

LAW OFFICES OF
VAN COTT, BAGLEY, CORNWALL & MCCARTHY

A PROFESSIONAL CORPORATION

SUITE 1600

50 SOUTH MAIN STREET

SALT LAKE CITY, UTAH 84144

TELEPHONE (801) 532-3333

FACSIMILE (801) 534-0058

TELEX 453149

ADDRESS ALL CORRESPONDENCE TO

POST OFFICE BOX 45340

84145-0450

WRITER'S DIRECT DIAL NUMBER

November 30, 1994

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

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

BENNETT, HARKNESS & KIRKPATRICK
1874-1890

BENNETT, MARSHALL & BRADLEY
1890-1896

BENNETT, HARKNESS, HOWAT
SUTHERLAND & VAN COTT
1896-1902

SUTHERLAND, VAN COTT & ALLISON
1902-1907

VAN COTT, ALLISON & RITER
1907-1917

VAN COTT, RITER & FARNSWORTH
1917-1947

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

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

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

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

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: December Meeting

Dear Advisory Committee Members:

Our next meeting will be held on Wednesday, December 7, 1994 beginning at 4:00 p.m. The meeting will be held at the usual place, the Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. Please let me know if you will not be able to attend or expect to be late.

I have enclosed for your review minutes of our October 26 meeting prepared by Julie Fortuna. I have also enclosed Julie's revised minutes of our meeting of September 28. Julie has done an excellent job in compiling these minutes; they provide a crisp and informative review of our work over the past several months. Thanks to Julie for doing such a good job.

At our meeting on December 7 we will consider the following:

30
45
69 } 1/1/95
VAR prior to 1/1/95
63 disqual of judge - no underline
640
expires 12/16/94

1. Colin Winchester will provide us with an update on the status of recent rule changes recommended by our committee. In particular, we will ask Colin for a review of rule changes that have been adopted by the Supreme Court and their effective date, and an indication of those rules that are now out for comment.

2. We will have a brief report from our subcommittee on forms (made up of me and Tom Karrenberg) about plans for revisions to the forms published behind the rules of civil procedure.

3. We will have a discussion on proposed changes to Rule 4 to provide for service of the summons and complaint by mail. Please find enclosed a letter to me from Salt Lake County Sheriff Aaron D. Kennard, with a proposal for changes that

SUPREME COURT ADVISORY COMMITTEE
ON CIVIL PROCEDURE

November 30, 1994

Page 2

parallel recent changes in the federal rules. A representative of the County Sheriff's Office will be our guest at the meeting.

4. We will again discuss of our old friend Rule 65B on extraordinary relief. Please find enclosed a letter from Assistant Attorney General Lorenzo K. Miller asking for revisions to that rule. We have invited Mr. Miller and other representatives of the attorney general's office to address the committee.

5. We have been asked by the Supreme Court and the Administrative Office of the Courts to review proposed small claims forms and instructions. I enclose for your information a copy of Colin Winchester's September 7, 1994 letter to me, together with the forms, rules and procedures adopted for the small claims court. I ask you to review them carefully and, at our meeting next Wednesday, provide Colin with your comments.

6. We will have status reports from other subcommittees on the 10-day summons procedure under Rule 3 (Colin Winchester), supersedeas bonds (Jim Soper and Colin Winchester), Rule 68 offers of judgment (Terry Kogen and Mary Anne Wood), and Rule 56 affidavit revisions (Judge Stirba). *got Task Force/Collection/forwarded to AS*

I look forward to seeing all of you next Wednesday.

enclosed

Very truly yours,



Alan L. Sullivan

ALS/kr

Enclosures

cc:

Julie Fortuna, Esq. (w/encl.)

Colin Winchester, Esq. (w/encl.)

Captain Van Wagoner, Salt Lake County Sheriff's Office (w/o encl.)

Lorenzo K. Miller, Esq. (w/o encl.)

AGENDA

Utah Supreme Court Advisory Committee on Civil Procedure

December 7, 1994



Happy Holidays!

