LAW OFFICES OF
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ADDRESS ALL CORRESPONDENCE TO
POST OFFICE BOX 45340
84145-0340

WRITER'S DIRECT DIAL NUMBER

November 25, 1996

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: December Meeting

Dear Committee Members:

The next meeting of the Supreme Court Advisory Committee on Civil Procedure will be held on Wednesday, December 4, 1996 beginning at 4:00 p.m., at the Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. This is a special date for the meeting; in January we will return to our normal schedule of holding meetings on the third Wednesday of each month.

Please find enclosed a copy of the minutes prepared by our new recording secretary, Todd Shaughnessy. Todd has done an excellent and detailed job of reporting our last meeting. We look forward to working with him for a long time to come.

At our December 4 meeting we will consider the following items:

1. We will have a report from Tim Shea on public comment to our pro hac vice rule. We will need to decide whether changes should be made in the rule before we submit it to the Supreme Court for approval.

2. We will hear from Judge Stirba concerning her proposed changes to Rule 41 on court approval of stipulated judgments. Please find enclosed a proposed draft based on Judge Stirba's suggestions. At our last meeting in October, the Committee was evenly divided as to whether Rule 41(a) should be amended to require entry of an order or whether it should be left as is. Perrin Love will make some additional suggestions about potential changes to Rule 41.

3. Judge Tim Hanson will address the Committee on his proposed resolution of the conflict between Rule 56(c) and Rule 4-501, Code of Judicial Administration, as they relate to the filing of affidavits in support of or in opposition to motions for summary judgment.

4. We will continue our discussion of Rule 64C's bond amount limits. Since our last meeting, Tim Shea's staff has conducted research concerning other states' practices. We will ask Ginger Smith to help us determine how to proceed from here.

5. We will continue our discussion of the apparent conflict between Rule 58A(c) and Section 78-22-1 concerning the creation of a lien upon property as a result of the entry of a judgment. Please find enclosed a memo from Tim Shea on that topic together with a suggested change to Rule 58A(c).

6. Finally, we will have a report from Tom Karrenberg and Cullen Battle on our forms project.

I look forward to seeing all of you next Wednesday. If you have any questions or would like to add anything to the agenda, please feel free to call me at any time.

Very truly yours,

Alan L. Sullivan

ALS/cfb
Enclosures
cc: Tim Shea, Esq. (w/encls.)
The Honorable Timothy Hanson (w/encls.)
Todd Shaughnessy, Esq. (w/encls.)

Agenda

Advisory Committee on Rules of Civil Procedure

December 4, 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
Comments to Pro Hac Vice Rule	Tim Shea
Rule 41	Judge Stirba Perrin Love
Conflict between CJA 4-501 & URCP 56(c)	Judge Timothy Hanson
Rule 64C; Amount of Bond	Virginia Smith
Conflict between 78-22-1 & URCP 58A(c)	Tim Shea
Forms	Cullen Battle Tom Karrenburg

QUESTAR
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GARY G. SACKETT
ASSOCIATE GENERAL COUNSEL

November 15, 1996

Peggy Gentles, Staff Attorney
Administrative Office of the Courts
230 South 500 East
Salt Lake City, Utah 84102

Dear Ms. Gentles:

Re: Proposed Rule 11-302, Admission Pro Hac Vice

On their own behalf and on behalf of Questar Corporation and its operating subsidiaries,[1] 16 in-house attorneys for these companies submit the following comments concerning proposed new Rule 11-302 of the Code of Judicial Administration.

These comments reflect the views of a family of Utah-based companies that are involved in legal matters in several states and who have analyzed the proposed new rule by asking: "Would a similar *pro hac vice* rule in the other states in which these companies have legal affairs to pursue or defend be reasonable?"

We have come to the conclusion that many aspects of the rule are appropriate measures to provide a reasonable measure of "quality control" for lawyers who wish to represent clients on a *pro hac vice* basis in Utah courts. However, there are two aspects of the rule that are particularly troubling and appear to be unduly protectionist in nature, with relatively little prophylactic effect.

Salutary Effects of the Proposal. Those aspects of the rule that require identification of the attorney and a variety of other information as set forth in §§ (e)(1) - (e)(7) are perfectly reasonable. Perhaps the most important and laudable aspect of the rule (if this provision isn't already in effect) is the explicit requirement that the nonresident attorney comply with the Utah Rules of Professional Conduct and the Rules of Lawyer Discipline and Disability and be subject to the disciplinary authority and procedures of the Utah State Bar in § (g).

Undue Burdens of the Proposal. Together with the inherent power of a trial judge to control proceedings before him, the requirements in §§ (e) and (g) should provide a sound basis for assuring that Utah's legal system is not compromised. These

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[1]Mountain Fuel Supply Company, Questar Pipeline Company, Wexpro Company, Celsius Energy Company, Universal Resources Corporation, Questar InfoComm, Inc., and Interstate Land Company.

considerations must be balanced with a recognition of the diminishing span of the world of commerce and human transactions. The practice of law, as an adjunct to a broad range of commercial and other human activity, has become interstate and international in nature. The Utah judiciary should not adopt procedural rules that serve to insulate Utah from these evolutionary changes in areas where political boundaries play a lesser role than before. We believe that the practice of law throughout the country, in this age of multi-state and multi-national corporations, should become more universal, not less so.

Section (f) of the proposed rule strikes us as implementing a degree of protectionism that is unnecessarily restrictive and burdensome on the users of Utah's legal system—particularly when viewed on a reciprocal basis with other states. Although we do not know the historical development of the proposed language in this section and its intended effect, a straightforward reading strongly suggests that the Utah court system will treat the practice of law in Utah as a domain that is generally off limits to unaccompanied nonresident lawyers. In particular, the following two subsections appear to force any out-of-state litigant with its own out-of-state counsel (often, in-house counsel) to undertake major added expense and inefficiency of employing duplicate efforts:

- § (f)(3), which requires a Utah lawyer to "participate meaningfully in the preparation and trial of the case, and
- § (f)(4), which requires the lawyer to "appear at all hearings."

