

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

January 19, 1994

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE

Re: January Meeting

Dear Committee Members:

The next meeting of the Committee will be held on Wednesday, January 26, 1994, beginning at 4:00 p.m. We will meet at the usual place, in the Council Room, Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah. Our meeting will last for about an hour and a half. Please be on time so that we can begin and end according to our regular schedule.

At our meeting on January 26, we will deal with the following issues:

1. We will consider any comments received on rules submitted for publication, including Rule 30(f) (on depositions), Rule 45 (on subpoenas), Rule 69 (on execution and supplemental proceedings), and Rule 72 (on restitution of premises). The comment period expires for these proposed rules on January 24.

2. We will discuss proposed changes to Rule 64D on continuing garnishments. Please find enclosed a revised version of that proposed rule change. I have invited Bruce Plenk and others to give us their comments on the continuing garnishment.

3. We will discuss proposed changes to Rule 63(b) on disqualification of judges. The problem here is that, under current practice, judges are automatically disqualified from sitting on a case if a legally sufficient affidavit is filed. The judge has no opportunity to respond to the affidavit, even if the affidavit is factual incorrect. Colin Winchester has collected research on this topic and will report to us on the

MEMBERS OF THE UTAH SUPREME COURT
ADVISORY COMMITTEE ON CIVIL PROCEDURE
January 19, 1994
Page 2

experience of other jurisdictions. In addition, Judge Bunnell has written me with some proposed changes to Rule 63(b) that would deal with the perceived problem. I enclose Judge Bunnell's proposals.

4. We will discuss generally changes that should be made to the discovery rules in light of the recent changes in the federal rules. This is a topic that we have discussed before and, in light of the number of questions and comments I have received personally, perhaps we should discuss again. I would like all of you to think about whether the state rules should follow the federal rules, whether selected portions of the federal rule changes should be adopted in the state, or whether we should wait and see. I enclose for your information a summary of the federal rule changes prepared by the District of Utah.

I look forward to seeing all of you next Wednesday.

Very truly yours,



Alan L. Sullivan

ALS/kr
Enclosure

cc: Craig T. Jacobsen, Esq.
Colin R. Winchester, Esq.

AGENDA

Utah Supreme Court Advisory
Committee on Civil Procedure

January 26, 1994

1. Welcome and discussion of minutes (A. Sullivan).
2. Discussion of comments received on public drafts of Rule 30(f), Rule 45, Rule 69, and Rule 72 (C. Winchester).
3. Discussion of proposed changes to Rule 64D on continuing garnishment (K. Hinman and B. Baldwin).
4. Discussion of proposed changes to Rule 63(b) on disqualification of judges (C. Winchester; Judge Bunnell).
5. Discussion of changes in discovery rules to coincide with federal rule changes (F. Wikstrom).

MINUTES

Utah Supreme Court Advisory Committee on the Rules of Civil Procedure

Wednesday, January 26, 1994, 4:00 p.m.
Administrative Office of the Courts

Alan L. Sullivan, Presiding

PRESENT: Alan L. Sullivan, Hon. Anne M. Stirba, Thomas R. Karrenberg, Hon. Boyd Bunnell, Colin R. Winchester, Terrie T. McIntosh, Francis M. Wikstrom, James R. Soper, Glenn C. Hanni, Perrin R. Love, David K. Isom, Hon. Ronald N. Boyce, Allan L. Larsen, Hon. Michael R. Murphy and Brad R. Baldwin

EXCUSED: Jaryl L. Rencher, Robert A. Echard, Hon. Samuel Alba, M. Karlynn Hinman, Mary Anne Q. Wood, Elizabeth T. Dunning and Terry S. Kogan

STAFF: Craig T. Jacobsen

VISITORS: None

I. WELCOME AND APPROVAL OF MINUTES

Mr. Sullivan welcomed the Committee members to the meeting. He reviewed the agenda items and other housekeeping matters, including a discussion he had with Clark Arnold regarding Rule 3(a), addressing the ten-day summons. Mr. Sullivan indicated that he had reviewed with Mr. Arnold the Committee's attempt three years ago to change Rule 3(a) and the problems encountered. Mr. Sullivan suggested to the Committee that the Committee punt and tell Mr. Arnold to suggest how the rule should be changed. Colin Winchester indicated that he would contact Phyllis Hansen, the Clerk of the Third Circuit Court, to determine whether the clerks perceive a problem with the ten-day summons.

Mr. Sullivan indicated that the minutes from the meeting held December 1, 1993, will be approved at the next Committee meeting.

II. DISCUSSION OF COMMENTS RECEIVED ON PUBLIC DRAFTS OF RULE 30(f), RULE 45, RULE 69 AND RULE 72

Mr. Sullivan reviewed the Supreme Court's requirement that a proposed rule be published forty-five days before submission to the Court. Mr. Sullivan indicated that, in his experience, the publication assists the Committee as another check of its work. Mr. Sullivan turned the floor over to Mr. Winchester to review the comments received.

Mr. Winchester indicated that the forty-five day comment period on Rules 30(f), 45, 69 and 72 had ended on Monday, January 24, 1994. He had received no comments on Rule 30(f). Mr. Winchester indicated that he had received two comments on proposed Rule 45. He first reviewed the comment received from Thomas Rossa, suggesting that the geographical boundaries under Rule 45 should be based on a radius in miles, not on county boundaries. Mr. Boyce stated that such a provision would be difficult to compute, whereas county lines are fairly well known. Other Committee members, including Mr. Hanni, agreed that a boundary based on a radius would raise difficulties. Mr. Sullivan asked the Committee whether there was any motion to amend proposed Rule 45 based on Mr. Rossa's comments. No motion was made.

