M I N U T E S

SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF CIVIL PROCEDURE

Wednesday, June 23, 1993, 4:00 - 6:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT:

Alan L. Sullivan
Francis M. Wikstrom
Perrin R. Love
Prof. Terry S. Kogan
M. Karlynn Hinman
Hon. Boyd Bunnell
Terrie T. McIntosh
Thomas R. Karrenberg
Jaryl L. Rencher
Prof. Ronald N. Boyce
David K. Isom
Perrin R. Love

EXCUSED:

Alan L. Larson
Glenn C. Hanni
Elizabeth T. Dunning
Brad R. Baldwin
Hon. Michael R. Murphy
John L. Young
Hon. Samuel Alba
Robert A. Echard
Mary Anne Q. Wood
James R. Soper

STAFF:

Colin Winchester

GUEST:

Kim S. Christy
James Deans
Bruce Plenk

1. **WELCOME.** Mr. Sullivan welcomed the Committee members to the meeting and indicated that the Administrative Office of the Courts would next publish proposed rules in late July or early August. If possible, proposed Rule 45 should be completed and submitted for comment in that publication.

2. **WRITS OF RESTITUTION.** The Writ of Restitution Subcommittee, comprised of Ms. McIntosh, Mr. Plenk and Mr. Deans, had distributed in the packet a clean copy of the proposed rule. Ms. McIntosh explained that the subcommittee had attempted to draft a comprehensive rule, which by its nature included both substantive

law and procedural law. The subcommittee felt that it was necessary to include substantive provisions in order to fully address the issues. She also explained that many of the provisions were drafted in an attempt to balance the competing concerns of landlords and tenants, and that the subcommittee, through research provided by Mr. Plenk's law clerks, had adapted several of the provisions from current laws in other states. Mr. Plenk distributed a copy of the proposal which includes cross-references to those other states' laws.

Mr. Sullivan suggested that the word "writ" be avoided and that the subcommittee refer to the document as an "order for restitution of premises." Mr. Plenk noted that "writ of restitution" appears in Utah Code Ann. § 21-2-4.[1]

Mr. Sullivan suggested that the proposal be reorganized as follows:

(a) -- Scope.
(b) -- Contents of Order (Current (b)(1)).
(c) -- Service of Order (Current (b)(2) through (b)(4)).
(d) -- Enforcement of Order (Current (b)(5) through (b)(7)).
(e) -- Disposition of Personal Property (Current (c)).

Ms. Hinman asked whether the proposal applies to commercial situations or only to residential situations. The proposal refers to "residing at the property" which tends to imply that it has only residential application. Ms. Hinman suggested that the proposal be amended to clearly apply to both residential and commercial situations.

Mr. Sullivan, referring to paragraph (a), asked whether there are "any other court orders" to which the process could apply. Mr. Plenk indicated that the Mobile Home Park Residency Act may include such orders. The subcommittee will review the Mobile Home Park Residency Act and amend the proposal accordingly.

Mr. Sullivan suggested that the statutory references throughout the proposal be deleted.

Mr. Sullivan suggested that paragraph (b)(1)(A) is duplicative of U.R.C.P. 10, and is therefore unnecessary.

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[1] The Utah Code has one additional reference to "writ of restitution." That is found in the Mobile Home Park Residency Act at § 57-16-9.

Mr. Sullivan noted that the subcommittee needs to determine whether there should be only a judgment which includes the language contemplated by the proposal, or whether there should be a separate order in addition to a judgment.

Regarding paragraph (b)(1)(B), Mr. Deans noted that the court should be given the discretion to increase or decrease the "three business days" time period. The Committee discussed several scenarios which would require a time period shorter or longer than the proposed three days.

Mr. Sullivan noted that the subcommittee should review the Process Server Act and incorporate appropriate amendments in the proposal.

Mr. Karrenberg noted that if the subcommittee recommends an order in addition to a judgment, the proposal should specify what needs to be served. Should it be a certified copy of the order, the original order, a regular copy of the order, or some other form of the order.

Mr. Sullivan suggested that the subcommittee simply refer to the personal service provisions found in U.R.C.P. 4(e), rather than specify modes of appropriate service within the proposal.

Mr. Rencher suggested that "plaintiff" and "defendant" be replaced with "landlord" and "tenant." Mr. Plenk however, preferred the "plaintiff" and "defendant" designations.

Mr. Sullivan suggested that paragraph (b)(7), addressing returns of service, be combined with the provisions regarding service.

Mr. Sullivan suggested that the provisions in paragraph (b)(6) limiting the time of day during which a restitution order can be enforced are substantive rather than procedural. Mr. Love agreed. Mr. Plenk reminded the Committee that the proposal was intended to be comprehensive, and that by necessity, it contained both substantive and procedural law. Mr. Kogan expressed concern that the time of day requirement could result in enforcement while working adults were out of the home but children were home.

Mr. Sullivan suggested that the reference to "suitable storage facilities" in paragraph (c) was too specific, and that the proposal should simply require that personal property be safely stored and that the tenant be required to pay for said storage.

Mr. Kogan noted that paragraph (c)(1) should specifically refer to personal property removed by the sheriff or constable. Mr. Plenk indicated that paragraph (b)(5) already includes such a reference.