It is not unusual practice for experienced corporate counsel to handle all aspects of a case in a jurisdiction where that attorney is not a permanent member of the bar with little more than an introduction by local counsel. To require local counsel's "meaningful" participation and to require the appearance at all hearings seems to be an unnecessarily draconian measure to insure that local judges have adequate control over misbehaving nonresident attorneys. It is much like the grade-school teacher who punishes the whole class because of one unidentified miscreant; it is simply not fair to the vast majority of out-of-state litigants who could be well-served by their nonresident attorneys under the other safeguards provided by the proposed rule.

The adoption of Rule 11-302 implicitly proclaims to the rest of the legal world that only Utah lawyers are qualified to practice before Utah courts and that they must hand-hold every nonresident lawyer at each step of the way by appearing at all hearings and "participating meaningfully."

We believe that rules requiring the initial introduction of an out-of-state attorney by a local attorney and the requirement that such local counsel be available for procedural matters such as the service of papers are reasonable. Beyond that, the artificial insertion of local counsel into the merits and substance of a case will often cause duplicative and unjustified extra costs for a litigant in Utah who wishes to use his own out-of-state corporate or outside counsel. For Utah to take this approach to the practice of law does not reflect well on the state as a participant in a national and

global economy and society.

We are cognizant that there are nonresident attorneys who have created problems for some Utah judges, but the judges—through their contempt powers and the ability to affect the procedural and substantive outcomes of cases before them—have other powerful tools at their disposal. It should not be necessary to impose major cost burdens on all nonresident litigants in order to deal with those few who do not respect the Utah court system.

Factors in Admission and Revocation. Finally, the provision in § (c) concerning the information that a court may consider in permitting or revoking an admission *pro hac vice* includes in subsection (3) the following factor: "[whether nonresident counsel] is employed by the party as in-house counsel." It is unclear what role this fact plays. Nonresident in-house counsel for a party can exhibit the same range of desirable and undesirable characteristics as outside counsel in these matters. To the extent that a court has the discretion and authority to take action on *pro hac vice* status, the characteristics of the lawyer listed in subsections (1), (2), (4), (5), (6) and (7) of § (c) should govern. It is hard to see that, if all six of these criteria were equally satisfied by an outside attorney and an in-house counsel, one might be admitted and the other not. This criterion should be eliminated.

In summary, we urge the Supreme Court to modify proposed Rule 11-302 by removing subsections (c)(3), (f)(3) and (f)(4). The remaining provisions of the proposed rule, in connection with the inherent powers of the judiciary, will provide appropriate safeguards against any nonresident lawyer abuses of the Utah legal system.

Respectfully submitted,

Gary G. Sackett
David S. Andersen
Colleen Larkin Bell
C. Scott Brown
Eric L. Dady
Patricia S. Drawe
Jonathan M. Duke
Margaret M. Frank
R. Donn Hilton
Connie C. Holbrook
Thomas C. Jepperson
Robert H. Lovell
Richard M. Mollinet
Douglas K. Pehrson
E. William Rideout
Tad M. Taylor

GGS:dt
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Utah State Bar

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Salt Lake City, Utah 84111-3834
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John C. Baldwin
Executive Director

November 15, 1996

Peggy Gentles
Staff Attorney
Administrative Office of the Courts
230 South 500 East, Suite 300
Salt Lake City, UT 84102

Re: Comment on Proposed Amendment to Utah Code of Judicial Administration

Dear Ms. Gentles:

The Utah State Board of Bar Commissioners has requested me to submit the following comments to proposed Rule 11-302 of the Utah Code of Judicial Administration on pro hac vice admission in the Utah courts. The Bar Commission generally endorses the proposed rule, but strongly recommends the following modifications. First, to avoid repeated pro hac vice admissions, the rule should require applicants to disclose all pending or prior pro hac vice admissions to any Utah court. Therefore, the phrase "within the prior 6 months" should be deleted from subsection (e)(3) of the proposed rule.

Second, the Bar Commission believes that a lawyer who makes repeated appearances in the Utah courts is practicing law in the State of Utah and should comply with the same requirements as other lawyers practicing in the state. Therefore, the rule should discourage repeated pro hac vice appearances by modifying subpart (b) of the proposed rule as follows:

Nonresident counsel may be permitted to appear in a particular case if the court in which the case is pending determines that admission pro hac vice will serve the interests of the parties and the efficient and just administration of the case. Admission pro hac vice under this rule is discretionary with the court in which the application for admission is made. Absent special circumstances, however, the court shall deny an application for repeated appearances by any person under this rule. Admission pro hac vice may be revoked by the court upon its own motion or the motion of a party if, after notice and a hearing, the court determines that admission pro hac vice is inappropriate. Admission pro hac vice shall be denied or, if granted, shall be revoked if the court determines that the process is being used to circumvent the normal requirements for the admission of attorneys to the practice of law in this state.

Thank you for your attention to this matter.

Sincerely,

Debra J. Moore

Debra J. Moore
Bar Commissioner

MEMORANDUM

To: Civil Procedure Advisory Committee
From: Peggy Gentles
Subject: Comment on Rule 11-302
Date: November 8, 1996

The Clerks of Court have a concern about the pro have vice rule. As the rule reads currently, (d) requires the clerks to collect a $20 check payable to the Bar and forward the check. The clerks think that the court should not be involved in collecting the fees and that the money should be paid directly to the Bar.

cc Holly Bullen, Assistant Court Administrator

Law Office of
Bruce Margolius, P.C.
588 Main Street, Box 3039
Park City, Utah 84060
(801) 649-9337

September 30, 1996

Peggy Gentles, Esq.
Administrative Office of the Courts
230 South 500 East, Suite 300
Salt Lake City, Ut 84102

Dear Ms. Gentles

This letter constitutes my comments on proposed Code of Judicial Administration Rule 11-302, regarding admission pro hac vice in Utah courts.

As a member of the Utah and New York bars, I have had occasion to be admitted pro hac vice in a number of other states. Since I have always worked with local counsel, he or she has always moved my admission before the appropriate court. In many cases, such motion was granted from the bench in a cordial and collegial manner. As a Utah lawyer, it would distress me to feel that lawyers from the states where I have been treated so kindly might be treated less well before a Utah court.

On the other hand, I have also been admitted pro hac vice in California. In that state, a procedure similar to -- although even more onerous than -- proposed Rule 11-302 is in effect. One feature of the California rule that does not appear in the Utah counterpart is that a copy of the motion for admission pro hac vice must be served upon the California State Bar some days or weeks before the motion is scheduled to come before the court. In many cases, the state bar actually appears and opposes such motions. It is also my recollection that the fee in California is much higher.

