

## MINUTES

### UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, November 19, 2008  
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Honorable Lyle R. Anderson, Jonathan Hafen, Thomas R. Lee, Honorable Anthony B. Quinn, Leslie Slaugh, James T. Blanch, Francis J. Carney, Todd M. Shaughnessy, Steven Marsden, Honorable Derek Pullan, David W. Scofield, Barbara Townsend, Matty Branch

EXCUSED: Lincoln Davies, Judge R. Scott Waterfall, Cullen Battle, Lori Woffinden, Terrie T. McIntosh, Honorable David O. Nuffer, Janet H. Smith, Anthony W. Schofield

STAFF: Tim Shea, Trystan B. Smith

GUEST: Hutch Fale

#### I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the October 22, 2008 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. RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY.

Mr. Slaugh addressed concerns regarding a loophole in Rule 26 that allowed a party to serve document subpoenas on an unrepresented party prior to engaging in an attorney planning meeting. Mr. Slaugh discussed domestic practitioners concerns who felt it necessary to subpoena records prior to an attorney planning meeting in preparation for hearings on motions for temporary orders. The committee noted its concern for parties engaging in discovery without an attorney planning meeting. The committee also debated Mr. Slaugh's suggestion to amend Rule 26(d) to state: "In all cases, a party may not seek discovery from any source until 30 days after service of the pleading to which the discovery relates."

Judge Quinn observed that the committee should await a recommendation from the Family law section before addressing concerns regarding practitioners engaging in discovery in domestic cases without an attorney planning meeting.

Mr. Wikstrom suggested that the committee allow the Third District to render its

recommendations before the committee acts on the problem.

### **III. RULE 7. PLEADINGS ALLOWED; MOTIONS, MEMORANDA, HEARINGS, ORDERS, OBJECTION TO COMMISSIONER'S ORDER.**

The committee discussed Judge Claudia Laycock's recommendation that Rule 7(g) addressing objections to court commissioner's recommendations be moved to Rule 101. After a brief discussion, the committee unanimously agreed to move the language in Rule 7(g) to Rule 101.

The committee further discussed a number of concerns about the timing for a party to file a response to a cross-motion for summary judgment. After a brief discussion, the committee agreed Rule 7 as written adequately addressed the timing for such motions.

### **IV. RULE 3. COMMENCEMENT OF ACTION.**

Mr. Wikstrom welcomed our guest Hutch Fale and invited him to discuss Rule 3(a)(2) and his concerns regarding the 10-day summons.

The specific provision in question is Rule 4(c)(2), which states: "If the action is commenced under Rule 3(a)(2), the summons shall state that the defendant need not answer if the complaint is not filed within 10 days after service and shall state the telephone number of the clerk of the court where the defendant may call at least 13 days after service to determine if the complaint has been filed." The concern is that well-intentioned debtors call the court to determine if a complaint was filed, are told there is no complaint on file, when a complaint has been filed but due to administrative delays the clerk of the court is unaware of the filing.

Mr. Fale noted his experiences in the Fourth District that there is sometimes a 2 - 3 day delay before a filed complaint is lodged on the docket. He further noted a debtor's difficulty trying to determine if a complaint is on file because there is no assigned judge and no case number listed on the complaint and summons.

The committee discussed its previous discussions about abolishing the 10-day summons. The committee previously decided to keep the 10-day summons because it saved the debtor from paying a filing fee as a part of any judgment.

Mr. Carney suggested the committee elicit input from creditors and members of the collections industry before eliminating the 10-day summons.

Mr. Wikstrom recommended a revision where the action started with a summons, but the debtor would not have to file a response until another notice was sent telling the debtor to respond to the complaint.

Mr. Fale suggested either abolishing the 10-day summons, or increasing the deadline for a debtor to file an answer, perhaps 40 days.

Mr. Shaughnessy suggested a debtor contact the creditor's lawyer to see whether a complaint has been filed. To get a default, the lawyer would have to certify she told the debtor a complaint had been filed.

