MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

February 22, 2012

PRESENT: Francis M. Wikstrom, Chair, Terrie T. McIntosh, Janet H. Smith, James T. Blanch, Francis J. Carney, Honorable Kate Toomey, Lori Woffinden, Robert J. Shelby, Trystan B. Smith, Professor David Moore, Honorable John L. Baxter, Lincoln L. Davies, Barbara L. Townsend, Jonathan O. Hafen, W. Cullen Battle

EXCUSED: David W. Scofield, Honorable David O. Nuffer, Honorable Todd M. Shaughnessy

PHONE: Honorable Derek P. Pullan, Honorable Lyle R. Anderson

STAFF: Timothy Shea, Diane Abegglen, Sammi Anderson

GUESTS: Bob Wilde

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the January 25, 2012 minutes. The committee unanimously approved the minutes.

II. PROPOSED RULE 26.3.

Bob Wilde presented to the committee a proposed Rule 26.3, focusing on employment law. The rule would cover employment cases that include a state law wrongful termination claim. The proposed rule essentially tracks a federal proposal with minor modifications. Mr. Wilde explained that disclosures under Rule 26.3 should in many respects preempt the necessity for a document request, at least as to preliminary matters, and is intended to ensure that discovery can begin in earnest immediately upon receipt of disclosures. The committee questioned whether the number of employment cases litigated in state court warrant the proposed specialty rule. Judge Pullan raised an additional concern about whether subsections (c)(2) or (c)(3) of the proposed 26.3 conflict with the sanctions and proportionality provisions contained in Rule 26. The committee agreed that the procedures called for in the specialty rules must not differ from the provisions in Rule 26 and the other rules. They need to be harmonized. Mr. Wikstrom also raised concerns about the potential for proposed Rule 26.3 superseding, rather than supplementing, Rule 26(a)(1). Jan Smith agreed to head up a subcommittee to discuss with Bob Wilde and the employment law section whether proposed Rule 26.3 can be brought into

conformity with the format of Rule 26 and specialty rules 26.1 and 26.2. Jon Hafen and Sammi Anderson agreed to serve on the subcommittee.

III. FREQUENTLY ASKED QUESTIONS.

Judge Pullan and Mr. Frank Carney have compiled a list of frequently asked questions about the simplified rules of discovery and have prepared proposed answers to many of these. The committee reviewed the first ten proposed questions and considered responses to each.

Question 1 – With regard to the effective date of the new rules, the committee voted in favor of the proposed response to Question 1.

Question 2 – With regard to the question of who will keep track of the standard discovery deadlines, the committee discussed the proposed response at length. Ms. McIntosh suggested that the burden be placed on both counsel and parties (in case of pro se matters). Mr. Carney suggested moving the last paragraph to the beginning, front loading the notion that the trial court is supposed to provide a reminder of deadlines. However, Judge Anderson expressed concern that the primary obligation remain on counsel and that the proposed response not create the misimpression that the court can be trusted and relied upon exclusively to shoulder this burden. Judge Toomey noted that not all cases are currently being handled in this fashion and that issues could arise if counsel's e-mail address is not current with the Utah State Bar. Judge Anderson expressed concern that parties could argue that their time had not run if they did not receive notice. Ms. Smith suggested amending the second paragraph to say "While the new rules contemplate increased judicial case management, the ultimate burden falls on counsel and the parties." Judge Toomey suggested inserting a section addressing what the court will actually do now. Mr. Carney agreed to revise the response.

Question 3 – Concerning the issue of what damages are considered in arriving at the damage amount for purposes of the tier level, Mr. Smith raised an issue he has encountered where the plaintiff is naming a minimum damage amount but then claiming some unspecified amount beyond that. It is therefore unclear what tier the plaintiff is pleading into. The committee discussed a hypothetical to put into a Q & A format to state that such a pleading would be defective. Mr. Smith agreed to prepare this. The committee otherwise unanimously voted in favor of the response to question 3.

Question 4 – With respect to the question of whether the tier designation is based on damages claimed by plaintiff only, or on damages claimed by all parties, the committee voted unanimously in favor of the proposed response.

Question 5 – As to the question of what happens if a party is not permitted to state an amount of damages in its pleading or simply wants to plead reasonable damages, Mr. Hafen moved to amend Rule 10 to require tier designation in the caption as

suggested in Mr. Shea's memorandum circulated in advance of the meeting. Otherwise, the pleading will be defective and the clerk will reject it. The complaint will be considered lodged for purposes of the statute of limitations, but if the defective pleading is not followed with a pleading that conforms to Rule 10 as amended, the case will be dismissed. The motion was seconded and approved by the committee unanimously. Mr. Hafen agreed to revise the response to Question No. 5 to conform to the proposed amendment to Rule 10.

Question 6 – With regard to whether interrogatories or other discovery may be served with a party's initial disclosures, the committee approved the proposed response to Question No. 6, subject to a minor formatting change suggested by Mr. Shelby.

Question 7 – Regarding clarification as to "that party" under Rule 26(c)(2), the committee suggested grammatical changes and revisions to make the language of the response gender neutral. The committee voted in favor of the response as amended.

Question 8 – Concerning the question of whether the new discovery rules place any limits on third-party subpoenas, Mr. Carney proposed amending the response to note that subpoenas are limited by concepts such as proportionality, relevance, etc. While subpoenas are not numerically limited, the parties must still abide by the other discovery rules.

