MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, February 24, 2010
Administrative Officer of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Barbara L. Townsend, Honorable Anthony B. Quinn, Honorable Reuben Renstrom, W. Cullen Battle, James T. Blanch, Jonathan O. Hafen, Thomas R. Lee, Lincoln L. Davies, Leslie W. Slaugh, Anthony W. Schofield, Steven Marsden, David W. Scofield

TELEPHONE: Lori Woffinden, Honorable Lyle R. Anderson, Honorable Derrek P. Pullan

EXCUSED: Todd M. Shaughnessy, Honorable David O. Nuffer, Terrie T. Macintosh

STAFF: Timothy M. Shea, Sammi V. Anderson

I. INTRODUCTIONS.

Pursuant to Utah Supreme Court Rule 11-101(4), the following committee members formally introduced themselves: Jonathan O. Hafen, Honorable Reuben Renstrom, David W. Scofield, Steven Marsden, Anthony W. Schofield

II. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the January 27, 2010 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.

III. SIMPLIFIED RULES OF CIVIL PROCEDURE.

The committee engaged in a lengthy discussion regarding Rule 26. The discussion centered upon the standard that should govern the scope of discovery, the definition of proportionality, where it will come into play and how it will be enforced, and, to a lesser extent, protective orders.

First, with regard to the scope of discovery under the revised Rule 26, Mr. Lee summarized the interim correspondence regarding what is relevant under Rule 26, *ie*, whether "relevance" under Utah R. Evid. 401 is really helpful or useful in these circumstances. Mr. Lee opined that it would be better to define "proportionality," which ought to govern the scope of

discovery. In other words, the standard of discoverability ought to be tied to proportionality standards, rather than requiring a party to make a motion to limit discovery based on proportionality.

Judge Pullan noted concerns about satellite litigation regarding what is proportional, *ie*, every answer to every interrogatory is "we decline to answer because the request is disproportionate," followed by a motion to compel. Judge Pullan emphasized the importance of early judicial involvement as to what is proportional. He expressed that the evidentiary standard of relevance is perhaps too broad and advocated moving proportionality into (b), so that scope of discovery is really rooted in proportionality. Mr. Lee talked about fact that "reasonableness" is already embodied in rules, along with some kind of cost-benefit analysis. It is necessarily a two-edged sword: we don't want discovery to be an abusive tactic, but it is still very helpful to get information out early to help settle cases. The committee has to figure out a way to balance the risks. Mr. Lee proposed putting into subsection (b) language like "for good cause and consistent with standards of proportionality in (c), courts can order additional discovery." Mr. Lee felt there ought to be reference to the definition of proportionality in subsection (b).

Mr. Wikstrom reminded the committee that the objective is to try and flip the default from "you get it," to "you don't get it, unless you can demonstrate need and proportionality." The hope is for every lawyer drafting a request or a response to think about how they are going to demonstrate proportionality. Mr. Wikstrom noted the concern is focused not on cases where the parties are equally positioned, but on cases where one party has more resources and more information, an example being the typical employment case. Mr. Lee pointed out the possibility of cost-shifting.

Judge Quinn explained that the one very good thing about the current standard is that it is self-executing. Courts rarely have to be involved. Judge Quinn doesn't see any way this is not going to generate litigation; the new standard gives parties hope that they can win, regardless of the side on which they fall. Judge Quinn is inclined to leave the scope alone and to limit discovery by proportionality and through the other tangible limitations already discussed, *eg*, number limitations on depositions and interrogatories. In other words, leave the scope/standard as is (calculated to lead to discovery of admissible evidence), and add proportionality and external limitations.

The committee moved to a discussion of proportionality and burdens. Mr. Slaugh inquired as to what party has the burden of asserting proportionality. Mr. Wikstrom suggested that the party seeking discovery be required to demonstrate proportionality in the face of an objection. Judge Pullan noted that the discovery standard currently in place is so broad that judges have little meaningful ability to restrict discovery. Judge Pullan agreed that the real work is going to be done with proportionality and potentially cost shifting. Judge Quinn analogized the scope issue to a target with a bulls eye, surrounded by concentric rings. The bulls eye represents information that is clearly, directly relevant to dispute. The surrounding rings represent more tangential information. The further away from the bulls eye a party gets, the greater the chances that costs of discovery will be shifted, or that the party might not get discovery at all if it cannot demonstrate proportionality.

