MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 22, 2009
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, James T. Blanch, Anthony W. Schofield, Francis J. Carney, Todd M. Shaughnessy, Honorable Derek Pullan, Lincoln Davies, Jonathan Hafen, Cullen Battle, Honorable Anthony B. Quinn, Leslie W. Slaugh

EXCUSED: Janet H. Smith, Steven Marsden, Matty Branch, Lori Woffinden, Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Thomas R. Lee, Barbara Townsend, David W. Scofield

STAFF: Tim Shea, Trystan B. Smith

GUESTS: Joe Joyce and Lynn Davies

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the March 25, 2009 minutes. No comments were made and Mr. Wikstrom asked for a motion that the minutes be approved. The motion was duly made and seconded, and unanimously approved.

II. RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

Mr. Carney welcomed our guests Joy Joyce and Lynn Davies to the meeting.

Mr. Joyce and Mr. Davies defend personal injury cases and addressed the defense lawyer's concerns regarding the committee's proposed revisions to Rule 35.

Mr. Davies began by addressing the concept of reciprocity — requiring the recording of a plaintiff's examination by her treating physician when the physician is either retained by the plaintiff's attorney or the plaintiff is referred to the treater by her attorney.

He noted the difficulty in truly establishing reciprocity. He argued the defense does not know when a doctor has been retained or when a plaintiff has been referred by her lawyer. Mr. Davies' contention was that reciprocity would only work to the extent that a plaintiff's attorney

acknowledged that he referred his client. He concluded reciprocity would in be, in its application, inherently unfair.

Mr. Wikstrom questioned why a defense lawyer could not tell from the medical records whether a treating physician was actually retained. Mr. Davies provided examples where a treating physician did not disclose how the patient was referred, or the patient was told not to disclose who referred her.

The committee continued their discussions concerning retained physicians versus referred treating physicians. Mr. Joyce suggested a revision to Rule 26 that would require a treating physician who provided expert opinions beyond the contents of their medical records at trial to be treated as a retained expert. Mr. Carney noted that the dispute as to when a treating physician becomes a retained expert under Rule 26 is currently on appeal.

The committee asked Mr. Davies his opinion about the use of video recording versus audio recording. He supported the use of audio recording. He noted that audio recording would be less intrusive, prevent abuse, and protect both the patient and the examiner from unfounded claims.

Judge Quinn cautioned the committee to keep in mind when revising Rule 35 that often the most important part of a personal injury case is the physical body of the plaintiff.

Mr. Davies indicated that he did not understand the complaints about the (i) terminology used to describe Rule 35 medical examinations, or (ii) the complaints in general about the need for prior reports. He noted that everyone knows that the defense expert is being paid money to examine the plaintiff.

Mr. Joyce indicated he has never experienced a trial judge allowing a lawyer to cross examine an expert using prior reports from other individuals. He also noted that he is not aware of another state that allowed for the exchange of prior reports.

Mr. Carney responded by noting comments from plaintiffs' lawyers finding it effective to cross examine a medical expert with prior reports.

Mr. Davies further noted his concerns about a 'trial within a trial' that occurs when prior reports are used for impeachment.

Mr. Shaughnessy questioned why the committee would require medical experts to produce prior reports when the rules do not require professional experts in other contexts to provide prior reports. He indicated that the only explanation provided for prior reports is that the medical expert was a professional witness.

Mr. Carney noted that from his discussions with professional medical examiners the examiners could track prior reports from the date the rule was adopted forward.

Mr. Wikstrom suggested a proposal where the trial judge appointed an independent examiner. Mr. Carney noted that trial courts in other states have followed that procedure, where both parties provide a list of doctors and the judge chooses. Mr. Davies responded that it is understood that plaintiffs get to pick and choose who to send their clients to. He argued out of fairness the defense should have the same flexibility.

Mr. Davies supported Mr. Shaughnessy's concerns questioning why doctors would be singled out and required to issue prior reports.

Mr. Shaughnessy suggested that perhaps the solution was to remove subsection (c) requiring a report of the examination and instead specifically refer to Rule 26 (a)(3).

Judge Pullan asked Mr. Joyce if he was aware of any studies that showed how recording may affect the examination. Mr. Joyce discussed an empirical study authored by Dr. Sam Goldstein discussing how neuropsychological examinations are negatively affected by recording.

Mr. Wikstrom asked Mr. Joyce and Mr. Davies for suggested language to address the issue of treating physicians providing expert opinions at trial beyond the treatment disclosed in their medical records. Mr. Davies suggested the committee amend Rule 26 to expand the definition of retained experts to include any medical doctor who testifies at trial.

III. RULE 63A. CHANGE OF JUDGE AS A MATTER OF RIGHT.

Judge Quinn brought Rule 63A to the committee, which allows for a change of judge as a matter of right by unanimous agreement of the parties.