Question 9 – As to whether co-defendants or third-party defendants with conflicts between them are required to share their standard discovery allotment, Judge Toomey suggested amending the last sentence of the response to state that conflicts may warrant a request for extraordinary discovery "at an appropriate time." The committee also suggested changing the words "significant conflicts" in the response to read "substantial controversy." The committee also changed the question in that respect. The question and response is now targeted to co-defendants or third-party defendants with "substantial controversies" between them. The committee voted in favor of the response as amended.

Question 10 – With respect to the question of what happens to the discovery deadlines if new parties are added, the committee proposed grammatical changes and revisions to make the response gender neutral. Mr. Wikstrom suggested adding "at the appropriate time" to the end of the last sentence. Mr. Blanch suggested removing the word "fact" as a modifier of discovery in the first and last paragraph. Mr. Carney proposed removing the word "sometime" from the second paragraph. The committee voted to approve as amended.

Mr. Wikstrom announced that the committee would start with Number 11 on the proposed list of Frequently Asked Questions at the next meeting.

IV. SMALL CLAIMS SUBCOMMITTEE.

Mr. Wikstrom noted that the Supreme Court has asked the committee to review some concerns about the rules governing small claims proceedings. Mr. Wikstrom asked Judge Baxter to chair the subcommittee and mentioned that Mr. Slaugh had served as a small claims court judge. Judge Baxter stated he would approach potential members and come back to the committee with the subcommittee's proposed composition. Mr. Shea briefly addressed the issues the Supreme Court would like the committee to review and consider, which include most immediately questions regarding service.

V. ISSUES IDENTIFIED DURING STATEWIDE WORKSHOPS.

Mr. Shea led a discussion regarding suggested revisions to the new simplified rules that were received from court clerks and judges during a series of workshops conducted by the Administrative Office of the Courts for judges and clerks.

First, court clerks want to be able to e-mail notices to the lawyers on the case. The committee discussed amending Rule 5 to permit courts to e-mail case notices to counsel. Significant discussion ensued regarding courtesy notices that are currently anticipated being sent by the courts regarding scheduling, as well as concerns that those notices may not be concise and/or accurate. The committee discussed the importance of language in the notice indicating that the dates included are an outside date, expressly disclaiming the parties' ability to conclusively rely upon the notice as to deadlines and stating that the actual due date may be earlier than stated in the notice such that counsel and parties need to consult the rules. The committee agreed to amend Rule 5 on this point and Mr. Shea agreed to bring proposed language back to the committee.

Second, it was suggested that the committee amend Rule 10 to require that all attorney contact information included on a pleading match the contact information on file with the Utah State Bar and to require coversheets for counter and cross claims. The coversheets should be used to designate a tier. The committee approved these amendments in concept and Mr. Shea will bring proposed language back to the committee on these revisions.

Third, the committee rejected proposals to default to Tier 1 if no tier is designated in the pleading. The committee also rejected a proposal to amend Rule 26 to state that in motions and stipulations for extraordinary discovery, the client, not the lawyer representing a party, has approved a discovery budget.

Last, the committee discussed a proposed amendment to Rule 26 to reinstate the exemption from disclosure requirements for contract cases with amounts in controversy under $20,000. Mr. Shea explained that the judges are primarily concerned about pro se defendants who may not understand the rules. Courts don't

want to see evidence excluded where a pro se defendants fails to produce with its initial disclosures, for example, a receipt in a debt collection case.

VI. RULE 58A. NOTICE OF JUDGMENT AND HOW IT AFFECTS APPEAL.

Mr. Wikstrom reintroduced the issue of service of notice of judgment and how that affects a party's ability to timely appeal the judgment; specifically, whether a party may be jurisdictionally time-barred from appealing a judgment where the prevailing party failed to serve notice of the entry of the judgment as required by the rules. Mr. Wikstrom stated that perhaps the best way to deal with the issue is by explicitly noting in Rule 60(b) that this may be a basis to set aside the judgment at the trial court level. The concern is that the 30 day window for appealing is generally considered jurisdictional. The committee discussed that the problem may not be solved through electronic filing or notices because the persons not getting notices are typically prisoners or pro se litigants. Mr. Wikstrom also suggested having the appeal time run not from the date of the judgment but from the certificate of service of notice of the judgment. This may require amendment to Appellate Rule 4. Mr. Carney suggested changing the definition of judgment in Rule 58A to change when the judgment is final and having that date triggered by service of the notice of judgment, as opposed to entry by the clerk. Mr. Carney also suggested amending Appellate Rule 4 to state that the appeal time runs not from the date of entry of the judgment, but from the date of service. Mr. Wikstrom proposed tweaking 58A to require service of the judgment but also filing a Notice of Service and proposing a change to Appellate Rule 4 to have the appeal deadline run from the time of service of notice of the judgment.

Mr. Shea summarized the various possibilities to resolve the issue, including amending Rule 60(b), amending the rules to have the 30 day appeal time triggered by the filing of a Notice of Service or creating a 60(b) like process where a party can plead its case to the court as to excusable neglect for failing to meet the appeal deadline. The committee decided to pursue the second alternative and Mr. Shea agreed to return to the committee with some proposed language at the next meeting.

VII. HB 235 – OFFER OF JUDGMENT.

The committee discussed generally the history of proposed amendments affecting the rule governing offers of judgment rule while waiting for Representative Ivory to join the meeting to explain his proposed HB 235. The committee discontinued discussions when Representative Ivory did not join the meeting as previously planned.

VIII. ADJOURNMENT.

The meeting adjourned at 6:04 p.m. The next meeting will be held on March 28, 2012 at 4:00 p.m. at the Administrative Office of the Courts.