Mr. Winchester reviewed the second comment, submitted by David Carlson. There was much discussion over the requirement that the party obtaining documents must provide such documents to opposing parties. A discussion focused on whether the language was clear and the problems that such a requirement could pose. After extensive discussion, Mr. Sullivan acknowledged that the issue was complicated and asked Perrin Love to consider the issue and address Mr. Carlson's concern. Judge Murphy suggested to Mr. Love that the issue could be resolved through a Committee note. Thereafter, the Committee further discussed the burden that could be placed on non-parties, depending on whether the party obtaining documents is required to provide the documents to opposing parties. Mr. Sullivan acknowledged the risk of gamesmanship. Judge Boyce stated that one of the problems the Committee faces is that it must attempt to determine problems to proposed rules that may never arise. Judge Murphy countered, however, that the Committee must also determine the probability of problems occurring and the issue raised by Mr. Carlson will probably arise. Thereafter, the Committee continued to discuss issues related to requiring dissemination of documents to all parties. Judge Murphy stressed that the Committee needs to have concern for non-litigants served with subpoenas who do not understand the judicial process. Mr. Sullivan again indicated that it would be best to let Mr. Love articulate some alternatives to address the issue.

Mr. Winchester reviewed comments received on proposed Rule 69. He reported on the comment received from Kevin Olsen. Mr. Baldwin stated that he would make a change to proposed Rule 69 in accordance with Mr. Olsen's comment. Mr. Winchester also reviewed Bruce Plenk's comment. After discussion by the Committee, the Committee adopted an amendment to proposed Rule 69 that changed the wording "accruing costs" to "reasonable accrued costs."

Mr. Winchester reported on the Judicial Review Committee's comment on proposed Rule 72. The Judicial Review Committee is concerned that proposed Rule 72 addresses substantive law rather than procedural law. Mr. Winchester recommended tendering the issue back to the Legislature and let it address the problem. Mr. Sullivan disagreed, stating that the Committee should finish its work and let the Legislature and the Supreme Court work out any disagreements. Judge Murphy so moved. The motion was seconded and the Committee unanimously approved Judge Murphy's motion.

The Committee discussed any remaining comments to proposed Rule 72, making changes where appropriate. After considering all comments to proposed Rule 72, Mr. Sullivan indicated that the Committee needed to draft Committee notes and appropriate forms. Mr. Sullivan volunteered to draft the Committee notes. He also asked the subcommittee to draft the appropriate forms. There was no further discussion on the comments received.

Mr. Sullivan then reviewed other tasks necessary to complete the proposed rules. He asked Mr. Love to draft Committee notes for proposed Rule 45. After further discussion as to some minor changes in the proposed rules, the Committee discussed how to send the proposed rules up to the Supreme Court for adoption. Mr. Sullivan expressed his preference to send all of them up at the same time. The Committee agreed.

III. RULE 64D (CONTINUING GARNISHMENT)

Mr. Sullivan reviewed the previous history on proposed Rule 64D. He stated that the Legislature became interested and drafted a proposal related to continuing garnishment. At the Supreme Court's request, the Committee had agreed to review the Legislature's proposal. The Committee had reviewed the proposal and had come up with a draft. Mr. Sullivan indicated that the Committee now should polish the draft and send it to the Supreme Court, allowing the Court and the Legislature to work out their differences. Mr. Sullivan turned the table over to Brad Baldwin. Mr. Baldwin discussed the Committee's work on the proposed draft. He explained the scope of continuing garnishment. Mr. Sullivan then asked what other changes needed to be made to the draft and what action should be taken by the Committee thereafter. It was discussed that if this were the normal situation, the Committee would polish the draft and send it out for comment. Mr. Sullivan asked Mr. Winchester to lend his views as to what action should be taken. Mr. Winchester stated that the Committee could send the rule out for comments or send it directly to the Legislature. Mr. Sullivan saw no reason why the Committee could not do both. The Committee agreed. Mr. Sullivan asked Mr. Baldwin to put together a new draft within the next week. Mr. Baldwin consented. Mr. Sullivan asked Mr. Winchester to draft a transmittal letter to the Legislature. Mr. Winchester agreed. There was no further discussion on Rule 64D.

IV. RULE 63(b) (DISQUALIFICATION OF JUDGES)

Mr. Sullivan indicated that Mr. Winchester had researched issues related to disqualification and had also conducted a survey related thereto. He also indicated that Judge Bunnell had sent out a letter to colleagues related to disqualification. Mr. Sullivan asked Mr. Winchester to report on his findings. Mr. Winchester indicated that he had researched disqualification procedures in the Rocky Mountain states and several of the larger states. He explained the issues that he researched and explained how other states had resolved problems that had been raised by the Committee. The judges reported the various kinds of disqualification allegations that they had observed while sitting on the bench. Following

further discussion, Mr. Sullivan asked Mr. Winchester if he could draft a proposed rule. Mr. Winchester agreed.

V. OTHER BUSINESS

Mr. Sullivan indicated that there is a proposed statute that would be presented to the Legislature which would require the use of recycled paper in all courts and administrative hearings. Mr. Sullivan asked the Committee to give some thought to such a proposal.

VI. CONCLUSION

There being no further business, Mr. Sullivan adjourned the Committee until the next meeting, scheduled for Wednesday, February 23, 1994.