# Agenda

## Advisory Committee on Rules of Civil Procedure

September 23, 1996
4:00 to 6:00 p.m.

Administrative Office of the Courts
230 South 500 East, Suite 300

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| Welcome and Approval of Minutes | Fran Wikstrom |
| Mailing Orders and Judgments | Tim Shea |
| Review Comments to Rule 11 Amendments | Peggy Gentles |
| Rule 4; Service of Process | Perrin Love |
| Rule 64C; Amount of Bond | Virginia Smith |
| Rule 41 | Judge Stirba<br>Perrin Love |

**MINUTES**

**Supreme Court's Advisory Committee on the Rules of Civil Procedure**

Administrative Office of the Courts
230 South 500 East, Ste. 300
Salt Lake City, Utah 84102

Monday, September 23, 1996
4:00 p.m.

Francis M. Wickstrom, Presiding

**PRESENT:**
Francis M. Wickstrom
Glenn C. Hanni
Terrie T. McIntosh
Perrin Love
Virginia Smith
Mary Ann Wood
James Soper
Hon. Anne Stirba

**EXCUSED:**
Hon. Boyd Bunnell
Alan L. Sullivan
Terry S. Kogan
W. Cullen Battle
Hon. Ronald Boyce
M. Karlynn Hinman
Thomas R. Karrenberg
John L. Young
David I. Isom

**STAFF:**
Peggy Gentles
Tim Shea

## I. Welcome and Approval of Minutes.

Francis Wickstrom welcomed Committee members to the meeting and stated that Alan Sullivan had asked him to preside over the next two meetings. Mr. Wickstrom referred to his letter to Committee members asking that the next two meetings be scheduled for Tuesday October 22, 1996 and Wednesday December 4, 1996. Mr. Wickstrom introduced Peggy Gentles, Staff Attorney at the Administrative Office of the Courts. The May minutes were approved.

## II. Appearance Pro Hac Vice.

Tim Shea informed Committee members that the proposed Rule on the Appearance Pro Hac Vice was being sent out this week for comment. The publication date, if approved by the Supreme Court, would be April 1997.

## III. Mailing Orders and Judgments.

Mr. Shea noted that at the meeting last Spring the Committee had expressed interest in making changes to the rules governing mailing of orders and judgments. The changes were intended to clarify who is responsible for mailing orders and to protect appellate interests of the non prevailing party. Mr. Shea noted that several rules govern this area.

Mr. Shea referred to the document sent to Committee members dated September 17, 1996. Mr. Shea highlighted some of the changes that had been made. In Rule 5(a)(1) "judgment" had replaced "judgment, order, decree." Rule 5(b)(2)(C) adds a requirement that any order or judgment prepared by the court must be served by the court.

Rule 5(d) has had language removed referring to discovery documents. Mr. Shea suggested that a Committee note be added to indicate that other rules may govern of filing of discovery documents. Terrie McIntosh suggested that subparagraph (d) be amended to expressly refer to the rule in the Code of Judicial Administration that refers to filing of discovery documents. Mary Anne Wood suggested that language "all papers which are required to be filed and served" be added. Virginia Smith suggested that the language be broader.

Mr. Shea noted that Rule 58(a) has been amended to add requirement that the party preparing a judgment for the court's signature must serve the judgment. Mr. Shea noted that the Committee could suggest a change to the Rule of Appellate Procedure which would change existing case law. The proposed amendment would define excusable neglect to include failure of the appealing party to receive a copy of the order of judgment if the party required to serve the judgment had failed to comply with Rule 5. Mr. Wickstrom expressed concern that a potential for abuse still exists. Glenn Hanni stated that there had been a great deal of debate around this issue and the prevailing sentiment was that some finality should be given to all parties. Ms. Wood noted that most parties would get something from the court separate from the papers prepared by the opposing party, for instance a minute entry or notice of a hearing. Ms. Smith noted that in default judgments that may not be the case. Mr. Shea noted that the major concern was for pro se parties who did not prevail in the trial court. Ms. McIntosh asked whether Rule 4 of Appellate Procedure had been through the Advisory Committee on Appellate Procedure. Judge Stirba moved that the rules prepared by Mr. Shea be tentatively approved with the one change regarding discovery documents and that amendments to RAP 4 be recommended to the Appellate Rules Committee. Ms. Wood seconded. The motion passed unanimously.

**IV. Comments on Rule 11.**

Rule 11 was published for comment in the Spring. However, the Committee did not meet in time to consider the comments for November publication. Peggy Gentles presented a synopsis of the comments received. Following that synopsis, Mr. Wickstrom asked if the Committee wished to make any changes in response.

The Committee discussed the Judicial Rules Review Committee comment that adopting a federal rule may not be appropriate for Utah practice. Specifically the JRRC was concerned that this rule would bar entering a general denial in litigation as a tactic preceding

settlement. The Committee discussed this and concluded that the rule did not alter existing Rule 11 application to such a scenario. If there is insufficient time to thoroughly research an answer, inquiry into the facts may be less and a general denial may be appropriate. But the duty to inquire still exists.

