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WRITER'S DIRECT DIAL NUMBER

May 15, 1996

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: May Meeting

Dear Committee Members:

This is just a reminder that our next meeting will be held on Wednesday, May 22, 1996 at 4:00 p.m. As usual, the meeting will take place at the Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. I urge you to be prompt so that we can begin and end on time. We have a long agenda, and I would like to complete as many of these items as we can before we recess for the summer.

Please find enclosed minutes from our last meeting.

At our May meeting we will consider the following items:

1. We will consider and, I hope, take a final vote on the pro hac vice rule on which we have been working for the past several months. Tim Shea has drafted the enclosed version from the Committee's comments last time. Tim suggests that we recommend to the Supreme Court that the rule be included in its own Rules of Administrative Procedure, rather than the Rules of Civil Procedure. We would, of course, appreciate any input you have on <u>where</u> the rule should be published.

2. We will consider changes to a number of rules on the mailing of orders and judgments. Included in the enclosed package you will find the rule changes that have been redrafted from our last meeting. I hope we will be able to take a final vote on these rules as well.

3. We will again consider changes to Rule 4 on Service of Process. This is a project that has been hanging around for a long time. I hope we can give our subcommittee (consisting of Perrin Love) some guidance on how to proceed.

4. We will consider proposed changes to Rule 64C on the maximum amount of the undertaking for issuance of writs of attachment. Judge Tim Hanson has suggested to us that there are many instances in which a writ of attachment is issued against sizable assets of a party, yet Rule 64C(b) limits the undertaking to a maximum amount of $10,000. This is different from the approach taken by other provisional remedy rules involving undertakings. 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 in an amount adequately to protect against damages. Ginger Smith will present this matter to the Committee at our meeting.

5. We will consider a number of proposed suggestions for change to Rule 41 on judgments. We have enclosed again correspondence on those issues for your review.

6. Finally, we will consider some suggested problems in Rule 6 on the computation of time, which Tim Shea will have the pleasure of explaining to the Committee.

I look forward to seeing all of you next Wednesday. If you have any questions, or suggestions about the agenda in advance of that meeting, I hope you will feel free to call me at any time.

Very truly yours,

Alan L. Sullivan

ALS/kr
Enclosure
cc: Timothy M. Shea, Esq.
Julie Fortuna, Esq.

Agenda

Advisory Committee on Rules of Civil Procedure

May 22, 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
Rule 41	Judge Stirba Perrin Love
Rule 6	Tim Shea

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, May 24, 1996, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Honorable Boyd Bunnell, Mary Anne Q. Wood, Terry S. Kogan, Virginia S. Smith, Terrie T. McIntosh, James R. Soper, Cullen W. Battle, Terri T. McIntosh, Honorable Ronald N. Boyce, Honorable Anne M. Stirba, Perrin R. Love

EXCUSED: M. Karlyn Hinman, Thomas R. Karrenberg, Francis M. Wikstrom, John L. Young, David K. Isom, Glen C. Hanni

STAFF: Timothy R. Shea, Julie Fortuna

I. WELCOME AND APPROVAL OF MINUTES

Mr. Sullivan welcomed Committee members to the meeting. The March and April minutes were approved. Mr. Sullivan thanked Mr. Shea for presiding over the April Committee meeting and for preparing the agenda for the May Committee meeting.

Mr. Sullivan reminded the Committee that they had proposed significant changes to the Rules 65B and 65C relating to extraordinary proceedings. He reported that the Committee's changes had been circulated for comment, the comment period had expired, and no comments were received. Mr. Sullivan indicated that the proposed changes needed to go into effect by July 1, 1996 to coincide with companion legislation proposed by attorney general. Ms. Smith moved to recommend the Committee's proposed changes to Rules 65B and 65C to the Utah Supreme Court for adoption. Mr. Kogan seconded the motion. The Committee voted unanimously in favor of the motion.

II. APPEARANCE PRO HAC VICE

Mr. Sullivan referenced Mr. Shea's memorandum, circulated to the Committee, that made the final changes to the pro hac vice rule proposed by the Committee at the April meeting. Mr. Sullivan asked the Committee for recommendations on where the proposed rule should be promulgated, indicating that the Committee had tacitly assumed it would not be in the rules of civil procedure.

Mr. Shea reported that 11-302 is Utah Supreme Court's reserved section of the Code of Judicial Administration ("CJA"), published by Michie, and available on Utah Law on Disc and Westlaw. He indicated that although this section of the CJA is not routinely referred to, it is reasonably available to out-of-state attorneys. Mr. Sullivan agreed with Mr. Shea and indicated that it did not make sense to put the rule anywhere else.

Mr. Shea asked the Committee for further suggestions and/or comments on the proposed pro hac vice rule. Mr. Sullivan asked why under (a) of the rule the word "shall" was used. Mr. Shea indicated that the intent of (a) was to require application of the proposed rule, not to require admission of an attorney.

Ms. Wood asked whether the intent of using "active" in the proposed rule was to make the rule applicable to inactive members of the bar. Mr. Sullivan asked whether the proposed rule required inactive bar members to apply to be admitted pro hac vice. Mr. Kogan asked whether an inactive member of another state's bar could practice law in this state. He indicated that an inactive member should not be considered a "member." The Committee agreed that an inactive bar member should not be allowed to appear using the proposed pro hac vice rule and agreed that the word "active" should be stricken from the proposed rule in (a) and (d)(6).

Mr. Sullivan asked the Committee whether the proposed rule should set forth a more specific test to guide the court's discretion in determining admission pro hac vice under (b). Mr. Battle indicated that the court should have discretion, but the proposed rule should set forth a less generalized test. Mr. Sullivan suggested the following test be added as the first sentence in (b): "Nonresident counsel may be permitted to appear in a particular case if the court in which the case is pending determines that admission pro hac vice will serve the interests of the parties and the efficient and just administration of the case."

Mr. Sullivan also suggested that the second to the last sentence in the first paragraph in (b) be changed to read: "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 requirements for admission of attorneys to the practice of law in this state."

Mr. Kogan indicated that the factors enumerated in (b) were unclear as to whether they weighed in favor of or against pro hac vice admission. He suggested that they be rephrased to set forth positive requirements. Mr. Sullivan indicated that the factors may only be relevant if a judge is revoking an attorney's pro hac vice admission.

Mr. Battle asked whether the presence of nonresident counsel at hearings should be a factor under (b) because nonresident counsel may make only one appearance. Mr. Kogan agreed that the proposed rule needed to be flexible. Judge Bunnell believed the rule was flexible enough because the factors were discretionary, rather than mandatory.

