

LAW OFFICES OF
VAN COTT, BAGLEY, CORNWALL & McCARTHY

A PROFESSIONAL CORPORATION
SUITE 1600
50 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84144-0450
TELEPHONE (801) 532-3333
FACSIMILE (801) 534-0058
TELEX 453149

ADDRESS ALL CORRESPONDENCE TO
POST OFFICE BOX 45340
84145-0340

WRITER'S DIRECT DIAL NUMBER

November 28, 1995

DAVID E. SALISBURY
M. SCOTT WOODLAND
NORMAN S. JOHNSON
EPHEN D. SWINDLE
LILIAM G. FOWLER
GREGORY P. WILLIAMS
ALAN F. MECHAM
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RICHARD H. JOHNSON, II
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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.
GEORGE M. McMILLAN

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: November Meeting

Dear Committee Members:

The next meeting of the Supreme Court Advisory Committee will be held on Wednesday, December 6, 1995, beginning at 4:00 p.m. It will be held at the usual place, the council room of the Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. If you do not plan to attend or expect to be late, I would appreciate your letting me, or my secretary Kay Rich, know so that we will not wait for you. We try to complete our meeting in about an hour and a half.

Please find enclosed a copy of the minutes of our special meeting on November 15 prepared by Tim Shea. We appreciate all Tim Shea's service to our committee; he always does an excellent job.

At our meeting on December 6, we will consider the following items:

1. We will consider a new draft of Rule 65B on extraordinary relief and proposed Rule 65C on post-conviction relief. The enclosed draft of these proposed changes incorporates points made during our discussion on November 15. We will invite Christine Soltis and her colleagues from the Utah Attorney General's Office to provide us with their input; in addition, we will invite members of the criminal bar who frequently represent inmates in post-conviction proceedings. I

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE
November 28, 1995
Page 2

hope that we can bring this rule change to a conclusion and send it to the Supreme Court before the legislative session begins in January.

2. For your information, I enclose a new draft of our changes to Rule 11 which we approved at our meeting on October 26. One of our members asked that we circulate a copy of the revised draft in advance of the rule's going out for comment. I do not anticipate the need to take any additional action on this rule at our December meeting.

3. Please find enclosed proposed revisions to Rule 77, Rule 58A, and Rule 4 of the Utah Rules of Appellate Procedure, the total effect of which is to require the prevailing party to present a certificate with a proposed form of judgment that he/she has provided to the court sufficient copies of the judgment and stamped, self-addressed envelopes to go to all parties of record who should receive copies. Failure of the prevailing party to file either the certificate or to have done the things that are certified as having been completed will result in modification of the judgment pursuant to Rule 60(d) or extension of time, in appropriate cases, within which to file a notice of appeal. Our thanks to Tim Shea for drafting this rule following our discussion on October 26.

4. We will have a report from Tim Shea on his progress in preparing a rule relating to appearances *pro hac vice*. At our meeting in October, we agreed that the starting point of a rule on this topic should be the local rule for the federal courts. Tim has also looked at other state jurisdictions to determine how they approach this issue.

5. We will discuss any changes that should be made to Rule 4 on service of process. As you may recall, this is something we have debated on and off for more than a year. The differences between federal Rule 4(d), which provides specifically for a waiver of service, and state Rule 4, which does not specifically so provide, was the springboard of our discussion. Since then, we have discussed a number of significant differences between the state and federal rules on service. Please find enclosed a memorandum from Perrin Love to the committee, dated last February, which summarizes the issues. In advance of our meeting in December, compare state Rule 4 with federal Rules 4 and 4.1 so that we may decide which direction we want to head on this issue.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE
November 28, 1995
Page 3

I look forward to seeing all of you on December 6.

Very truly yours,

A handwritten signature in black ink, appearing to be 'AS', written over a horizontal line.

Alan L. Sullivan

ALS/kr

Enclosure

cc: Timothy Shea, Esq.
Julie Fortuna, Esq.
Christine Soltis, Esq.

