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MEMBERS OF THE UTAH SUPREME COURT  
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: May Meeting

Dear Committee Members:

The next meeting of the Advisory Committee will be held on Wednesday, May 24, 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 have enclosed Julie Fortuna's minutes of our last meeting on March 22. Again Julie has done a great job on the minutes, and I recommend them to you as a way to get up to speed.

At our meeting on May 24, we'll consider the following issues:

1. We will, I hope, be in a position to approve the latest draft of our revisions to Rule 64D on garnishments, which I enclose together with proposed committee notes. Ginger Smith has redrafted the rule with comments from our last meeting.

2. We should also be in a position to give final approval to our revisions to Rule 62 on stays of proceedings. I have enclosed Jim Soper's draft of the rule (including revisions from our last meeting) and proposed committee notes.

3. We will consider revisions to Rules 3 and 4 that would modify the ten-day summons procedure. You'll recall that at our last meeting a majority of the

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committee voted to keep the ten-day procedure but with modifications suggested by Judge Murphy and others. Tim Shea has prepared a draft of these rules, which I enclose.

4. We'll ask for a report from Perrin Love on proposed changes on Rule 4 on service of process.

I look forward to seeing you next Wednesday.

Very truly yours,



Alan L. Sullivan

ALS/kr

Enclosure

cc:

Tim Shea, Esq.

Julie Fortuna, Esq.

**UTAH SUPREME COURT ADVISORY COMMITTEE  
ON CIVIL PROCEDURE**

**AGENDA**

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*May 24, 1995*

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1. *Welcome and approval of minutes (A. Sullivan)*
  
2. ✓ *Rule 64D on garnishments: consideration of the latest draft and committee notes (V. Smith)*
  
3. *Rule 62 on stay of proceedings: consideration of the latest draft and committee notes (J. Soper)*
  
4. *Rule 3 and 4 on modification of the 10-Day Summons procedure: consideration of draft (T. Shea)*
  
5. *Rule 4 on service of process: report (P. Love)*

## MINUTES

### Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, May 24, 1995, 4:00 p.m.  
Administrative Office of the Courts

Alan L. Sullivan, Presiding

**PRESENT:** Virginia S. Smith, Honorable Boyd Bunnell, John L. Young, Thomas R. Karrenberg, Honorable Ronald N. Boyce, David K. Isom, Glen C. Hanni

**EXCUSED:** Mary Anne Q. Wood, Terry S. Kogan, Terrie T. McIntosh, Perrin R. Love, James R. Soper, Honorable Michael R. Murphy, Francis M. Wikstrom, M. Karlynn Hinman, Honorable Anne M. Stirba, James R. Soper

**STAFF:** Timothy R. Shea and Julie Fortuna

**VISITORS:** Ralph C. Petty

#### **I. WELCOME AND APPROVAL OF MINUTES**

Mr. Sullivan welcomed Committee members to the meeting. Mr. Karrenberg moved to adopt the March minutes and the motion carried. Mr. Sullivan explained that letters from the Utah Supreme Court had been mailed to new and existing Committee members regarding the length of their tenure. Mr. Sullivan also informed the Committee that it traditionally did not meet during the summer months of June, July, and August.

#### **II. RULE 64D ON GARNISHMENTS: CONSIDERATION OF THE LATEST DRAFT AND COMMITTEE NOTES**

Mr. Sullivan thanked Ms. Smith for her excellent work on the latest draft of Rule 64D and accompanying Advisory Committee Notes.

Ms. Smith began discussion by reporting that the subparagraph numbers used in the draft followed the correct rule numbering format. Ms. Smith also indicated that the latest draft allowed debtors to request a hearing at any time during the garnishment process subject to the discretion of the court.

Ms. Smith reported that she had created several forms for use with Rule 64D, including: Affidavit of Garnishee as to Continuing Garnishment, Writ of Continuing Garnishment, Interrogatories to Garnishee with an accompanying Affidavit of Garnishee and instructions to the garnishee explaining the process, a Request for Hearing, and a Notice of Garnishment and Exemptions.

Mr. Sullivan solicited comments from the Committee on Rule 64D. He suggested calling the notice a Notice of Continuing Garnishment and Exemptions and adding language to the second to the last paragraph of the notice educating the garnishee about the continuing garnishment process.

Magistrate Boyce voiced approval of draft Rule 64D and indicated that he intended to use it as a model for the parallel federal rule.

Mr. Sullivan noted the following corrections: page one, sub (v)(i), last sentence should read: "as are described;" page two, sub (v)(iv) should allow ten days to answer interrogatories; the word "establishes" should be added to the 1995 amendments in sub (j); "without filing" should be replaced by "who fails to file" in sub (j); in sub (v), the word "specifies" should be replaced with "establishes;" "saiDs" should be replaced with "the" throughout the draft; and the draft should be presented to the Utah Supreme Court in legislative form.

