

LAW OFFICES OF
VAN COTT, BAGLEY, CORNWALL & McCARTHY

A PROFESSIONAL CORPORATION

SUITE 1600

50 SOUTH MAIN STREET

SALT LAKE CITY, UTAH 84144-0450

TELEPHONE (801) 532-3333

FACSIMILE (801) 534-0058

TELEX 453149

ADDRESS ALL CORRESPONDENCE TO

POST OFFICE BOX 45340

84145-0340

WRITER'S DIRECT DIAL NUMBER

September 21, 1995

DAVID E. SALISBURY
M. SCOTT WOODLAND
NORMAN S. JOHNSON
STEPHEN D. SWINDLE
WILLIAM G. FOWLER
GREGORY P. WILLIAMS
ALAN F. MECHAM
BRENT J. GIAUQUE
E. SCOTT SAVAGE
KENNETH W. YEATES
RAND L. COOK
JOHN A. SNOW
DAVID A. GREENWOOD
MAXILIAN A. FARBMAN
ARTHUR B. RALPH
ALAN L. SULLIVAN
J. KEITH ADAMS
THOMAS T. BILLINGS
RICHARD C. SKEEN
JOHN T. NIELSEN
MICHAEL F. RICHMAN
DANNY C. KELLY
STEVEN D. WOODLAND
RICHARD H. JOHNSON, II
H. MICHAEL KELLER
BRENT CHRISTENSEN
JEFFREY E. NELSON
PATRICIA M. LEITH
R. STEPHEN MARSHALL
THOMAS G. BERGGREN
ERVIN R. HOLMES
RONALD G. MOFFITT
ERIC C. OLSON
PATRICK J. O'HARA
MATTHEW F. McNULTY, III
S. ROBERT BRADLEY
JON C. CHRISTIANSEN
GUY P. KROESCHE
JOHN A. ANDERSON

WAYNE D. SWAN
GREGORY N. BARRICK
SCOTT M. HADLEY
TIMOTHY W. BLACKBURN
DONALD L. DALTON
GERALD H. SUNVILLE
DAVID L. ARRINGTON
CASEY K. MCGARVEY
DOUGLAS A. TAGGART
KATHRYN H. SNEDAKER
PHYLLIS J. VETTER
JEREMY M. HOFFMAN
CLARK K. TAYLOR
BRYON J. BENEVENTO
ROBERT W. PAYNE
JAMES D. GILSON
MICHAEL T. ROBERTS
SUSAN G. LAWRENCE
NATHAN W. JONES
ELIZABETH D. WINTER
JON E. WADDUPS
DAVID E. SLOAN
BRADLEY R. CAHOON
DAVID E. ALLEN
MELYSSA D. DAVIDSON
CRAIG W. DALLON
MICHELE BALLANTYNE
THOMAS W. CLAWSON
DANIEL P. McCARTHY
PAMELA MARTINSON
MATTHEW M. DURHAM
S. BLAKE PARRISH
SANDRA L. CROSLAND
PRESTON C. REGEHR
A. CRAIG HALE
TODD M. SHAUGHNESSY
ERIC E. VERNON
DAVID P. ROSE

BENNETT, HARKNESS & KIRKPATRICK
1874-1890
BENNETT, MARSHALL & BRADLEY
1890-1896
BENNETT, HARKNESS, HOWAT
SUTHERLAND & VAN COTT
1896-1902
SUTHERLAND, VAN COTT & ALLISON
1902-1907
VAN COTT, ALLISON & RITER
1907-1917
VAN COTT, RITER & FARNSWORTH
1917-1947

2404 WASHINGTON BOULEVARD
OGDEN, UTAH 84401
(801) 394-5783

314 MAIN STREET
PARK CITY, UTAH 84060
(801) 649-3889

100 WEST LIBERTY
RENO, NEVADA 89501
(702) 333-6800

OF COUNSEL
LEONARD J. LEWIS
CLIFFORD L. ASHTON
RICHARD K. SAGER
JAMES P. COWLEY
JOHN CRAWFORD, JR.
MARLIN K. JENSEN
GEORGE M. McMILLAN

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: September Meeting

Dear Committee Members:

It is a pleasure to welcome you back to another year of the Committee's work. We will next meet on Wednesday, September 27, 1995, beginning at 4:00 p.m. at the usual place, the Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. I urge you to be prompt so that we may end by 5:30. Please let me know if you will not be able to attend or will be late.