For these reasons, I suggest that, in a spirit of true reciprocity, proposed Rule 11-302 be restructured in such a manner that admission pro hac vice to practice before Utah courts be based upon a procedure that mirrors the procedure of the state in which the non-resident lawyer is admitted. In particular, I would urge the that the fee for California lawyers seeking admission pro hac vice be equal to the fee that Utah lawyers must pay when seeking such admission in California. Subsection (d) could easily be recast to place the burden of ascertaining the correct amount in excess of $20.00 on the applying lawyer. I also suggest that the Utah State Bar be served by California lawyers so that it might oppose such applications here on the same grounds (usually that the lawyer has applied too often) that the California State Bar opposes them there.

Sincerely,

Bruce Margolius

BM/bt

DRAFT NOVEMBER 22, 1996

PRO HAC VICE APPLICATION

INSTRUCTIONS

Admission Pro Hac Vice in Utah State Courts is governed by the Code of Judicial Administration Rule 11-302

Application	The attached application form must be filled out completely and legibly. A check for $20 made payable to "Utah State Bar" must accompany each application.
Requirements	▸ Application and fee must be accompanied by a motion by a member of the Utah State Bar who expressly consents to appearing as associate counsel. ▸ A separate application must be filed for each case in which the applicant wishes to appear. ▸ An attorney admitted pro hac vice shall comply with and is subject to Utah statutes, rules of the Utah Supreme Court, including the Rules of Professional Conduct and the Rules of Lawyer Discipline and Disability, the rules of the court in which the attorney appears, and the rules of the Utah Judicial Council.

DRAFT NOVEMBER 22, 1996

APPLICATION FOR ADMISSION PRO HAC VICE

APPLICANT:

Name _____

Address _____

_____

Telephone _____ Fax Number _____

E-mail address (if any) _____

Bar Admission

STATE TO WHICH ADMITTED	BAR NUMBER

Case in which Applicant wishes to appear:

Case Name: _____

Court: _____ Case Number: _____

Party on whose behalf Applicant seeks to appear: _____

Other cases in any court of Utah in which the application has appeared pro hac vice in the previous 6 months:

CASE NAME	CASE NUMBER	COURT

Applicant ____ is ____ is not currently suspended or disbarred from the practice of law in any state.

Applicant ____ has ____ has not been disciplined by any state's or court's Bar organization in the prior 5 years.

Applicant ____ is ____ is not the subject of any pending disciplinary proceedings by any state's or court's Bar organization in the prior 5 years.

DRAFT NOVEMBER 22, 1996

ASSOCIATE COUNSEL

Name _____ Utah Bar No. _____

Address _____

_____

Telephone _____ Fax Number _____

E-mail address (if any) _____

Applicant certifies the following:

A. Applicant submits to the disciplinary authority and procedures of the Utah State Bar.
B. Applicant is familiar with the rules of procedure and evidence, including applicable local rules.
C. Applicant will be available for depositions, hearings, and conferences.
D. Applicant will comply with the rulings and orders of the court.
E. All the information included in this Application is accurate to the best of Applicant's knowledge.

STATE OF _____)
) ss
COUNTY OF _____)

Signed and sworn to before me on _____ by _____.

_____

My Appointment expires:

_____

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.

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April 9, 1996

The Honorable Anne M. Stirba
THIRD JUDICIAL DISTRICT COURT
240 East 400 South, Room #304
Salt Lake City, Utah 84111

Attn: Sally Ann Koch, Clerk

Re: Pack vs. Intermountain, Inc.; Civil No. 960900707CV - (CN&M #08444.38)

Dear Judge Stirba:

Your office has advised me that the parties, to effectively dismiss the case, must prepare an Order of Dismissal in addition to the previously filed Stipulation of Dismissal. I have therefore prepared an Order of Dismissal. However, I think Rule 41(a)(1)(ii) is quite clear that a case "may be dismissed without order of court (i) . . . ., or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action."

An ORDER OF DISMISSAL is enclosed, along with return, stamped envelopes to counsel for enclosing a date-stamped, conformed copy.

Sincerely,

CALLISTER NEBEKER & McCULLOUGH

P. Bryan Fishburn, Esq.

PBF/mhm
Encls.: (1) Proposed Order of Dismissal
(2) Reference to Rule 41(a)(1)(ii)

cc: F. Kevin Bond, Esq.
Mr. G. Thomas Watkins, Intermountain, Inc.
pbf\157049-1\ltr.25

Third Judicial District Court

Anne M. Stirba
District Judge

April 29, 1996

P. Bryan Fishburn, Esq.
900 Kennecott Bldg.
Salt Lake City, Utah 84133

Re: Pack v. Intermountain, Inc.
Civil No. 960900707 CV

Dear Mr. Fishburn:

Thank you for your letter dated April 9, 1996 regarding the order of dismissal based on the stipulation of all parties and your reference to Rule 41(a)(1)(ii), Utah Rules of Civil Procedure.

Your interpretation of the rule is correct and an order of dismissal is not necessary under the circumstances of your case. I am, therefor, filing your order unsigned and ordering that the case be closed.

When I received your letter I checked to find out why you were asked to send in an order of dismissal and was informed that the clerks, at least in the Third District, have been trained to obtain orders of dismissal from counsel based on a stipulation of all parties to dismiss. Frankly, in the five years of being a judge I have become so accustomed to receiving proposed orders of dismissal based on stipulations, I had forgotten the rule and probably would have myself asked you to send in an order of dismissal even if a clerk had not.

I have learned that the clerks downstairs do close cases without involving the assigned judge when a plaintiff files a "notice of dismissal" and no answer in the case has been filed. They have, however, been trained that when they receive stipulations of dismissal which do not include orders of dismissal, to request them.

After doing some checking, it appears that this training has resulted from problems in cases in which the stipulations do not state "stipulation of dismissal," where counsel for all parties have not agreed to the stipulation and where the intended dismissal

is conditional, such as when payments need to be made by one party to another prior to dismissal. In these situations, analysis of the stipulations require legal analysis which the clerks are not permitted to do.

