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MEMBERS OF THE UTAH SUPREME COURT  
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Dear Committee Members:

The special holiday meeting of the Committee will be held on Wednesday, December 9, 1992, beginning at 4:00 p.m. The meeting will be held at the usual location, in the Council Room of the Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. Colin Winchester has promised to have on hand both Diet Coke and Classic Coke, all in the spirit of the season. He has not yet agreed to put up decorations in the Council Room, but he may.

Please find enclosed minutes from our meetings in September and October. Thanks to Colin Winchester and Craig Jacobsen for their careful job in preparing these minutes.

The matters that we will take up at our December 9 meeting will be as follows:

1. I have invited Bruce Plenk to address the Committee briefly on his proposal for a rule of civil procedure on writs of restitution. I have enclosed for your information correspondence and a proposed rule from Bruce.
2. We will have a report from our Rule 45 Subcommittee, chaired by Perrin Love.
3. We will have a report from Colin Winchester on progress, if any, made toward getting the Judicial Council's input on the use of recycled paper.
4. We will have a brief discussion of current developments in the discovery rules --

Members of Supreme Court Advisory Committee  
December 3, 1992  
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particularly the recently published Local Rules of the United States District Court for the District of Utah. We will discuss whether our Discovery Subcommittee, chaired by the recently returned Fran Wikstrom, should begin to formulate proposals for the Committee's consideration.

I look forward to seeing all of you on December 9. If you can't make it, or expect to be late, please give me a call so that we do not wait for you.

Very truly yours,



Alan L. Sullivan

ALS/kr  
Enclosures

cc: Craig T. Jacobsen, Esq. (w/encls.)  
Colin R. Winchester, Esq. (w/encls.)

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

**A G E N D A**

**December 9, 1992**

next mtg  
Uth Wed  
Jan 27  
4PM

1. *Welcome and approval of minutes (A. Sullivan).*
2. *Proposed rule on writs of restitution (B. Plenk).*
3. *Rule 45 modifications - report from subcommittee (T. Karrenberg).*
4. *Rule 10(d) modifications - report on Judicial Council input on use of recycled paper (C. Winchester).*
5. *General discussion on major changes in the discovery rules (A. Sullivan and F. Wikstrom).*
6. *Other business.*

MINUTES

Utah Supreme Court Advisory Committee  
on the Rules of Civil Procedure

Wednesday, December 9, 1992, 4:00 p.m.  
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Alan L. Sullivan, Colin R. Winchester, Brad R. Baldwin, Terrie T. McIntosh, Jaryl L. Rencher, David K. Isom, Hon. Ronald N. Boyce, Glenn C. Hanni, James R. Soper, Terry S. Kogan, Elizabeth T. Dunning, Francis M. Wikstrom, and Allan L. Larsen.

EXCUSED: John L. Young, Thomas R. Karrenberg, M. Karlynn Hinman, Hon. Michael R. Murphy, Perrin R. Love, Robert A. Echard, Hon. Samuel Alba, and Hon. Boyd Bunnell.

STAFF: Craig T. Jacobsen

VISITORS: Bruce Plenk and Lisa J. Watts.

**I. WELCOME**

Mr. Sullivan welcomed the members of the Committee to the meeting and introduced both Lisa Watts as a visitor on behalf of the Office of Legislative Counsel, and Bruce Plenk from Legal Services.

**II. APPROVAL OF MINUTES**

Mr. Sullivan asked the Committee for a motion to approve the minutes for both the September and October 1992 meetings. Professor Kogan so moved and Mr. Soper seconded the motion. The Committee unanimously approved the minutes for both meetings.

**III. RULE 69, PROPOSED RULE ON WRITS OF RESTITUTION**

Mr. Sullivan introduced Bruce Plenk as an expert on writs of restitution and explained that Mr. Plenk had requested the opportunity to discuss some suggestions for possible rule implementations related to writs of restitution.

Mr. Plenk began the discussion by defining "writ of restitution" as an archaic form to restore possession of property. Mr. Plenk stated that there currently exists a problem with writs of restitution because there is no guidance in the rules on how to execute a writ of restitution. He explained that a long line of cases has clarified that self-help evictions are

improper, but reiterated that the appropriate procedure is not provided for in any rules. Mr. Plenk described a survey under taken by Legal Services to determine whether the Bar recognizes a generally accepted method to complete evictions. The survey revealed that eviction procedure uniformity, that the lack of uniformity invites additional litigation, and that it is presently impossible to advise clients as to appropriate methods to complete evictions. Mr. Plenk indicated this problem is growing because of the current housing shortage within the state. Mr. Plenk suggested for these reasons that a written rule should be adopted so that all lawyers will understand uniform procedure for issuance of writs of restitution in unlawful detainer actions. Mr. Plenk stated that he has prepared a draft of a rule that provides a uniform procedure. He indicated that this draft would assist sheriffs, constables and parties to eviction proceedings in completing eviction proceedings. Mr. Plenk indicated that he had submitted this draft to the judicial counsel last spring, but that Mr. Winchester had suggested that any such provision should be part of the Rules of Civil Procedure.