The Committee discussed comments on (c)(1)(A) which states that absent exceptional circumstances a law firm shall be held jointly responsible for violations committed by its partners, associates and employees. Mr. Wickstrom noted that the new federal rule had taken a lot of the acrimony out of practice. Apparently, the federal rule was intended to deter a firm from using one employee or associate as "fall guy" for abusive practices. Ms. Wood noted that she understood the federal rule to be aimed at some law firms who engaged in firmwide sanctioned practices. For instance, using falsified affidavits in motions for temporary restraining orders.

Judge Stirba expressed great concern with the presumption that an entire firm would be sanctioned given the Judicial Council's Perform Evaluation Program. Each time the attorney survey is done for a specific judge, that judge is allowed to remove from the list any attorney that judge has sanctioned. If a judge was required to remove all members of firm, the pool of attorneys to be surveyed in some cases may be drastically reduced.

Mr. Soper inquired into the meaning of "jointly responsible." The Committee discussed whether this was a indication of joint liability for monetary sanctions. Ms. Smith suggested changing the last sentence in (A) to state, "In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees."

The Committee then focused on the term "law firm". Concern was expressed in sympathy with Michael Deamer's comment that this rule would impose liability on office-sharing arrangements. After discussion, the Committee felt that the term "law firm" was sufficiently concrete to allow a judge to determine if liability should be imposed in a specific circumstance. Mr. Shea asked if the Committee wanted to include a advisory committee note to the rule detailing the Committee's decision to depart from the federal rule.

In response to Mitchell Barker's concern that repeated violations of Rule 11 withdrawn within the 21 day period would be unsanctionable, the Committee expressed the opinion that the Bar disciplinary procedures are better suited to addressing such problems since generally these violations would be spread out over a number of cases rather than appearing before one judge only. The motion was made to approve Rule 11 with the last sentence in paragraph (c)(1)(A) amended to read "In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees." That motion passed unanimously.

## V. Rule 4. Service of Process

Perrin Love presented a proposed amendment to Rule 4 which would allow for a waiver of service of process. The issue presented by Mr. Love was whether the Committee thought the rule should be an incentive for plaintiffs to use the procedure or for defendants to opt to waive process. The impetus for this proposed change is the sheriff's office that wants to have fewer complaints to serve. Judge Stirba noted that this would be a process unavailable in domestic cases if there were any orders to show cause dealing with temporary issues which were filed with the complaint. Mr. Love agreed with Judge Stirba and stated that in such cases, the waiver procedure would not be practicable. Discussion focused on amount of time a defendant waiving service of process would have to answer. Mr. Hanni felt that the incentive needed to be given to the defendant and also felt that there was no reason not to be consistent with the federal rule. The Committee inquired into the federal court's experience with this version of Rule 4. The Committee instructed staff to contact the federal court clerk and the sheriff's office to see what recent experience has been. The Committee deferred action on this rule until the October meeting.

## VI. Rule 64(c). Amount to be posted by party upon issuance of writ of attachment.

Virginia Smith presented her proposed amendment to Rule 64(c). This amendment would remove the $10,000.00 maximum and $50.00 minimum that currently appear in the rule. This language will be replaced with discretionary language that would allow the court to determine the appropriate amount and form based on the value of the property attached. This language is similar to that found in the injunction rule. The Committee began discussing these changes and determined that the issue was too involved to conclude in this meeting. Therefore, the issue was put over until the October meeting.

## VII. Rule 41.

Judge Stirba's presentation of an issue related to Rule 41 and orders of dismissal was put over until the October meeting.

## VIII. Conclusion.

There being no further business, Mr. Wickstrom adjourned the Committee until the next meeting scheduled for 4:00 p.m., Tuesday October 22, 1996 at the Administrative Office of the Courts.

## 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 judgment, 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 and by whom.

(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:

(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(C) an order or judgment prepared by the court shall be served by the court.

(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 by the party preparing it 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. At the time of presenting any written order or judgment to the court for signing, the party seeking such order or judgment shall deposit with the clerk sufficient copies thereof for mailing as hereinafter required. Immediately upon the entry of an order or judgment, the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and, shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack~~

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

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

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

**Intent:**

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

**Applicability:**

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

**Statement of the Rule:**

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

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

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

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

[~~(5)~~] (4) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the

court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

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

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

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

[~~(9)~~] (8) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

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

**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.

## Rule 11. Signing of pleadings, motions, and other papers; Representations to court; sanctions.

(a) Signature. Every pleading, written motion, and other paper [~~of a party represented by an attorney~~] shall be signed by at least one attorney of record in [~~his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading motion, or other paper and state his address~~] the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. [~~The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existinlaw, and that it is not interposed~~] An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting a pleading, written motion, or other paper to the court (whether by signing, filing, submitting, or later advocating), an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[~~. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.~~];

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

# MEMORANDUM

**To:** Supreme Court's Advisory Committee on the Rules of Civil Procedure
**From:** Peggy Gentles, Staff Attorney, Administrative Office of the Courts
**Subject:** Comments Received on Proposed Amendments to Rule 11
**Date:** September 16, 1996

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A digest of comments received on the version of Rule 11 proposed for comment in March follows. Copies of the letters are attached.

