MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

April 25, 2012

PRESENT: Francis M. Wikstrom, Chair, W. Cullen Battle, James T. Blanch, Francis J. Carney, Professor Lincoln L. Davies, Steve Marsden, Terrie T. McIntosh, Honorable David O. Nuffer, Robert J. Shelby, Leslie Slaugh

EXCUSED: Honorable Lyle R. Anderson, Sammi Anderson, Jonathan O. Hafen, Honorable Derek P. Pullan, Janet H. Smith, Trystan B. Smith, Honorable Kate Toomey, Barbara L. Townsend

PHONE: David W. Scofield, Lori Woffinden

STAFF: Diane Abegglen, Timothy Shea

GUESTS: Rep. Ken Ivory, Phillip Favro

Judge Nuffer introduced Mr. Favro, who is following the Utah discovery experiment and will be writing an article with Judge Pullan.

I. Approval of minutes.

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

II. HB 235, Offer of judgment in civil cases.

Rep. Ivory said that he had proposed HB 235 in the 2012 general session to try to create a tool to help settle cases. He said that business groups generally supported the legislation, but that attorney groups did not. He said that including the obligation to pay the offeror's attorney fees, if the offeree does not improve upon an offer creates a powerful incentive to settle. He said that HB 235 was based on a Nevada statute, and that he is working to simplify the language. He said that Nevada lawyers use the statute to weed out non-meritorious cases. He said that authorizing attorney fees seemed to be substantive, although the process by which offers are made is procedural.

Mr. Carney said that this committee had worked with Rep. Dougal some years ago to develop the current Rule 68. He said that insurance defense attorneys at that time had opposed including an attorney fee provision because plaintiffs often did not have the assets with which to pay a defendant's attorney fees.

Mr. Slaugh asked, if the amended bill is limited to commercial litigation, why not simply let the parties contract for attorney fees? Rep. Ivory said that many small business owners wrongly assume that the loser has to pay the winner's attorney fees, so there might not be an attorney fee provision in the contract.

Mr. Carney asked, how does this help a small business claim? Rep. Ivory said that the parties are in control of the offers and both parties will have to size up the case. He said that if a party's offer is rejected, the offeror will have more latitude in future negotiations.

Ms. McIntosh asked, has Nevada studied the effects of their statute? Rep. Ivory said that there has been no statistical analysis, but that anecdotal evidence is supportive.

Mr. Blanch said that the federal approach has Congress deciding whether, in a particular statutory cause of action, the term "costs" includes attorney fees. Then the rules of procedure describe the recovery of costs.

Mr. Favro said that California has a statute similar to the Nevada policy and that including attorney fees does create a strong incentive to settle when served with an offer.

Mr Wikstrom said that when the committee worked with Rep. Dougal to draft Rule 68, the committee concluded that the Supreme Court does not have the authority to authorize attorney fees. Similar to the federal model, Rule 68 includes recovery of attorney fees for failure to improve upon an offer, but only if some other law establishes the right to attorney fees. He said the legislature could establish whether there is a right to recover attorney fees, and the court rule could govern the process.

Mr. Carney said that the substantive provision should include the right to recover expert witness fees as well as attorney fees. Mr. Carney will work with Rep. Ivory.

III. Rule 83. Vexatious litigants.

Mr. Wikstrom reported that he and Judge Toomey and Mr. Shea had met with the Supreme Court to recommend adoption of Rule 83. The Court has approved the rule with two further changes. Instead of reporting a vexatious litigant to the Judicial Council, the clerk will report it to the Administrative Office of the Courts. And, in the definition of a vexatious litigant, the Court has changed five wins to two wins against 5 loses.

IV. Rule 26.2(d).

Discussion was deferred to the next meeting due to the absence of Mr. Zimmerman and Mr. Smith.

V. Initial disclosure deadlines. Rule 26.

Mr. Blanch suggested a change to Rule 26 so the deadlines are more certain. Actual deadline dates may vary by as much as 14 days from the courtesy notice from the court, depending on how quickly the plaintiff serves its initial disclosures. His proposed change would add up to 14days to the time in which the defendant has to serve its initial disclosures, but the delay seems modest and the added certainty is important.

Mr. Wikstrom treated Blanch's proposal as a motion, which was seconded by Mr. Battle. The committee voted all in favor.

Mr. Slaugh said that as drafted Rule 26 used "provided" and "made" when the term "served" would be more appropriate. Mr. Shea will make those replacements for the committee to consider.

VI. Definition of damages. FAQ.

Mr. Shea suggested that the FAQ on the definition of damages be amended to read: "To determine the appropriate tier, a party should include in the damage calculation all amounts sought as damages by all parties." He said that during the discussion last month of a party pleading a counterclaim or cross claim, the committee seemed to intend the subsequent tier designation needed to include damages claimed in an earlier pleading. The committee approved the amendment.

VII. FAQs.

The committee considered the question and answer "Monitoring discovery deadlines." The committee will reconsider the answer after reviewing the notice of deadlines that the court sends out.

The committee approved the question and answer "Designating a tier without specified damages." The committee approved the question and answer "Effect of not designating a discovery tier." The committee amended and approved the question and answer "Third-party subpoenas."

The committee considered and approved the first of Mr. Blanch's two suggested questions and answers, which he had circulated by email before the start of the meeting. The committee considered the question and answer "Definition of 'damages' for designation of a discovery tier." Mr. Blanch will integrate this latter topic into the question and answer which the committee had already approved.

The committee considered the question and answer "Length of depositions." Mr. Blanch will redraft this section.

The committee considered the question and answer “Expert discovery—Rebuttal experts.” Mr. Carney said that because Rule 26 does not include the timing for a report or deposition of a rebuttal expert, many believe that rebuttal experts are no longer allowed. That was never the committee’s intent. Mr. Carney will draft a new section for Rule 26 to include rebuttal experts.

The committee considered the question and answer “Judgment exceeding tier limits” and “Discovery tier limits and the jury.” The discussion was to the effect that by designating a discovery tier, a party waived the right to recover damages beyond the upper limit of that tier, but that the waiver should be treated as a statutory cap on damages. Professor Davies will integrate the two sections and redraft the answer in light of the discussion.

VIII. Adjournment.

The meeting adjourned at 6:00 p.m. The next meeting will be held on May 23, 2012 at 4:00 p.m. at the Administrative Office of the Courts.