MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, June 24, 2009
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Honorable David O. Nuffer, James T. Blanch, Francis J. Carney, Lincoln Davies, Janet H. Smith, Jonathan Hafen, David W. Scofield, Barbara Townsend, Anthony W. Schofield, Honorable Derek Pullan, Steven Marsden, Honorable Anthony B. Quinn, Leslie W. Slaugh

EXCUSED: Todd M. Shaughnessy, Cullen Battle, Honorable Lyle R. Anderson, Thomas R. Lee, Lori Woffinden, Matty Branch

STAFF: Tim Shea, Trystan B. Smith

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the May 27, 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. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom brought simplified civil procedures back to the committee and the committee began its discussions with Rule 8(a) and the appropriate pleading standards.

Pleading Standards

The committee began debating the suggested revisions to Rule 8 (a), which would require claims for relief to state with particularity the facts on which the claim is based and the remedy requested, including the types of damages. The factual statement must set forth detail as to the time, place, participants, and events; and in response to an objection for lack of detail, the court should permit a claimant a limited opportunity to develop the facts when necessary and when the claimant does not have access to the information.

Judge Pullan summarized for the committee's consideration a number of alternative pleading standards under Rules 9, 65(c), U.C.A. § 24-1-4 (Utah Uniform Forfeiture Procedure

Act - reasonable particularity), U.C.A. § 54-8-9 (Underground Conversion of Utilities - particularity sufficient), and the Twombley Standard (plausible basis for claims asserted).

Judge Quinn noted his concern about requiring particularity and frustrating the purpose of increasing access of justice.

A question was raised whether the committee needed enhanced pleading, if the rules required enhanced initial disclosures.

Mr. Hafen noted that enhanced pleading would provide an increased barrier to justice. He would rather see enhanced initial disclosures, rather than more detailed pleading. Judge Quinn agreed with Mr. Hafen's suggestion.

Judge Pullan suggested adding to the existing rule the sentence: "The statement of claims, in so far as reasonably practicable, set forth in detail the time, place, participants, and events."

Judge Pullan indicated that the change would encourage parties to plead facts with more specificity, but would not encourage an increase in motion practice or reflect a change in the pleading standard.

Judge Quinn suggested that if the committee adopted a change encouraging pleading with more specificity that the committee issue an advisory committee note indicating that the pleading standard has not changed.

Rule 16

The committee next examined Rule 16.

Mr. Wikstrom discussed the proposed changes to Rule 16 (b)(8), stating: "If parties and counsel agree to a discovery plan and the parties certify that they each have given a budget for the discovery contemplated by the plan and have approved it, the court shall approve the plan."

Mr. Wikstrom asked the committee to discuss the policy considerations involved with allowing the parties, without initial judicial oversight, to manage discovery.

Judge Nuffer expressed his concern about the need for judges to oversee discovery. He suggested that after the parties agree on a discovery plan that the subsection's language call for a presumption of proportionality, but not mandate that the court approve the plan. Mr. Slaugh also expressed hesitation about mandating that the trial judge approve the plan, and the use of the word "shall."

Ms. Smith and Mr. Slaugh suggested the rule have an escape clause, and also agreed that the committee should remove the "shall" language.

Judge Pullan and Judge Quinn noted in their experiences they have not seen cases where trial judges intervene to alter the agreed upon limits in the initial case management order.

Rule 26

Finally, the committee discussed Rule 26.

The committee initially discussed the contents and timing of a parties' initial disclosures. Rule 26(a)(1), as revised, would require a plaintiff within 30 days after filing the complaint and a defendant within 30 days after filing an answer, to serve initial disclosures. The disclosures, in summary, would require a party to produce copies of all documents that it refers to in its complaint or answer, or may use at trial, and also provide a written disclosure statement for each non-expert witness that a party may call at trial in its case-in-chief.

The committee agreed a defendant did not need more than 30 days after filing an answer to file initial disclosures. Mr. Marsden questioned whether 30 days were sufficient with the onset of electronic discovery for a plaintiff to serve initial disclosures. Mr. Wikstrom indicated that the plaintiff, prior to filing the complaint, had ample opportunity collect, review, and prepare electronic discovery for production to comply with the 30 day deadline.

Mr. Wikstrom next asked the committee to discuss Rule 26(a)(1) (E), which states, "no party may seek additional discovery until that party's obligations under this section are satisfied, unless ordered by the court upon a showing of good cause." This subsection would prevent a party from engaging in any discovery, even after completion of the attorney planning meeting, until after both parties served initial disclosures.

Judge Nuffer indicated the revision would lead to an increase in motion practice, with parties asking for discovery before initial disclosures were exchanged.

Mr. Wikstrom asked whether the committee should carve out exceptions for personal injury and employment cases, but the committee did not feel it was appropriate.

Judge Nuffer questioned why a computation of damages should not be required for all cases.

Mr. Hafen suggested the committee keep the disclosures contained in the current iteration of subsections (a)(1)(C) and (D), which require a computation of damages and disclosures of any insurance agreements, and remove the revised subsections (C) and (D).

Mr. Schofield questioned the meaning of a "non-expert" witness under subsection (a)(1)(B), and whether a treating physician would qualify. Mr. Wikstrom suggested replacing "non-expert" with "fact" witness.

Mr. Blanch questioned how subsection (a)(1)(B) would provide a meaningful may-call witness list early on in the case, as opposed to a list of people who may have discoverable information.

Mr. Marsden also noted that a may-call witness list should have an enforcement mechanism.

Judge Quinn suggested that the enforcement should be included in the supplementation requirement. He suggested a revision to subsection (a)(1)(E) — "any such supplementation shall include a statement of why it was not previously disclosed."

Mr. Hafen suggested a will-call witness list and a may-call witness list in the initial disclosure stage with sanctions for failure to disclose.

Mr. Wikstrom shifted the committee's discussions to Rule 26(b)(1). Rule 26(b)(1) contains two major suggested changes (1) that a party may only seek discovery directly relevant to the issues in the case as stated in the pleadings, and (2) a party is not entitled to disclosure of information simply because it appears reasonably calculated to lead to the discovery of admissible evidence.

Mr. Blanch noted the changes would lead to an increased number of motions for protective order. He noted that the current iteration of the rule helps practitioners with client management.

Judge Pullan questioned the definition of "directly relevant." He suggested the committee consider the evidentiary definition of "relevance" defined as a "fact of consequence" as an appropriate standard.

Mr. Blanch questioned what was the difference between "relevant" and "directly relevant."

Mr. Marsden suggested the most effective way to limit discovery is not in the scope of discovery and its definitions, but to limit the number and length of depositions and the amount of written discovery.

Judge Quinn suggested the committee leave the relevance test the same, but focus on proportionality and the trial judge's discretion to shift the cost of discovery.

Mr. Slaugh suggested keeping the existing language in subsection (b)(1) that states, "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

After digesting the committee's comments, Mr. Wikstrom asked that Mr. Shea revise Rule 26(b) to reflect the language of the federal rule for the committee's future consideration.

Mr. Wikstrom then shifted the committee's focus to Rule 26(b)(3) and cost-shifting. The suggested change would allow the court to shift or allocate the costs of discovery where clearly necessary to achieve proportionality.

Mr. Hafen questioned whether the cost of discovery meant fees or expenses. Mr. Wikstrom indicated he was thinking about expenses, for example the expense associated with electronic discovery.

Judge Quinn noted the cost-shifting standards should be burden, relevance, and case complexity.

Mr. Wikstrom asked that the committee revisit Rule 26 and the simplified rules at the next committee meeting.

III. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday, September 23, 2009, at the Administrative Office of the Courts.