostensibly permit the appeal of a case beyond the usual time for appeal.

URCP 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 or order. The prevailing party shall submit with the proposed order or judgment a copy thereof and a preaddessed envelope with postage prepaid. Immediately upon entry of the order or judgment, the clerk shall conform the copy to the original and return the copy to the prevailing party. The prevailing party shall promptly give notice of the [~~signing or~~] entry of a judgment or order to all other parties and shall file proof of service of such notice with the clerk of the court. [~~However~~] Except as provided in [Rule 60(c)] [Utah Rules of Appellate Procedure 4], the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) 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) 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).~~]

URCP 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) Notice of orders or judgments. At the time of presenting 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 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, 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)~~] (d) 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.

CJA 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.

URCP 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 the non-prevailing party fails to receive a copy of an order or judgment and if the prevailing party failed to comply with Rule 58A(d), then the non-prevailing party 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 58A(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 58A(d) do so? A certificate of mailing provided to the court under Rule 58A should be presumptive proof, subject to the moving party presenting sufficient evidence to the contrary. The relief permitted in subdivision (c) is 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 provisions of the order or judgment must be obtained under some other subdivision or rule.

A certificate of mailing as required by Rule 58A shown to be false can be analyzed under Rule 60(b)(3).

URAP Rule 4. Appeal as of right: when taken.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Motions post judgment or order. If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) Filing prior to entry of judgment or order. Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) Extension of time to appeal. The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. Excusable neglect includes the failure of the appealing party to receive a copy of the order or judgment appealed from if the prevailing party failed to comply with Utah Rule of Civil Procedure 58A(d). A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

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.

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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.

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MEMORANDUM

TO: Supreme Court Advisory Committee

DATE: February 21, 1995

FROM: Perrin R. Love

RE: Rule 4

The request by the Salt Lake County Sheriff's Office that the committee adopt a service by mail provision similar to the federal rule appears to be based on the federal rule prior to its amendment in 1991. Prior to amendment, Rule 4(c)(2)(C)(ii) authorized service:

> by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgement conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

This provision was abandoned in the revised rule in favor of the new waiver of service provision in Rule 4(d). The provision authorizes a plaintiff to request in writing "through first class mail or other reliable means," that a defendant waive service, and imposes the cost of service on a defendant who refuses to waive service. The request must allow the defendant 30 days to respond (60 days if the defendant is outside the U.S.). If the defendant

waives service, the defendant has an additional 60 days to answer the complaint (90 days if the defendant is outside the U.S.). If the defendant waives service, the plaintiff must file the waiver with the court. A copy of Fed R. Civ. P 4(d) is appended to this memo.

Paragraph 2 of the revised Fed. Rule 4 does not state explicitly, but appears to indicate that the defendant may be assessed costs only if the defendant actually receives notice of the request for waiver. This appears consistent with the Committee Notes; they indicate that one of the reasons for the rule change was to clear-up confusion in the former rule, which

> misled some plaintiffs into thinking that service could be effected without the affirmative cooperation of the defendant. It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service.

See, e.g., Bankston v. Toyota Motor Corp., 886 F.2d 172 (8th Cir. 1989) (adopting the majority rule under former Rule 4 that service by mail is ineffective if plaintiff does not receive the acknowledgment form from the defendant, and that plaintiff must then effect personal service).

In summary, the Sheriff's Office requests the adoption of a rule that no longer exists. This Committee can consider adopting the former federal rule, the current federal rule, or even a combination of the two. Given the length of time that a defendant has to respond if the defendant waives service, many plaintiffs may not choose waiver as an option. If so, the new federal rule may not ease the burden on the Sheriff's Office.

I have not had an opportunity to review what states, if any, may authorize service by mail. Generally, it is my impression that states allow service by mail upon court order as a form of substitute service, similar to publication, if the defendant cannot be found.

Any amendment to Rule 4 should be done in conjunction with any amendment to the ten-day summons provision in Rule 3, and in consideration of a new rule to correspond to new federal Rule 4.1. Listed below are other points of similarity and difference between the current federal and state rules:

1. Title. The title of the federal rule has been changed from "Process" to "Summons" to emphasize that it applies only to the service of a complaint, and not other forms of service, which are now governed by Fed. R. Civ. P. 4.1.

2. Issuance. The federal summons must be signed by the clerk and bear the seal of the court. The plaintiff presents the summons to the clerk when (or after) the complaint is filed. Rule 4(b). A state summons may be signed by the attorney.