Since we last met, the Supreme Court approved our proposed changes to Rule 64D on continuing garnishment. With a few very minor changes, the Supreme Court approved both our amendments and continuing garnishment forms, and they will be effective November 15, 1995.

When we meet on September 27, we will consider the following items:

1. We will consider a proposed revision to Rule 65B on extraordinary relief proposed by the Utah Attorney General's Office. I enclose for your review in advance of the meeting a letter from Lorenzo K. Miller, together with a proposed amendment to the rule.

2. We will give final approval to our proposed changes to Rule 62 on stay of proceedings to enforce a judgment. When we last met, we approved these changes for publication. There have been no comments as a result of publication, and we are now ready to take final action on this rule change to send it to the Supreme Court.

Tun
Jan

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE
September 21, 1995
Page 2

3. We will again consider changes to the so-called ten day summons procedure, specifically changes that we discussed at our last meeting to Rule 4(c) on the content of the summons in actions commenced by the issuance of a ten day summons. Please find enclosed a memorandum from Tim Shea, together with a proposed change to Rule 4(c).

4. We will consider an amendment proposed by Leslie Slaugh of Provo to Rule 58A on entry of judgment and Rule 77 on notice of orders and judgment. I enclose a copy of these proposed changes for your consideration.

5. We will also consider a comment and a suggestion from David G. Challed, an attorney with Utah Legal Services, relating to Rule 69(o). I enclosed Mr. Challed's letter of July 17, 1995.

Finally, I enclose for your information, two brief articles on issues on continuing interest to the committee. First, I enclose an article from the *ABA Journal* (April 1995) on states considering discovery reform. Second, I enclose an article by Francis Carney on various "loser pays" proposals. This article is from the May 1995 *Utah Bar Journal*.

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

Very truly yours,



Alan L. Sullivan

ALS/kr

Enclosures

cc: Lorenzo K. Miller, Esq. (w/o encl.)
David Challed, Esq. (w/o encl.)
Leslie Slaugh, Esq. (w/o encl.)
Julie Fortuna, Esq. (w/encl.)
Timothy Shea, Esq. (w/encl.)

MINUTES

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

**Wednesday, September 27, 1995, 4:00 p.m.
Administrative Office of the Courts**

Timothy R. Shea, Presiding

PRESENT: W. Cullen Battle, Terry S. Kogan, M. Karlyn Hinman, Virginia S. Smith, Terrie T. McIntosh, Honorable Anne M. Stirba, Thomas R. Karrenberg, Honorable Ronald N. Boyce, Francis M. Wikstrom, James R. Soper

EXCUSED: Alan L. Sullivan, Perrin R. Love, Mary Anne Q. Wood, Honorable Boyd Bunnell, John L. Young, David K. Isom, Glen C. Hanni

STAFF: Julie Fortuna

I. WELCOME AND APPROVAL OF MINUTES

Mr. Shea welcomed Committee members to the meeting and indicated that Mr. Sullivan was unable to attend. Mr. Shea introduced Mr. Battle to the Committee as a new member and reminded the Committee that it meets on the fourth wednesday of every month.

Mr. Kogan moved to adopt the May Committee minutes. Ms. Smith seconded the motion and the Committee voted unanimously to adopt the May minutes as drafted.

II. RULE 65B ON EXTRAORDINARY RELIEF: CONSIDERATION OF REVISION PROPOSED BY THE UTAH ATTORNEY GENERAL'S OFFICE

Mr. Soper addressed the Committee and indicated that the Committee had been reviewing inmate litigation procedure under Rule 65B. Mr. Soper informed the Committee that the Utah State Legislature was also reviewing inmate litigation and that the Utah Attorney General Office was drafting proposed legislation for the legislature's review.