I asked Craig Ludwig, Clerk of the Third District Court, to check with the Second and Fourth District Clerks to learn how they handle these stipulations. Based on that, it appears that those clerks offices handle the stipulations exactly the way the clerks in the Third District are trained to do.

I appreciate you bringing this to my attention. Because the Rule 41(a)(1)(ii) stipulations of dismissal are being handled by at least the Wasatch front court clerks differently from the stated rule, I have brought this to the attention of the Utah Supreme Court Advisory Committee on Civil Procedure (of which I am a member) to assess whether the rule is a good rule or whether current practice should change to conform to the rule.

I am sending a copy of your letter dated April 9 and a copy of this response to Alan L. Sullivan, Chair of the Advisory Committee and Tim Shea, AOC representative on the committee for their information. I invite you to send to them any recommendations you may have concerning this matter.

Sincerely yours,

Anne M. Stirba
District Court Judge

AMS:jsh
cc: F. Kevin Bond, Esq.
cc w/enc: Alan L. Sullivan, Esq.
Timothy M. Shea ✓

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May 3, 1996

The Honorable Anne M. Stirba
THIRD JUDICIAL DISTRICT COURT
240 East 400 South, #304
Salt Lake City, Utah 84111

Re: Pack vs. Intermountain, Inc., Civil No. 960900707CV; (CN&M #08444.38)

Dear Judge Stirba:

Thank you for your insightful and candid letter of April 29 regarding my prior letter, Rule 41, and how it is being interpreted by clerks in the various courts. It is good to know, and is a refreshing revelation, that letters to courts regarding procedural issues are read and considered.

Interestingly, since I wrote you, I have encountered two additional instances almost identical to that which I raised in this case. This morning, in fact, Judge Reese's clerk (Third Circuit Court), advised me I needed to prepare an Order of Dismissal even though a Stipulation of Dismissal, signed by all parties to the action, had been filed.

It makes no sense to me to have a rule that states an action can be dismissed in a certain manner, if clerks of court are in effect being trained to disregard the rule. If the rule in its present form forces clerks into making decisions that they are not qualified to make, and so they are trained simply to disregard it, then I would urge that the rule be changed.

Thank you again for your letter.

Sincerely,

CALLISTER NEBEKER & McCULLOUGH

P. Bryan Fishburn, Esq.

PBF/mhm

cc: Alan L. Sullivan, Esq.
Timothy M. Shea, Esq.
F. Kevin Bond, Esq.
Mr. G. Thomas Watkins

pbf\161361-1\ltr.12

Third Judicial District Court

Courts Building
240 East Fourth South
Salt Lake City, Utah 84111
(801) 535-5677

TIMOTHY R. HANSON
DISTRICT JUDGE

October 2, 1996

Honorable Michael D. Zimmerman
Chief Justice, Utah Supreme Court
332 State Capitol
Salt Lake City, Utah 84114

Re: Rule 56, Utah Rules of Civil Procedure and Rule 4-501 of the Code of Judicial Administration

Dear Chief Justice Zimmerman:

I bring the following matters to your attention for your consideration in perhaps bringing this matter to the attention of the Supreme Court's Advisory Committee on Rules of Civil Procedure.

Rule 56(c) of the Utah Rules of Civil Procedure provides, in summary, that a motion for summary judgment shall be served ten days prior to a time fixed for a hearing thereon, and that the party adverse to the motion for summary judgment may "prior to the day of the hearing. . . serve opposing affidavits." Rule 56 contemplates that there will be a hearing on every motion for summary judgment, and that opposing affidavits can be filed at any time prior to the day of the hearing, including the day before.

Rule 4-501 and its various subparts set forth a time period and a procedure for filing and responding to a Motion for Summary Judgment before the matter is placed on the calendar for hearing, if it is placed on the calendar at all. The two rules conflict and create practical problems that a modification of Rule 56 would resolve.

I believe the operation of the Code of Judicial Administration, and specifically Rule 4-501 has been a positive step forward in resolving outstanding motions, including summary judgment, from days gone by where all matters were placed on a law and motion calendar for oral argument. The Bar seems to have accepted Rule 4-501 as an appropriate means of resolving disputed motions, and perhaps the practice has been to generally ignore the provisions of Rule 56(c) in dealing with a motion for summary judgment.

Obviously, Rule 56 has been in place for a substantial period of time in the form that it now exists, and was drafted and approved by the Court at a time prior to the implementation of the Code of Judicial Administration.

The practical problems arise in at least two instances. First, is the instance where the parties follow Rule 4-501, file their moving and supporting memoranda, together with supporting and opposing affidavits, request a hearing, and the matter is set at a future time on the law and motion calendar for oral argument. A responding party may deem during the interim, between the notice to submit and the time for the hearing, that additional affidavits would bolster the responding party's position, and under Rule 56 they can be filed the day before the oral argument is scheduled.

The second situation is when there is no response to a motion for summary judgment, an inadequate response, or just a request for hearing, and immediately prior to the hearing affidavits are filed by the responding party, which neither the moving party or the Court has had the benefit of reviewing before oral argument.

I have had both those situations arise, and in the second instance, more than once. It has been argued that Rule 56 mandates a hearing, or at least contemplates that a hearing will be held in every motion for summary judgment. A party who fails to comply with the time constraints of Rule 4-501 and has a motion for summary judgment granted against them could, and has argued that Rule 56 contemplates a hearing, and that they have the ability to file affidavits immediately prior to that hearing, and therefore, the granting of summary judgment without a hearing was in violation of Rule 56. It is also a good way to ambush the proponent of the summary judgment the day before the hearing.

In situations where a conflict has arisen between Rule 56 and Rule 4-501, I have determined that because Rule 56 is a rule that is approved and adopted by the Utah Supreme Court, that it should take preference over the imposition of the requirements of Rule 4-501, not a Supreme Court rule.

A modification of Rule 56 of the Utah Rules of Civil Procedure by the Supreme Court, and specifically subpart (c) thereof, to either make reference to Rule 4-501 and its procedure, or adopt specifically Rule 4-501 and its procedure, would solve the conflict.

If this matter is of sufficient moment, I would request your consideration in forwarding this matter to the Supreme Court's Advisory Committee for its review and possible suggestions to the Court for resolution.

