

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, September 17, 2008
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Jonathan Hafen, David W. Scofield, Cullen Battle, Barbara Townsend, Honorable Anthony B. Quinn, Leslie W. Slauch, James T. Blanch, Francis J. Carney, Todd M. Shaughnessy, Anthony W. Schofield, Steven Marsden, Honorable Derek Pullan, Matty Branch, Lori Woffinden

EXCUSED: Janet H. Smith, Judge R. Scott Waterfall, Lincoln Davies, Thomas R. Lee

STAFF: Tim Shea, Trystan B. Smith

GUEST: Rebecca Love Kourlis, Executive Director, Institute for the Advancement of the American Legal System

I. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and introduced Rebecca Love Kourlis, former Justice of the Colorado Supreme Court. She is the founder and Executive Director of the Institute for the Advancement of the American Legal System. Mr. Wikstrom provided Ms. Kourlis with some background on the committee's previous discussions concerning simplified discovery.

Ms. Kourlis summarized the Institute's work and research for the committee. She indicated the Institute maintains a database of different jurisdictions' rules of civil procedure from across the world. She discussed the work of a joint task force on discovery between the American College of Trial Lawyers and the Institute, and the task force's observations that in seventy-five (75%) percent of civil cases discovery was a problem. She indicated the joint task force planned to look at a set of concepts or principles for overhauling the current rules. In that context, Ms. Kourlis asked the committee to describe its goals and desires for simplified discovery rules.

Mr. Wikstrom and Mr. Carney indicated concerns about proportionality and in what cases simplified rules should be applied. Judge Nuffer noted his observations that discovering the adverse party's case has benefitted the process by allowing parties to know the deficits in their own case and settle cases without the need for a trial. Judge Pullan expressed his concerns about the current discovery rules and the lack of access to justice.

Mr. Shaughnessy questioned whether fee-shifting or a “loser pays” system had any affect on simplifying or decreasing the amount of discovery. Ms. Kourlis indicated the empirical data did not support fee-shifting as an alternative.

Ms. Kourlis indicated that the Oregon Bar was satisfied with their state discovery rules, but the Arizona Bar was dissatisfied with its rules. She further indicated that Utah would be on the forefront of re-examining its rules, and would have to be cautious and periodically re-evaluate the effectiveness of any changes.

Ms. Kourlis was asked what model she would recommend. She suggested requiring the plaintiff and defendant to put their respective cases on the table at the outset (for example disclosing witnesses, the subject matter of testimony, and material documents) in the complaint and in a responsive pleading. She would advocate early judicial intervention for case management. She would also suggest the judicial control of experts. In terms of document disclosure and particularly e-discovery, the requesting party would have to show the need for additional document requests beyond some presumed, limited discovery. If warranted, the requesting party could then be responsible to pay for it.

Mr. Wikstrom suggested specifically referencing proportionality. For example, limiting discovery in proportion to the amount in controversy and/or revising the rules to only allow discovery of admissible evidence.

The committee discussed pleading with particularity and disclosing all facts, documents, and witnesses as a part of the complaint and responsive pleading, and the limitations on a party’s ability to introduce evidence that was not initially disclosed.

The committee also discussed e-discovery—the process and the cost.

Ms. Kourlis suggested the committee begin by gathering feedback from the Bar to allow lawyers to be invested in the concepts and principles for a simplified process. She discussed developing a position paper outlining the proposals and discussing the issues with members of the Bar. She also suggested gathering the input of consumers of legal services to address their concerns in the process.

Finally, the committee discussed a pilot program where cases would be randomly picked for expedited discovery.

Mr. Wikstrom thanked Ms. Kourlis for joining us, and asked the committee to continue its discussions at the next meeting.

II. 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, October 22, 2008, at the Administrative Office of the Courts.