Following Mr. Plenk's initial remarks, Mr. Isom asked Mr. Plenk whether eviction proceedings raise due process issues. Mr. Plenk responded that they do not. The Committee then discussed in some detail possible due process issues, related to eviction proceedings. The Committee formed no conclusion.

Mr. Sullivan asked Mr. Plenk how other states have addressed this issue. Mr. Plenk responded that although he has undertaken no formal study, he has seen both rules and statutes addressing writs of restitution. Mr. Plenk indicated that he personally believes that the issues raised by writs of restitution are similar to the issues relevant to writs of execution and should, therefore, be in the Rules of Civil Procedure. Mr. Sullivan followed Mr. Plenk's response by asking whether implementation of a rule requiring a landlord to hold property after an eviction would be a substantive change in the law that is beyond the power of the Supreme Court. Mr. Plenk responded that he did not think that such a change would be substantive. Mr. Plenk compared such a rule to rules related to writs of attachment. Mr. Sullivan disagreed with Mr. Plenk, stating that the interests of plaintiffs in an attachment proceeding were different than the interests of a plaintiff in a writ of restitution proceeding. The Committee further discussed whether a rule such as the rule suggested by Mr. Plenk could be adopted as a Rule of Civil Procedure.

The Committee also discussed the notice requirements provided in Mr. Plenk's draft. Mr. Wikstrom asked Mr. Plenk whether the sheriff would eat the cost incurred to store property

seized pursuant to a writ of restitution. Mr. Plenk responded that he did not think so. In his experience, 90% of the people evicted from property pick up their personal property within five days of eviction. Mr. Sullivan also asked Mr. Plenk whether there were any problems related to lessors' liens. Mr. Plenk stated that lessors' liens are rarely used. He indicated that he has seen only three such cases in more than five years of practice in the area of landlord/tenant law practice.

Mr. Soper asked Mr. Plenk what language in the draft would be objectionable to landlords. Mr. Plenk responded that the five days notice requirement, the storage requirement and the prohibition of evictions on weekends and evenings would possibly be objectionable to landlords. Magistrate Boyce suggested that the language prohibiting evictions on weekends and evenings could pose a significant problem, especially with individuals who have learned how to manipulate such procedural requirements. Mr. Plenk responded that requirement in Rule 69 of a possession bond alleviates such problems in eviction proceedings.

Mr. Sullivan told the Committee that it must decide whether to organize a subcommittee (consisting of a Committee member, Mr. Plenk, and a representative of landlords) or whether the creation of such a rule is beyond the authority of the Committee. Mr. Rencher responded, stating that he agreed with Mr. Plenk's position but that the Committee ought to check with the Supreme Court liaison prior to taking further action. Mr. Plenk stated that he has already spoken with James H. Deans, an attorney who represents many local landlords in eviction proceedings, and that Mr. Deans had agreed to serve on a subcommittee that may be organized by the Committee. Magistrate Boyce stated that the Committee should contact the Supreme Court liaison before doing any further work, particularly because the rule appeared to be a mixture of procedural and substantive law.

Mr. Isom concurred with Magistrate Boyce but suggested that the Committee give the liaison some idea as to the Committee's sentiments regarding the proposed rule. The Committee members generally agreed with Mr. Isom's comments.

Ms. McIntosh suggested that the Committee analyze how other states have addressed the issue. Mr. Sullivan concurred and also indicated that it would be useful to have a model rule to analyze.

There was further discussion regarding whether Mr. Plenk's proposal was substantive in nature. Magistrate Boyce reiterated that the Committee should not tempt the legislature to exercise its constitutional majority and therefore, should raise the issue with the Supreme Court before taking further action.

There was a consensus among Committee members that the Committee should communicate with the Supreme Court before proceeding further. Mr. Sullivan asked Ms. Watts if she had any comments. Ms. Watts stated that her only concern was that the legislature not be perceived as an entity waiting for any opportunity to flex its constitutional majority.

After some discussion by Committee members as to other possible ways to address the issues raised by Mr. Plenk, Mr. Sullivan indicated that he would contact the Supreme Court liaison.

Mr. Plenk thanked the Committee members for their time and excused himself.

#### IV. RULE 45 MODIFICATIONS

Mr. Sullivan opened the discussion by stating that for the time being, the Committee had hesitated from pursuing global changes to the discovery rules. However, due to internal inconsistencies with Rule 45 and other state rules governing the issuance of subpoenas and changes to Federal Rule 45, the Committee established a subcommittee to analyze the issuance of subpoenas. Mr. Sullivan asked Ms. Dunning to report on the subcommittee's progress.