Thank you for your consideration in this matter.

Very truly yours,

Timothy R. Hanson
District Court Judge

TRH:jsh

Abbott & Abbott

Attorneys-at-Law

Charles F. Abbott
Nelson Abbott

40 South 100 West, Suite 101
Provo, Utah 84601

Telephone (801) 373-1112
Facsimile (801) 373-1209

June 5, 1995

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

Re: proposed amendment to the Utah Code of Judicial Administration

Dear General Counsel:

I recently received the bulletin regarding proposed modifications to the Utah Code of Judicial Administration. After reviewing the bulletin, I discovered three areas that are not covered in the proposed modifications, but that I believe should be modified.

(1) Rule 4-501 provides that opposing memoranda must be served within 10 days of the date the moving papers were served and reply memoranda must be served within five days thereafter. I believe that the rule should be modified to give parties opposing motions for summary judgments a longer period of time, such as thirty days. That change is necessary because oppositions to motions for summary judgments often require the opposing party to gather affidavits and other documents in support of his or her memoranda. It can be extremely difficult, if not impossible, to do this in 10 days, especially when a client happens to be out of town, or lives out of state.

This modification is not without precedent. The Utah Federal Courts provide additional time to respond to motions for summary judgment.

(2) My experience has shown that most Judges in this State grant motions to extend the time to respond to motions routinely. In almost every case, these motions are granted ex-parte.

For example, about a month ago, an opposing attorney called me and asked for an extension of time. I graciously granted the extension. Apparently, at the end of the extension the opposing attorney decided he needed additional time. Instead of calling me, the opposing attorney simply went to the Judge presiding over the case and obtained additional time. The other attorney made no effort to contact me, nor did he inform the judge of my prior extension or of his lack of efforts to contact me.

After that experience, I was somewhat dismayed to learn that opposing party had an ex-parte communication with the Judge. I searched the Code of Judicial Administration, only to find that there is no provision regarding motions to extend time to respond to motions.

I believe that a provision should be added to the code to cover these situations to guide judges and lawyers in those rare situations arise. The provision should require the party moving for an extension to make reasonable efforts to notify the other attorney of the extension and then show good cause before an extension is granted.

(3) Rule 4-501(3)(b) and (f) states that all requests for hearings must be made in writing at the time the principal memoranda are filed. I believe that the courts would operate more smoothly if this requirement were changed to require the request to be made in the notice to submit for decision.

The reason that this change would be beneficial is that most judges and clerks do not see the principal memoranda until a notice to submit is filed. The judge is then forced to decide whether a hearing is warranted under Rule 4-501(c) without specific input from either counsel.

Very truly yours

Nelson Abbott

MICHAEL A. JENSEN, ATTORNEY AT LAW
First Interstate Plaza, Ninth Floor, Salt Lake City, Utah 84101-1655 • (801) 575-5000 • Fax: 575-5006

FAX LETTER to

July 10, 1996

Timothy M. Shea, Esq.
Advisory Committee on Civil Rules
Administrative Office of the Courts
230 South 500 East, Suite 300
Salt Lake City, UT 84102

Include cover letter

RE: Amendments to Rule 4-501(3), *CJA*

Dear Tim:

After our conversation today, I reviewed my suggestions for amending the above rule. If the term "principal memoranda" is a term of art, then I suggest deleting the word "principal" from the rule. This eliminates any potential conflict with other definitions that may exist. The important point to my proposed amendment is to broaden the opportunity to request a hearing. Permitting a request for hearing in the Reply memorandum in no way prejudices any party or causes any delay in the proceedings. The Notice to Submit is submitted only after the Reply memorandum is filed or after the time has run to file a Reply memorandum.

Many attorneys with whom I have discussed this rule have all shared their concerns with me. In particular, they believe that some judges abuse the rule in denying hearings when it would be in the best interests of the parties to hold a hearing on an issue. If the judge is prepared, a hearing often brings judicial efficiency. More importantly, a hearing can often shorten the litigation and reduce the costs to the litigants. Accordingly, I suggest adding a sentence to the above rule to emphasize that granting requests for hearings should be liberally allowed, keeping with the spirit of Rule 1, *Utah R. Civ. P.*, which expressly admonishes that the rules "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action." I have attached a copy of my proposed amendments, including each of the above suggestions.

Very truly yours,

Michael A. Jensen
Attorney at Law

Proposed Rule 4-501 Amendments
by
Michael A. Jensen (#7231)
July 10, 1996

(3) **Hearings.**

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits [~~with prejudice~~], either party at the time of filing their [~~principal~~] memoranda[~~um~~] as provided in paragraphs (1)(b) and (2)(c) in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided. Keeping with the spirit intended in Rule 1 of Utah's Rules of Civil Procedure, the court shall liberally grant requests for hearings.

(d) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their [~~principal~~] memoranda, a hearing on the motion shall be deemed waived.

Note: As a practical matter, the parties ought to be able to request a hearing any time prior to the filing of a Notice to Submit for Decision. Any such request would not prejudice either party in the action and would not delay the proceedings. The court does not act on a motion until a Notice to Submit is filed. Only at that time does the court decide whether a hearing should be held. Therefore, a request for hearing filed prior to that time, regardless of whether such request was included in the parties' memoranda, should be a valid and timely request.

MICHAEL A. JENSEN, ATTORNEY AT LAW
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October 20, 1995

Timothy M. Shea, Esq.
Advisory Committee on Civil Rules
Administrative Office of the Courts
230 South 500 East, Suite 300
Salt Lake City, Utah 84102

Dear Mr. Shea:

I should like to propose a change in Rule 4-501(3), *CJA*, as follows:

(3)(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the ~~principal~~ memoranda[~~um~~] as provided in paragraphs (1)(b) and (1)(c) in support of or in opposition to a motion may file a written request for a hearing.

(3)(f) If no written request for a hearing is made at the time the parties file their principal memoranda as provided in paragraphs (1)(b) and (1)(c), a hearing on the motion shall be deemed waived.