Change: Adopts the federal rule.

Comments: Should not adopt the federal standard without first considering the practicalities of Utah practice. Especially in small cases, most efficient defense is to enter general denial and proceed with settlement discussions. However, under proposed rule, may be subject to sanctions. *Rep. Pignanelli, Judicial Rules Review Committee.*

Should not follow "lockstep" the recent amendment to Federal Rule of Civil Procedure 11. *Bret F. Randall, Parry, Murray, Ward & Moxley, Salt Lake City*

Favors uniformity between state and federal rules. *Utah State Bar Litigation Section (per Kent Scott)*

Change: (b) imposes Rule 11 liability on an attorney who advocates a position which had been presented by a prior attorney.

Comment: Imposing liability for "later advocating" is overly broad. It places too much burden on successor attorneys to exhaustively review all prior documents. *Leslie W. Slaugh, Howard, Lewis & Peterson, Provo.*

Change: Rule 11 applies to documents which rely upon client's representations.

Comment: Concerned about sanctioning attorney who in good faith relies on statements by client which later prove to be false. *Rep. Valentine, Judicial Rules Review Committee*

Change: (c)(1)(A) calls for a motion for sanctions to be served on the opposing party but

not filed or otherwise submitted to the court for 21 days after service and only if the challenged document is not withdrawn or appropriately corrected.

Comments: Rule will make cases more time consuming, costly and counterproductive to settlement. *Rep. Valentine and Rep. Pignanelli, Judicial Rules Review Committee*

Allowing 21 days for withdrawal before sanction motion can be filed shifts the burden of good faith from the attorney submitting the document to the attorney defending bad-faith litigation. *Bret F. Randall, Parry, Murray, Ward & Moxley, Salt Lake City*

Allows a cooling down period for party seeking sanctions to evaluate whether worth continuing with other procedural aspects of the proposed rule. *Utah State Bar Litigation Section (per Kent Scott)*

Change: (c)(1)(A) authorizes the court to award attorneys fees "incurred in presenting or opposing motion."

Comment: The rule is unclear whether fees can be awarded if the document is withdrawn in the 21 day period. *Leslie W. Slaugh, Howard, Lewis & Peterson, Provo*

Comment: The rule should indicate that attorneys who repeatedly withdraw documents within the 21 day period are subject to sanctions. This change would be especially helpful when the other party is unrepresented. *Mitchell Barker, West Valley City.*

Comment: Court's discretion in imposing sanctions is too limited. *Bret F. Randall, Parry, Murray, Ward & Moxley, Salt Lake City*

Change: (c)(1)(A) holds law firms liable for violations of "its partners, associates, and employees."

Comment: The words "who are attorneys" should be added after "employees." *Mitchell Barker, West Valley City.*

Comment: This rule unreasonably burdens other firm members and will increase the cost of litigation by requiring all documents to be reviewed by a second attorney. Additionally, firms which are in reality office sharing arrangements will be subject to liability when they are not sharing

revenue. If Rule 11 is going to remain substantially as proposed, firm liability should only be imposed when the other firm members sanctioned or participated in the conduct. *Michael L. Deamer, Randle, Deamer, Zarr, & Lee, Salt Lake City*

Change: (c)(2) limits sanctions to "what is sufficient to deter repetition."

Comment: Sanction should not be so limited. The court should be able to consider other factors such as attorney fees incurred by other party. *Mitchell Barker, West Valley City.*

Change: (c)(2)(A) does not allow monetary sanctions against a represented party.

Comment: While such sanctions should be discouraged, they should not be prohibited. *Mitchell Barker, West Valley City.*

Change: Structure/grammar/usage

Comment: (c)(1)(A) uses "attorney's fees" and (c)(2) uses "attorneys' fees." Current court opinions use "attorney fees." *Leslie W. Slaugh, Howard, Lewis & Peterson, Provo*

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John C. Baldwin
Executive Director

May 14, 1996

Timothy M. Shea
Senior Counsel
Administrative Office of the Courts
230 South 500 East, Suite 300
Salt Lake City, Utah 84102

**RE: COMMENTS OF THE LITIGATION SECTION TO THE PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE, RULES OF COURT ANNEXED ADR, RULES OF APPELLATE PROCEDURE, RULES OF PROFESSIONAL CONDUCT THE CODE OF JUDICIAL ADMINISTRATION, JUDICIAL NOMINATING COMMISSION MANUAL.**

Dear Mr. Shea:

On behalf of the Litigation Section of the Utah State Bar Association I would like to thank you for the opportunity to comment on the Proposed Amendments to the Rules of Civil Procedure, Rules of Court Annexed ADR, Rules of Criminal Procedure, Rules of Appellate Procedure, Rules of Juvenile Procedure, Rules of Professional Conduct, Forms, Code of Judicial Administration, Judicial Nominating Commission Manual, and Sentence and Release Guidelines.