Mr. Sullivan asked whether employment of nonresident counsel by the party as in-house counsel cut in favor of pro hac vice admission. Ms. McIntosh indicated that it cut in favor of admission because nonresident counsel would be familiar with the client. Mr. Kogan indicated that the issue was not whether an attorney was in-house or out-house, but whether they were familiar with the client's needs. He suggested that the proposed rule set forth this concern more directly.

Mr. Sullivan suggested the factors enumerated in (b) be clarified to state that the court may consider: 1) whether nonresident counsel is familiar with the applicable rules of evidence and procedure, 2) whether nonresident counsel is available to opposing parties, 3) whether nonresident counsel has particular familiarity with the client, 4) whether nonresident counsel complies with rulings and orders of the court, and 5) whether nonresident counsel has caused delay or disruption in the case.

Mr. Sullivan suggested that (b)(3) (the presence of nonresident counsel at hearings) and (b)(7) (whether personal jurisdiction in the case is through application of Utah Code Annotated Section 78-27-20 though 78-27-26) be stricken from the proposed rule. The Committee generally agreed.

Mr. Kogan suggested that the phrase "at a minimum" be stricken from (d) because the information required by the rule should be sufficient and this phrase suggests that a really good application would contain more information.

Mr. Kogan asked whether the requirements of the application form in (d) were directed to the court clerk. Mr. Shea indicated that the Committee could develop an accompanying form so as not to burden the court clerk. Mr. Kogan suggested that the Committee draft a form and delete the list of form requirements from the proposed rule. Mr. Battle indicated that the list was useful and allowed counsel more flexibility.

Ms. Smith asked why (E) followed (6) and suggested that (E) be changed to (7). Mr. Sullivan suggested that "active" be stricken from (d)(6) since what was intended was information regarding the member of the Utah Bar who would continue as counsel of record.

Mr. Kogan indicated that (e) was confusing. Mr. Shea responded that (e) tracked other pro hac vice rules. Mr. Sullivan suggested that "Utah counsel associated with nonresident counsel seeking admission pro hac vice shall" be substituted in place of "Utah counsel associated with an attorney admitted pro hac vice shall".

Mr. Sullivan suggested that the semicolon in (f) be changed to a comma and "and the" be inserted before "rules".

Ms. Smith moved that the Committee approve the proposed pro hac vice rule with the Committee's suggested changes. Mr. Battle seconded the motion. The Committee

voted unanimously in favor of the motion, with Mr. Love abstaining.

III. MAILING ORDERS AND JUDGMENTS

Mr. Shea began by isolating two issues for discussion: 1) technical/clerical - problem of conforming four conflicting rules (URCPs 5, 58A, & 77, and CJA 4-504) that govern who is responsible for giving notice, and 2) substantive - problem of better protecting the appellate interests of a nonprevailing party who fails to get notice of the entry of a judgment.

Mr. Shea reminded the Committee that it had considered focusing the responsibility for giving notice on court clerks like the federal system. However, the Committee had concluded that this was not a viable option because unlike the federal system, there are fewer clerks and they are less well paid. In addition, because shifting noticing responsibilities to court clerks would likely overload the current system, the Committee had determined that it was unrealistic. Ms. Wood suggested that the noticing issue could be better handled by court clerks and asked why filing fees couldn't be raised to deal with the resulting burden. Mr. Sullivan responded that the Committee had an obligation to inform the Utah Supreme Court of an easier solution. Mr. Shea indicated that raising filing fees was not an easy task.

Mr. Shea referenced a memorandum he had drafted and circulated to the Committee that summarized the nature and cumulative effect of the proposed changes. He reported that the proposed changes place the burden of serving a final order/judgment/decree on the party preparing it. A party need only serve a non-final order/judgment/decree if service is required by the order, itself. Mr. Shea also indicated that the proposed changes would allow a court to direct parties to serve orders otherwise.

Mr. Shea indicated that the proposed changes did not change the 30 day time period a party has to appeal. Doing so would change a large body of existing case law, require a legislative enactment, and change Utah Rule of Appellate Procedure 4, which is outside the scope of the Committee's jurisdiction.

Mr. Kogan asked what sanction was currently available against a prevailing party who fails to give the required notice. Mr. Shea indicated that the non-prevailing party has the option to petition the trial court for more time. The trial court has discretion to do so, but is reluctant to exercise its discretion because late-filed appeals are closely scrutinized. Mr. Shea indicated that the proposed changes would expressly recognize that failure to give notice would be grounds for the trial court to exercise its discretion.

Mr. Sullivan asked why the changes related only to final and not interlocutory orders. Mr. Shea responded that no notice obligation existed with interlocutory orders and that the Committee had rejected an earlier draft that imposed notice obligations on

interlocutory orders. Mr. Battle indicated that although it made sense to make someone responsible for giving notice of the entry of interlocutory orders, making an unserved interlocutory order unenforceable would add a burden that did not already exist.

Judge Bunnell asked what constituted a prevailing party. Mr. Shea indicated that the proposed rule sidestepped this confusion by placing the burden on the party preparing the order and not the prevailing party. Mr. Sullivan asked who was responsible for serving orders prepared by the court. He suggested that the proposed changes include a provision requiring the court clerk to serve orders prepared by a judge.

The Committee reviewed Mr. Shea's draft rules as follows:

Mr. Sullivan asked why proposed rule 5 used "paper." Mr. Shea indicated that "paper" was intended as a generic term. Mr. Sullivan suggested changing "paper" to "paper or order" for clarity.

Ms. Wood asked whether it was clear under proposed rule (5)(b)(2) that a party had to serve a signed order, or just a proposed order. Mr. Sullivan suggested changing (5)(b)(2) to read "unless otherwise directed by the court, the party preparing the pleading, paper, or judgment, signed by the court, shall cause it to be served."

Mr. Shea asked whether "decree" should be included in the proposed rule. Mr. Battle suggested deleting "order" and "decree" from the proposed rules because "judgment," as defined by Rule 54, is an order from which any appeal lies. Mr. Sullivan indicated that the proposed rules also required service of nonfinal orders which by their terms were required to be served. Mr. Sullivan asked Mr. Shea to further investigate the use of these words in the proposed rules.

Mr. Sullivan suggested reiterating the concept that the party preparing a judgment is responsible for serving it in Rule 58A in (d) on page 3.