[Note: added text is underlined; stricken text is "redlined"]

These changes clarify more precisely which memoranda qualify as proper vehicles for requesting a hearing and will also avoid a judge's denial for a hearing as "untimely" when such request is made in the "Reply" memorandum provided in paragraph (1)(c). Although the initial Supporting Memorandum may not have requested a hearing, the assertions and arguments put forth in the opposing party's Opposition Memorandum may properly prompt the need for a hearing. Hence, allowing the request for a hearing in the Reply Memorandum provides a more just rule and the changes above avoid the present ambiguity as to whether a hearing may be requested in the Reply Memorandum.

Very truly yours,

Michael A. Jensen (7231)

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be served [~~at least 10 days before the time fixed for the hearing~~] in accordance with CJA 4-501. [~~The adverse party prior to the day of hearing may serve opposing affidavits.~~] The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court [~~at the hearing of the motion~~], by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to

the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

RULE 4-501. MOTIONS.

Intent:

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all district and circuit courts except proceedings before the court commissioners and the small claims department of the circuit court. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) Filing and service of motions and memoranda.

(a) Motion and supporting memoranda. All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) Memorandum in opposition to motion. The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

(c) Reply memorandum. The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(d) Notice to submit for decision. Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) Motions for summary judgment.

(a) Memorandum in support of a motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) Hearings.

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be

delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(g) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(4) Expedited dispositions. Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) Telephone conference. The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

MEMORANDUM

To: Supreme Court's Advisory Committee on Rules of Civil Procedure
From: Peggy Gentles
Subject: Bonds for Prejudgment Writs of Attachment
Date: November 22, 1996

At the last meeting, the Committee requested some samples of other states' requirements for bonds for prejudgment writs of attachment. I have compiled the following excerpts:

Multiple of amount claimed

[a bond] in a sum not less than double the amount claimed by the plaintiff if such amount be $1,000 or under or, in case the amount so claimed by plaintiff shall exceed $1,000, then in a sum equal to such amount. In no case shall an undertaking be required exceeding in amount the sum of $20,000.

MONT. CODE ANN. § 27-18-204

at least double the amount sworn to in the affidavit, or in such lesser amount as the district court in its discretion shall by order direct

N.M. STAT. ANN. § 42-9-7

a surety bond or undertaking in the sum in no case less than three thousand dollars, in the superior court, nor less than five hundred dollars in the district court, and double the amount for which plaintiff demands judgment, or such other amount as the court shall fix

WASH. REV. CODE § 6.25.080

Amount of claim

in an amount not less than the amount for which action is brought

ARIZ. REV. STAT. ANN. § 12-1524

Discretion of the court

[plaintiff] has provided a written undertaking with sufficient sureties as ordered by the court

COLO. R. CIV. P. 102

[a hearing to determine] whether the plaintiff should be required to post a bond to secure the defendant against damages that may result from the prejudgment remedy or whether the defendant should be allowed to substitute a bond for the prejudgment remedy

CONN. GEN. STAT. § 52-278d

a surety bond or an irrevocable letter of credit issued by a commercial bank . . . in an amount fixed by the court

OREG. R. CIV. P. 82A

Such bond shall be in an amount which, in the opinion of the court, will adequately compensate the defendant in the event plaintiff fails to prosecute his suit to effect, and to pay all damages and costs which may be adjudged against him for wrongfully suing out the writ of attachment.

TEX. R. CIV. P. 592

a bond on the part of the plaintiff in a sum set by the judge or the judicial officer issuing the writ of attachment in an amount sufficient to provide adequate security to the defendant for any damages the defendant may sustain by reason of the attachment

WISC. STAT. §§ 811.03

surety bond in an amount fixed by the court for the payment of all costs and damages which may be incurred or suffered by any party as a result of the wrongful issuance of the writ

WYO. STAT. § 1-15-104

Rule 64C. Attachment.

(a) When attachment may issue; affidavit. Except as provided in Rule 64A and as authorized and permitted therein, the plaintiff, at any time after the filing of the complaint, in an action upon a judgment, upon any contract express or implied, or in an action against a nonresident of this state, may have the property of the defendant, not exempt from execution, attached as security for the satisfaction of any judgment that may be recovered in such action, unless the defendant gives security to pay such judgment as provided in Subdivision (f) of this rule, by filing with the court in which the action is pending an affidavit setting forth the following: That the defendant is indebted to the plaintiff, specifying the amount thereof as near as may be over and above all legal setoffs and the nature of the indebtedness; that the attachment is not sought to hinder, delay or defraud any creditor of the defendant; that the payment of the same has not been secured by any mortgage or lien upon real or personal property, situated or being in this state, or, if originally so secured, that such security has, without any act of the plaintiff or the person to whom the security was given, become impaired; and alleging, but not in the alternative, any one or more of the following causes for attachment:

(1) That the defendant is not a resident of this state;

(2) That the defendant is, a foreign corporation, not qualified to do business in this state;

(3) That the defendant stands in defiance of an officer, or conceals himself so that process cannot be served upon him;

(4) That the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, any of his property with intent to defraud his creditors;

(5) That the defendant has departed or is about to depart from the state to the injury of his creditors;

(6) That the defendant fraudulently contracted the debt or incurred the obligation respecting which the action is brought;

(7) Such other additional facts showing probable cause for being, and that plaintiff is, justly apprehensive of losing his claim unless a writ of attachment issue.

(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. 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.

(c) Exception to sureties; justification. Within five days after the levy of any attachment, the defendant may except to the sufficiency of the sureties, by serving and filing a notice of such exception. Within five days after such exception, the plaintiff's sureties, upon notice to the defendant of not less than two days, must justify before a judge of the court, or before the clerk thereof, and upon failure to justify, and if others in their places fail to justify, at the time and place appointed, the clerk or judge shall dismiss the writ of attachment.

(d) Contents of writ; how directed. The writ must be issued in the name of the state of Utah and shall be directed to the sheriff of any county in which property of the defendant may be, and must require him to attach and safely keep all the property of such defendant within his jurisdiction not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant gives him an undertaking as provided for in Subdivision (f) of this rule; provided, that writs governing personalty only may be directed to a constable.

(e) Manner of executing writ. The officer to whom the writ is directed must execute the same without delay, and, if the undertaking provided for in Subdivision (f) of this rule is not given, as follows:

(1) Real property, standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by leaving a similar copy of the writ, description and notice with an occupant of the property, if there is one, and if not, then by posting the same in a conspicuous place on the property attached.