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

AGENDA

December 6, 1995

- 1. Welcome and approval of minutes (*A. Sullivan*)**

- 2. Rules 65B and 65C (Extraordinary and Post-Conviction Relief):
Further consideration of proposed rules (*A. Sullivan; C. Soltis*)**

- 3. Rule 4 (Ten-Day Summonses): Consideration of Comments on
Publication (*T. Shea*)**

- 4. Rules 58A, 60(c), and 77(d) (Mailing of Orders and Judgments):
Consideration of draft (*T. Shea*)**

- 5. Proposed Pro Hac Vice Rule (*T. Shea*)**

- 6. Rule 4 (Service of Process by Mail): Discussion of options (*P. Love*)**

- 7. Other Business**

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, December 6, 1995, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Virginia S. Smith, Honorable Ronald N. Boyce, Honorable Boyd Bunnell,
James R. Soper, Terry S. Kogan

EXCUSED: W. Cullen Battle, M. Karlyn Hinman, Terrie T. McIntosh, Honorable Anne
M. Stirba, Thomas R. Karrenberg, Honorable Ronald N. Boyce, Francis M.
Wikstrom, Perrin R. Love, Mary Anne Q. Wood, John L. Young, David K.
Isom, Glen C. Hanni

STAFF: Timothy R. Shea, Julie Fortuna

VISITORS: Christine Soltis, David Yokum, Jim Beattles, Lionel Deland, Ed Brass, Ron
Gibson, Lisa Watts-Baskin

I. WELCOME AND APPROVAL OF MINUTES

Mr. Sullivan welcomed committee members to the meeting and introduced visitors. The committee approved the minutes from the October 26, 1995 and the November 15, 1996 meetings.

II. RULES 65B AND 65C (EXTRAORDINARY AND POST-CONVICTION RELIEF): FURTHER CONSIDERATION OF PROPOSED RULES

Ms. Soltis introduced Mr. Deland and Mr. Brass to the committee and began the discussion by reviewing the November 16, 1995 drafts of rules 65B and 65C. Ms. Soltis indicated that the drafts incorporated all of the changes proposed by the committee at the prior meeting and made some additional changes as follows:

- 1) page 2, line 21 - pro se litigants should be entitled to receive only orders and memoranda that are relevant, rather than all orders and memoranda
- 2) page 3, lines 20 & 21 - add a g(4) as follows: "the court shall not review for summary dismissal an initial petition that has been filed by a person sentenced to death"

- 3) page 3, g(3) - language changed to "should not be summarily dismissed, the court shall not . . ." to make the language for both concepts in section g parallel

Ms. Soltis asked the committee whether they had any suggestions regarding the proposed corresponding statute drafted by the Utah Attorney Generals Office. She indicated that the statute basically provided for compensation in post-conviction cases that involve a sentence of death. Ms. Soltis indicated that the Department of Finance had the responsibility of drafting rules relating to compensation. Magistrate Boyce responded that the federal system can be expensive and that no more than \$75 per hour could be charged for pre-trial representation. Magistrate Boyce reported that court appointed attorneys are authorized to expend fees and costs to a certain point, about \$40,000 to \$50,000 per case, and then fees and costs are within the court's discretion. Magistrate Boyce also indicated that parties are in conflict about whether extra witnesses in post-conviction hearings should be compensated differently.

Ms. Soltis indicated that apart from compensation, the proposed statute incorporated the present statute of limitations, delineated grounds for relief by incorporated existing case law, and clarified the burden of proof. Ms. Soltis indicated that the proposed introductory language had been changed to track language in proposed rule 65C, including time limitations and that capital cases are to be given the highest priority. Ms. Soltis reported that time limitations will also be incorporated through judicial rules and that she would contact Representative Valentine.