Mr. Sullivan indicated that (d) on page 4 was confusing. He questioned how often correspondence to the court required a reply and suggested striking the last sentence in (d). Mr. Shea responded that the sentence Mr. Sullivan suggested striking incorporated language from CJA 4-504 that was being stricken. The Committee agreed that the last sentence should be stricken. Mr. Sullivan also asked why (d) required a court clerk to mail copies of orders/judgments to parties if provided, when proposed rule 5 placed the burden of service on the party preparing the paper. Judge Bunnell responded that "may" was used in the first sentence of (d) and that providing copies to be conformed and mailed out by the court clerk was an alternative to the proposed rule 5. The Committee agreed the procedure was adequately set forth in proposed rule 5 and agreed to strike (d).

Mr. Shea indicated that proposed changes had been made to Utah Rule of

Appellate Procedure 4(e) to provide the trial court with a basis to extend the time to appeal if a party fails to comply with proposed rule 5. He indicated that changes to URAP 4 were outside of the Committee's jurisdiction, but he would recommend the changes to the committee that reviews the URAPs.

Mr. Sullivan suggested that Mr. Shea circulate a subsequent draft of the proposed rules, incorporating the Committee's suggestions, for the Committee to discuss at its September meeting.

IV. RULE 4: SERVICE OF PROCESS

Mr. Sullivan indicated that Rule 4 is several generations behind the current federal rule on service of summonses and complaints. Unlike its federal counterpart, Rule 4 provides no mechanism by which a plaintiff can present a defendant with a paper requesting the defendant waive the right to service in exchange for reduced costs, simpler process, and an extra 60 days to file a response. He explained that a defendant has 30 days to sign the waiver and return it. If the defendant does not waive service, the plaintiff can apply for and be awarded the costs of service and attorneys fees incurred obtaining the award, regardless of the ultimate outcome of the case.

Mr. Sullivan reported that the next to the last version of the federal rule allowed a plaintiff to serve by mail a summons and complaint with an acknowledgment for the defendant to sign and return, thereby avoiding the costs of service.

Mr. Sullivan referenced a memorandum circulated by Mr. Love that highlighted differences between the state and federal Rule 4. He indicated that some of the differences could be attributed to matters unique to state law, like how to serve school boards, children, incompetents, etc.

Mr. Sullivan reported that the Salt Lake Sheriff's Office had requested the Committee update Rule 4 because they believed it would decrease the number of summonses and complaints their office serves. The Committee has been reluctant to respond to the Sheriff Office's request because the vast majority of cases filed are collection cases; and, due to the nature of collection work, it is unlikely that a plaintiff would give a defendant additional time to answer a collection complaint. Notwithstanding, Mr. Sullivan indicated that it was generally a good policy to review state rules that had been updated in the federal system.

Mr. Sullivan asked Mr. Love to draft a new rule 4 that adopted the changes made to federal rule 4 for waiver of service of process and mailing of service of process. He suggested the additional 60 days granted under the federal rule be shortened to 30 days and that Mr. Love make any other changes that made sense so that the state rule coincided with the federal rule. Mr. Love agreed to have an amended rule 4 ready for consideration at the Committee's September meeting.

V. RULE 64C: AMOUNT OF BOND

Mr. Sullivan began discussion by referencing a letter from Ms. Smith that was circulated to the Committee. Ms. Smith reported that Judge Hanson would like Rules 64C and 64D to be amended to provide the court discretion in setting bond amounts so that courts can grant adequate protection against potential damages. The rules currently set a bond limit of $10,000. She indicated that Judge Hanson would like to be able to set a higher bond amount when dealing with sizeable assets without fear of being overturned.

Ms. Smith indicated that amending these rules to so provide may be as simple as a change to Rule 64C(b) to grant courts discretion. Mr. Battle asked whether courts should have the ability to waive a bond in a case where there is a strong likelihood of success and whether the rule should set a mandatory minimum for a bond. Mr. Battle indicated that it was very difficult for non-institutional creditors to obtain bonds because surety companies require so much in the way of collateral. He indicated that requiring a bond can be a serious impediment that a judge's discretion could ameliorate.

Mr. Sullivan asked Ms. Smith to draft a proposed rule for the Committee's consideration at its September meeting and consider whether the matter should be left completely to the court's discretion or whether the rule should set a minimum bond amount. Mr. Sullivan also asked Ms. Smith to make Rules 64C and 64D consistent.

VI. RULE 41

No discussion was held.

V. RULE 6

Mr. Shea reported that a Cliff Panos from Texas had asked the Committee to consider changing Rule 6. Mr. Panos' question was whether the 3 day mailing provision added onto a 5 day period results in weekends being excluded when calculating the number of days within which a party is required to act.

The Committee concluded that this was not generally an issue and that changes to Rules 6(a) and 6(e) were not necessary.

Mr. Sullivan asked Mr. Shea to write Mr. Panos a letter indicating that it was the Committee's considered judgment that Rule 6 did not need to be changed; and it was is the Committee's opinion that in Mr. Panos' scenario, a judge would allow the longer period of time.

VI. CONCLUSION

There being no further business, Mr. Sullivan adjourned the Committee until the next meeting scheduled for 4:00 p.m., Wednesday, September 25, 1996 at the Administrative Office of the Courts.

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 Rules Committee
From: Timothy M. Shea
Date: May 23, 1996
Re: Pro Hac Vice

The pro hac vice rule with the final changes agreed to at the last committee meeting is attached. If you have any further changes, please get them to me as soon as possible. The draft rule will be published for comment at the next opportunity.

230 South 500 East / Suite 300 / Salt Lake City, Utah 84102 / (801) 578-3800 / Fax: (801) 578- 3843 / Fax: (801) 578-3968

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 of Utah.

Applicability:

This rule shall apply to any attorney who is not a member of the Utah State Bar appearing as counsel before a court of record or not of record.

Statement of the Rule:

(a) An attorney who is not a 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 apply to be admitted pro hac vice in accordance with this rule prior to appearing as counsel in a court of record or not of record.

(b) Nonresident counsel may be permitted to appear in a particular case if the court in which the case is pending determines that admission pro hac vice will serve the interests of the parties and the efficient and just administration of the case. 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 requirements for the admission of attorneys to the practice of law in this state.

(c) In determining whether to enter or revoke the order of admission pro hac vice, the court may consider any relevant information, including whether non resident counsel:

(1) is familiar with Utah rules of evidence and procedure, including applicable local rules;

(2) is available to opposing parties;

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

(4) has particular familiarity with the legal affairs of the party relevant to the case;

(5) complies with the rulings and orders of the court ;

(6) has caused delay or been disruptive; and

(7) has been disciplined in any other jurisdiction within the prior 5 years.

(d) 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 $20, which shall be made payable to and forwarded by the court to the Utah State Bar. Fees paid under this rule shall used for attorney discipline investigations and proceedings.

