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WRITER'S DIRECT DIAL NUMBER

October 15, 1996

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: October Meeting

Dear Committee Members:

The next meeting of the Supreme Court Advisory Committee on Civil Procedure will be held on Tuesday, October 22, 1996, beginning at 4:00 p.m., at the Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. Please note this date and the date of our next meeting - December 4, 1996 - in your calendars. In January, we will return to our normal schedule of holding meetings on the third Wednesday of each month.

Thanks to Fran Wikstrom for filling in during the month of September and in chairing the last meeting. We will continue, at our meeting next week, with a number of items that were discussed at the September meeting. Specifically:

1. We will consider a slight change to the Committee's draft change to Rule 5(d) relating to the service of papers. Please find enclosed an amendment that I have suggested on that topic.

2. We will review once again the Committee's proposed changes to Rule 11, together with the enclosed Committee Notes prepared by Tim Shea. Once we approve the rule and the notes, this will be submitted to the Supreme Court for approval.

3. We will again consider changes to Rule 4, particularly the time "bonus" that a defendant should receive in return for agreeing to accept service by mail. Please find enclosed our most recent draft on that topic. We will also hear

from Tim Shea concerning his communications with the sheriff's office and the clerk's office.

4. We will again consider changes to Rule 64C relating to the proper relationship between the original bond and the amount of the bond necessary to discharge the attachment. Please find enclosed our most recent draft of an amendment to that rule. We will continue our discussion from last month.

5. We will hear from Judge Stirba concerning her proposed changes to Rule 41 on court approval of stipulated judgments. Please find enclosed a draft based upon Judge Stirba's suggestions.

6. We will have a report from our subcommittee on forms to the Rules of Civil Procedure. That subcommittee is made up of Tom Karrenberg and Cullen Battle.

7. We will consider changes to Rule 58A(c), which provides that "[a] judgment is . . . deemed entered for all purposes except the creation of a lien upon property, when the same is signed and filed . . .". Section 78-22-1, Utah Code, states: "The entry of a judgment by a district court is a lien upon the real property of the judgment debtor." We will ask those of our members with special experience in the area of judgment lien practice to comment on a proposed amendment to resolve this conflict.

I look forward to seeing all of you next Tuesday. If you plan to be late or absent, I would appreciate your giving me or my secretary, Kay Rich, a call so that we do not wait for you.

Very truly yours,

Alan L. Sullivan

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

Agenda

Advisory Committee on Rules of Civil Procedure

October 22, 1996
4:00 to 6:00 p.m.

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

Welcome and Approval of Minutes	Alan Sullivan
Rule 5 Amendment: Page 2, Line 18	Tim Shea
Committee Note to Rule 11	Tim Shea
Rule 4; Service of Process	Perrin Love
Rule 64C; Amount of Bond	Virginia Smith
Rule 41	Judge Stirba Perrin Love
Forms	Cullen Battle Tom Karrenburg
Conflict between §78-22-1 and Rule 58A(c)	Tim Shea

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Tuesday, October 22, 1996, 4:00 p.m. Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Honorable Boyd Bunnell, Thomas R. Karrenberg, David I. Isom, James Soper, Glenn C. Hanni, W. Cullen Battle, Francis M. Wickstrom, Virginia S. Smith, Terrie T. McIntosh, Honorable Ronald N. Boyce.

EXCUSED: Perrin Love, Mary Ann Q. Wood, Honorable Anne M. Stirba, Terry S. Kogan, M. Karlynn Hinman, John L. Young.

STAFF: Timothy R. Shea, Peggy Gentles, Todd M. Shaughnessy.

I. Welcome and Approval of Minutes.

Mr. Sullivan welcomed Committee members to the meeting. He thanked Mr. Wickstrom for presiding over the September meeting. Mr. Sullivan reminded the Committee that the next meeting will be held on December 4, 1996, and that this will be the last meeting for 1996. Beginning in January, 1997, meetings will be held on the third Wednesday of each month. The September minutes were approved.