## INTRODUCTION

The Executive Committee of the Litigation Section has made a study of the Proposed Amendments and has discussed their applicability and impact. We have reached a consensus and have presented our comments in this letter. The names of the officers and members of the Litigation Section Executive Committee are provided in a separate attachment. Commissioner Jim Jenkins, David Jordan an I oversaw this project. In addition, the advice and direction given by John Young and Cullen Battle, both past chairs of the Litigation Section, was most helpful in preparing these comments. The majority of the work in preparing these comments was done by several subcommittees chaired by the following attorneys:

P. Bruce Badger and Barbara H. Ochoa: Rules of

Civil Procedure.

Craig G. Adamson: Rules of Court Annexed ADR and Code of Judicial Administration.

Roger H. Bullock: Rules of Appellate Procedure.

W. Cullen Battle: Rules of Professional Conduct.

Steven J. Aeschbacher: Code of Judicial Administration and Judicial Nominating Commission Manual.

We determined not to offer any comments as a Section on the Proposed Amendments dealing with the Rules of Criminal Procedure, Rules of Juvenile Procedure, Forms, and Sentence and Release Guidelines.

**RULES OF CIVIL PROCEDURE**

Rule 1: The simple amendment to Rule 1 is to bring the rule in line with the court consolidation program and the elimination of circuit courts. We favor this amendment.

Rule 11: The proposed amendments to Rule 11 will conform this Rule to Rule 11 of the Federal Rules of Civil Procedure. We favor the uniformity between the state and federal rule. Most of the lawyers have become familiar with the federal rule by now.

The proposed amendments have some notable features. The new rule will submit not only attorneys but also their law firms to sanctions if the rule is violated.

The rule continues to require litigants to "stop and think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and provides protection against sanctions if the litigants withdraw or correct their intentions after a potential violation is called to their attention.

Clearly, the purpose of these proposed changes to Rule 11 point to sanctions that are to deter rather than to compensate for violations of the rule. One of the things we have noticed generally about Rule 11 motions is that they are frequently as frivolous as the conduct they

propose to sanction. We think the twenty one day grace period to withdraw a challenged pleading or written motion will have some impact. If it does nothing else, it will provide a cooling down period for the party seeking sanctions to re-evaluate whether the remaining procedural aspects brought about by the other changes to the rule make the effort of going through with the motion really worth the effort.

Rule 63(a): The only change to this rule is to strike a reference to the circuit court. We support this amendment.

Rule 64(g): The proposed amendment to this rule (garnishee fee) strikes Rule 64(g) in its entirety. The fee to be paid to a garnishee will be governed by Utah Code Ann. § 21-7-20. We support this amendment.

Rule 65B: Extraordinary Writs. The proposed amendments will sever the portion of the rule dealing with extraordinary writs for wrongful imprisonment which is then renumbered as new Rule 65C. We are not clear what the purpose is for this change. Aside from severing the post-conviction relief portion of the rule, the most notable revision to Rule 65B is to include actions by the Board of Pardons and Parole to the list of actions for which extraordinary relief is available.

We have determined not to comment on the changes to the post-conviction relief rule (Rule 65C - formerly Rule 65B(b). The Criminal Law section would be in a better position to study and comment in this proposed amendment.

**RULES OF APPELLATE PROCEDURE**

We endorse the proposed amendments in their present form. We think they will assist in a more efficient and effective administration of the courts.

**RULES OF COURT ANNEXED ADR**

Under subparagraph (f), discovery will no longer be stayed and may proceed during the pendency of the mediation proceedings. We endorse the adoption of this amendment. The continuation of discovery will help move the dispute toward a trial in the event the ADR process is not successful. Also, the right to continued discovery may be helpful in furnishing the parties with

**UTAH STATE LEGISLATURE**
SALT LAKE CITY, UTAH

May 1, 1996

Chief Justice Michael D. Zimmerman
Associate Chief Justice I. Daniel Stewart
Justice Christine Durham
Justice Richard C. Howe
Justice Leonard H. Russon
332 State Capitol
Salt Lake City, UT 84114

Dear Members of the Utah Supreme Court:

The Judicial Rules Review Committee met yesterday to discuss proposed amendments to the various court rules which have been published for comment by May 10, 1996. The committee appreciates the opportunity to offer suggestions and make comments. The committee also appreciates the attendance of Mr. Brent Johnson, Mr. Rick Schwermer, and Mr. Tim Shea at today's meeting. They willingly responded to the committee's questions and offered valuable insight into the rationale of certain proposed rules changes.

The committee passed motions to submit the following comments to the Supreme Court regarding the following rules:

**Rule 1.13(f), Rules of Professional Conduct** (p.22)

At the end of line 42, insert "This rule is limited to lawyers elected to provide legal services and shall not be applicable to a lawyer who is elected to public office, where legal services rendered are merely incidental to the office held."

At line 31, delete "god cause" and insert "good cause"

**Rule 101, Rules of Court Annexed ADR** (p. 16)

Please review whether the change to Rule 101, which permits discovery to proceed during the pendency of the mediation proceedings, implicates or conflicts with the prohibition against discovery in Medical Malpractice Prelitigation Panel Screening, Utah Code Ann. § 78-14-13(4).