(e) The application and fee shall be filed with a motion by a member of the Utah State Bar to admit the applicant pro hac vice and with a consent by that member of the Utah State Bar to appear as associate counsel. 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 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:

(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;

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

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

(6) the name, address, Utah State Bar identification number, telephone number, fax number, and e-mail address of the member of the Utah State Bar to serve as associate counsel; and

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

(f) Unless otherwise ordered for good cause, Utah counsel associated with nonresident counsel seeking admission pro hac vice shall:

(1) file a motion for admission of the applicant pro hac vice;

(2) file a written consent to appear as associate counsel;

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

(4) appear at all hearings;

(5) sign the first pleading filed;

(6) continue as one of the counsel of record in the case unless another member of the Utah State Bar is substituted as associate counsel;

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

(8) 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 .

(g) 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, the rules of the court in which the attorney appears, and the 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 Procedure Committee
From: Timothy M. Shea
Date: April 26, 1996
Re: Admission Pro Hac Vice

I made the following changes to the draft rule as determined by the committee:

- ◊ Delete the applicability of the rule to administrative agencies: and
- ◊ Require local counsel to file a motion (with attendant Rule 11 responsibilities) for admission of the non-resident attorney.

The rule already requires a separate application and fee for each case in which the non-resident attorney appears, and so no changes were made in this regard. See Page 2, Lines 3 through 6.

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 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.

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 a court of record or not of record.

(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. In determining whether to enter or revoke the order of admission pro hac vice, the court may consider:

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

(2) the availability of nonresident counsel to opposing parties;

(3) the presence of nonresident counsel at hearings;

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

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

(6) whether nonresident 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 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 to the Utah State Bar. Fees paid under this rule shall used for attorney discipline investigations and proceedings.

(d) The application and fee shall be filed with a motion by an active member of the Utah State Bar to admit the applicant pro hac vice and with a consent by that member of the Utah State Bar to appear as associate counsel. 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 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:

(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;

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

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

(6) the name, address, Utah State Bar identification number, telephone number, fax number, and e-mail address of the 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.

(e) Unless otherwise ordered for good cause, Utah counsel associated with an attorney admitted pro hac vice shall:

(1) file a motion for admission of the applicant pro hac vice;

(2) file a written consent to appear as associate counsel;

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

(4) appear at all hearings;

(5) sign the first pleading filed;

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

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

(8) 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 .

(f) 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.

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: April 26, 1996
Re: Mailing orders and judgments

The attached draft includes several rule amendments that collectively implement the decisions of the committee thus far.

Protecting the right of appeal upon failure to mail an order or judgment.

The committee decided that the proposed amendments to URCP 60, establishing a new procedure to vacate and reenter an order, created too many uncertainties. The amendments to Rule 60 are eliminated from this draft. The proposed amendment to URAP 4 accomplishes the same result in a much more direct manner.

The provision in URCP 77(d) stating that lack of notice of the entry of judgment "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," Page 4, Lines 27 and 28, must be deleted to fully effect this change. The provision in URCP 58A stating that the "time for filing a notice of appeal is not affected by the notice requirement," Page 3, Lines 13 and 14, does not need to be deleted. The former rule eliminates the discretion of the trial court to extend the time in which to appeal, and the committee believes the court should have this discretion. The latter rule is merely a statement of the law that the time for appeal is running even though the appellant may have no notice of the entry of the judgment.

As discussed at the last meeting, this proposal will be contrary to existing caselaw regarding extending the time in which to appeal. The changes to URAP 4, if approved by this Committee, would be presented to the Advisory Committee on the Rules of Appellate Procedure.

Responsibility for mailing orders and judgments.

The Committee has identified four rules governing the responsibility to mail orders or the notice of entry of an order: URCP 5, URCP 58A, URCP 77 and CJA 4-504. With some modest amendments to URCP 5, the mailing provisions of the other rules are superfluous. It appears to me the most reasonable approach to coordinating these rules is as follows:

- ◊ Strike CJA 4-504(4).
- ◊ Strike the notice requirements of URCP 77(d). I have proposed amendments to this paragraph to deal with a different subject matter: the ability of a party to provide pre-addressed envelopes with postage pre-paid if the party submitting an order wants conformed copies returned or if a party corresponds with the court and the correspondence requires a response. These are new issues, and the Committee may choose not to introduce them at this time. Currently, there is no provision for conformed copies of orders, although the practice is common. The provision regarding correspondence is contained in CJA 4-504(4), which is proposed for deletion.
- ◊ Amend URCP 58A(d) to be little more than a cross reference to URCP 5.
- ◊ URCP 5 needs only modest amendments as it already governs responsibility for service of orders by one party upon another. Most of the proposed amendments are intended to simplify and modernize the rule a little bit, but are not strictly necessary to effect the goal of the committee.

Under these rules as amended:

- ◊ final orders, judgments and decrees must be served;
- ◊ any other order must be served if service is required by the order;
- ◊ the party preparing the order, judgment or decree is responsible for service;
- ◊ these general provisions regarding service are subject to control by the court;
- ◊ the time in which to appeal is not changed; and
- ◊ the rules and caselaw prohibiting lack of notice of the entry of judgment as grounds for an extension of time in which to appeal are changed.

Rule 5. Service and filing of pleadings and other papers.

(a) Service: When required.

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every final order, judgment and decree, every order required by its terms to be served, every pleading subsequent to the original complaint [~~unless the court otherwise orders because of numerous defendants~~], every paper relating to discovery [~~required to be served upon a party unless the court otherwise orders~~], every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, [~~notice of signing or entry of judgment under Rule 58A(d),~~] and similar paper shall be served upon each of the parties.

(2) No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2)(default proceedings) [~~or pleadings~~]. Pleadings asserting new or additional claims for relief against [~~them which~~] a party in default shall be served [~~upon them~~] in the manner provided for service of summons in Rule 4.

(3) In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made.

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party [~~himself~~] is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy [~~to him~~] or by mailing [~~it to him at his~~] a copy to the last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at [~~his~~] the person's office with [~~his~~] a clerk or [~~other~~] person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at [~~his~~] the person's dwelling house or usual place of abode

with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

[~~(2) A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any foreign attorney practicing in any of the courts of this state.~~]

(2) Unless otherwise directed by the court, the party preparing the paper shall cause it to be served.

(c) Service: Numerous defendants. In any action in which there [~~are~~] is an unusually large [~~numbers~~] number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter [~~, but the court may upon motion of a party or on its own initiative order that depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding~~] together with a certificate of service showing the date, time, and manner of service completed by the person effecting service.

(e) Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may [~~permit the papers to be filed with him, in which event he shall~~] accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk [~~, if any~~].

