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WRITER'S DIRECT DIAL NUMBER

March 15, 1995

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: March Meeting

Dear Committee Members:

The next meeting of the Advisory Committee will be held on Wednesday, March 22, 1995, beginning at 4:00 p.m. The meeting will be held at the usual place, the Council Room of the Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. Please let me or my secretary, Kay Rich, know if you will not be able to attend or expect to be late so that we do not wait for you. I would appreciate your arriving promptly at 4:00 so that we can begin and end on time. We make a serious effort to conclude our meetings by 5:30.

I enclose a copy of Julie Fortuna's minutes of our last meeting. Once again, Julie has done an excellent job of recording our discussions. She deserves our thanks for her help.

At our March 22 meeting, we will consider the following items:

1. We will ask Tim Shea to provide us with an update on electronic filing of papers with the courts. The 1995 general session of the Legislature passed a bill that establishes standards for the use of digital signatures on electronic documents. These standards make possible the authentication and secure transmission of documents via electronic mail. This, in turn, provides a framework within which the courts can allow electronic filing of documents. Tim will give us a preview of consequences of this legislation for our committee.

2. We will consider any comments you have to a proposed form of subpoena that attempts to comply with the terms of our revised Rule 45. Please find enclosed a copy of a letter to me from Brent Johnson which encloses the form.

3. We will discuss another draft of the garnishment rule, Rule 64D, including revisions made since last meeting on the continuing garnishment rule and other portions of the rule as well. Ginger Smith, who has undertaken this project for the committee, will probably be providing you with the new draft under separate cover in advance of next week's meeting. If not, she will distribute the draft at the meeting. In addition, Ralph Petty, on behalf of the constables, has asked to make a brief presentation regarding the continuing garnishment portion of the rule.

3. We will continue our discussion of the proposed changes to Rule 68(b). At our last meeting, Terry Kogan made a presentation that sparked an interesting debate on the "winner pays" concept as modified in the Kogan/Wood proposal. At our meting next week, Terry and Mary Anne will continue this discussion. To get you thinking again about this topic, I have enclosed a copy of a thoughtful letter from Jeryl Rencher to Terry Kogan that raises a number of questions about the proposal.

4. We will again consider proposed changes to Rule 62 on stay of proceedings to enforce a judgment. You will recall that our efforts to change this rule began with a concern from the Supreme Court about deposits in lieu of supersedeas bonds. Last month Jim Soper, who is in charge of work on this revised version of Rule 62, provided us with a draft. For your convenience, I have enclosed that draft, dated February 22, 1995.

5. We will again consider changes to Rule 4. I enclose for your convenience a copy of a memorandum from Perrin Love to the Advisory Committee setting forth the options and requesting direction from the committee. At our meeting next week, we should be prepared to provide Perrin with direction as to how the rule should be re-revised.

I look forward to seeing all of you on March 22. If you have anything you would like to add to the agenda, please give me a call.

Very truly yours,

Alan L. Sullivan

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

AGENDA

Utah Supreme Court Advisory Committee on Civil Procedure

March 22, 1995

1. *Welcome and approval of minutes (**A. Sullivan**)*

2. *Update on electronic filing of papers with the Court (**T. Shea**)*

3. *Rule 45 form comments.*

4. *Rule 64D - Discussion of revised section on continuing garnishment (**V. Smith**)*

5. *Rule 68(b) - Continued discussion of "loser pays" modifications to the rule (**T. Kogan and M. Wood**)*

6. *Rule 62 - Discussion of proposed changes on cash deposits in lieu of supersedeas bonds (**J. Soper**)*

7. *Rule 4 - Discussion of alternatives for service by mail*

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, March 22, 1995, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Virginia S. Smith, Mary Anne Q. Wood, Honorable Boyd Bunnell, Terry S. Kogan, Glen C. Hanni, Terrie T. McIntosh, Honorable Ronald N. Boyce, Perrin R. Love, James R. Soper, Thomas R. Karrenberg, Honorable Michael R. Murphy

EXCUSED: Francis M. Wikstrom, M. Karlynn Hinman, John L. Young, David K. Isom, Honorable Anne M. Stirba, James R. Soper

STAFF: Timothy R. Shea and Julie Fortuna

VISITORS: Ralph Petty

I. WELCOME AND APPROVAL OF MINUTES

Mr. Sullivan welcomed Committee members to the meeting. The Committee approved the February 22, 1995 Minutes.