(1a) Growing crops (which, until severed, shall be deemed personal property not capable of manual delivery), growing upon real property standing upon the records of the county in the name of the defendant, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the growing crops to be attached, and of the real property upon which the same are growing, and a notice that such growing crops are attached in pursuance of the writ, and by leaving a similar copy of the writ, description and notice with an occupant of the real property, if there is one, and if not, then by posting the same in a conspicuous place on the real property.

(2) Real property or an interest therein belonging to the defendant and held by any other person, or standing on the records of the county in the name of any other person, must be attached by filing with the recorder of the county a copy of the writ, together with a description of the property and a notice that such real property and any interest of the defendant therein held by or standing in the name of such other person, naming him, are attached, and by leaving with the occupant, if any, and with such other person or his agent, if known and within the county, or at the residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The recorder shall index such attachment when filed, in the names both of the defendant and the person by whom the property is held, or in whose name it stands on the records.

(2a) Growing crops (which, until severance, shall be deemed personal property not capable of manual delivery), or any interest therein belonging to the defendant, and growing upon real property held by any other person or standing upon the records of the county in the name of any other person, must be attached in the same manner as crops growing upon real property standing upon the records of the county in the name of the defendant are attached by the

provisions of Subparagraph (1a) of this subdivision. The notice of attachment shall state that the crops therein described or any interest of the defendant therein, held by, or standing upon the records of the county in the name of such other person (naming him), are attached in pursuance of the writ. In addition, a similar copy of the writ, description and notice shall be delivered to such other person, or his agent, if known and within the county, or left at the residence of either, if known and within the county. The recorder must index such attachment when filed in the names of both the defendant and of the person by whom the real property is held, or in whose name it stands on the records.

(3) Personal property capable of manual delivery must be attached by taking it into custody, except as provided in the next succeeding paragraph.

(4) Cattle, horses, sheep, and other livestock, running at large and commonly known as range stock, between the 1st day of November and the next succeeding 15th day of May, must be attached by the sheriff's filing with the recorder of the county in which such stock is running at large a copy of the writ, together with a description of the property, specifying the number as nearly as may be with marks and brands, if any, and a notice that such range stock are attached; and such levy shall be as valid and effectual as if such stock had been seized and the possession and control thereof retained by the officer; provided that an attachment may, by direction of the plaintiff, be levied upon such range stock by taking the same into custody; but if additional costs are made by such levy, the same shall not be allowed to the plaintiff, if in the judgment of the court the taking of the property into the custody of the officer was unnecessary.

(5) Stocks or shares, or interest in stocks or shares, of any corporation or company must be attached by leaving with the president, secretary, cashier or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ and by taking the certificate into custody, unless the transfer thereof by the holder is enjoined or unless it is surrendered to the corporation issuing it.

(6) Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits or other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits or other personal property

in his possession or under his control belonging to the defendant, are attached in pursuance of the writ.

(7) When there are several attachments against the same defendant in different actions, they shall be executed in the order in which they are received by the officer.

(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.

(2) To secure a release of property from the attachment the defendant shall furnish a bond, with sufficient sureties, in a sum not less than the value of the property to be released, but in no case in an amount greater than necessary to obtain a discharge of the attachment. 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.

(3) The undertaking required by Subparagraphs (1) and (2) of this subdivision shall be delivered to the sheriff or other officer having the writ where the release or discharge is obtained at or before the time of service of the attachment. Where the release or discharge is sought after the writ has been executed or the property attached, the defendant must apply to the court, upon reasonable notice to the plaintiff, for an order releasing such property or discharging the attachment. The undertaking required shall be filed with the court, and a copy thereof served upon the plaintiff. Within five days after notice of the filing of the undertaking required by Subparagraphs (1) and (2) of this subdivision, plaintiff may except to the sufficiency of defendant's sureties, by serving upon the defendant and filing with the court a notice of such exception. Thereafter defendant's sureties, or others in their stead, shall justify in the manner required for justification of plaintiff's sureties under the provisions of

Subdivision (c) of this rule. Upon a discharge of the attachment or release of the property, all of the property released, if not sold, and the proceeds of any sale thereof, must be delivered to the defendant; provided that the release or discharge by the court shall not be effective until defendant's sureties have justified, or until the time for plaintiff's exception thereto has expired.

(4) The defendant may also at any time, upon such notice to the plaintiff as the court may require, make a motion to the court in which the action is pending, to have the writ of attachment discharged on the ground that the same was improperly or irregularly issued; provided however, that the court shall give the plaintiff reasonable opportunity to correct any defect in the complaint, affidavit, bond, writ or other proceeding so as to show that a legal cause for the attachment existed at the time it was issued.

(g) Liability of sureties to be set forth in undertaking. The undertaking required by Subdivisions (b) and (f) of this rule shall, in addition to other requirements, provide that each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the undertaking may be served, and that his liability may be enforced on motion and upon such notice as the court may require without the necessity of an independent action.

(h) Return of sheriff; inventory of property. The officer must return the writ of attachment to the court within twenty days after its receipt, together with a certificate of his proceedings endorsed thereon or attached thereto. Such certificate shall contain a full inventory of the property attached. To enable him to make such return as to the debts and credits attached he must request, at the time of service, the party owing the debts or having the credits to give him a memorandum stating the amount and description of each; and if such memorandum is refused, the officer must return the fact of refusal with the writ.

(i) Examination of defendant or third party. The defendant may be required to attend before the court or a master appointed by the court, to be examined on oath respecting his property. Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may likewise be required to appear before the court or a master and be examined respecting the same. The court or master, after any examination conducted pursuant to this subdivision, may order

personal property capable of manual delivery to be delivered to the officer, on such terms as may be just, having reference to any liens thereon or claims against the same, and may require a memorandum to be given of all other personal property, containing the amount and description thereof. The court may make such provision for witness fees and mileage as may be just, provided that if any third party has refused to give the officer executing the writ a memorandum of any debts or credits, requested under the provisions of Subdivision (h) of this rule, such party may be required to pay the costs of any proceeding taken for the purpose of obtaining such information.

(j) Sale of attached property before judgment.

(1) Where property is perishable. If any of the property attached is perishable, the officer must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the action, unless released or discharged, or subjected to execution upon another judgment recovered previous to issuing the attachment.