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. [~~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.~~] A copy of the signed judgment shall be served in the manner provided in Rule 5. [~~However, the~~] 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~~] such action may be suspended or altered or rescinded by the court upon cause shown.

(d) [~~Notice of orders or judgments.~~] Copies provided to the court for mailing. At the time of presenting any written order or judgment to the court for signing, the party seeking such order or judgment [~~shall~~] may deposit with the clerk [~~sufficient~~] copies thereof [~~for mailing as hereinafter required~~] with a pre-addressed envelope with postage pre-paid. 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~~] conform the copies to the original and mail the copies to the party submitting them. Correspondence to

the court requiring a reply shall be accompanied by envelopes pre-addressed to the parties or counsel for parties with postage pre-paid.

(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.

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.

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 party required to do so failed to comply with Utah Rule of Civil Procedure 5. 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.

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

Rule 64C. Attachment.

(a) **When attachment may issue; affidavit.** Except as provided in Rule 64A and as authorized and permitted therein, the plaintiff, at any time after the filing of the complaint, in an action upon a judgment, upon any contract express or implied, or in an action against a nonresident of this state, may have the property of the defendant, not exempt from execution, attached as security for the satisfaction of any judgment that may be recovered in such action, unless the defendant gives security to pay such judgment as provided in Subdivision (f) of this rule, by filing with the court in which the action is pending an affidavit setting forth the following: That the defendant is indebted to the plaintiff, specifying the amount thereof as near as may be over and above all legal setoffs and the nature of the indebtedness; that the attachment is not sought to hinder, delay or defraud any creditor of the defendant; that the payment of the same has not been secured by any mortgage or lien upon real or personal property, situated or being in this state, or, if originally so secured, that such security has, without any act of the plaintiff or the person to whom the security was given, become impaired; and alleging, but not in the alternative, any one or more of the following causes for attachment:

(1) That the defendant is not a resident of this state;

(2) That the defendant is, a foreign corporation, not qualified to do business in this state;

(3) That the defendant stands in defiance of an officer, or conceals himself so that process cannot be served upon him;

(4) That the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, any of his property with intent to defraud his creditors;

(5) That the defendant has departed or is about to depart from the state to the injury of his creditors;

(6) That the defendant fraudulently contracted the debt or incurred the obligation respecting which the action is brought;

(7) Such other additional facts showing probable cause for being, and that plaintiff is, justly apprehensive of losing his claim unless a writ of attachment issue.

(b) **Undertaking; issuance of writ.** The clerk shall issue the writ of attachment upon the filing by the plaintiff of the affidavit required by Subdivision (a) of this rule, together with a written undertaking on the part of the plaintiff, with sufficient sureties, in a sum not less than double the amount claimed by the plaintiff, but in no case shall an undertaking be required exceeding $10,000.00 or less than $50.00 in amount. The conditions of such undertaking shall be to the effect that if the defendant recovers judgment, or if the attachment is wrongfully issued, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. Several writs may be issued at the same time to the sheriffs of different counties; and the plaintiff may have other writs of attachment as often as he may require at any time before judgment, upon the original affidavit and undertaking, if sufficient; provided, that writs governing personalty only may be directed to a constable.

(c) **Exception to sureties; justification.** Within five days after the levy of any attachment, the defendant may except to the sufficiency of the sureties, by serving and filing a notice of such exception. Within five days after such exception, the plaintiff's sureties, upon notice to the

defendant of not less than two days, must justify before a judge of the court, or before the clerk thereof, and upon failure to justify, and if others in their places fail to justify, at the time and place appointed, the clerk or judge shall dismiss the writ of attachment.

(d) **Contents of writ; how directed.** The writ must be issued in the name of the state of Utah and shall be directed to the sheriff of any county in which property of the defendant may be, and must require him to attach and safely keep all the property of such defendant within his jurisdiction not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant gives him an undertaking as provided for in Subdivision (f) of this rule; provided, that writs governing personalty only may be directed to a constable.

(e) **Manner of executing writ.** The officer to whom the writ is directed must execute the same without delay, and, if the undertaking provided for in Subdivision (f) of this rule is not given, as follows:

(1) Real property, standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by leaving a similar copy of the writ, description and notice with an occupant of the property, if there is one, and if not, then by posting the same in a conspicuous place on the property attached.

(1a) Growing crops (which, until severed, shall be deemed personal property not capable of manual delivery), growing upon real property standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the growing crops to be attached, and of the real property upon which the same are growing, and a notice that such growing crops are attached in pursuance of the writ, and by leaving a similar copy of the writ, description and notice with an occupant of the real property, if there is one, and if not, then by posting the same in a conspicuous place on the real property.

(2) Real property or an interest therein belonging to the defendant and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property and a notice that such real property and any interest of the defendant therein held by or standing in the name of such other person, naming him, are attached, and by leaving with the occupant, if any, and with such other person or his agent, if known and within the county, or at the residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The recorder shall index such attachment when filed, in the names both of the defendant and the person by whom the property is held, or in whose name it stands on the records.

(2a) Growing crops (which, until severance, shall be deemed personal property not capable of manual delivery), or any interest therein belonging to the defendant, and growing upon real property held by any other person or standing upon the records of the county in the name of any other person, must be attached in the same manner as crops growing upon real property standing upon the records of the county in the name of the defendant are attached by the provisions of Subparagraph (1a) of this subdivision. The notice of attachment shall state that the crops therein described or any interest of the defendant therein, held by, or standing upon the records of the

county in the name of such other person (naming him), are attached in pursuance of the writ. In addition, a similar copy of the writ, description and notice shall be delivered to such other person, or his agent, if known and within the county, or left at the residence of either, if known and within the county. The recorder must index such attachment when filed in the names of both the defendant and of the person by whom the real property is held, or in whose name it stands on the records.

(3) Personal property capable of manual delivery must be attached by taking it into custody, except as provided in the next succeeding paragraph.

(4) Cattle, horses, sheep, and other livestock, running at large and commonly known as range stock, between the 1st day of November and the next succeeding 15th day of May, must be attached by the sheriff's filing with the recorder of the county in which such stock is running at large a copy of the writ, together with a description of the property, specifying the number as nearly as may be with marks and brands, if any, and a notice that such range stock are attached; and such levy shall be as valid and effectual as if such stock had been seized and the possession and control thereof retained by the officer; provided that an attachment may, by direction of the plaintiff, be levied upon such range stock by taking the same into custody; but if additional costs are made by such levy, the same shall not be allowed to the plaintiff, if in the judgment of the court the taking of the property into the custody of the officer was unnecessary.