II. UPDATE ON ELECTRONIC FILING OF PAPERS WITH THE COURT

Mr. Shea addressed the Committee and discussed electronic filing of papers with the courts. He indicated that the 1995 general session of the Legislature passed a bill establishing standards for the use of digital signatures on electronic documents and provided the Committee with a two page summary of the process. Mr. Shea indicated that these standards make possible the authentication and secure transmission of documents via electronic mail. Mr. Shea also informed the Committee that it was possible to encrypt electronic documents for secrecy.

Mr. Shea indicated that electronic court filings would represent one percent of the anticipated use of electronic documents. He stated that the Utah Rules of Civil Procedure would need to be amended to incorporate electronic filing in Utah.

Magistrate Boyce voiced skepticism about the use of electronic filing in the court system. He indicated that people are able to make changes to electronic documents and that $16,000,000 has been stolen from government projects through tampering with electronic documents.

Ms. Smith indicated that the bill went way beyond where banks in Salt Lake City were ready to go. She indicated that banks were especially concerned with forgery issues.

III. RULE 45 FORM COMMENTS

Mr. Sullivan began discussion by indicating that Brent Johnson, Associate General Counsel to the Administrative Office of the Courts, had asked the Committee for comments on a proposed Rule 45 subpoena form for use by pro se litigants. Mr. Sullivan indicated he had reviewed the form and did not see any problems with it. Mr. Karrenberg indicated that paragraph six on the form was misleading because it implied that the five listed objections were the only possible objections.

IV. RULE 64D - DISCUSSION OF REVISED SECTION ON CONTINUING GARNISHMENT

Ms. Smith began discussion by indicating that the Committee had asked her to do three things. First, Ms. Smith indicated that she had redlined changes to the writ of continuing garnishment and circulated it to the Committee. Mr. Karrenberg suggested that "by first class mail" be added to the end of subparagraph (iii) where the rule indicates that the plaintiff shall notify the garnishee in writing within 5 days. Ms. Smith indicated that subparagraph (iii)(a) on expiration of garnishments had been clarified to reflect that writs terminate 120 days after date of service of the writ or in a multiple garnishment situation, 120 days from the date the writ becomes effective. Mr. Kogan objected to the use of the language "as described herein" and suggested that the rule pinpoint the applicable sections of the rule. Mr. Sullivan agreed. Mr. Sullivan also suggested that the rule pinpoint where "earlier" is, as used in the last line of subparagraph (v)(ii).

Second, Ms. Smith indicated that Judge Rees had raised concerns about money coming into Court without answers to interrogatories under 64D(j). Mr. Kogan suggested using the verbiage in Judge Rees' proposal in the context of the rule to see whether it worked. Mr. Kogan also pointed out that the numbering system under the rule was unusual and suggested that it be made consistent with other rules.

Third, Ms. Smith indicated she had compiled Committee Notes for the rule.

Mr. Sullivan solicited comments on proposed Rule 64D. Mr. Petty raised concerns that the rule did not require notice and the right to a hearing for every garnished pay period. Ms. Smith indicated that other states treat future pay periods in a perfunctory manner and do not require individual notice or hearings, but leave it to the court's discretion. Mr. Petty inquired how a garnishee knew his pay period would be garnished and voiced concern about what a garnishee could do if half way through the garnishment his wages changed. Mr. Sullivan suggested that a garnishee is on notice of how much he worked and can raise the issue with the court if pay conditions change.

Mr. Petty indicated that the case of *Fisher v. Nielsen* contemplates a due process right to notice and a hearing every time money is taken. Mr. Sullivan inquired whether any case existed holding a continuing garnishment rule unconstitutional because it did not provide notice of garnishment and a hearing for every pay period. Ms. Smith indicated that the issue was addressed in the garnishee's initial notice under the rule. She indicated that the initial notice tells the garnishee that the garnishee may request a hearing initially or anytime the garnishee's

circumstances change. Mr. Petty insisted that a garnishee has a right to notice and a hearing every pay period. Mr. Kogan indicated that the initial notice was sufficient. Mr. Karrenberg agreed with Mr. Kogan.

