MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

Wednesday April 27, 2011
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Chair, Trystan B. Smith, Francis J. Carney, Terrie T. McIntosh, Honorable Kate Toomey, Honorable Lyle R. Anderson, James T. Blanch, Honorable Derek P. Pullan, Lincoln L. Davies, Robert J. Shelby, W. Cullen Battle, W. Todd Shaughnessy, David Moore, David W. Scofield, Barbara L. Townsend, Steven Marsden

EXCUSED: Honorable David O. Nuffer, Leslie W. Slaugh, Jonathan O. Hafen, Lori Woffinden, Sammi V. Anderson

STAFF: Timothy M. Shea

I. APPROVAL OF MINUTES:

Mr. Wikstrom called the meeting to order at 4:00 p.m. Mr. Wikstrom entertained comments from the committee concerning the March 23, 2011 meeting minutes. Mr. Carney moved to amend the third paragraph, section II of the minutes. He further moved to include in section III a paragraph referencing the committee's discussions concerning *Drew v. Lee* and disclosures from non-retained experts. The committee approved the minutes as amended.

II. SIMPLIFIED DISCLOSURE AND DISCOVERY RULES:

The committee studied each of the disclosure and discovery rules, and debated the suggested amendments, before releasing the current version of the rules for the forty-five day comment period.

Mr. Battle questioned which party bore the burden of proof if a party objected to a discovery request under standard discovery? Mr. Battle moved to amend Rule 26(b)(3) to indicate the party seeking discovery <u>always</u> has the burden of showing proportionality and relevance. He indicated the current version of Rule 26 and its comment did not fully resolve the issue, but suggested the burden is shifted only where a party seeks discovery beyond standard discovery. Mr. Battle also moved to amend Rule 26's Committee Note to indicate the party seeking discovery always has the burden of showing the request is relevant and satisfies the standards of proportionality. The committee unanimously approved both motions.

Mr. Wikstrom asked the committee to address the Rules one-by-one for substance and form.

Mr. Carney moved to amend Rule 8's Committee Note to omit the citation and reference to *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1186 (Utah 1989) as it refers to motions for summary judgment under Rule 56. The committee approved the motion.

Mr. Carney directed the committee's attention to Rule 9(l)(2) addressing allocation of fault. He noted the need to amend the subsection to omit the reference to 'discovery plan' as the simplified rules no longer contemplate parties entering into a discovery plan. Mr. Carney discussed the history of Rule 9(l) and its connection to the Liability Reform Act. Mr. Blanch discussed his concern that parties identify those they contend are at fault as soon as practicable. Judge Pullan also noted the rule should encourage parties to identify potentially at fault parties early on in the litigation. The committee discussed when it was appropriate to identify potentially at fault non-parties, for example, as soon as practicable, in a responsive pleading, in initial disclosures, at the deadline for amendment of pleadings, at the close of discovery, or ninety days before trial. Mr. Marsden questioned the circumstance where one party would be unaware of a potentially at fault non-party.

The committee discussed inserting the language of Rule 9(l)(2) into Rule 26(a)(1). After addressing a party's right to move for good cause shown to allocate fault to a non-party ninety days before trial, Mr. Smith moved to strike the reference to discovery plan in Rule 9(l)(2). The committee unanimously approved the motion.

The committee next addressed Rule 16 and the amendments to subsections (a)(5) and (b) regarding mediation and ADR. The suggested amendments would allow the court in its discretion or upon motion to order the parties to appear for mediation or other ADR processes. The amendment, in subsection (b), would require a party to certify there were no pending motions; that mediation or other ADR processes were complete or excused; and disclosures and discovery were complete before the court could set a matter for trial.

The committee discussed its concern that when ADR or mediation is ordered neither may be successful. Mr. Carney, in particular, noted his observations as a mediator in this regard. Mr. Battle questioned whether 'disclosures' meant not only initial disclosures, but pretrial disclosures.

Mr. Battle moved to remove the word 'disclosures' in subsection (b). Mr. Smith moved to remove the phrase "no pending motions" in subsection (b). Mr. Battle moved to include the word 'required' before mediation in the same subsection. The committee unanimously approved the three motions. The committee further approved the suggested amendment to subsection (a)(5).

The committee next discussed Rule 26(a)(3)(D) and non-retained experts. Mr. Battle questioned whether the rule needs to specifically state that a party is entitled to depose a non-retained expert. The committee believed it was clear you could take the non-retained expert's deposition. However, Mr. Blanch moved to strike the language in the last sentence of Rule 26(a)(3)(D) that states, "must be taken within 28 days after the expert witness is disclosed." The committee unanimously approved the motion.

Judge Pullan questioned (1) whether the time to depose experts was in addition to fact depositions, and (2) where in Rule 26 it was included? After debating whether the current version of the rules addressed the issue, Mr. Shaughnessy and Mr. Battle suggested amending Rule 26(c)(5) and the corresponding table to amend the phrase, "standard discovery," where appropriate, to state, "standard fact discovery." The committee unanimously approved the motion.

Mr. Battle suggested amending Rule 26(c)(6)(B) to require a party to not only move and sign a statement for extraordinary discovery, but set forth the reasons why extraordinary discovery is necessary and proportional and certify the party has reviewed and approved a discovery budget. The committee agreed parties should explain the reasons why extraordinary discovery is necessary and believed a certification would be appropriate. The committee therefore approved the motion.

Mr. Shaughnessy brought to the committee's attention that Rule 26's Committee Note indicated that the parties' 26(a)(1) disclosure obligations do not commence while a motion to dismiss is pending. He was not clear if the committee reached a consensus on the issue, but the committee noted its belief that this was accurate.

Judge Pullan subsequently questioned whether discovery motions suspended or tolled discovery time limits? Mr. Wikstrom and Mr. Shelby commented that the committee agreed that a party makes its motion, but continues to engage in discovery. The committee further noted the last sentence of Rule 37(d) specifically addressed the issue.

The committee next addressed Rule 29. The committee questioned why subsection (a) should not be moved to Rule 30 dealing with depositions. Mr. Battle suggested moving the language in Rule 29(a) and creating a subsection Rule 30(i), Deposition procedures. The committee approved.

Ms. McIntosh questioned whether we needed Rule 29(b), in light of the language in Rule 26? Mr. Wikstrom noted its importance if there was a question whether parties by stipulation could opt for extraordinary discovery.

Finally, Mr. Carney moved to amend Rule 37(e)(2) to state, "may impose appropriate sanctions for the failure to follow its orders …." He pointed out the Utah Court of Appeals noted a grammatical error in the rule. The committee approved the amendment.

The committee agreed to submit the current version of the rules as amended for comment. The committee further agreed to add an additional meeting on its schedule for August 3, 2011 to consider comments.

III. ADJOURNMENT:

The meeting adjourned at 6:20 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday, May 25, 2011, at the Administrative Offices of the Courts.