Mr. Wikstrom suggested leaving the old standard in place, but adding "subject to a demonstration of proportionality." Mr. Lee suggested: "relevant to claims and defenses and consistent with principles of proportionality." Mr. Wikstrom reminded the Committee of the overall context: Initial disclosures will be much broader than they currently are. Each side will put their cards on the table up front and both sides will get very limited discovery. At that point, and only then, does the issue of additional discovery arise.

Mr. Davies queried at what point does proportionality kick in? At the outset? Does it govern all requests? Or only after limited discovery has been done? Mr. Wikstrom opined that it should be from the outset. To change the current culture, the mind set of the judiciary, lawyers and litigants must be changed. Mr. Marsden opined that it is the initial disclosures that will go the furthest in changing the culture. Mr. Wikstrom again emphasized that both sides will know at the outset all the facts, witnesses and documents that support the case. A party will need to be specific and persuasive in telling the court what additional discovery is needed and why and how it is proportionate. Judge Pullan agreed and noted that the initial disclosures would give him enough information to be comfortable making a proportionality decision. Judge Pullan also reminded the committee that each practice area can draft their own requirements for initial disclosures. The committee agreed to incorporate proportionality into the scope of discovery. With regard to subsection (b)(4) (Statement previously made about the action), the committee decided to revert back to the original language.

Second, the committee discussed defining the term "proportionality." Mr. Lee suggested defining the term instead of listing a host of factors and leaving the parties and courts to interpret them on their own. Mr. Hafen advocated defining the term "proportionality." Mr. Hafen stated that if the objective is to effect a shift, the new terms must be defined. Mr. Shea pointed out that 26(c) used to deal exclusively with protective orders and suggested addressing proportionality in 26(b). Judge Pullan summarized Judge Nuffer's efforts to define proportionality. Mr. Wikstrom suggested adopting Judge Nuffer's changes and adding a sentence at the end saying the party seeking discovery has the burden to show proportionality. Mr. Davies suggested adding "less burdensome, or less expensive" at the end of (i).

There was a motion to replace the draft proportionality factors with the Lee-Nuffer-Davies draft. Judge Pullan supported the change and noted that the laundry list of factors is more an explanation of the committee's discussions, perhaps better placed in the Advisory Committee notes. Judge Pullan expressed that the simplicity of the Nuffer language would make it easier to render a ruling than by referring to a whole list of factors. Mr. Slaugh advocated for leaving "unreasonably" before the word "cumulative." The committee agreed.

Mr. Lee then led a discussion regarding re-framing the definition to be affirmative, rather than negative. The committee voted in favor of an affirmative definition of proportional and the committee voted in favor of the term "proportional," as opposed to "proportionate." Mr. Lee proposed, consistent with Mr. Shea's earlier suggestion, that the language and analysis regarding proportionality be moved into subsection (b), and that subsection (c) be limited to protective orders.

The committee then moved to a brief discussion of protective orders and subpart (c). Mr. Marsden pointed out that protective orders are for confidential business information, personal information, etc. Mr. Hafen noted that the other facts, such as undue burden, oppression, annoyance, harassment, lent themselves more to proportionality. The committee then discussed that proportionality issues as they arise under 26(c) really apply to discovery requests that do not require a written response from a party, such as third-party discovery or notices of deposition. The committee reasoned that if dealing with regular written discovery between parties, one party would simply object and the party seeking discovery would have to demonstrate proportionality under subsection (b). Judge Quinn suggested an Advisory Note that the reference to proportionality does not imply that the burden is on any party other than the party seeking discovery.

The committee voted in favor of the following limitations: (A) one hundred fifty (150) days for initial fact discovery; and, (B) twenty (20) hours for depositions per side, allocated any way the party wishes, except that no party deposition can last more than seven (7) hours and no witness can be deposed for more than four (4) hours. The committee agreed to remove any specialty rules pertaining only to certain types of actions or certain sections within the bar. The committee believes the specialty bars should be called upon to customize their own set of initial disclosures at the appropriate time.