(5) Stocks or shares, or interest in stocks or shares, of any corporation or company must be attached by leaving with the president, secretary, cashier or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ and by taking the certificate into custody, unless the transfer thereof by the holder is enjoined or unless it is surrendered to the corporation issuing it.

(6) Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits or other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits or other personal property in his possession or under his control belonging to the defendant, are attached in pursuance of the writ.

(7) When there are several attachments against the same defendant in different actions, they shall be executed in the order in which they are received by the officer.

(f) **Release of property or discharge of attachment; undertaking required; justification of sureties.** At any time, either before or after the execution of the writ of attachment, the defendant may obtain a release of any property or a discharge of the attachment, as follows:

(1) To secure a discharge of the attachment the defendant shall furnish a bond, with sufficient sureties, in a sum of not less than double the amount claimed by the plaintiff, but not less than $50.00 in amount. The conditions of such undertaking shall be to the effect that if the plaintiff recovers judgment, the defendant will pay the same, together with interest and all costs assessed against him, not exceeding the sum specified in the undertaking.

(2) To secure a release of property from the attachment the defendant shall furnish a bond, with sufficient sureties, in a sum not less than the value of the property to be released, but in no case in an amount greater than necessary to obtain a discharge of the attachment. The conditions of such undertaking shall be to the effect that if the plaintiff recovers judgment, the defendant will pay the same, together with interest and all costs assessed against him, not exceeding the sum specified in the undertaking.

(3) The undertaking required by Subparagraphs (1) and (2) of this subdivision shall be delivered to the sheriff or other officer having the writ where the release or discharge is obtained at or before the time of service of the attachment. Where the release or discharge is sought after the writ has been executed or the property attached, the defendant must apply to the court, upon reasonable notice to the plaintiff, for an order releasing such property or discharging the attachment. The undertaking required shall be filed with the court, and a copy thereof served upon the plaintiff. Within five days after notice of the filing of the undertaking required by Subparagraphs (1) and (2) of this subdivision, plaintiff may except to the sufficiency of defendant's sureties, by serving upon the defendant and filing with the court a notice of such exception. Thereafter defendant's sureties, or others in their stead, shall justify in the manner required for justification of plaintiff's sureties under the provisions of Subdivision (c) of this rule. Upon a discharge of the attachment or release of the property, all of the property released, if not sold, and the proceeds of any sale thereof, must be delivered to the defendant; provided that the release or discharge by the court shall not be effective until defendant's sureties have justified, or until the time for plaintiff's exception thereto has expired.

(4) The defendant may also at any time, upon such notice to the plaintiff as the court may require, make a motion to the court in which the action is pending, to have the writ of attachment discharged on the ground that the same was improperly or irregularly issued; provided however, that the court shall give the plaintiff reasonable opportunity to correct any defect in the complaint, affidavit, bond, writ or other proceeding so as to show that a legal cause for the attachment existed at the time it was issued.

(g) **Liability of sureties to be set forth in undertaking.** The undertaking required by Subdivisions (b) and (f) of this rule shall, in addition to other requirements, provide that each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the undertaking may be served, and that his liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

(h) **Return of sheriff; inventory of property.** The officer must return the writ of attachment to the court within twenty days after its receipt, together with a certificate of his proceedings endorsed thereon or attached thereto. Such certificate shall contain a full inventory of the property attached. To enable him to make such return as to the debts and credits attached he must request, at the time of service, the party owing the debts or having the credits to give him a memorandum stating the amount and description of each; and if such memorandum is refused, the officer must return the fact of refusal with the writ.

(i) **Examination of defendant or third party.** The defendant may be required to attend before the court or a master appointed by the court, to be examined on oath respecting his property. Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may likewise be required to appear before the court or a master and be examined respecting the same. The court or master, after any examination conducted pursuant to this subdivision, may order personal property capable of manual delivery to be delivered to the officer, on such terms as may be just, having reference to any liens thereon or claims against the same, and may require a memorandum to be given of all other personal property, containing the amount and description thereof. The court may make such provision for witness fees and mileage as may be just, provided that if any

third party has refused to give the officer executing the writ a memorandum of any debts or credits, requested under the provisions of Subdivision (h) of this rule, such party may be required to pay the costs of any proceeding taken for the purpose of obtaining such information.

(j) **Sale of attached property before judgment.**

(1) **Where property is perishable.** If any of the property attached is perishable, the officer must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the action, unless released or discharged, or subjected to execution upon another judgment recovered previous to issuing the attachment.

(2) **Other property.** Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court that the interest of the parties to the action will be subserved by a sale thereof, the court may order such property sold in the same manner as property sold under an execution, and the proceeds to be deposited in the court to abide the judgment in the action. Such order can be made only upon notice to the adverse party, in case such party has been personally served in the action.

(k) **Satisfaction of judgment; deficiency; redelivery of property.** If judgment is recovered by the plaintiff, the officer must satisfy the same out of the property attached by him which has not been delivered to the defendant or a claimant as herein provided, or subjected to a prior lien, if it is sufficient for that purpose, by paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him or so much as shall be necessary to satisfy the judgment; and, if any balance remains due and an execution shall have been issued on the judgment, by selling under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remains in his hands. Notice of the sales must be given and the sales conducted as in other cases of sales on execution. If, after selling all the property attached by him remaining in his hands and after deducting his fees and applying the proceeds, together with the proceeds of any debts or credits collected by him, to the payment of the judgment, any balance shall remain due, the officer must proceed to collect the same as upon an execution in other cases. Whenever the judgment shall have been paid, the officer, upon reasonable demand, must deliver to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment.

(l) **Proceedings where defendant prevails.** If the defendant recovers judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the officer and all the property attached remaining in his hands must be delivered to the defendant, and the attachment shall be discharged and the property released therefrom.

(m) **Liability of third persons after attachment.** All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ of attachment shall be, unless such property is delivered up or transferred or such debts are paid to the officer, liable to the plaintiff for the amount of such credits, property or debts, until the attachment is discharged, or such debts, credits, or other personal property are released from the attachment, or until any judgment recovered by the plaintiff is satisfied. Payment of such debts, or delivery or transfer of such property or debts, to the officer shall be a sufficient discharge for the same as to the defendant.

(n) **Release of attachment upon real property.** Whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order must be filed in the office of the county recorder in which the notice of attachment has been filed, and shall be indexed in like manner.

(o) **Attachment before maturity of claim.** A party may commence an action upon an obligation before it is due and have an attachment against the property of the debtor upon any one or more of the grounds set forth in Subdivisions (a)(4), (5), (6) and (7) of this rule. The property attached, or its proceeds, shall be held subject to the judgment thereafter to be rendered; but no judgment shall be rendered on such claim until the obligation shall by its terms become due.