II. Rule 5 Amendment.

Mr. Shea discussed Rule 5(d), which states that "a 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 of for use in the proceeding." Rule 5(d) conflicts with Rule 4-502 of the Utah Code of Judicial Administration, which generally prohibits filing of discovery requests and responses with the court. Mr. Shea proposed that Rule 5(d) be redrafted to state "except where rules of court prohibit the filing of discovery requests and responses, all papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service." Mr. Sullivan stated that "rules of court" may be misleading, because the Code of Judicial Administration is not technically a rule of the court. Mr. Shea

recommended against referring to Rule 4-502 because it may be difficult to track changes to the rules of judicial administration. Mr. Sullivan recommended that the phrase "rules of court" be replaced with "rules of judicial administration." Mr. Sullivan also recommended that the reference to "time" in the sentence dealing with certificates of service be deleted, that the words "together with" be eliminated as confusing, and that the Rule be divided into two sentences. As proposed, Rule 5(d) states: "Except where rules of judicial administration prohibit the filing of discovery requests and responses, all papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. Papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service."

Judge Bunnell moved that the Committee approve the rule. Mr. Karrenberg seconded. The motion passed unanimously.

III. Committee Note to Rule 11.

Mr. Shea introduced the modified advisory committee note to Rule 11, which is intended to explain the difference between the rule and the corresponding Federal Rule of Civil Procedure. The changes to subsection (c)(1)(A) are a departure from the federal rule and are intended to give the judge discretion in determining when a law firm should be held jointly responsible for violations committed by its partners, associates, and employees. During the Committee's September meeting, Judge Stirba raised a concern about the impact that imposing sanctions on a law firm might have on the judicial evaluation survey. Mr. Shea reported that he had consulted with Standing Committee on Performance Evaluations who informed him that if a judge imposed sanctions on a firm, that judge could exclude from his or her evaluation all members of that firm. Mr. Isom expressed his view that the rule should follow the federal rule and impose responsibility on the entire firm, absent "exceptional circumstances." Mr. Karrenberg pointed out that there still may be some ambiguity about the term "law firm" and therefore the rule should simply grant the judge discretion. Judge Boyce stated that Rule 11 sanctions are rare in Utah's federal district court, and Mr. Karrenberg and Mr. Sullivan agreed that they also are rare in state court. Mr. Hanni stated that there is no reason to hold a firm jointly responsible on every occasion, and that judges ought to have the discretion to address repeat offenders. Mr. Sullivan also noted that the term "exceptional circumstances," as used in the federal rule, is unclear.

Mr. Wickstrom moved that the Committee approve the rule and advisory committee note. Ms. Smith seconded. Mr. Isom

opposed the motion. With the exception of Mr. Isom, all members present voted in favor of the motion.

IV. Rule 4; Service of Process.

Mr. Sullivan discussed a proposed amendment to Rule 4 that would incorporate a mechanism for obtaining service of process by mail. Mr. Sullivan explained that the amendment is being proposed for two reasons. First, there have been a number of changes to Rule 4 of the Federal Rule of Civil Procedure dealing with alternative service of process, including a provision allowing parties to arrange for service by mail. The Utah rule has not kept pace with these changes to its federal counterpart. Second, the Salt Lake County Sheriff's Office has requested changes to the Utah Rule, which it believes will decrease the volume of summonses and complaints it is asked to serve.

Ms. Gentles reported that she recently had talked with the Sheriff's Office, who told her that the volume was even greater than before and that there were instances in which 120 days had elapsed before the Sheriff's Office could serve process. Judge Boyce indicated that he believed the changes to Rule 4 would have an impact on the number of summonses and complaints being served by the Sheriff's Office. Mr. Sullivan expressed some doubt about whether the changes would have an impact, given that the growth in the district court's caseload comes primarily from collection and domestic actions, neither of which are likely to use the Sheriff's Office. Ms. Gentles also stated that much of that office's workload comes from a large volume of protective orders, which the amended rule would not affect. Mr. Wickstrom and other members of the Committee agreed that there was no harm in amending the Rule regardless of whether it positively affected the workload of the Sheriff's Office.

Mr. Sullivan explained that the amended rule provides defendants an incentive to accept service by mail by giving them additional time to respond to the complaint. This period has been shortened from the corresponding federal rule so that the rule will not create a disincentive for plaintiffs.