Mr. Kogan suggested inviting the Utah Attorney General to attend a Committee meeting and suggested the two organizations coordinate their efforts. Mr. Soper volunteered to act as the liaison between the Committee and the Utah Attorney General. Judge Stirba indicated that the Committee should be informed of the Utah Attorney General's proposals, at a minimum, even though Magistrate Boyce indicated that the Committee's involvement may be minimal due to constitutional constraints. Mr. Kogan indicated that the Committee had a good eye for due process issues and should review any procedural mechanisms proposed by the Utah Attorney General. Judge Stirba agreed with Mr. Kogan and indicated that procedure under the current version Rule 65B was very confusing.

Mr. Shea suggested deferring to the legislature on the substantive issues raised by Rule 65B. Mr. Soper indicated that the legislature would prefer to see any proposed bill endorsed by the Committee. Mr. Kogan indicated asked whether the legislature could pass rules of civil procedure. Mr. Soper responded that the legislature cannot adopt rules of civil procedure, but can amend existing rules with a two-thirds perfect majority.

Mr. Shea asked Mr. Soper to find out what legislation the Utah Attorney General was proposing with respect to inmate litigation, to separate the substantive issues for the procedural issues as much as possible, and present the procedural issues to the Committee for review and discussion. Mr. Shea also proposed the Committee invite Mr. Lorenzo K. Miller to the Committee's next meeting to present any legislation drafted by the Utah Attorney General on the issue.

III. RULE 62 ON STAY OF PROCEEDINGS: FINAL APPROVAL TO PROPOSED CHANGES

Mr. Shea indicated that the Committee's proposed changes to Rule 62 had been circulated for comment and that no suggestions for further amendment had been made. Judge Stirba moved that Rule 62 as proposed be presented to the Utah Supreme Court for final action. The Committee voted unanimously in favor of Judge Stirba's motion. Mr. Shea thanked Mr. Soper for his work on Rule 62.

IV. TEN DAY SUMMONS: MEMORANDUM FROM TIM SHEA AND PROPOSED CHANGES

Mr. Shea began discussion on the ten day summons rule by indicating that at the Committee's last meeting, the Committee discussed adding language to the ten day summons to indicate that a defendant need not file an answer if no complaint has been filed and providing the defendant with the relevant court's phone number. Mr. Shea circulated proposed changes to Rule 4(c), rather than Rule 3, that incorporated these proposed modifications.

Mr. Battle inquired whether a defendant could determine when a complaint was filed over the phone. Judge Stirba indicated that it was unclear what information circuit court clerks would provide over the phone.

Mr. Kogan proposed adding language to the circulated draft of Rule 4(c) to indicate that the complaint must be filed within ten days of service of the summons in order for an action to be commenced. Magistrate Boyce suggested adding "after ten days" to line 13 of draft Rule 4(c) so that it reads: "the summons shall state that the defendant need not answer if the complaint is not filed after ten days."

Mr. Karrenberg moved that the Committee send out proposed Rule 4(c) with Magistrate Boyce's proposed additional language for comment. Mr. Wikstrom seconded the motion. The Committee voted unanimously in favor of Mr. Karrenberg's motion.

V. RULE 58A ON ENTRY OF JUDGMENT & RULE 77 ON NOTICE OF ORDERS AND JUDGMENT: AMENDMENT PROPOSED BY LESLIE SLAUGH

Mr. Shea indicated that Leslie Slaugh, an attorney from Provo, had proposed amendments to Rules 68A and 77 for two reasons: 1) to create a uniform procedure, and 2) to remove the responsibility of providing notice from the attorney and place it on the clerk of the court to protect the appellant's right of appeal because the time to appeal runs from entry of a judgment, rather than notice of entry of a judgment.