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April 9, 1996

The Honorable Anne M. Stirba
THIRD JUDICIAL DISTRICT COURT
240 East 400 South, Room #304
Salt Lake City, Utah 84111

Attn: Sally Ann Koch, Clerk

Re: Pack vs. Intermountain, Inc.; Civil No. 960900707CV - (CN&M #08444.38)

Dear Judge Stirba:

Your office has advised me that the parties, to effectively dismiss the case, must prepare an Order of Dismissal in addition to the previously filed Stipulation of Dismissal. I have therefore prepared an Order of Dismissal. However, I think Rule 41(a)(1)(ii) is quite clear that a case "may be dismissed without order of court (i) . . . ., or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action."

An ORDER OF DISMISSAL is enclosed, along with return, stamped envelopes to counsel for enclosing a date-stamped, conformed copy.

Sincerely,

CALLISTER NEBEKER & McCULLOUGH

P. Bryan Fishburn, Esq.

PBF/mhm
Encls.: (1) Proposed Order of Dismissal
(2) Reference to Rule 41(a)(1)(ii)

cc: F. Kevin Bond, Esq.
Mr. G. Thomas Watkins, Intermountain, Inc.
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not to grant a continuance. Griffiths v. Hammon, 560 P.2d 1375 (Utah 1977).

—New theory of case.

Continuance could be obtained to develop a theory of the case suggested after issue joined and before trial. Tiernan v. Trewick, 2 Utah 393 (1877).

—Procedural delays.

Court properly denied motion for continuance in action based on credit card obligation which had been procedurally delayed for two and a half years by interrogatories and by various motions of the defendant; and although trial date had been set for four months, motion for continuance was not filed until nine days before trial. First Sec. Bank v. Johnson, 540 P.2d 521 (Utah 1975).

—Supporting affidavits.

Subdivision (b) does not require affidavits to accompany a motion for continuance. Bairas v. Johnson, 13 Utah 2d 269, 373 P.2d 375 (1962).

—Unavailable witness.

——Lack of diligence.

Where subpoena for absent witness was not placed in hands of an officer for service until the morning the case was called for trial, though it had been set for several weeks, and the witness had testified at a former trial, continuance was denied. Corporation of Members of Church of Jesus Christ of Latter-Day Saints v. Watson, 30 Utah 126, 83 P. 731 (1906).

In malpractice action, motion for continuance based on plaintiff's inability to serve subpoena on vacationing medical witness was properly denied, where plaintiff had made no effort to depose witness and had never contacted witness for the purpose of testifying. Maxfield v. Fishler, 538 P.2d 1323 (Utah 1975).

After plaintiff had been granted one continuance because of unavailability of her preferred expert witness, and her second request for a continuance several months later was solely due to her own failure to retain and designate a new expert witness in a timely manner, there was no abuse in the district court's denial of plaintiff's second motion. Hill v. Dickerson, 839 P.2d 309 (Utah Ct. App. 1992).

——Need.

Where the defendant's counsel had three weeks to prepare for trial, and where two of the witnesses, purportedly important to his case, were actually present at trial and thus subject to cross-examination, the purely speculative need for a third witness did not entitle the defendant to the granting of a motion for continuance. State v. Humpherys, 707 P.2d 109 (Utah 1985).

Cited in Thorley v. Thorley, 579 P.2d 927 (Utah 1978); Holbrook v. Master Protection Corp., 883 P.2d 295 (Utah Ct. App. 1994).

COLLATERAL REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d Continuance § 1 et seq.; 75 Am. Jur. 2d Trial §§ 76, 80, 83, 84.

C.J.S. — 17 C.J.S. Continuances § 1 et seq.; 88 C.J.S. Trial §§ 18 to 35.

A.L.R. — Admissions to prevent continuance sought to secure testimony of absent witness in civil case, 15 A.L.R.3d 1272.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

Key Numbers. — Continuance ⇐ 1 et seq.; Trial ⇐ 1 to 7.

Rule 41. Dismissal of actions.

(a) **Voluntary dismissal; effect thereof.**

(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) **By order of court.** Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Third Judicial District Court

Anne M. Stirba
District Judge

April 29, 1996

P. Bryan Fishburn, Esq.
900 Kennecott Bldg.
Salt Lake City, Utah 84133

Re: Pack v. Intermountain, Inc.
Civil No. 960900707 CV

Dear Mr. Fishburn:

Thank you for your letter dated April 9, 1996 regarding the order of dismissal based on the stipulation of all parties and your reference to Rule 41(a)(1)(ii), Utah Rules of Civil Procedure.

Your interpretation of the rule is correct and an order of dismissal is not necessary under the circumstances of your case. I am, therefor, filing your order unsigned and ordering that the case be closed.

When I received your letter I checked to find out why you were asked to send in an order of dismissal and was informed that the clerks, at least in the Third District, have been trained to obtain orders of dismissal from counsel based on a stipulation of all parties to dismiss. Frankly, in the five years of being a judge I have become so accustomed to receiving proposed orders of dismissal based on stipulations, I had forgotten the rule and probably would have myself asked you to send in an order of dismissal even if a clerk had not.

I have learned that the clerks downstairs do close cases without involving the assigned judge when a plaintiff files a "notice of dismissal" and no answer in the case has been filed. They have, however, been trained that when they receive stipulations of dismissal which do not include orders of dismissal, to request them.

After doing some checking, it appears that this training has resulted from problems in cases in which the stipulations do not state "stipulation of dismissal," where counsel for all parties have not agreed to the stipulation and where the intended dismissal

is conditional, such as when payments need to be made by one party to another prior to dismissal. In these situations, analysis of the stipulations require legal analysis which the clerks are not permitted to do.

I asked Craig Ludwig, Clerk of the Third District Court, to check with the Second and Fourth District Clerks to learn how they handle these stipulations. Based on that, it appears that those clerks offices handle the stipulations exactly the way the clerks in the Third District are trained to do.

I appreciate you bringing this to my attention. Because the Rule 41(a)(1)(ii) stipulations of dismissal are being handled by at least the Wasatch front court clerks differently from the stated rule, I have brought this to the attention of the Utah Supreme Court Advisory Committee on Civil Procedure (of which I am a member) to assess whether the rule is a good rule or whether current practice should change to conform to the rule.

I am sending a copy of your letter dated April 9 and a copy of this response to Alan L. Sullivan, Chair of the Advisory Committee and Tim Shea, AOC representative on the committee for their information. I invite you to send to them any recommendations you may have concerning this matter.