Mr. Petty voiced concern that courts are receiving money via proposed Rule 64D. Ms. Smith indicated that proposed Rule 64D benefitted the consumer. Mr. Sullivan indicated that the Committee was reviewing Rule 64D at the legislature's request.

Mr. Petty voiced concern that proposed Rule 64D required collection attorneys to be less conciliatory because if they were not first in line, they would have to wait 120 days to collect. Ms. Smith disagreed. She indicated that 120 days was not a long time to a collection attorney and believed that collection attorneys would continue to work with debtors.

Mr. Sullivan inquired whether the Committee should pass proposed Rule 64D, send it out for comment again with Ms. Smith's additions, forms, and committee notes, or wait to see the revisions suggested by the Committee. Mr. Sullivan suggested that the Committee wait to see revisions. Ms. Smith agreed with Mr. Sullivan.

Mr. Sullivan thanked Ms. Smith for her work on proposed Rule 64D and indicated the Committee would review proposed Rule 64D with revisions at the next Committee meeting.

V. RULE 68(b) - CONTINUED DISCUSSION OF "LOSER PAYS" MODIFICATIONS TO THE RULE

Mr. Sullivan began discussion by thanking Mr. Kogan for his work in this area and indicated he believed it was well worth the Committee's time to think about modifications to Rule 68(b).

Judge Murphy indicated he had an overriding concern about how modifications to Rule 68(b) would affect access to the courts. He voiced distress over the empirical basis used in debates over the litigation issues in the House of Representatives. Judge Murphy inquired whether there was an objective data base that would indicate whether a problem existed with the way litigation is currently handled. Judge Murphy indicated that he was not convinced there was a problem and that if there was a problem, he was not convinced the problem existed in Utah. Judge Murphy indicated he thought it was important to define any problem before trying to solve it.

Mr. Kogan responded that a reason always exists to create a greater incentive to settle cases and to settle cases at an earlier point in time. Mr. Kogan indicated that he did not want to modify Rule 68(b) to the extent that it was unfair.

Mr. Love suggested that no real problem existed and that the anecdotal cases discussed in the house average about twelve a year nationwide according to Arthur Miller. Judge Bunnell indicated that only one percent of cases fall into that category and that tort litigation in general accounts for only five to ten percent of court cases.

Mr. Karrenberg indicated that he was concerned that modifying Rule 68(b) would discourage evolution of the common law. Mr. Kogan responded that the proposed Rule 68(b) contained an exception when a case is developing a new area of law.

Mr. Kogan distributed a copy of the Schwarzer Proposal on Rule 68 with examples and a letter from Jaryl L. Rencher raising some concerns about modifying Rule 68 to the Committee for the Committee's consideration. Mr. Kogan also distributed H.R. 988 (Attorney Accountability Act of 1995) for the Committee's review.

VI. RULE 62 - DISCUSSION OF PROPOSED CHANGES ON CASH DEPOSITS IN LIEU OF SUPERSEDEAS BONDS

Mr. Sullivan began discussion by indicating that he had circulated Mr. Soper's draft of Rule 62, which included new subsections (i) and (j), and a memorandum on the effect of bankruptcy from Mr. Soper to the Committee. Mr. Sullivan thanked Mr. Soper for his excellent efforts.

Mr. Soper indicated that security posted to stay judgments is affected by bankruptcy in varying degrees. Mr. Soper reported that a deposit into court of cash and property can be voided as a preference like any other transfer. Mr. Soper reported courts did not treat cash uniformly: most courts characterize the debtor as having a contingent revisionary interest in posted cash, not sufficient to be property of the debtor's estate that could be reclaimed by a trustee. Mr. Soper indicated that the best way to avoid a bankruptcy stay is to create a tailored trust arrangement where the debtor's rights in the collateral are spelled out. Mr. Soper indicated that property rights are state law issues and as such raise the level of protection in bankruptcy.

Mr. Soper indicated that bankruptcy concerns were not the only thing that the Committee should be concerned with in revising Rule 62. Mr. Soper pointed out that personal security bonds, where a person pledges by affidavit that they own property, afford little protection from fraud because assets are not protected or frozen. Mr. Soper indicated that a judgment creditor may prefer one method of posting security over another and suggested that the Committee leave the issue to be decided by the court and the creditor. Judge Bunnell indicated that courts usually follow that path.