Mr. Wikstrom asked that the committee think further about possible solutions and revisit Rule 3(a)(2) at a future meeting.

## **V. SIMPLIFIED CIVIL PROCEDURES**

Mr. Wikstrom circulated a draft of concerns and principles for the committee's consideration, and opened discussion to determine if the committee could reach any consensus.

Judge Quinn noted that currently parties do not meet and meaningfully discuss a discovery plan. Parties merely circulate dates through correspondence and rely on the defaults when drafting attorney planning meeting reports.

Mr. Marsden noted that rule changes alone would not be enough to accomplish our goals.

The committee debated whether lowering the defaults would simplify discovery.

Mr. Wikstrom discussed changing the view point from all facts are discoverable to absent agreement, no facts are discoverable unless the party seeking discovery can demonstrate proportionality and reasonable likelihood of finding usable evidence.

Judge Pullan suggested the committee approach the Supreme Court suggesting a paradigm shift, a cultural change, amongst lawyers.

Mr. Shaughnessy questioned whether the rules should be drafted to deal with the ordinary case or the exceptional case.

Mr. Carney questioned whether the committee believed there was a problem with discovery. Mr. Shaughnessy noted there was a problem with the routine case. Mr. Slauch noted that the dollar amount in controversy was not a good indicator of the complexity of the case. He suggested simplified discovery based on a dollar amount alone may not alleviate the committee's concerns. Mr. Wikstrom said the committee should approach the issue with a "veil of ignorance," not anticipating the perspective of plaintiff or defendant on a large or small case.

Mr. Wikstrom asked the committee's opinion about a requirement that a party produce without a request at the onset of litigation all documents and things that they might use as evidence to support their claims or defenses. The committee questioned how the above principle would differ from the current rules governing initial disclosures.

Mr. Marsden and Judge Quinn said that we might develop custom disclosure lists based on the nature of the case. Mr. Wikstrom indicated that we could ask the specialty sections of the Bar to develop such lists.

Judge Quinn said that as a lawyer he frequently had several boxes of documents and so did the other side. He has observed as a judge that seldom are more than 25 documents critical to the case. The difficulty is in identifying those documents. Several committee members said that is especially difficult as the amount of data from multiple drafts, email, text messaging and other sources grows at an incredible rate.

Mr. Wikstrom said that if a \$50,000 case cannot be filed because the cost is prohibitive, we have a problem. Mr. Carney indicated that in medical malpractice a \$200,000 case is iffy. Judge Pullan said that if we try to measure the cases that are not being filed, we may be looking for something that is not there. Mr. Shea said that the computer system may be able to report an amount in controversy, and we could then see the minimum amounts claimed.

Mr. Lee said that our discussions with the Supreme Court should identify the issues and the principles, but that we do not have a particular agenda. At a minimum we need to let the court know what we are doing, and see whether they have any advice.

Mr. Carney noted that an earlier effort with the legislature to streamline the process did not pass.

Judge Quinn made a motion to approve Mr. Wikstrom meeting with the Supreme Court to present the issues and principles prepared in Mr. Wikstrom's paper and as modified by the discussion today. Mr. Carney seconded the motion.

Mr. Marsden said that there are some points in the paper that he does not support, but that he favors the motion. Mr. Hafen suggested removing some of the more controversial detailed suggestions that might act as lightning rods.

Mr. Marsden referred to the New Mexico principles, which he thought might be adequate at this early stage: proportionality, reduce delay and cost, improve access to trials, protect court resources, modify the legal culture.

Mr. Hafen said that he thought it compelling to observe that the federal rules are designed for a certain type of case and that most cases in the state system are not that case.

Mr. Wikstrom called for the question and the motion passed unanimously. Ms. Branch will try to find time on the Court's December 10 agenda.

## **VI. 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, January 28, 2009, at the Administrative Office of the Courts.