**Rule 11, Civil Procedure** (p. 21)

Rep. Valentine and Rep. Pignanelli expressed concerns about the policy of adopting the federal rule standards. Rep. Pignanelli discussed the use of denials in responsive pleadings to facilitate settlement and the potential difficulties of enforcing sanctions in those instances. Rep. Valentine expressed concerns about sanctioning an attorney who relies on his client's statements in good faith which later prove to be false statements. Both expressed concerns about the impact of the rule, making cases more time-consuming, costly, and counter-productive to settlement. Rep. Pignanelli questioned the adoption of the federal standards without a thorough consideration of the practicalities of practice in Utah.

Please accept these comments in the spirit of cooperation and concern. For your information, the committee has also prepared correspondence to be sent to Judicial Council concerning proposed changes to the Code of Judicial Administration.

Thank you for your genuine interest in these matters.

Sincerely,

Robert F. Montgomery /LWB
Senator Robert F. Montgomery
Co-Chair, JRRC

John L. Valentine /LWB
Representative John L. Valentine
Co-Chair, JRRC

cc: Mr. Brent Johnson
Mr. Rick Schwermer
Mr. Tim Shea

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March 27, 1996

Timothy M. Shea
Senior Counsel
Administrative Office of the Courts
230 South 500 East, Suite 300
Salt Lake City, UT 84102

Re: Proposed Rules of Civil Procedure

Dear Tim:

I have the following comments concerning the proposed amendments to the Utah Rules of Civil Procedure, which were recently published for comment.

Rule 1. The effect of the proposed amendment would be to make the proposed rules applicable to small claims actions. I think that is an excellent idea, because currently there are no rules which govern small claims action. Utah Code Ann. § 78-6-1(7) provides: "Small claims matters shall be managed in accordance with simplified rules of procedure and evidence promulgated by the Supreme Court." To my knowledge, however, the Supreme Court has never promulgated such rules. If the committee decides to except small claims actions from the general rules of civil procedure, the committee should propose simplified rules applicable to small claims actions.

Rule 11. Proposed subparagraph (b) would impose Rule 11 liability on an attorney for "later advocating" a position taken by a prior attorney in a case. I think this rule is overly broad. What would be the result, for example, if an attorney filed a motion based on seven arguments, five of which were frivolous, and a second attorney took over the case and continued to prosecute the motion? Would the second attorney be required to file a document expressly disavowing the frivolous arguments? The same potential confusion exists if all but one of the claims in a complaint were frivolous. If the attorney advocates that his or her client is entitled to recover under the complaint, the attorney is still advocating a frivolous position, even if the attorney concentrates only on the non-frivolous claim. It is unreasonable to expect a successor attorney to conduct an exhaustive investigation of all of the prior documents filed in a case in order to ferret out potential Rule 11 violations.

Subparagraph (c)(A) is potentially confusing as to when attorney fees might be awarded. The first few sentences appear to give a 21-day period in which the challenged paper may be withdrawn without penalty. The second to the last sentence, however, gives the court authority to award the prevailing party its expenses and attorney fees incurred in presenting the motion. Those attorney fees will be incurred even if the challenged paper is withdrawn within the 21 days. Would the "prevailing" party still be entitled to attorney fees?

The proposed rule uses the phrase "attorney's fees" in subparagraph (c)(1)(A), and "attorneys' fees" in subparagraph (c)(2). Neither is consistent with current usage by the Utah Supreme Court. Current opinions of the court use "attorney fees."

Rule 64G. Rather than totally eliminating this rule, the rule should be replaced by a statement that "the party serving the garnishment shall pay to the garnishee a fee as provided by Utah Code Ann. § 21-7-20." To just eliminate the section creates potential hazard for pro se and occasional practitioners, who may not be aware that they need to look in another section to find a fee.

Sincerely,

HOWARD, LEWIS & PETERSEN

Leslie W. Slaugh

LWS/lo

J:\LWS\SHEA.LO

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April 26, 1996

Timothy N. Shea, Esq.
Senior Counsel
Administrative Office of Courts
230 South 500 East, Suite 300
Salt Lake City, Utah 84102

**Re: Proposed Rules Amendments**

Dear Mr. Shea:

I received and have reviewed the proposed amendments to the various rules of procedure and court rules. As invited in those proposed amendments, I provide the following miscellaneous comments:

1. I can appreciate the desirability of amending Rule 11 to make it more workable for the bench and bar. I believe it would be helpful to provide that although the 21 day period in which to withdraw a challenged paper would apply, repeated violations should result in the sanction even if they are each withdrawn within the 21 day period. This will be particularly helpful in the event some plaintiff or member of the bar uses oppressive means against an unrepresented party.

At the top of page 8 is a provision indicating that a law firm is generally held responsible for violations committed by partners, associates or employees. I would suggest that the word "who are attorneys" should follow that language at the end of the sentence.