Judge Quinn proposed two changes. First, he proposed an exception to the rule in cases where there is only one party, for example, adoption matters. Second, he proposed an exception to subsection (b) where the notice of change must filed either within 90 days or before any issue is decided by the judge.

He noted there were a handful of attorneys in adoption cases who consistently changed judges as a matter right when particular judges were assigned to their cases. He also observed this practice occurring in minor settlement cases as well. Judge Quinn indicated the purpose of the proposed changes is to prevent judge shopping.

Mr. Wikstrom questioned why the committee would except changing a judge as a matter of right after any issue is decided by the judge.

Mr. Slaugh suggested that the committee remove "in small claims proceedings" from Rule 63A to the extent small claims proceedings were governed by separate rules.

Mr. Schofield suggested that if the judge being reassigned is the presiding judge that the associate presiding judge should be the one to issue the reassignment, not the Chief Justice.

Mr. Wikstrom suggested adding the term "substantive issue" in subsection (b).

Judge Quinn moved to adopt the proposed rule with Mr. Slaugh's and Mr. Schofield's proposed changes, and subsequently amended his motion to remove the second exception — "before any issue is decided by the judge." With the changes noted above, Judge Quinn moved to adopt the proposed rule, and the committee unanimously agreed to the adopt the revisions as amended.

IV. CONSIDERATION OF COMMENTS TO RULE AMENDMENTS.

Mr. Shea brought the comments to published Rules 52, 76, 7, and 101 to the committee.

Mr. Shea discussed the comments to Rule 52 and the process to correct the record of a hearing. He noted there were many comments concerning the plan to record trials by digital audio recording, but none of the comments specifically addressed Rule 52.

Mr. Shea noted there were no comments to Rule 76. However, he indicated that he and Judge Rodney Page discussed a proposed change to Rule 76 in 2006, but was unaware of the committee's thoughts about Judge Page's proposal.

The committee decided the revised Rule 76 was simpler and placed the burden on the party to promptly notify the court of any change in the party's contact information.

The committee further discussed the comments to Rule 101, but noted the comments did not address the substantive revisions raised for comment.

Mr. Quinn moved to submit the proposed changes to Rules 52, 76, 7, and 101 to the Supreme Court as submitted. The committee unanimously agreed.

V. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom brought simplified civil procedures rules back to the committee.

Mr. Shea reported on his contact with National Center for State Courts, and began by addressing two kinds of measurements — surveys and snapshots of data.

He indicated the surveys will identify the people whose opinions the committee wants to solicit, specifically, lawyers, judges, clerks and possibly litigants. He suggested the committee refrain from trying to measure the costs to society and potential litigants as he feared the committee would end up getting a public opinion poll. He also noted measuring a shift in public opinion would be difficult.

The second measurement would consist of before and after snapshots of data recorded in the AOC's case management system, for example, the number of trials, length of trials, number of experts depositions, impact on filings, effect on motion practice, time to disposition, etc. He

indicated the data is there and available to gather once the committee decides what it wants to measure.

Several committee members questioned generally what would be accomplished with measurements. Mr. Shea indicated his understanding was to establish a baseline and a pilot program. He further noted the importance of defining what would be a success, as opposed to a consequence. He noted the committee may want to spend some length of time defining its goals.

Mr. Hafen also questioned the purpose of tracking measurements. He suggested the committee may not change its opinions in light of the results. He was also concerned with the amount of effort and resources involved with the AOC in keeping these measurements.

Mr. Wikstrom suggested maintaining a closing cover sheet. Mr. Shea noted the Institute tried something similar, but practitioners failed to meaningfully participate.

Judge Pullan noted that he saw three (3) reasons to measure. First, to show if there is a problem. Second, to justify adopting simplified rules. Finally, to gauge the effect of simplified rules. He then noted that he did not see a reason to measure whether there was a problem as the committee already had evidence to suggest the current rules were flawed.

Mr. Hafen noted his concern that we measure those members of the population who did not or could not access the system to determine if the simplified rules improved access to justice.

Mr. Blanch noted that measuring access to justice is difficult because currently we do not have a baseline.

Mr. Wikstrom indicated he did not want the committee to be overly focused on the mechanics of the surveys, but allow the Center and the Institute to address those concerns.

Mr. Shea stated that if the committee decided if it wanted to measure some of these items, for example, time to disposition, that those measurements would need to be defined initially.

Mr. Lincoln Davies indicated he would help Mr. Shea develop protocols for the measurements.

Mr. Carney circulated a district court opinion concerning discovery and proportionality for the committee's consideration.

Mr. Wikstrom asked the committee to continue its discussions at the next meeting.

VI. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday, May 27, 2009, at the Administrative Office of the Courts.