(2) Other property. Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court that the interest of the parties to the action will be subserved by a sale thereof, the court may order such property sold in the same manner as property sold under an execution, and the proceeds to be deposited in the court to abide the judgment in the action. Such order can be made only upon notice to the adverse party, in case such party has been personally served in the action.

(k) Satisfaction of judgment; deficiency; redelivery of property. If judgment is recovered by the plaintiff, the officer must satisfy the same out of the property attached by him which has not been delivered to the defendant or a claimant as herein provided, or subjected to a prior lien, if it is sufficient for that purpose, by paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him or so much as shall be necessary to satisfy the judgment; and, if any balance remains due and an execution shall have been issued on the judgment, by selling under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remains in his hands. Notice of the sales must be given and the sales conducted as in other cases of sales on execution. If, after selling all the property attached by him remaining in

his hands and after deducting his fees and applying the proceeds, together with the proceeds of any debts or credits collected by him, to the payment of the judgment, any balance shall remain due, the officer must proceed to collect the same as upon an execution in other cases. Whenever the judgment shall have been paid, the officer, upon reasonable demand, must deliver to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment.

(l) Proceedings where defendant prevails. If the defendant recovers judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the officer and all the property attached remaining in his hands must be delivered to the defendant, and the attachment shall be discharged and the property released therefrom.

(m) Liability of third persons after attachment. All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ of attachment shall be, unless such property is delivered up or transferred or such debts are paid to the officer, liable to the plaintiff for the amount of such credits, property or debts, until the attachment is discharged, or such debts, credits, or other personal property are released from the attachment, or until any judgment recovered by the plaintiff is satisfied. Payment of such debts, or delivery or transfer of such property or debts, to the officer shall be a sufficient discharge for the same as to the defendant.

(n) Release of attachment upon real property. Whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order must be filed in the office of the county recorder in which the notice of attachment has been filed, and shall be indexed in like manner.

(o) Attachment before maturity of claim. A party may commence an action upon an obligation before it is due and have an attachment against the property of the debtor upon any one or more of the grounds set forth in Subdivisions (a)(4), (5), (6) and (7) of this rule. The property attached, or its proceeds, shall be held subject to the judgment thereafter to be rendered; but no judgment shall be rendered on such claim until the obligation shall by its terms become due.

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 31, 1996
Re: Conflict Between Rule 58A(c) and §78-22-1

I have been able to confirm Ginger Smith's impression that most states require some separate, affirmative step before a court judgment becomes a lien upon real property. I researched the statutes in 12 states. Arizona, Colorado, Connecticut, Florida, Idaho, Illinois, Nevada and Oregon require the court judgment to be filed with the county recorder or some other officer separate from the court system and require that officer to record and index the judgment. Arkansas, Delaware and Georgia require the court judgment to be filed with the clerk of the court and require the clerk separately to record and index the judgment. Only Washington seems to have a system similar to Utah. In Washington, the judgment is effective as a lien upon filing and entry and those terms, at least on the face of the statutes, carry with them no notion of recording to provide notice. RCWA 4.56.190; RCWA 4.56.200.

Regardless of how the disparity between the statute and the rule is resolved, statutory amendment or rule amendment, it seems the judgments of the district court will have a dual nature. Finality of the judgment, as among the parties, should not have to wait for the ministerial step of recording the judgment. Delays of one to two days in recording the judgment will be regular; longer delays likely; and, through clerical error, permanent delays possible. Yet recording the judgment to give notice to the world seems a fundamental concept in creating a lien.

Under the attached rule amendment, this duality is contained in the rule itself. An alternative is to propose an amendment to the statute to provide that a judgment of the court does not become a lien until the judgment is recorded in the register of actions and the judgment docket. With a statutory amendment, the dual nature of the judgment would be shown by examination of the statute and the rule, which would continue to govern finality of the judgment among the parties.

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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:

(1) for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided-[~~. The~~]; and

(2) for the creation of a lien on real property when the clerk [~~shall immediately make a notation of~~] records the judgment in the register of actions and the judgment docket.

. . . .

Advisory Committee Note. The amendment of Section 78-22-1 in 1992 changed the operative act for establishing a district court judgment as a lien upon real property from "docketed and filed" to "entry," which by rule means "signed and filed." This statutory amendment created a conflict with Rule 58A(c) which, for many years prior to 1992, defined the entry of a judgment for all purposes other than the creation of a lien as signing by the judge and filing with the clerk. Rule 58A(c) merely admonished the clerk immediately to make a notation of the judgment in the register of actions and in the judgment docket. The 1992 amendment of Section 78-22-1 changed the somewhat imprecise term "docketed" into the term "entry," which is a more well-defined term.

The 1997 amendment to Rule 58A(c) is intended to eliminate the conflict between the rule and Section 78-22-1 and to return the practice to the original intent of the Legislature to require notice of a judgment before it is considered a lien. Under this amendment, the judgment is entered, as it relates to the parties and the court, when the parties have prepared

and submitted the final judgment, the judge has signed it, and the judgment is filed with the clerk. Whether the clerk takes the additional step of recording the judgment in the register of actions and the judgment docket is a ministerial step irrelevant to the finality of the judgment as it relates to the parties and the court. A lien upon real property, however, should require not only finality among the parties but also notice to the world. Notice can be achieved only by the additional step of recording the judgment in the register of actions and the judgment docket.

Under this amendment, the judgment should be recorded in both the register of actions and the judgment docket, which is separately indexed. With the use of modern computers a single clerical entry can be posted simultaneously to both the register of actions and the judgment docket, satisfying the requirement of this rule.

Utah is different from nearly all states in that the Utah statute does not require the separate, affirmative step of recording a district court judgment for it to become a lien upon real property. For a court judgment to become a lien upon real property, most states require the judgment to be filed with a county recorder or some other officer separate from the court and separately recorded and indexed by that officer. Some states provide that a judgment of the court is effective as a lien when the judgment is separately filed with the clerk of the court and separately recorded and indexed by the clerk. The Legislature has determined that entry of a district court judgment has the collateral effect of automatically becoming a lien upon the real property of the judgment debtor. The court rule regulating judgments should define the term "entry" to bring Utah practice into conformity with the rest of the states and ensure proper notice of the lien to persons other than the parties.

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.