I disagree that the nature of the sanction should be "limited to that which is sufficient to deter repetition of such conduct." The court should be permitted to consider other factors, including the amount of attorney fees incurred by the non offending party as a result of the inappropriate conduct. I also disagree with the provision that monetary sanctions may not be awarded against a represented party for violation of subdivision (b)(2). It would be appropriate for the rule to discourage such damages, except in unusual cases, but not to prohibit them

entirely.

Finally, on page 8 line 16-18, I would think that "withdrawal" ought to be one of the factors which can be considered to avoid a sanction by the Court by its own initiative.

2. Rule 63A is potentially helpful, but seldom used. I would suggest that Utah consider adopting a rule similar to the one which I believe Idaho uses, which permits a party unilaterally to remove a judge one time from each case, if done within few days of the initial judge assignment. I believe this would avoid a lot of conflicts and problems which are difficult to quantify or prove, but which are very real.

3. The post conviction relief provisions on page 14 are mostly an improvement. However, I do not concur with the provision that the sentencing judge must review the post conviction relief. I think that basic rights would be better protected by eliminating that requirement. I also doubt of the limitations on further papers contained on page 14, lines 45-47. It should be remembered that we are dealing largely with unsophisticated prisoners.

On page 15 line 28 I believe that the word "and" should be replaced by the word "or".

4. I believe Rule 14, which is considered on page 18, should permit a defense attorney the same power the prosecutors have to issue subpoenas. Not only would this make the process more fair and less expensive for defendants with limited means, but it would also make the criminal system more consistent with the new subpoena issuance power of attorneys in civil cases.

Further, in light of article I section 12 of the Utah Constitution, a provision ought to be included somewhere to make clear to the courts that witnesses who appear pursuant to defendant's subpoenas at criminal trials are just as entitled to a witness fee from the court as are those who appear in the behest of the prosecution.

Thank you for considering the above comments. I appreciate the hard work that has gone into this effort to amend and correct the various rules.

Sincerely,

Mitchell R. Barker

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March 27, 1996

Mr. Timothy M. Shea
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Salt Lake City, UT 84102

RE: Comments on Proposed Amendment to Utah Rule of Civil Procedure 11

Dear Mr. Shea:

I am writing to express my concern over the Utah courts following, lock-step, the recent amendments to Rule 11, Federal Rules of Civil Procedure. More specifically, my concern focuses on the provision of the proposed rule allowing for voluntary withdrawal of a challenged pleading, document, paper, etc. within 21 days. In my opinion, this provision totally shifts the burden of good faith from the attorney submitting the matter to the attorney defending the victim of bad faith litigation. Rule 11 as it stands provides a significant deterrent for the mere filing of bad faith matters in the first instance. The proposed rule now seems to say: you are free to file whatever you want, unless someone objects; if an objection is raised, you can withdraw the matter without any penalty whatsoever. The significant limitation in the Court's discretion when imposing a penalty also suggests that even if someone objects, the penalty for violating the rule will not be significant.

The amended Federal Rule 11 was enacted despite vigorous opposition. We should seriously consider the implications of adopting the new federal rule, and address its weaknesses before adopting the change.

I appreciate the opportunity to offer my comments.

Very truly yours,

PARRY MURRAY WARD & MOXLEY

Bret F. Randall

BFR:pls

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March 26, 1996

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Re: *Proposed Amendments to the Rules of Civil Procedure*

Dear Mr. Shea:

I have reviewed the March 12, 1996 draft of the Amendments to the Rules of Civil Procedure. My comments deal principally with Rule 11. I specifically object to Rule 11(c)(1)(A) language to the effect that "absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." I think it is unfair and unreasonable that a law firm be responsible for the acts of its partners, associates and employees. There really is no mechanism in place nor should there be a mechanism in place due to its cost effectiveness to have one attorney review the legal documents filed by another partner or attorney in the law firm. I think it is not in the public's best interest nor in the interest of a cost effective delivery of legal services to require everyone to review the work of everyone else in the law firm. Additionally, in law firms where the partners are just office sharing under the name of the law firm, it imposes liability on others who not only are not responsible for the acts of other attorneys in their firms but do not even share in the benefits of any fees that were generated for the legal services provided.

I would recommend that the language in Rule 11 referred to above be deleted from Rule 11. If it cannot be accomplished, then I recommend a modification of the language to the effect that law firms "may" be held responsible if it can be shown that they sanctioned or directly participated in the acts that constitute Rule 11 violations.

Those are my comments.

Sincerely yours,

MICHAEL L. DEAMER
Attorney at Law

MLD:st
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**RULE 4. PROCESS.**

(a) **Signing of summons.** The summons shall be signed and issued by the plaintiff or the plaintiff's attorney. Separate summonses may be signed and served.

(b) **Time of service.** In an action commenced under Rule 3(a)(1), the summons together with a copy of the complaint shall be served no later than 120 days after the filing of the complaint unless the court allows a longer period of time for good cause shown. If the summons and complaint are not timely served, the action shall be dismissed, without prejudice on application of any party or upon the court's own initiative. In any action brought against two or more defendants on which service has been obtained upon one of them within the 120 days or such longer period as may be allowed by the court, the other or others may be served or appear at any time prior to trial.