Mr. Sullivan suggested the Committee look at subparagraph (j). He questioned whether subparagraph (j) when combined with subparagraph (i)(2) gave the right to except to the type of security proposed. Mr. Karrenberg suggested that the rule allow objection to the amount as well as sufficiency of the security. Mr. Karrenberg also suggested that "object" be used in place of "except" in (i)(1). Ms. Smith indicated that line 2 of (i)(2) should state "issued by" so that a commercial bond could be issued by a surety. Ms. Wood suggested that "having" be used and that under (i)(2), "upon motion and good cause shown" be used. Mr. Sullivan suggested that under (g), "writ of mandamus and execution" should be changed to "extraordinary relief during the pendency." Ms. McIntosh objected to the use of "quo warranto" in (f). Magistrate Boyce suggested adding "other proceedings" to "pendency of an appeal" in order to leave the rule sufficiently flexible.

Mr. Kogan inquired whether this rule affected Rule 62(c) and asked whether a party was entitled to an injunction in circumstances other than formal appeal.

Mr. Love proposed leaving the language of the rule unchanged, but adding committee notes stating Rule 62 applies during the pendency of appeal and includes other proceedings before the appellate court such as extraordinary relief. Mr. Sullivan suggested the language, "during the pendency of an appeal or other proceeding." Ms. Smith pointed out that "pendency of an appeal" was used twice under subparagraph (g).

Mr. Soper indicated that Rule 62 did not state whether the amount of the bond included interest on the judgment and inquired whether the Committee should consider it. Mr. Love indicated that the amount of the bond was usually agreed to by the parties and incorporated interest according to the amount of time the parties anticipated an appeal would take. Mr. Karrenberg inquired how an attorney fee entitlement on appeal affected the amount of the bond. Mr. Sullivan inquired whether there should be a standard.

Mr. Soper also pointed out that Rule 62 states that a bond is not effective until approved by the court. He inquired whether there was a court proceeding every time a bond is posted.

Mr. Sullivan inquired whether the Committee had further comment. Mr. Love suggested that Rule 62 needed an advisory committee note explaining the intent of the rule. He suggested that the note incorporate the idea that the intent of the rule is to give parties a choice when posting a bond, but warn them of potential bankruptcy ramifications. Mr. Sullivan asked Mr. Soper to draft an advisory committee note discussing the bankruptcy issues for review by the Committee at the next meeting.

VII. RULE 4 - DISCUSSION OF ALTERNATIVE FOR SERVICE BY MAIL

Mr. Sullivan began discussion by framing the issue for the Committee as whether the Committee should adopt the post-1991 version of Rule 4 or some earlier version. He indicated that if the Committee adopted service by mail, it would be adopting a longer answer period. Mr. Sullivan also indicated that county sheriffs had complained that they were spending too much time serving complaints and had suggested that the Committee amend Rule 4 to allow service by mail.

Mr. Sullivan informed the Committee that under old Rule 4, service by mail included an acknowledgment form that the defendant returned, but if the form was not returned, personal service was effected. He indicated that in 1991, this procedure was eliminated in favor of "waiver" service. Under "waiver" service, a plaintiff can request in writing that the defendant waive service. The defendant has 30 days to respond to this request and then has an additional 30 days to answer, providing an incentive to the defendant to waive service. Mr. Karrenberg pointed out that under "waiver" service, a defendant can receive an additional two weeks to respond merely be asking the court for it. Mr. Love pointed out that the defendant must pay the cost of personal service if the defendant does not waive service.

Mr. Love informed the Committee that both versions of Rule 4 reduce County Sheriffs' work load, but indicated that plaintiffs typically do not want to extend a defendant's response

time, especially since the majority of suits filed in third district court use 10-day summons. Mr. Karrenberg suggested that the Committee shorten the defendant's response time under the post-1991 Rule 4.

Magistrate Boyce indicated that large government and corporate agencies waive service to receive extra response time. He also indicated that in federal service costs are greater than state service costs because federal marshals will not serve complaints. Magistrate Boyce reported that California and several other states have a mailing scheme, but the problem has been getting attorneys to use it. He indicated that when attorneys use the post-1991 Rule 4, it works fairly effectively.