1. *Welcome and Approval of Minutes (Alan Sullivan)*
2. *Update on the status of recent rule changes and proposals (C. Winchester)*
3. *Rule 4: Proposal for change to permit service of summons and complaint by mail. (Salt Lake County Sheriff's Office)*
4. *Rule 65B: Proposal for changes from the Attorney General's office (Lorenzo Miller)*
5. *Small claims forms (C. Winchester)*
6. *Rule 3: Ten-day summons procedure (C. Winchester)*
7. *Supersedeas bonds (J. Soper and C. Winchester)*
8. *Rule 68: Offers of judgment (T. Kogan and M. Wood)*

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, December 7, 1994, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Hon. Boyd Bunnell, Glenn C. Hanni, M. Karlynn Hinman, David K. Isom, Terry Kogan, Perrin R. Love, Terrie T. McIntosh, Hon. Michael R. Murphy, James R. Soper, Alan L. Sullivan, Francis M. Wikstrom, Mary Anne Q. Wood

EXCUSED: Hon. Samuel Alba, Brad R. Baldwin, Hon. Ronald N. Boyce, Elizabeth T. Dunning, Robert A. Echard, Thomas R. Karrenberg, Allan L. Larsen, Jaryl L. Rencher, Honorable Anne M. Stirba, John L. Young

VISITORS: Bob Peterson, Salt Lake County Sheriff's Office; Lorenzo Miller, Attorney General's Office

STAFF: Colin R. Winchester and Julie Fortuna

I. WELCOME AND APPROVAL OF MINUTES

Mr. Sullivan welcomed the Committee members to the meeting and wished everyone happy holidays! The September 28, 1994 and the October 24, 1994 minutes were approved without correction.

II. UPDATE ON THE STATUS OF RECENT RULE CHANGES AND PROPOSALS

Mr. Winchester reported that Rules 30(f) (Depositions), 45 (Subpoenas) and 69 (Supplemental Proceedings and Execution) had been submitted to the Utah Supreme Court and were adopted with the Committee's proposed changes effective January 1, 1995. Mr. Winchester also reported that the Committee's changes to Rule 64D (Garnishment) and to Rule 63 (Disqualification of a Judge) were published for public comment through December 16, 1994. Mr. Winchester indicated that Rule 63 would be republished because the Committee's proposed changes were not underlined when it was originally published.

III. RULE 4: PROPOSAL FOR CHANGE TO PERMIT SERVICE OF SUMMONS AND COMPLAINT BY MAIL

Mr. Sullivan presented a letter from Aaron D. Kennard, Sheriff for Salt Lake County and Vice President of the Utah Sheriff's Association, addressing concerns over the

increase in the number of civil processes served by the Salt Lake County Sheriff's Office and proposing changes to Rule 4. Mr. Sullivan introduced Bob Peterson, also a sheriff from the Salt Lake County Sheriff's office, and invited him to address the Committee on these issues.

Mr. Peterson presented the Committee with a packet of information containing statistical information on the number of summons served by the Salt Lake County Sheriff's Office from January 1990 through October 1994, a proposed amendment to Rule 4, and a copy of the Rule 4 as it currently reads in both the federal and state rules of civil procedure. Mr. Peterson indicated that although the statistical information contained in the packet was indicative, the Salt Lake County Sheriff's Office was even busier serving civil processes. He reported that thirty to forty percent of the papers served by the Salt Lake County Sheriff's office are summons and complaints which are served at no cost to the government and at \$6.00 plus mileage to non-governmental entities, although the actual cost to serve is \$15.00 to \$20.00 per summons. Mr. Peterson indicated that serving civil processes keeps two to three sheriffs busy full time. Mr. Peterson did not have any statistical information regarding constables, but indicated that the amount constables charge to serve civil processes is not limited by a fee schedule.