The Committee then discussed the phrase "located within the United States," as used in subparagraphs (2)(e) and (2)(f). Mr. Sullivan indicated that he could not see any reason why that phrase was necessary in the Utah rules, and believes that it simply was incorporated from the federal rules. Members of the Committee generally agreed that the phrase seemed to unnecessary. Mr. Sullivan suggested that the Committee allow him and Mr. Shea to research whether there was any reason to leave the phrase in

the Rule and, if so, to come back to the Committee with a suggestion. If the phrase is included, some members of the Committee felt is should read "located within the United States and its territories." Mr. Wickstrom stated that defendants located in territories of the United States should have more than 45 days to respond to a complaint. A majority of the Committee, however, believed this revision was unnecessary. Mr. Sullivan also proposed minor grammatical changes to subparagraph (e)(2)(d).

Mr. Isom moved that the Committee approve the rule, with the language deleted from subparagraphs (2)(e) and (2)(f), subject to additional research by Mr. Sullivan and Mr. Shea. Mr. Hanni seconded. The motion passed unanimously.

V. Rule 64C; Amount of Bond.

Ms. Smith discussed the minimum and maximum bond amounts contained in Rule 64C and her proposed changes to that Rule. She stated that her initial thought was simply to delete the minimum and maximum amounts, and leave the issue entirely up to the judge's discretion. She indicated, however, that she believed judges want the Rule to provide some guidance and not simply leave the amount up to the judge. Judge Bunnell agreed that the Rule should provide some guidance, but should give the judge discretion.

Ms. Smith stated that the Rule could be amended to provide for a bond in the amount of two times the value of the property. The problem with this, however, is that the plaintiff often does not have any idea what the property is worth. Several members of the Committee expressed concern over requiring a bond in double the amount of the property's value. Judge Boyce suggested that the Rule be amended to leave the amount of the bond up to the judge, but place the burden of establishing the property's value on the party seeking the bond. Mr. Wickstrom pointed out that this would not deal with the problem of valuing the property and that this problem is exacerbated by the fact that plaintiffs often seek a prejudgment writ of attachment because the defendant is about to depart from the state.

Members of the Committee also discussed the problem that arises when the amount of property attached greatly exceeds the amount at issue in the lawsuit. Rule 64C currently sets a bond limit of $10,000.00. Several members of the Committee expressed the view that this amount was insufficient to protect valuable property that may be subject to attachment. Mr. Sullivan suggested that the Rule leave the amount of the bond up to the judge entirely, and that it permit a party to attach property up to the value of its claim. Ms. Smith stated that

many items subject to attachment are difficult to value and, moreover, a party may not know the full value of its claim.

Mr. Sullivan stated that he thought this issue needed more research, and proposed that the Administrative Office of the Courts conduct research into how this issue has been handled in other states. Mr. Sullivan asked Mr. Shea to arrange for this research and report his findings to Ms. Smith prior to the December meeting so that she can make some additional suggestions.

VI. Rule 41; Dismissal by Stipulation of the Parties.

Mr. Sullivan discussed Rule 41(a)(1), which permits parties to voluntarily dismiss an action by filing a stipulation. Judge Stirba previously has raised the issue of whether an order from the court should be required to dismiss an action. Mr. Sullivan stated that Rule 41(a)(1) frequently is ignored by judges and presents problems for clerks, who may not know how to interpret a complicated stipulation or a stipulation that is conditioned upon the occurrence of certain events. Mr. Soper stated that the better practice is to require a court order because third parties reviewing a court file may not pick up on the stipulation. Mr. Isom stated that the tradition is to require an order. Mr. Wickstrom stated that parties should have the freedom to decide how to dismiss the action. Mr. Sullivan stated that resistance to requiring an order among practitioners may stem from the belief that certain judges want to retain control over the litigation and do not want to allow the parties to dictate the terms on which it will be dismissed. The Committee was evenly divided on whether Rule 41(a) should be amended to require an order or whether it should be left as is. Mr. Sullivan suggested that the Committee not take any action on this issue until Judge Stirba has an opportunity to comment. The issue therefore was put over to the December meeting.

VII. Forms.

Mr. Karrenberg reported to the Committee that he and Mr. Battle have nearly completed the process of updating the forms and that the forms will be ready for consideration at the December meeting. Copies of the forms will be mailed to Committee members in advance of that meeting.