This difference appears due to the ten-day summons procedure allowed by Rule 3. A state summons and complaint can be served before filing, but a federal summons and complaint cannot. Any amendment to this aspect of Rule 4 should be made in conjunction with any amendment to Rule 3.

3. Time of Service. Both rules require service within 120 days after filing. See Fed. Rule 4(m), State Rule 4(b).

4. Content. The content of the federal and state summons essentially are the same, except the state rule requires

plaintiff's (or attorney's) telephone number as well as address, and requires the summons to state whether the complaint has been filed or will be filed within ten days. See Fed. Rule 4(a), State Rule 4(c).

5. By whom served. Both federal and state rules authorize service by any person who is 18 years old and who is not a party, but the state rule adds "or a party's attorney." Both rules authorize service by respective law enforcement officers. See Fed. Rule 4(c)(2), State Rule 4(d).

6. Manner of Service. The provisions for service on an individual are the same. See Fed. Rule 4 (e), State Rule 4(e). For an infant or an incompetent person, the federal rule simply specifies service in the manner authorized by state law. The federal rule requires service on a unit of state or local government by delivering a copy to the chief executive of the unit, or in the manner authorized by state law. State Rule 4 specifies the manner of service on infants, incompetents, inmates, cities or towns, counties, school districts or boards of education, irrigation districts, and the State of Utah. See State Rule 4(e).

The manner of service on a corporation is the same, except that the State Rule specifies that if a corporation has no officer or managing or general agent in the state, but "has, or advertises or holds itself out as having an office or place of business within the state or elsewhere, then upon the person in charge of such office or place of business." See Fed. Rule 4(h)(1), State Rule 4(e)(5).

7. Service in a foreign country. Both the federal and state rules authorize service in a foreign country (1) in a manner prescribed by the law of the country; (2) by personal service on a person; or (3) by any form of mail requiring a signed receipt, dispatched by the court clerk. See Fed. Rule 4(f)(2), State Rule 4(f)(1)-(3). The federal rule includes a new provision, "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague convention . . . ." See Fed Rule 4(f)(1). The state rule has no similar provision.

The state rule authorizes service on a corporation or other business entity in a foreign country by delivery on an officer or managing or general agent of a corporation or other business entity. See State Rule 4(e)(5). The federal rule specifically prohibits this manner of delivery. See Fed. Rule 4(h)(2).

8. Other service. The state rule includes a provision for service by publication or other means of substitute service if the defendant cannot be found. See State Rule 4(g), (l). The federal rule has no comparable provision, but does allow the court to assert jurisdiction over a defendant's assets and seize them. See Fed. Rule 4(n)(2).

(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive.

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

First Interstate Bank
of Utah, N.A.
Legal Department
Salt Lake City, UT 84142-1810
801 350-7119

November 30, 1995

Alan L. Sullivan, Esq.
Van Cott, Bagley, Cornwall & McCarthy
50 South Main, Suite 1600
Salt Lake City, Utah 84144

RE: Rule 64C, Writ of Attachment, Utah Rules of Civil Procedure

Dear Alan:

Several months ago Judge Tim Hanson expressed concerns to Judge Mike Murphy, which Mike passed on to me, about the bond required by Rule 64C, Utah Rules of Civil Procedure. I recently discussed these concerns with Judge Hanson. Judge Hanson has seen many instances where a writ of attachment is issued against sizeable assets of a party, yet Rule 64C(b) limits the undertaking to a maximum amount of $10,000.00. In comparison, the replevin bond is required to be "double the value of the property" and the amount of security for an injunction appears to be within the court's discretion. Regarding garnishments, Rule 64D(b)(ii) ties the amount of a bond for a prejudgment writ of garnishment to "the form and amount required for the issuance of a writ of attachment."

Judge Hanson would like the Civil Procedure Committee to consider removing the dollar limitation for the bond so that the Court may set the bond amount to adequately protect against damages. If there is some rational purpose for the bond limit remaining at $10,000 Judge Hanson would like the Rule to clarify whether the Court may require multiple bonds when the assets being attached are owned by multiple parties. His solution to the dollar limitation of the bond for writ of attachment, especially prejudgment, has been to require multiple bonds when there are multiple parties involved.

The Committee can discuss this issue later. I just wanted to get this matter on the Committee's list of Rules to consider over the next few months.

Thanks.

Very truly yours,

Virginia S. Smith

Virginia S. Smith
Vice President & Senior
Legal Counsel

cc: Judge Timothy J. Hanson