Mr. Peterson informed the Committee that eighty percent of civil processes served by mail under the federal counterpart to Rule 4 are accepted, according to information gathered over an approximate two year period of time. Accordingly, Mr. Peterson proposed that the Committee consider amending subparagraph (g) of Rule 4 to allow service of all summons by mail-back. Mr. Peterson generally proposed that a plaintiff provide a defendant two copies of a summons with one to be mailed back. If a summons did not come back within thirty days, the court clerk would have the defendant personally served with costs assessed to the defendant.

Mr. Kogan inquired whether the Mr. Peterson's proposed changes to Rule 4 were identical to the federal Rule 4 and suggested that the two be uniform. Judge Bunnell inquired whether it would be a good idea to burden court clerks with another duty. Judge Murphy suggested serving by U.S. Mail with return receipt. Ms. Hinman suggested raising the sheriff's fee schedule. Mr. Kogan asked the Committee to consider how the proposed changes to Rule 4 would affect personal jurisdiction requirements and service in a foreign country. Judge Bunnell inquired about the frequency of ten-day summons to which Mr. Peterson responded that the Salt Lake County Sheriff's Office served very few. Mr. Winchester indicated that in juvenile court practice, summonses are mailed and if the parties fail to appear, summonses are then personally served.

Mr. Love suggested that a comprehensive analysis be done on Rule 4 and further suggested that the Committee hear from constables regarding their experience with service under Rule 4. Mr. Sullivan agreed with Mr. Love and suggested that the Committee also consider ten-day summons, who to burden --the plaintiff or the clerk, and the proof when served mechanism. Mr. Sullivan appointed Mr. Love to follow up on the Committee's discussion of Rule 4 by creating a subcommittee to review practice under Rule 4 on both the state and federal level. Mr. Sullivan asked Mr. Love to prepare a report of the subcommittee's findings for the Committee to review in the near future so that the Committee could make recommendations to the Utah Supreme Court. Mr. Sullivan

volunteered to send Mr. Peterson the results of the Committee's review of Rule 4 and thanked him for addressing the Committee.

IV. RULE 65B: PROPOSAL FOR CHANGES FROM THE ATTORNEY GENERAL'S OFFICE

Mr. Sullivan introduced Lorenzo Miller from the Utah Attorney General's Office and invited him to address the Committee. Mr. Miller informed the Committee that he represented the Utah Board of Pardons and Parole on post-conviction writs and had dealt with every aspect of Rule 65B except for subparagraph (b). Mr. Miller informed the Committee that judges, attorneys, and pro se litigants dealing with Rule 65B do not understand how Rule 65B works procedurally and that as a result, Rule 65B is dealt with in an inconsistent, confusing, and ad hoc manner. Specifically, Mr. Miller indicated that Rule 65B lacked discovery time limits, response time limits, and created confusion about whether responses were allowed if not ordered. Mr. Miller also inquired whether subparagraphs (b), (c) and (e) were mutually exclusive and what parties should be named in a 65B proceeding (the State, the Board of Pardons, etc.). Mr. Miller indicated subparagraph (e) was especially unclear.

Mr. Miller presented the Committee with a rough draft of proposed changes to Rule 65B and indicated that the draft emphasized the parts of Rule 65B that needed to be clarified. Mr. Miller indicated that a committee at the Attorney General's Office was reviewing Rule 65B and considering proposing legislation that would clarify Rule 64B, but believed the process would take years.

Judge Murphy inquired whether Rule 65B encompassed an appellate review and Mr. Sullivan indicated that it contemplated an original proceeding and not an appellate procedure. Judge Murphy indicated that part of the problem with Rule 65B was that prisoners throw in subparagraph (e) without reason. Judge Murphy also indicated that prisoners use the same procedure for both subparagraphs (a) and (b) despite the fact that different procedures apply. Judge Bunnell indicated that a judge needed wide discretion in dealing with 65B because of the unusual circumstances it is meant to encompass. Mr. Sullivan agreed.