(c) **Contents of summons.** (1) The Summons shall contain the name of the court, the address of the court, the names of the parties to the action, and the county in which it is brought. It shall be directed to the defendant, state the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number. It shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. It shall state either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service.

(2) If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed.

(3) If service is made by publication, the summons shall briefly state the subject matter and the sum of money or other relief demanded, and that the complaint is on file.

(d) **By whom served.** The summons and complaint may be served in this state or any other state or territory of the United States, by the sheriff or constable, or by the deputy of either, by a United States Marshal or by the marshal's deputy, or by any other person 18 years of age or older at the time of service, and not a party to the action or a party's attorney.

(e) **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 paragraph (f) or (g), 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 paragraph (f)(5);

(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) set forth tin the text of Notice to Persons served with a summons in substantially similar form to Form 1A, or 1B in the Appendix of Forms to these rules;

(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 45 days after the date on which the request for waiver of service was sent, or 60 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 subparagraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under paragraph (f) or (g), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(f) **Personal service.** Personal service shall be made as follows:

(1) Upon any individual other than one covered by subparagraphs (2) (3) or (4) below, by delivering a copy of the summons and/or the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and/or the complaint to an agent authorized by appointment or by law to receive service of process;

(2) Upon an infant (being a person under 14 years) by delivering a copy to the infant and also to the infant's father, mother or guardian or, if none can be found within the state, then to any person having the care and control of the infant, or with whom the infant resides, or in whose service the infant is employed;

(3) Upon a natural person judicially declared to be of unsound mind or incapable of conducting his own affairs, by delivering a copy to the person and to the person's legal representative if one has been appointed and in the absence of such representative, to the individual, if any, who has care, custody or control of the person;

(4) Upon an individual incarcerated or committed at a facility operated by the state or any of its political subdivisions, by delivering a copy to the person who has the care, custody, or control of the individual to be served, or to that person's designee or to the guardian or conservator of the individual to be served if one has been appointed, who shall, in any case, promptly deliver the process to the individual served;

(5) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or other agent authorized by appointment or by law to receive service or process and, if the agent is one authorized by statute to receive serviced and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found within the state, and the defendant has, or advertises or holds itself out as having, an office or place of business within the state or elsewhere, or does business within this state or elsewhere, then upon the person in charge of such office or place of business;

(6) Upon an incorporated city or town, by delivering a copy thereof to the recorder;

(7) Upon a county, be delivery a copy to the county clerk of such county;

(8) Upon a school district or board of education, by delivering a copy to the superintendent or business administrator of the board;

(9) Upon an irrigation or drainage district, by delivering a copy to the president or secretary of its board;

(10) Upon the state of Utah, in such cases as by law are authorized to be brought against the state, by delivering a copy to the attorney general and any other person or agency required by statute to be served; and

(11) Upon a department or agency of the state of Utah, or upon any public board, commission or body, subject to suit, by delivering a copy to any member of its governing board, or to its executive employee or secretary.

(g) **Service and proof of service in a foreign country.** Service in a foreign county shall be made as follows:

(1) In the manner prescribed by the law of the foreign country for service in an action in any of its courts of general jurisdiction; or

(2) Upon an individual, by personal delivery; and upon a corporation, partnership or association, by delivering a copy to an officer or a managing general agent; provided that such service be made by a person who is not a party to the action, not a party's attorney, and is not less than 18 years of age, or who is designated by order of the court or by the foreign court; or

(3) By any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served as ordered by the court. Proof of service in a foreign country shall be made as prescribed in these rules for service within this state, or by the law of the foreign country, or by order of the court. When service is made pursuant to subpart (3) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(h) **Other service.** Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service or process, the party seeking service or process may file a motion supported by affidavit requesting an order allowing service by publication, by mail, or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties. If the motion is granted, the court shall order service of process by publication, by mail form the clerk of the court, by other means, or by some combination of the above, provided that the means of notice employed shall be reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable. The court's order shall also specify the content of the process to be served and the event or events as of which service shall be deemed complete. A copy of the Court's order shall be served upon the defendant with the process specified by the court.

(i) **Manner of proof.** In a case commenced under Rule 3(a)(1), the party serving the process shall file proof of service with the court promptly, and in any event within the time during which the person served must respond to the process, and proof of service must be made within ten days after such service. Failure to file proof of service does not affect the validity of the service. In all cases commenced under Rule 3(a)(1) or Rule 3(a)(2), the proof of service shall be made as follows:

(1) If served by a sheriff, constable, United States Marshal, or the deputy of any of them, by certificate with a statement as to the date, place and manner of service;

(2) If served by any other person, by affidavit with a statement as to the date, place, and manner of service, together with the affiant's age at the time of service;

(3) If served by publication, by the affidavit of the

publisher or printer or that person's designated agent, showing publication, and specifying the date of the first and last publications; and an affidavit by the clerk of the court of a deposit of a copy of the summons and complaint in the United States mail, if such mailing shall be required under this rule or by court order;

(4) If served by United States mail, by the affidavit of the clerk of the court showing a deposit of a copy of the summons and complaint in the United States mail, as may be ordered by the court, together with any proof of receipt;

(5) By the written admission or waiver of service by the person to be served, duly acknowledged, or otherwise proved.