Magistrate Boyce suggested changing Rules 68A and 77 so that appeal time runs from the time notice of the entry of a judgment is given to counsel. Mr. Karrenberg indicated that an existing rule of judicial conduct, rule 504-4, requires counsel to provide court clerks with copies of proposed orders and stamped, addressed envelopes so that court clerks can send notice, but that some court clerks were not aware of this procedure. Judge Stirba indicated that she often gets proposed orders with certificates of mailing attached, but prefers that counsel mail a proposed order to opposing counsel to approve as to form, and then submit it to the court.

Mr. Kogan asked how often a proposed order is executed by the court when an objection to the order has been filed or is filed shortly thereafter, but within the allotted time for objecting. Judge Stirba indicated that the potential for Mr. Kogan's hypothetical was a few times a day, but that it only happens sometimes.

Mr. Karrenberg voiced concern about putting an additional burden on court clerks by requiring them to mail notice to parties that an order had been entered and indicated the burden to notify should be the prevailing party's. Mr. Battle indicated that information regarding whether an order has been entered is equally available to both parties so that neither should have an additional burden to notify the other. Mr. Soper indicated that regardless of whose burden it was to notify a party of an appeal, it was unenforceable because appeal time runs regardless of whether notice has been given. Mr. Boyce suggested that an article be published in the Utah Bar Journal to educate the local bar about the issues being discussed.

Mr. Shea asked the Committee whether the two different procedures for submitting an order outlined in Rules 58A and 77 should be streamlined. Mr. Karrenberg suggested that Rule 58A and 77 be left alone because although the procedures are different, they are both effective. Mr. Soper asked what was really gained by the additional provision in Rule 77 requiring counsel to submit copies of proposed orders with stamped, addressed envelopes. Ms. Smith responded that it can be the only form of notice that a pro se litigant gets.

Mr. Kogan asked whether rule 504-4 put too big a burden on court clerks. Magistrate Boyce indicated that the rules of judicial conduct were outside of the Committee's jurisdiction. Judge Stirba volunteered to ask the third district court clerks whether rule 504-4 was burdensome.

Mr. Shea suggested that the Committee table their discussion of Rules 58A and 77 until Judge Stirba had a chance to talk with the third district court clerks. Mr. Kogan suggested that the Committee also contact legal services to see whether pro se clients had lost appeal rights because they never received notice that an order had been entered.

VI: RULE 69(o): COMMENT AND SUGGESTION FROM UTAH LEGAL SERVICES

Mr. Shea began discussion of supplemental proceedings under Rule 69(o) by referencing a letter submitted to the Committee by David G. Chalid from Utah Legal Services on the abuse of supplemental proceedings in the case of an eight-four year old man. Mr. Shea solicited comments from the Committee on whether the Committee should amend Rule 69(o) to deal with the situation presented by Mr. Chalid

Magistrate Boyce indicated that the situation presented by Mr. Chalid was unusual and did not constitute good cause to take away the flexibility that exists under Rule 69(o). Ms. Smith agreed with Magistrate Boyce. She indicated that creditor's attorneys needed flexibility in supplemental proceedings and that taking away that flexibility would produce a chilling effect that was not warranted by Mr. Chalid's unusual situation. Mr. Karrenberg responded that he would want to know that abuses under Rule 69(o) were a bigger problem before he was willing to toy with Rule 69(o). Judge Stirba suggested that the Committee respond to Mr. Chalid by saying that the Committee's experience is that abuse under Rule 69(o) of the kind indicated in Mr. Chalid's letter is not pervasive and that other justifications exist to allow a party flexibility in supplemental proceedings.

VII: CONCLUSION

Mr. Shea thanked Committee members for their time and reminded the Committee that two articles had been distributed for their consideration, one discussing discovery reform and one discussing various "loser pays" proposals.

Mr. Wikstrom asked Magistrate Boyce what the response had been to the new federal discovery rules. Magistrate Boyce indicated that a final decision would be reached regarding the federal discovery rules in March of 1996. An informal anecdotal discussion of the federal discovery rules ensued and Mr. Shea indicated that he would put a formal discussion of the federal discovery rules on the agenda for the Committee's next meeting.

There being no further business, Mr. Shea adjourned the Committee until the next meeting.