Mr. Deans noted that storage fees may result in additional debt which the tenant will be unable to pay.

Mr. Sullivan suggested that the provisions of paragraph (c)(5), and the subsequent provisions of the proposal dealing with the disposal of personal property if the tenant fails to retrieve the same, should be deleted. Mr. Rencher expressed concern that if those provisions are deleted, the process server would be exposed to potential liability to the storage facility without a means of terminating that liability at some point.

Judge Bunnell indicated that the parties, not the court, should send the notices required by the proposal.

Mr. Rencher noted that the provisions of paragraph (c)(8), which allow the tenant to request a hearing within ten days, should be specifically tailored to apply only to the storage and disposition of property, and not include the removal of the tenant from the premises.

The subcommittee will revise the proposal pursuant to the Committee's discussion and report back with a new draft in September.

3. **RULE 45.** Mr. Love reported on the current draft of proposed Rule 45 as distributed in the Committee mailing. He noted that federal rule 45 requires that the text of paragraphs (c) and (d) be reprinted verbatim on the subpoena form. Mr. Sullivan asked whether the state versions of paragraphs (c) and (d) should be included verbatim, whether Mr. Love's summary of the applicable provisions of those paragraphs should be included on the subpoena form, or whether the provisions or a summary of the provisions should be included on a separate explanation sheet.

Mr. Isom suggested that redundant provisions in paragraph (a)(1)(B) be stricken.

Mr. Sullivan suggested that paragraph (a)(1)(D) should be amended to reflect a standard of substantial conformance.

Mr. Love indicated that an Advisory Committee Note should be drafted to explain that paragraph (a)(3) also applies to pre-action discovery pursuant to U.R.C.P. 27. He also noted that the subcommittee had deviated from paragraph (a)(2) of the federal rule

by changing "documents and evidence" to "documents and things." The Committee approved that deviation. Ms. Hinman noted that the word "evidence"

also appears in paragraph (b)(3)(B), and that it should be amended to be consistent with (a)(2). The Committee discussed the interplay between paragraphs (b)(3)(B), (a)(2), and the scope of discovery as set forth in Rule 26. It was determined that the scope of discovery sought by subpoena should be limited or defined by Rule 26, rather than by Rule 45.

Mr. Rencher questioned whether a party's attorney should be allowed to serve a subpoena as proposed in paragraph (b)(1). The Committee generally agreed that a party's attorney should be allowed to serve subpoenas.

Mr. Sullivan suggested that the words "for the Service of Process" be stricken from paragraph (b)(1), and that the third sentence of that paragraph should be amended to include the State of Utah, state officers and state agencies. Mr. Sullivan also suggested that paragraph (b)(3) be rewritten to achieve gender neutrality.

Mr. Rencher questioned whether an attorney could subpoena someone to his or her office, using Rule 45, and take a statement of that person under oath, without notifying the other party's counsel. The Committee discussed the question at length, and agreed to resolve the issue by amending paragraph (a)(1)(C) as follows:

> . . . command each person to whom it is directed to attend and give testimony <u>at a trial, hearing or deposition</u> to produce and permit inspection. . . .

The Committee determined to deal with the rest of Rule 45 at its July meeting.

4. <u>LEGISLATIVE ISSUES.</u>

a. <u>Continuing Garnishments.</u> Mr. Sullivan summarized the legislative proposal to create a continuing garnishment within the confines of Rule 64D. Prior to the meeting, he spoke with a member of the garnishment subcommittee and was reminded that the Committee had previously chosen not to create a continuing garnishment because the statutes only allowed for continuing garnishments in Office of Recovery Service type situations. The Committee did not feel that it had the authority to create a continuing garnishment in the absence of express statutory authorization.

Prof. Boyce noted that there might be a federal prohibition against such garnishments, and requested that staff research that issue.

Judge Bunnell noted that the major problem with Office of Recovery Service continuing garnishments is improper accounting procedures. As a result, the debtor's wages continue to be garnished after the account has been paid in full.

Prof. Boyce noted that continuing garnishments are very oppressive, and that they might be justified for such purposes as tax collection and child support, but may not be justified for the collection of commercial debts.

Mr. Sullivan indicated that he would approach Mr. Baldwin and ask Mr. Baldwin to study the matter further over the summer.

5. **RULE 65B AND OTHER SUBSTANTIVE RULES.** Mr. Sullivan informed the Committee that the Legislature's Judicial Rules Review Committee had received a report from two Assistant Attorneys General suggesting that Rule 65B be moved from the Rules of Civil Procedure to statute. Mr. Winchester indicated that there are several other rules, including the new proposed rule on writs of restitution, that also contain substantive remedies. The Committee discussed the appropriate placement of such rules, and asked Mr. Sullivan to speak with the members of the Supreme Court. It was also determined that Mr. Sullivan would address the members of the Judicial Rules Review Committee and the Legislature's Interim Judiciary Committee on those issues.

6. **FUTURE MEETINGS.** Although the Committee had originally planned to meet in September, it was determined that the Committee should meet again on July 21 in order to complete its work on Rule 45.

7. **ADJOURNMENT.** There being no additional business, the Committee meeting was adjourned.