(j) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(k) **Refusal of copy.** If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof.

(l) **Date of service to be endorsed on copy.** At the time of service, the person making such service shall endorse upon the copy of the summons left for the person being served, the date upon which the same was served, and shall sign his or her name thereto, and, if an officer, add his or her official title.

(m) **Designation of newspaper for publication of notice.** In any proceeding where summons or other notice is required to be published the court shall, upon the request of the party applying for such publication, designate the newspaper and authorize and direct that such publication shall be made therein; provided, that the newspaper selected shall be a newspaper of general circulation in the county where such publication is required to be made and shall be published in the English language.

**Form 1A.**

**NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE OF SUMMONS**

TO: ____(A)____ [as ____(B)____ of ____(C)____]

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. It has been filed in the _____ District Court for the ____(D)____ and has been assigned docket number ____(E)____.

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within ____(F)____ days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 45 days from the date designated below as the date on which this notice is sent (or before 60 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Utah Rules of Civil Procedure and will then, to the extent authorized by those Rules, as the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth on the reverse side (or at the foot) of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this ___ day of _____, 1996.

_____

*Signature of Plaintiff's Attorney or Unrepresented Plaintiff*

Notes:
A-Name of individual defendant (or name of officer or agent of corporate defendant)
B-Title, or other relationship of individual to corporate defendant.

C-Name of corporate defendant, if any
D-District
E-Docket number of action
F-Addressee must be given at least 30 days (60 days if located in foreign country) in which to return waiver

**Form 1B.**

**WAIVER OF SERVICE OF SUMMONS**

TO: (name of plaintiff's attorney or unrepresented plaintiff)

I acknowledge receipt of your request that I waive service of a summons in the action of (caption of action), which is case number (docket number) in the United States District Court for the (district). I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you with 60 days after (date request was sent), or within 90 days after that date if the request was sent outside the United States.

_____ _____

Date Signature

Printed/Typed name:_____

[as_____]

[of_____]

*To be printed on reverse side of the waiver form or set forth at the foot of the form:*

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Utah Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint if unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its

person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

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CATHERINE M. LARSON
MICHAEL S. JOHNSON
BRUCE R. MURDOCK

[1] ALSO MEMBER OREGON BAR
[2] ALSO MEMBER WASHINGTON D.C. BAR

ESTABLISHED 1888

GORDON R. STRONG
(1909-1969)

October 16, 1995

General Counsel
Administrative Office of the Courts
230 South 500 East, Suite 300
Salt Lake City, Utah 84102

**Re: Comment Concerning Proposed Modifications to the Utah Rules of Civil Procedure, Juvenile Procedure and Rules of Professional Conduct.**

Dear General Counsel:

I make the following comments concerning the above referenced proposed modifications.

First, I believe that Subsection (k) of Rule 4 of the Utah Rules of Civil Procedure should not be applicable to service of a Summons and Complaint outside the State of Utah. I have had numerous occasions to serve foreign defendants, and despite providing explicit instructions to the process server, both orally and in writing, I have found it extremely difficult to get the person making service to endorse upon the copy of the Summons left for the person being served the date upon which the summons was served, to also sign his name, and to also write his or her official title. I have experienced extreme inconvenience because of Subsection (k) of Rule 4 and almost always have to have process served on out of state defendants two or even three times. I also believe that it would be prudent for Utah to more closely conform its service rules with those of the Federal Rules of Civil Procedure.

Second, I am troubled by the new Rule 22(m) of the Utah Rules of Juvenile Procedure. I do not believe that is fair to a witness to require that bond be posted, and that a material witness may be jailed if he or she fails to post bond. I believe that this provision violates all notions of due process and fairness, and is probably unconstitutional. I believe that if it is likely that a material witness will not appear and testify, that a more appropriate remedy would be to order that a video taped evidentiary deposition be taken of the material witness within twenty-fours of his or her "apprehension", so that if the witness does not appear the evidence may still

be presented. I am sure that there may be other suitable alternatives to jailing a witness who cannot afford to post bond.

Third, with respect to Rule 1.13(e) of the Rules of Professional Conduct, I believe it is possible a lawyer may represent an organization, such as a corporation organized under the revised Business Corporations Act, which only has one officer, director, member, or shareholder, thus making it impossible for the necessary consent to be given by a person other than the individual who is to be represented.

I hope my comments are helpful to you.

Sincerely,

STRONG & HANNI

By _____
Bradley Wm. Bowen

BWB:jg

## Rule 64C. Attachment.

. . . .

(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~~] or in such amount and form as the court deems proper based on the value of the property attached by issuance of the writ of attachment. 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.

. . . .

(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.

. . . .

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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.
pbf\157049-1\ltr.25

# 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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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.