Mr. Young indicated that Rule 64C had a separate provision to deal with the defendant prevailing on crossclaims as opposed to the plaintiff prevailing and inquired whether a similar separate provision was necessary in Rule 64D. Ms. McIntosh indicated that a definition in 64D(a)(i)(v) covered the situation adequately.

Mr. Shea inquired whether the garnishment fee was going to be changed because of its proposed continuing nature. Ms. Smith asked whether that was within the Committee's jurisdiction to consider and suggested that the Committee make a recommendation to increase the fee because of the additional work involved. Magistrate Boyce suggested that the Committee make no recommendation, but bring the issue to the Judicial Counsel's attention. Mr. Shea responded that the legislature sets most fees. Mr. Sullivan set forth the following alternatives for the Committee's consideration: 1) state in the rule that the plaintiff shall provide a fee in the amount established by law, or 2) direct the problem to the Utah Supreme Court's attention and ask for direction.

The Committee expressed dissatisfaction over the length of time the legislature may take to set the fee. Mr. Shea suggested that the fee for issuing a writ be established by statute and the fee charged to the garnishee be established by writ. Mr. Young suggested that the garnishee receive \$10.00 each time a garnishment was in place. Mr. Karrenberg suggested that Rule 64D indicate that fees were established by law and alert the Utah Supreme Court to the problem.

Mr. Shea inquired whether the draft should be republished with the additional changes made by the Committee. Mr. Shea indicated that the draft had been published once and was officially ready to be forwarded to the Utah Supreme Court for final action. Mr. Sullivan suggested forwarding the current draft to the Utah Supreme Court with a letter indicating the nature of the changes made in response to comments received. Magistrate Boyce agreed. Mr. Karrenberg moved that the current draft of Rule 64D be adopted by the Committee. Mr. Young seconded the motion and the Committee unanimously voted to adopt the current draft. Judge Bunnell made a motion to forward the current draft of Rule 64D to the Utah Supreme Court with a cover letter. Mr. Karrenberg seconded the motion. The Committee unanimously voted to do so. Mr. Sullivan indicated he would follow through on the Committee's adoption of the current draft of Rule 64D and forward it to the Utah Supreme Court with an explanatory cover letter.

### **III. RULE 62 ON STAY OF PROCEEDINGS: CONSIDERATION OF THE LATEST DRAFT AND COMMITTEE NOTES**

Mr. Sullivan began discussion by informing the Committee that draft Rule 62 had not been sent out for comment and that Mr. Soper had drafted additional changes to subparagraphs (i) and (j) and an Advisory Committee Note. Mr. Sullivan indicated that Mr. Soper's changes were minor and clarified that a party could pay cash into court in lieu of a supersedeas bond, that a party could object to the sufficiency of security, and other bond issues.

Mr. Sullivan solicited comments from Committee members. Mr. Sullivan suggested the first sentence of the Advisory Committee Note should be changed to read as follows: "The 1995 amendments to this rule eliminated references to writs of mandate and writs of prohibitions in Subdivision (g) since Rule 65B extraordinary relief procedure has eliminated the concept of the 'writ.'" Mr. Sullivan also recommended that the third sentence of the Advisory Committee Note be changed to read: "The Committee concluded that individual circumstances will determine the degree to which a particular form of security may be effected by bankruptcy, financial instability or other uncertainty, and that the court should be given broad discretion to permit such forms of security as the facts may require." Mr. Sullivan suggested that the fourth sentence of the Advisory Committee Note be changed to read: "Subdivision (j) was amended to allow a party . . . "

Magistrate Boyce asked whether the rule referred to a writ of mandate or a writ of mandamus. Ms. Smith indicated that the rule referred to a writ of mandate.

Mr. Karrenberg moved that the current draft of Rule 62, as amended, be sent out for comment. Mr. Young seconded the motion and the Committee voted unanimously of circulating the current draft of Rule 62 for comment. Mr. Sullivan thanked Mr. Soper for his work on draft Rule 62.

### **IV. RULES 3 AND 4 ON MODIFICATION OF THE 10-DAY SUMMONS PROCEDURE: CONSIDERATION OF DRAFT**

Mr. Shea indicated that the Committee had voted to modify the 10-day summons rule by adopting a procedure that requires the plaintiff to notify the defendant when the complaint is filed. Mr. Isom asked what harm is committed if the plaintiff does not notify the defendant that the complaint has been filed. Mr. Sullivan indicated that it results in defendants filing answers in actions that have been dismissed.