Mr. Sullivan suggested that a subcommittee form to review Rule 65B abuses and areas of concern discussed by the Committee, and to review the draft of proposed changes to Rule 65B submitted by Mr. Miller. Judge Murphy suggested that someone from the Administrative Law Section and someone from the Attorney General's office be included in the subcommittee. Mr. Sullivan asked Mr. Miller and Mr. Soper to be on the subcommittee and suggested that he also be on the subcommittee as he had drafted the revisions to Rule 65B that are currently in place.

V. SMALL CLAIMS FORMS

Mr. Winchester presented a package of small claims forms with accompanying instructions containing proposed changes to the Committee for review. Mr. Winchester informed the Committee that when the Utah Supreme Court originally adopted the small

claims forms and instructions, it ordered that they be published for comment, used on an interim basis, and then referred to the Committee for further review and recommendation. Mr. Winchester indicated that the forms had been published, public comment had been received, and the subcommittee that had originally drafted the initial forms had proposed the changes included in the package presented to the Committee.

Mr. Sullivan informed the Committee that he had read through the proposed language changes and endorsed them. Mr. Sullivan asked Committee members to submit any additional revisions or comments to Mr. Winchester.

VI. RULE 3 TEN-DAY SUMMONS

Mr. Winchester indicated that the Utah Supreme Court had given the Committee authority to thoroughly review the ten-day summons rule and make recommendations. Mr. Winchester informed the Committee that a Utah State Bar report on collection abuses had recently been issued and that he would provide a copy for the Committee to review at their next meeting. Mr. Winchester suggested that the Committee hear from representatives from Utah Legal Services, the Circuit Court Board of Judges, and someone with a contingency fee practice regarding the rule.

VII. SUPERSEDEAS BONDS

Mr. Soper indicated that he and Mr. Winchester had reviewed surrounding states' practices with respect to supersedeas bonds and presented a one-page summary detailing their conclusions to the Committee. Mr. Soper indicated that he found no trend with respect to supersedeas bonds and reported that some states do not reference bonds and others require the posting of a bond or cash. Mr. Soper presented the Committee with proposed changes to clarify Rule 62.

Discussion ensued regarding whether Rule 62 could be made easier procedurally, whether a bond had to be commercial, and whether the bonding procedure could be made less expensive. Mr. Soper asked whether a cash could be posted in lieu of a bond and whether an affidavit of worth would suffice. Mr. Soper indicated that providing an affidavit of worth may violate the insurance code. Ms. Wood also indicated that it would not be possible for nonprofits to provide affidavits of worth.

Mr. Winchester suggested that the Committee ask Brad Baldwin to address the Committee regarding the bankruptcy ramifications of posting cash, including whether it would be treated as a preference requiring court approval or whether it would render a debtor insolvent. Mr. Hanni suggested the Committee consult the Insurance Commission.

Mr. Soper indicated that the Rule 62 contemplates an uncommercial surety and volunteered to propose changes to the rule in quo warranto proceedings. Judge Bunnell suggested Rule 62 condition a stay on court approval rather than expressly granting the court discretion. Judge Murphy asked the committee to consider the effect of Rule 62 revisions on Rule 64, sureties in extraordinary procedures, and unlawful detainer. Mr. Sullivan proposed that the Committee consider the issues further at its next meeting and volunteered to contact

someone knowledgeable about bankruptcy preference issues and someone in the practice of posting bonds.

VIII. RULE 68 OFFERS OF JUDGMENT

Mr. Kogan addressed the Committee and indicated that he and Ms. Wood had reviewed literature on fee shifting published by the National Center for State Courts. He indicated that they had reviewed Rule 68 and considered the possibility of expanding the definition of costs to include fees. Mr. Kogan referred to an article by William Schwarzer in *Judicature*, 1992, proposing revisions to Rule 68 and asked the Committee whether it was interested in the article. Mr. Kogan volunteered to draft a memo discussing the article for the Committee's next meeting.

IX. CONCLUSION

Mr. Sullivan reminded the Committee that the next meeting would be held on January 25th, 1995 and that the Committee would continue thereafter to meet on the fourth Wednesday of every month. There being no further business, Mr. Sullivan adjourned the Committee until the next meeting.