Ms. Dunning stated that the Committee addressed the Third District Court's concern for the misuse of subpoenas that are issued in blank. In particular, some attorneys provide inadequate notice and fail to serve opposing counsel with subpoenas that are issued during the course of litigation. Therefore, the subcommittee believed that while attorneys should be able to obtain subpoenas in blank, there also should be requirements regarding notice and service to opposing counsel. Mr. Sullivan indicated that there seems to be some consensus that ten days are an appropriate notice period.

Magistrate Boyce asked whether the subcommittee had addressed whether subpoenas should be issued by the court clerk or whether attorneys ought to be able to issue subpoenas as is now permitted by the federal rule. Responding to Magistrate Boyce, Ms. Dunning rearticulated the concerns of the subcommittee. In addition to issues of proper notice, service and time limits, the subcommittee was concerned that subpoenas to parties not become a way to circumvent other discovery rules. Thus the subcommittee discussed the possibility that Utah adopt the federal requirement that the rule's language be printed on the subpoena to provide notice to subpoenaed parties of their rights. Ms. Dunning also indicated that the subcommittee had discussed concerns related to costs, particularly when voluminous

records are the subject of the subpoena. Finally, Ms. Dunning reported that the subcommittee had addressed methods for providing documents to opposing counsel, an issue not addressed in the federal rule. The subcommittee had discussed the possibility of including a provision requiring the party issuing the subpoena to provide copies of any documents obtained to other parties in the litigation.

Magistrate Boyce indicated that in his experience, there are several problems with the new federal rule 45 that could be alleviated in any new rule adopted by Utah. Magistrate Boyce suggested that the rule should require the subpoena to (1) specify the place that documents will be produced, (2) contain language clarifying that the subpoenaed party has no obligation to make copies of subpoenaed documents, and (3) contain language clarifying that the subpoena comes under the authority of the court, not the attorney issuing the subpoena. Magistrate Boyce also suggested that the subcommittee analyze the provisions related to contempt.

There was further discussion by Committee members regarding whether the rule should contain provisions addressing stating that service in other states. Finally the Committee members discussed miscellaneous issues related to subpoenas. Thereafter, Ms. Dunning asked whether the subcommittee should move to draft a proposed rule. Mr. Sullivan responded affirmatively.

**V. RULE 10(d) MODIFICATIONS - REPORT ON JUDICIAL COUNCIL INPUT ON USE OF RECYCLED PAPER**

Mr. Sullivan reported that many attorneys supported a rule change that would permit the use of recycled paper. After some discussion, Mr. Winchester stated that the judicial council would be holding a meeting on December 21, 1992, and that he would raise the issue in that meeting.

**VI. GENERAL DISCUSSION ON MAJOR CHANGES IN THE DISCOVERY RULES**

Mr. Sullivan stated that the Committee is currently waiting for implementation of the major changes that have been implemented in the federal rules. These changes will take effect in approximately one year. Mr. Sullivan also reported that there is a subcommittee at the local federal district level that has proposed changes to the discovery rules. Mr. Wikstrom expressed disappointment in the local federal district rule changes. He explained that they are more watered down than the proposed changes at the federal level. Mr. Wikstrom acknowledged support for wholesale changes to discovery practice. Mr. Wikstrom stated



that subject to the Committee's approval, the subcommittee would like to move forward with drafts of changes to the state's discovery rule.

Magistrate Boyce reported on the federal rule changes. He predicted that ultimately, the local federal district discovery rules will conform with the changes implemented at the federal level. Magistrate Boyce stated that the most controversial provision seems to be the mandatory discouragement requirement. Professor Boyce stated that in his opinion, if the Committee makes any changes, the changes should parallel the changes made to the federal rules and any such changes should become effective simultaneously with the changes to the federal rules. Magistrate Boyce stated that any other direction would create mass confusion among practitioners.

Mr. Sullivan asked the Committee whether there was any opposition to working towards a change in the Utah discovery rules. Mr. Larsen voiced opposition, stating that changes to the Utah Rules will open a can of worms and that Utah should not conform to the federal rules merely to create uniformity. The Committee members discussed the merits of the present discovery procedure versus the wholesale changes provided by the proposed changes to the federal rules. After some discussion, Magistrate Boyce indicated that the Committee must move forward if it is going to implement changes because the federal rules changes will soon be upon us. Mr. Sullivan stated that he would reactivate the subcommittee.

## **VII. CONCLUSION**

There being no further business, Mr. Sullivan adjourned the Committee until the next meeting, scheduled for January 27, 1993.