Mr. Shea indicated that the proposed changes to the 10-day summons rule required the plaintiff to notify the defendant of the date when the complaint is filed and also required the plaintiff to include a statement in the 10-day summons notifying the defendant that the plaintiff is required to give the defendant notice and that the defendant's time to answer commences with his receipt of that notice. Mr. Shea indicated that the proposed changes require the plaintiff to file an affidavit stating that notice that the complaint was filed was mailed to the defendant. Mr. Shea also indicated that Rule 3 contained antiquated language and references that should be corrected.

Mr. Sullivan solicited comments from the Committee. Mr. Isom pointed out that no deadline existed within which the plaintiff was required to mail notice to the defendant that the complaint had been filed and voiced concern that the plaintiff could wait a year or more. Magistrate Boyce suggested that the plaintiff have three days after filing the complaint to mail notice to the defendant. Mr. Isom indicated that three days was too short, especially when dealing with outlying counties via first class mail. Mr. Young suggested that the plaintiff have ten to fourteen days within which to mail notice to the defendant that the complaint had been filed and indicated that the defendant would not be prejudiced as his time to answer did not run until he received notice of filing. Mr. Sullivan asked whether three days should be added to the defendant's time to answer if the plaintiff's notice was mailed.

Mr. Isom asked how the defendant would know if notice was mailed to the defendant. Mr. Isom expressed dissatisfaction with the probability that service of a 10-day summons would no longer lead to default judgments because defendants would represent to courts that they had not received notice even though the plaintiff mailed it. He indicated that judges would likely set aside default judgments on those grounds. Magistrate Boyce suggested requiring the plaintiff to mail notice if the complaint was not filed. Judge Bunnell indicated that that requirement would be unenforceable. Magistrate Boyce indicated that attorneys who violated the procedure would eventually be subject to an ethical violation and suggested that the party failing to provide notice be required to pay fees. Ms. Smith suggested requiring the plaintiff to send notice within fourteen days via certified mail to the address where the defendant was served with the 10-day summons. Mr. Karrenberg indicated that defendants get served at places other than residences, like construction sites, so that mailing notice to the service address may not give the defendant notice.

Magistrate Boyce suggested that the Committee build an indirect incentive into the rule by not allowing a default unless there is proof that notice was sent. Mr. Isom suggested penalizing the plaintiff if the plaintiff serves a 10-day summons, but fails to file a complaint. Mr. Young indicated that Mr. Isom's suggestion would undermine the rule's utility as the rule was designed to resolve a debt situation without requiring the plaintiff to incur filing fees. Mr. Sullivan indicated that the Committee had not heard about substantial abuse of the rule except for the notice issue and that changing the twenty day time period was difficult because mail is less than perfect.

Mr. Isom indicated that the language used in Rule 4(c) was unclear and suggested that the summons be modified to indicate that a defendant was not required to answer the complaint within twenty days of being served with a summons.

Mr. Isom indicated that Rule 12(a) should not measure time from when plaintiff mails notice. Magistrate Boyce suggested that the defendant have additional time to answer when mailing is used. Ms. Smith asked whether it was possible to indicate the address to which notice would be mailed in the summons.

Mr. Sullivan voiced concern that the rule was becoming too complicated and suggested that the Committee only modify the rule to require the plaintiff to send notice by certified mail indicating whether the complaint has been filed. Mr. Sullivan suggested that if a plaintiff filed a complaint and failed to send a letter notifying the defendant, that the plaintiff be denied a

default. Mr. Isom suggested that the summons include language notifying the defendant that the defendant could check with the court within ten days after being served to see whether the suit had been dismissed because the plaintiff failed to file a complaint. Mr. Young suggested including an address and telephone number that the defendant could contact on the eleventh day after to see if the suit still existed. Ms. McIntosh agreed. Mr. Sullivan suggested that the summons also make it clear that the defendant has not obligation to answer the complaint if it is not filed with the court within ten days after the defendant is served with a 10-day summons. Mr. Sullivan suggested that the Committee only change the language required in the summons.

Mr. Isom inquired whether these changes would make Rule 4 unusable to collection lawyers. Mr. Sullivan indicated that the defendant had a right to know what his rights were with respect to a 10-day summons.

Mr. Sullivan concluded the Committee's discussion of the 10-day summons rule by asking Mr. Shea to redraft changes to the 10-day summons rule based on the Committee's suggestions.

## **VI. RULE 4 ON SERVICE OF PROCESS - REPORT**

As Mr. Love was not present at the meeting, no discussion was held on Rule 4.

## **VIII. CONCLUSION**

Mr. Sullivan thanked the Committee members for their time and indicated that the next meeting would be held on September 27, 1995 at 4:00 p.m. Mr. Sullivan informed the Committee that he had received a long letter from the Attorney General's Office asking for revisions to the habeas corpus rule. Mr. Sullivan asked Committee members to contact him with ideas on the issue. There being no further business, Mr. Sullivan adjourned the Committee until the next meeting.