MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

Wednesday, December 15, 2010

Administrative Office of the Courts

PRESENT: Francis M. Wikstrom, Chair, W. Cullen Battle, Francis J. Carney, Lincoln L. Davies, Jonathan O. Hafen, Steve Marsden, Terrie T. McIntosh, Honorable David O. Nuffer, Honorable Derek Pullan, David W. Scofield, Todd M. Shaughnessy, Robert J. Shelby, Leslie W. Slaugh, Janet H. Smith, Trystan B. Smith, Honorable Kate Toomey, Barbara L. Townsend,

PRESENT BY PHONE: Honorable Lyle Anderson, David H. Moore, Lori Woffinden

EXCUSED: Sammi V. Anderson, James T. Blanch

STAFF: Timothy M. Shea, Diane Abegglen, Appellate Court Administrator

## I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the November 17, 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 approved.

## II. RULE 55. IMPLEMENTATION OF *ARBROGAST V. RIVER CROSSINGS*, 2010 UT 40.

In the interests of time, the committee deferred this item.

## III. RULES FOR AREAS OF PRACTICE.

In the interests of time, the committee deferred this item.

## IV. SIMPLIFIED DISCLOSURE AND DISCOVERY RULES.

Mr. Wikstrom reviewed the list of presentations with the committee and asked whether there were any missing. Mr. Battle said that he had agreed to present to the law firm of Stoel Reeves, but that the contact person never arranged the meeting.

Mr. Wikstrom described his meeting with the district judges of the Second and Third Districts and the Board of District Court Judges. The judges are generally supportive of the efforts. They are concerned about the ability of pro se parties to follow the requirements. Some judges thought that the opt-out provision was too liberal; that the court should have the ability to oversee stipulations for extra-ordinary discovery.

The judges suggested a session at the Spring conference, a central repository of decisions on discovery motions, and getting input from lawyers representing malpractice insurance firms.

**Expert Reports and Depositions**

The committee recognized the weight of opinion favoring the ability to depose an expert witness. Several members commented that either a report or a deposition was appropriate, but not both. The committee discussed whether the proponent or the opponent should be able to make that choice. Most favored the opponent making the choice to depose an expert or require a report. The consensus was that the currently proposed restrictions should apply to that choice: the deposition would be limited to 4 hours; and the expert's testimony would be limited to matters fairly disclosed in the report. All agreed that the opponent should pay the expert's deposition fee and expenses, but not the attorney's.

The committee discussed an appropriate time line and settled on the following:

- The plaintiff would disclose their expert witnesses and associated information no more than 7 days after the close of fact discovery.
- The defendant would exercise their option to require a report or to depose the expert within 7 days after the disclosure.
- The expert would then have 28 days to complete the report or the defendant would have 28 days to complete the deposition.
- The defendant would disclose their expert witnesses and associated information within 7 days after the report or deposition.
- The plaintiff would exercise their option to require a report or to depose the expert within 7 days after the disclosure.
- The expert would then have 28 days to complete the report or the plaintiff would have 28 days to complete the deposition.

Maximum total elapsed time should be 12 weeks after the close of fact discovery. Mr. Shaughnessy volunteered to draft language for the next meeting.

**Multiple Tiers**

Professor Davies suggested a three-tier approach in which extraordinary discovery for one tier would not exceed the standard discovery for the next tier. The committee discussed whether, in a multiple tier system, the parties should engage in standard discovery before requesting extraordinary discovery. The general consensus was that discovery motions would be much more focused if the parties had the benefit of standard discovery.

Mr. Carney suggested that the first tier might be claims less than $50,000 in which there was no discovery, only the mandatory disclosures. Ms. McIntosh asked whether the supreme court had the authority to eliminate all discovery. Mr. Shaughnessy said that the parties would have to be allowed at least interrogatories and third party document subpoenas.

It was observed that the parties would have to declare that their damages did not exceed the amount of their tier. It was observed that a counterclaim or cross claim might move the case to the next tier.

There was a lengthy discussion about whether the parties would be able to amend their pleadings to seek damages that would put them into a higher tier. Judge Toomey reported that she presided over a case that started out as a personal injury case, but ultimately became a wrongful death case. It was observed that multiple tiers will add greatly to the complexity of discovery.

There was a lengthy discussion about the amount of damages to define each of the tiers and the discovery limits for each tier.

Professor Davies and Mr. Hafen volunteered to draft language for the next meeting.

**Proportionality**

Mr. Wikstrom stated that several of the commentators objected to the factors surrounding the principle of proportionality. He proposed integrating the factors developed by the Sedona Conference, which he believes are more concrete. Mr. Slaugh thought that the Sedona factors were not that much different from our own. Mr. Wikstrom volunteered to draft language for the next meeting.

**IV. ADJOURNMENT.**

The meeting was adjourned at 6:00 p.m. The next meeting will be held at 4:00 p.m. on Wednesday, January 26, 2011, at the Administrative Office of the Courts.