Ms. Soltis asked whether a provision should be added to proposed rule 65C on page 5 to coordinate efforts between the attorney general and the county attorney. Ms. Soltis indicated that if a court vacates an original sentence, the court enters findings, and the order is automatically stayed five days. Magistrate Boyce indicated that the Tenth Circuit's position is that a district judge should not grant immediate relief, but stay the matter to determine whether it should be retried or appealed. Staying the matter keeps an individual in the court's jurisdiction and the Tenth Circuit recommends 60 days for such a stay. Mr. Beattles indicated that he had reviewed post-conviction stay cases and concluded that courts weigh certain factors, including dangerousness, reason for relief, and length in prison, to determine whether a 30 to 60 day stay was appropriate.

Mr. Brass indicated that he had no problem with a five day stay, but questioned whether it should be discretionary or automatic. Mr. Deland suggested that the five day stay be limited to felony offenses. Mr. Sullivan suggested that language like "if petitioner is serving a felony sentence . . ." be added to page 5.

Mr. Sullivan suggested the following changes be made to proposed rule 65C:

- 1) page 4 - language excepting out rule 65C provisions in definition of scope of "wrongful restraints on personal liberty" should go in initial scope paragraph

on page 1, line 8 so that it reads, "Procedures in this rule . . . except for instances governed by 65C"

- 2) page 1, line 8 - change language to "this rule shall govern proceedings on all petitions for post-conviction relief filed under"
- 3) change title to "Venue and Commencement Provision"
- 4) page 2, line 11, sub (6) - add "any" before "previous post-conviction petition"
- 5) page 3, line 18 - delete "procedural" because the entire rule is procedural
- 6) page 4, line 16 - delete "relevance and"
- 7) page 4, line 24 - change semi-colon to a colon
- 8) page 4, line 24 - delete "only"
- 9) page 4, lines 25, 26 - change language to "to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing"

Ms. Smith moved to recommend proposed rules 65B and 65C to the Utah Supreme Court for approval. Mr. Kogan seconded the motion and the motion was unopposed.

III. RULE 4 (TEN-DAY SUMMONSES): CONSIDERATION OF COMMENTS ON PUBLICATION

Mr. Shea began discussion by indicating that he had published the committee's proposed changes to rules 3 and 4 for comment and had received feedback. Mr. Shea reported that Attorney Robert Lord was opposed to adopting the proposed changes because Mr. Lord thought that the possibility for miscommunication between court clerks and defendants could raise more problems than the proposed changes solved. The Bar Commission was also concerned about the potential for miscommunication as well as the extra work the proposed changes would create for court clerks.

Mr. Sullivan questioned whether the perceived problems with the ten-day summons rule were serious enough to justify the committee's proposed changes. Mr. Shea asked whether the ten-day summons rule should be eliminated entirely if the committee believed it was a bad rule and subject to abuse.

Magistrate Boyce suggested a night depository or specially tailored computer program may alleviate some administrative burden. Mr. Soper suggested placing the burden on the attorney using the ten-day summons to notify the defendant if the complaint is not filed. Mr.

Soper indicated that this change could be enforced by awarding the costs of answering to defendants who answer when no complaint has been filed. Mr. Kogan voiced concern that due process would not be served because it will be too hard to track who is not following the rule. Magistrate Boyce suggested experimenting with the rule in practice to see if it is workable. Mr. Soper suggested that lengthening the time before a default is entered may solve the problems raised by Mr. Lords and the Bar Commission. Mr. Kogan suggested adding language to the ten-day summons telling the defendant not to call the court until fifteen days after the defendant had been served and amend the rule so that a default judgment would not be granted until twenty days had passed from the date of service.

Mr. Sullivan asked the committee to vote to either 1) leave the ten-day summons rule intact without change, or 2) adopt the ten-day summons rule with the suggested changes, slightly modified. Two committee members voted for to leave the ten-day summons rule intact and three committee members voted to adopt the ten-day summons rule, but change the ten day summons time to thirteen days. Mr. Sullivan indicated he would forward the proposed changes to the ten-day summons rule, including the change to thirteen days, to the Utah Supreme Court for adoption.

IV. CONCLUSION

There being no further business, Mr. Sullivan adjourned the committee until the next meeting scheduled for 4:00 p.m., Wednesday, January 24, 1996 at the Administrative Office of the Courts.