Sincerely yours,

Anne M. Stirba
District Court Judge

AMS:jsh
cc: F. Kevin Bond, Esq.
cc w/enc: Alan L. Sullivan, Esq.
Timothy M. Shea ✓

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LOUIS H. CALLISTER, SR.
(1904-1983)
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(1906-1995)

TO CALL WRITER DIRECT

May 3, 1996

The Honorable Anne M. Stirba
THIRD JUDICIAL DISTRICT COURT
240 East 400 South, #304
Salt Lake City, Utah 84111

Re: Pack vs. Intermountain, Inc., Civil No. 960900707CV; (CN&M #08444.38)

Dear Judge Stirba:

Thank you for your insightful and candid letter of April 29 regarding my prior letter, Rule 41, and how it is being interpreted by clerks in the various courts. It is good to know, and is a refreshing revelation, that letters to courts regarding procedural issues are read and considered.

Interestingly, since I wrote you, I have encountered two additional instances almost identical to that which I raised in this case. This morning, in fact, Judge Reese's clerk (Third Circuit Court), advised me I needed to prepare an Order of Dismissal even though a Stipulation of Dismissal, signed by all parties to the action, had been filed.

It makes no sense to me to have a rule that states an action can be dismissed in a certain manner, if clerks of court are in effect being trained to disregard the rule. If the rule in its present form forces clerks into making decisions that they are not qualified to make, and so they are trained simply to disregard it, then I would urge that the rule be changed.

Thank you again for your letter.

Sincerely,

CALLISTER NEBEKER & McCULLOUGH

P. Bryan Fishburn, Esq.

PBF/mhm

cc: Alan L. Sullivan, Esq.
Timothy M. Shea, Esq.
F. Kevin Bond, Esq.
Mr. G. Thomas Watkins

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Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof.

(1) By plaintiff; by stipulation. Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By order of court. Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for

improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) Dismissal of counterclaim, cross-claim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of previously-dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Bond or undertaking to be delivered to adverse party. Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

Salt Lake City, UT 84108-2548
March 14th, 1995

The Honorable Michael R. Murphy, Presiding Judge
The Third Judicial District Court in and for Salt Lake County, State of Utah

My dear Judge Murphy:

There's a controversy between myself and Judge Young's clerk and the Clerk of Court and the administrative counsel of the Court (how's that for just about everybody?). Details will follow, but here's the essence of it: What they're saying I should do is just go ahead and do as I see fit, and if it turns out in the end that I'm not in compliance with court rules, well then, that'll be passed on after the fact. But I say I'm entitled to know what the requirements of compliance are beforehand, so I may conduct myself in accordance with them. (If semantically this should be referred as an advance ruling rather than an advisory ruling, my apologies to Judge Reese over at 3rd Circuit Court).

What's compounding the matter is that I'm a pro se filer (and don't try dissuading me there isn't judiciary bias against pro se 'ers), and therefore everybody keeps telling me to get a lawyer if I don't understand the law, the judge can't assist me with presenting my case, blah, blah, blah. And that isn't what this whole thing's all about.

What's in view here is Rule 6 of URCP. That commences, "In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, ... or by any applicable statute ...". And don't kid yourself, much of this isn't statutorily defined, or by case law, and it really does devolve down to the discretion of each court.

Now here come the three or four questions I need the presiding judge's direction on; they're purely as to procedure and court rules so there's no need to join an adverse party or hear opposing argument on it, so I can ask ex parte:

The conclusion of 6(a) reads, "When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.".

6(e) says, "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.".

DOES THE ADDITION OF THE 3 DAYS TO 5 DAYS (the period for filing a reply memorandum after service of the responding party's memorandum in opposition to a motion) THEN SUM UP THE TOTAL PERIOD AS 8 DAYS SO THAT THE GOVERNANCE OF 6(a)(last sentence) NO LONGER APPLIES?

DOES THE GOVERNANCE OF 6(a)(last sentence) APPLY TO 6(e) ITSELF?

IS THE 3-DAY PERIOD FOR SERVICE BY MAIL APPENDED TO THE 5-DAY PERIOD PRECEDING IT OR FOLLOWING IT? This does make a difference --- if a document is mailed on a Thursday and the 3-day mailing period comes first --- and assuming 6(a)(last sentence) does not apply to the mailing time --- then you'd count Fri., Sat., Sun. + (5-day period) Mon., Tues., Wed., Thurs., Fri. --- a straight 8 days. However, if we assume the 5-day period comes first --- and applying 6(a)(last sentence) --- you'd come up with Fri. + space for weekend + Mon., Tues., Wed., Thurs. + (3-day mailing period) Fri., Sat., Sun. --- so now the last filing day is Mon. (it's extended to the next business day from Sun.). And if we further assume 6(a)(last sentence) applies to both periods --- we'd get Fri. + weekend space + Mon., Tues., Wed., Thurs. + (3-day mailing period) Fri. + space for weekend + Mon., Tues. --- so now the last filing day is Tues..

Look, Judge Murphy, it's a principle of law that the Court does not make advisory rulings, I understand that. You can't come before the bench and say, "Your Honor, I'm going to shoot Joe So-and-so next month. And if I explain now how I'll do it, please give me your decision ahead of time whether you'll rule that manslaughter or murder.". No, that's an advisory opinion and you can't give those. But there's another principle of law just as firmly established in jurisprudence --- that a person has the right to know in advance what the requirements are to conform himself to, so he may comply with them.

Now what the administrative counsel to the Court and your clerk and Judge Young's clerk and the Clerk of Court are telling me is that I should just file whatever way I interpret the statute and then you'll rule me wrong post facto if I'm out of order. I very much disagree. In this case where rules of the court and questions of procedure are concerned, I quite think I'm entitled to an advance ruling (again my apologies to Judge Reese for referring to it as an advisory ruling) from you as the presiding judge on the 3 queries I've submitted.

I've spoken to Jeff Butler, Clerk of the Utah Supreme Court. To Alan Sullivan, chair of the advisory committee to the Utah Supreme Court on amendment of the Rules of Civil Procedure. To Paul Vance over at 3rd Circuit. To Tim O'Shea and Brent Johnson over at court administration. To Chuck, Dave, and Marlene at the civil counter down on the 2nd floor. Believe me when I tell you there's no consensus on Rule 6 and no uniformity among the courts. And there ain't no case law neither. (Colin Winchester down in Kane County opines that's because these issues would usually be settled within cases rather than becoming cases in their own right.) Since the federal rules parallel the state ones, I've researched federal practice too, and there's little there as well.

cc: the honorable Judge Young

Most sincerely, Clifton W. Parcs

Rule 6. Time.

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b) and 73(a) and (g), except to the extent and under the conditions stated in them.

(c) **Unaffected by expiration of term.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) **For motions - Affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.