MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, March 24, 2010
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Lincoln L. Davies, Jonathan O. Hafen, Francis J. Carney, Thomas R. Lee, Cullen Battle, Barbara L. Townsend, Leslie W. Slaugh, Trystan B. Smith, Honorable Derek P. Pullan, Honorable Reuben Renstrom, Janet H. Smith

EXCUSED: James T. Blanch, Honorable Anthony B. Quinn, Honorable Lyle R. Anderson, Honorable David O. Nuffer, David W. Scofield, Todd M. Shaughnessy, Anthony W. Schofield, Steven Marsden, Sammi V. Anderson, Lori Woffinden

STAFF: Tim Shea, Matty Branch

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the February 24, 2010 minutes. Mr. Carney noted a spelling correction and with that change, a motion was duly made and seconded that the minutes be approved. Hearing no further comments, the minutes were unanimously approved.

II. CONSIDERATION OF RULES FOR FINAL ACTION: RULES 58B, 64D AND 64E.

Mr. Shea brought Rules 58B, 64D and 64E to the committee for final action.

The committee debated the public comment suggesting a revision to Rule 64D(h)(2), which would allow the Court to deny a request for an evidentiary hearing if a plaintiff's or defendant's reply does not raise a proper challenge or claim. Several committee members compared the proposed revision to the Court's power under Rule 7(e) to deny a request for hearing under Rule 56. Judge Pullan, however, expressed his concerns about due process and the deprivation of property without a hearing. He used the example of an unsophisticated pro se party who fails to properly indicate in his/her grounds for a hearing in the reply who is then denied his request under the proposed revision.

After further discussion, Mr. Wikstrom called for a motion concerning the suggested revision. Receiving no motion, the committee declined to adopt the suggested revision.

The committee also unanimously approved separating by commas the clause "a copy of the garnishee's answers" in Rule 64D(h)(1).

III. RULE 6. TIME.

Mr. Shea brought Rule 6 to the committee.

Electronic filing is scheduled to be available statewide the first week of August 2010. The committee debated whether it should wait to adopt the amendments to Rule 6 until after electronic filing was in place. It further debated whether to mandate electronic filing as a part of the amendments.

Several committee members raised concerns about practitioners mailing pleadings to take advantage of the time periods in the amendments if electronic filing was not mandated. The committee further discussed the need to evaluate any inefficiencies in electronic filing, after it is available, statewide before making it mandatory.

The committee agreed to wait until after August 2010 to revisit the amendments to Rule 6.

IV. SIMPLIFIED PROCEDURES.

The committee continued its discussions regarding the simplified rules.

Ms. Smith suggested and the committee agreed to revise the last sentence Rule 1(a) to state: "If, in the opinion of the court, applying the rule would be unjust the former procedure applies."

The committee continued its discussions regarding the scope of discovery and proportionality. Mr. Lee questioned the purposes of the second two sentences in Rule 26(b)(1). Mr. Lee also asked what the committee hoped to accomplish by (1) allowing a party upon a showing of good cause to seek broader discovery? and (2) whether the phrase "[d]iscovery and discovery requests are proportional" was intended to define what was discoverable?

The committee debated the need to allow a party to seek broader discovery beyond matters relevant to the claims or defenses of the parties. Mr. Lee suggested striking the second two sentences of subsection (b)(1) and revising the first sentence of Rule 26(b)(1) to state: "Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party, if the discovery satisfies the standards of proportionality set forth below." The committee unanimously agreed to the above revisions.

Mr. Davies observed that the second sentence of subsection (b)(2), which referenced Rule 26(c) Protective orders, appeared awkward and should be revised. The committee discussed whether to change the title of subsection (c) from protective orders to discovery orders. Mr. Shea also suggested moving the provisions of Rule 26(c) to Rule 37.

Mr. Shea proposed revising the second sentence of subsection (b)(2) to state: "The Court may enter orders described in Rule 37 to achieve proportionality." The committee agreed.

Mr. Wikstrom asked Mr. Shea to prepare a revised Rule 37 that incorporated the provisions of Rule 26(c). Mr. Hafen agreed to work with Mr. Shea to incorporate the provisions of Rule 26(c) into Rule 37 for the committee's future consideration.

Ms. Townsend directed the committee's attention to Rule 26(d)(1). She suggested deleting the first sentence, which states "Discovery shall be in two stages." She noted and the committee agreed that it was not the committee's intent to imply that parties are entitled to seek discovery beyond the 150 days noted in subsection (d)(1). The committee agreed.

The committee also debated the appropriate titles for subsections (d)(1) and (2). Mr. Wikstrom indicated that the objective should be to emphasize the limitation. Mr. Lee suggested titling subsection (d)(1), Standard Discovery. Mr. Battle suggested titling subsection (d)(2), Extraordinary Discovery. The committee discussed the use of the term extraordinary to indicate to practitioners that absent compelling circumstances, discovery should be completed within the 150 day limit set forth in subsection (d)(1). The committee agreed to the titles referenced above. The committee also agreed to remove the references to "fact" discovery.

Mr. Slaugh questioned why parties should not be able to stipulate to an extension of discovery under subsection (d)(2)(A), after the close of initial discovery? The committee debated whether it should adopt a revision allowing for such a stipulation. Several committee members indicated that parties, absent a formal stipulation, may informally agree to engage in discovery, despite the limitations of subsection (d)(2)(A). Mr. Wikstrom and Judge Pullan also noted the limitation is no different than any other bright-line rule.

Finally, Mr. Wikstrom directed the committee's attention to Rule 30 and expert depositions. The committee debated the prohibition on depositions for any witness who may present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

Mr. Battle began by questioning whether the prohibition would ultimately serve the committee's purposes. He suggested in medical malpractice cases plaintiff's lawyers in particular want to take expert depositions to settle cases. Mr. Carney agreed. He suggested that parties even in light of this rule would take expert depositions by informal stipulation.

Mr. Hafen suggested allowing expert discovery under Rule 26(d)(2), Extraordinary Discovery. The committee debated whether it should include an exception in Rule 30 for expert depositions by stipulation or allow for expert depositions under Rule 26(d)(2).

Mr. Carney also questioned whether a non-retained expert could be deposed under Rule 30. The committee agreed to look at Rule 26(a)(3)(A) and the designation of retained and non-retained experts in the context of Rule 30.

The committee agreed to revisit Rule 30 at the next meeting.

V. ADJOURNMENT.

The meeting adjourned at 6:00 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, April 28, 2010, at the Administrative Office of the Courts.