VIII. Conflict Between Utah Code Ann. § 78-22-1 and Rule 58A(c).

Mr. Shea explained the conflict between Rule 58A(c) and Utah Code Ann. § 78-22-1. Rule 58A(c) states: "A judgment is complete and shall be deemed entered for all purposes, <u>except the creation of a lien on real property</u>, 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." (Emphasis added.) Section 78-22-1(2), however, states that "the entry of judgment by a district court is a lien upon the real property of the judgment debtor . . . ." Mr. Shea discussed a proposed amendment to Rule 58A that would redefine the term "entry" for purposes of the rules of civil procedure. The proposed changes would provide a bifurcated definition of "entry": The judgment would be deemed complete as between the parties upon signature, and would be deemed complete for purposes of creating a lien on real property when the judgment is noted in the register of action and judgment docket. Mr. Shea explained that the judgment should be final for purposes of creating a lien upon notation in the register of actions and the judgment docket because title searchers typically look at the register. If a judgment had been signed by the judge, but not entered on the register, a title search probably would miss the judgment.

Judge Bunnell explained that clerks often wait some time before entering a judgment on the judgment docket. Ms. Smith stated that there may be a distinction between entry on the judgment docket and entry on the register of actions. Mr. Sullivan and other members of the Committee expressed concern about any attempt to redefine entry of judgment as it may impact other rules. Mr. Isom stated that care should be taken to avoid creating further conflicts with other rules and statutes.

Some members of the Committee stated that the lien should be created upon signing and filing a judgment to avoid the possibility of a judgment debtor transferring or encumbering the property after the judgment is signed, but before it is noted on the register of actions and judgment docket.

In light of these concerns, Mr. Sullivan recommended that Mr. Shea research how this problem has been addressed in other states and whether those states may provide helpful guidance. The question for Mr. Shea and the Committee is whether the Committee should incorporate two concepts of "entry" or some other solution to the problem. Ms. Smith explained that the Utah statute is far more liberal than other states in creating a lien automatically on entry of a judgment and she therefore doubts that other states will be of much assistance.

IX. Conflict Between Rule 56(c) and Rule 4-501 of the Code of Judicial Administration.

Ms. Sullivan mentioned, but the Committee did not discuss, an issue brought to the Committee's attention by Judge Hansen. Judge Hansen has pointed out a conflict between Rule 4-

501 and Rule 56(c) on the holding of oral argument for motions for summary judgment and the time for filing affidavits in support of such motions. Mr. Sullivan also asked Committee members to consider whether other changes to Rule 56 may be warranted. Mr. Sullivan stated that he will raise this issue for discussion by the Committee at its December meeting.

X. Conclusion.

There being no further business, Mr. Sullivan adjourned the Committee until the next meeting scheduled for Wednesday, December 4, 1996, at 4:00 p.m. 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~~] Except where rules prohibit the filing of discovery requests and responses, 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~~].

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 existing law, 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 fees incurred in presenting or opposing the motion. In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, 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 attorney 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.

Advisory Committee Note. The 1997 amendments conform state Rule 11 with federal Rule 11. One difference between the rules concerns holding a law firm jointly responsible for violations by a member of the firm. Federal Rule 11(c)(1)(A) states: "Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees." Under the federal rule, joint responsibility is presumed unless the judge determines not to impose joint responsibility. State Rule 11(c)(1)(A) provides: "In appropriate circumstances, a law firm may be held jointly responsible for violations committed by its partners, members, and employees." Under the state rule, joint responsibility is not presumed, and the judge may impose joint responsibility in appropriate circumstances. What

constitutes appropriate circumstances is left to the discretion of the judge, but might include: repeated violations, especially after earlier sanctions; firm-wide sanctionable practices; or a sanctionable practice approved by a supervising attorney and committed by a subordinate.

MEMORANDUM

To: Supreme Court's Advisory Committee on the Rules of Civil Procedure
From: Peggy Gentles, Staff Attorney, Administrative Office of the Courts
Subject: Contact with the Federal Court and Salt Lake County's Sheriff's Office Possible Amendment of U.R.C.P. 4
Date: October 15, 1996

Pursuant to the Committee's request at the September meeting, I spoke with Louise York, Chief Deputy Clerk for the District Court. I inquired into the usage of the waiver provisions under F.R.C.P. 4. In her opinion, the rule is under-utilized. Most plaintiffs do not want to extend the time to answer. This inclination is enhanced by the changes to Rule 16 which allow no discovery until after the attorney meeting. Given how long the defendant has to answer if waiving service and the time required to arrange the attorney meeting, discovery can be postponed for a long period.