Mr. Kogan inquired whether service could be effected by mail without requiring a defendant to waive personal service. Magistrate Boyce responded that the post office will not guarantee receipt, only efforts within post office regulations.

Mr. Karrenberg volunteered to look at the parallel California Rule. Mr. Love volunteered to look at the issue. Mr. Sullivan asked Mr. Karrenberg and Mr. Love to make a recommendation to the Committee in the form of a proposed rule.

A. 10-Day Summons

Mr. Boyce inquired about the effect of "waiver" service on 10-day summonses. Mr. Sullivan asked Committee members where they stood on the issue and indicated that if the Committee recommended abolishment, the Utah Supreme Court would consider the Committee's recommendation.

Mr. Sullivan suggested that no significant abuses existed under the current rule and that it was widely used. Mr. Sullivan indicated that Mr. Plenk's only concern was that the summons was called a 10-day summons when the defendant had 20 days to respond and that a defendant never knows if the case has been dismissed because the plaintiff failed to file a complaint. Mr. Kogan suggested that this problem be alleviated by requiring plaintiffs to send notice via first class mail to defendants if the case has been dismissed because a complaint was not filed. Magistrate Boyce inquired whether plaintiffs would object to the additional cost. Mr. Karrenberg inquired how it would be enforced. Magistrate Boyce inquired how the Fair Debt Collection Practices Act ("FDCPA") dealt with the issue. Mr. Sullivan indicated that the FDCPA only dealt with the issue of misrepresented judicial involvement and pointed out that 10-day summons are authorized.

Mr. Kogan voiced concern over the potential coercive effects of 10-day summons. Mr. Petty responded that collectors often use 10-day summons to locate debtors before incurring a filing fee. Mr. Petty suggested that plaintiffs notify defendants of the filing number obtained upon filing of a complaint. Magistrate Boyce asked whether a person who commences an action with a 10-day summons and mails the summons to the last known address with the complaint can obtain a default judgment twenty days later. Magistrate Boyce voiced concern over "sewer service" where plaintiffs hire unethical process servers who do not serve defendants but state that they have. Magistrate Boyce suggested that Utah conform its practices to those of other states who have abolished the 10-day summons.

Judge Murphy suggested that inquiring about abuses under the 10-day summons rule was an appropriate question and stated that he did not see any problem except that the defendant fails to receive notice about whether the complaint has been filed. He indicated that circuit court judges would have a good idea about abuses under the rule. Judge Murphy suggested that the problem be cured by requiring 10-day summons to indicate in bold that the plaintiff is obligated to tell the defendant if the complaint is filed within the ten day period. Mr. Karrenberg suggested that a plaintiff certify that it had sent notice to the defendant that the complaint had been filed in order to obtain a default. Mr. Love suggested that the plaintiff inform the defendant that the defendant has no obligation to answer unless the defendant receives notice that the plaintiff has filed the complaint. Mr. Petty indicated that this would result in double service. Ms. Wood suggested that the plaintiff be required to pay the defendant's costs of answering if the defendant is served a 10-day notice and the complaint is never filed. Magistrate Boyce suggested that the defendant's time to answer should not begin to run until the plaintiff has filed the complaint.

Mr. Karrenberg indicated that if the 10-day summons rule was abolished, the circuit court work load would be doubled. Judge Murphy indicated that filing fees were a very sensitive issue and that the 10-day summons rule is important to people for that reason.

Mr. Hanni inquired why the Committee was not abolishing the 10-day summons rule and indicated that the Committee in the past had unanimously voted to abolish the rule.

Mr. Sullivan asked the Committee to vote on whether to abolish the 10-day summons rule. Four members voted to abolish the rule, no members voted to keep the rule, and seven members voted to modify the rule as suggested by Judge Murphy.

Mr. Sullivan asked Mr. Shea to solicit a Committee member to draft Rule 3 with the changes suggested by Judge Murphy and to consider extending the defendant's time to respond to twenty days from the day the defendant receives notice that the plaintiff has filed the complaint.

VIII. CONCLUSION

Mr. Sullivan thanked the Committee members for their time and indicated that the next meeting would be held on May 24, 1995 at 4:00. There being no further business, Mr. Sullivan adjourned the Committee until the next meeting.