Ms. York gave me the following information. For the period June through September, 1996, sixteen waivers were filed. In that same period, 171 answers were filed. While these are not directly comparable, the number of answers does give an indication of the potential volume of waivers. Ms. York stated that it usually pro se plaintiffs who want to use the waiver option. Generally, federal civil litigation involves parties who are not very concerned about the costs of service.

I spoke with Sergeant Jackson at the Sheriff's Office. According to him, the office is in even greater need of relief from requirements to serve civil summons and complaints than it was when it contacted the Committee. The office has the same number of people as ten years ago while documents to be served have increased from 10,000/year to 25,000/year. The domestic violence protective order legislation has greatly increased the duties of the office. In addition, the office receives between 500 and 700 complaints per month to serve. Because so many filings (OSCs, Protective Orders) have a higher priority than complaints, some complaints do not get served within the required 120 days.[1] Sgt. Jackson has begun to send letters to some defendants named in the complaints asking them to come pick up the summons and complaint. He estimated that he has a 35 to 40 percent response rate.[2]

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1 Many of the document which are served by the Sheriff's Office are prepared by the various government entities.

2 Some letters are returned indicating that the defendant does not live there or has died, etc. Approximately thirty percent of the defendants come in to pick up the documents.

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.

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.

. . . .

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof.

(1) By plaintiff [~~; by stipulation~~]. Subject to the provisions of Rule [~~23(e)~~] 23(e), of Rule 66(i), 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~~] other response to the complaint. 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~~]

(i) by filing a stipulation of dismissal signed by all parties who have appeared in the action, or

(ii) 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.

CALLISTER NEBEKER
& McCULLOUGH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
SUITE 900 KENNECOTT BUILDING
SALT LAKE CITY, UTAH 84133
TELEPHONE 801-530-7300
FAX 801-364-9127

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

Administrative Office of the Courts

Chief Justice Michael D. Zimmerman
Chair Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Timothy M. Shea
Date: October 16, 1996
Re: Conflict Between Rule 58A(c) and §78-22-1

Attached are §78-22-1 and the relevant excerpt from Rule 58A.

Rule 58A(c) states: "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."

Prior to 1992, §78-22-1 required a judgment to be "docketed" for the creation of a lien upon real property. The term "docketed was not defined, but might have been interpreted as making a notation in the register of actions (The register of actions was commonly referred to as the docket book, a bound book in which events in a case such as pleadings, hearings and orders were noted by the clerk.) and the judgment docket. (The judgment docket was a similar bound book in which was recorded all judgments.)

In 1992, §78-22-1 was amended to its current form and provides: ". . . the entry of judgment by a district court is a lien upon the real property of the judgment debtor . . . ." The amendment of the statute creates a conflict with the rule. The proposed amendment of the rule will change the definition of "enter" to include the notation in the register of actions and the judgment docket.[1]

[1] Computers have made the terms "register of actions" and "judgment docket" somewhat obsolete, but there is no proposal to change the nomenclature.

230 South 500 East / Suite 300 / Salt Lake City, Utah 84102 / 801-578-3808 / Fax: 801-578-3843 / E-mail: timmys@courtlink.utcourts.gov

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~~] and a notation of the judgment is made in the register of actions and the judgment docket.

. . . .

78-22-1. DURATION OF JUDGMENT - JUDGMENT AS LIEN UPON REAL PROPERTY - ABSTRACT OF JUDGMENT - SMALL CLAIMS JUDGMENT NOT LIEN.

(1) Judgments shall continue for eight years unless previously satisfied or unless enforcement of the judgment is stayed in accordance with law.

(2) Except as limited by Subsection (4), the entry of judgment by a district court is a lien upon the real property of the judgment debtor, not exempt from execution, owned or acquired during the existence of the judgment, located in the county in which the judgment is entered.

(3) An abstract of judgment issued by the court in which the judgment is entered may be filed and docketed in any court of this state and shall have the same force and effect as a judgment entered in that court.

(4) A judgment entered in the small claims division of any court shall not qualify as a lien upon real property unless filed and docketed in accordance with Subsection (3). This subsection shall apply to all small claims judgments entered on or after April 27, 1992.