Minutes

Advisory Committee on the Rules of Civil Procedure

January 28, 2015

Present: Rod Andreason, John Baxter, Scott Bell, Lincoln Davies, Jonathan Hafen, Presiding, Steven Marsden, Terrie McIntosh, Amber Mettler, Todd Shaughnessy, Leslie Slaugh, Kate Toomey, Barbara Townsend, Lori Woffinden

Excused: James T. Blanch, Heather M. Sneddon, Trystan B. Smith, Paul Stancil

Staff: Tim Shea

Guests: Lane Gleave, Tyler Gleave, Paula Hannaford-Agor, Cynthia Lee

(1) APPROVAL OF MINUTES.

The minutes of November 19, 2014 were approved as prepared.

(2) ELECTRONIC SERVICE OF SUMMONS AND COMPLAINT

Mr. Lane Gleave of Utah Court Services, LLC, presented his proposal to allow electronic service under Rule 4 for personal jurisdiction. The system is web-based. Mr. Tyler Gleave demonstrated how the defendant would receive a postcard in the mail with the contact information of the process server, the web URL, and a PIN to download the complaint and summons. The defendant enters his or her cell phone (on which to receive a text) and the last 4 digits of his or her Social Security Number (which verifies the defendant's identity). The system sends a text with a second PIN that the defendant then uses to download the complaint and summons.

To download the files, the defendant must check a box agreeing to the process server's terms and conditions and a second box agreeing to be served electronically.

Mr. Gleave said that the system is 256-bit encrypted, so it is secure. Even if someone hacked into the system, the files would not be readable. He said this method of service reduces costs and results in less pollution because fewer miles are driven. If the plaintiff cannot provide Mr. Gleave with the defendant's SSN, this method of service will not work. The system maintains the defendant's SSN and cell phone number even if the defendant does not download the files. The system records the IP address of the computer the defendant uses.

Mr. Slaugh said that he supports electronic service, but does not like the idea of having to provide a cell phone number and truncated SSN. Committee members thought that most people would not trust the security of the website or respond to the postcard. Mr. Gleave said that people sometimes call to verify the legitimacy of the postcard before going to the website. He said that he was using this system to serve defendants until a clerk in West Jordan objected.

Judge Baxter asked what percentage of Mr. Gleave's service is in collections. Mr. Gleave estimated 50% to 75%. Committee members expressed concern that information provided by a defendant to a process server would be turned over to the creditor.

Mr. Andreason expressed concern that the actual defendant may not be the person downloading the files. Mr. Gleave said the system compares the SSN provided by the person responding to the postcard with the SSN provided to Mr. Gleave by the plaintiff. If the numbers do not match, the person will not receive a text with the second PIN and so cannot download the file. The postcard is mailed to the address provided by the plaintiff and will be forwarded by the Post Office.

Mr. Hafen expressed concern that the postcard included a badge and other indicators that it was from a court or a law enforcement agency.

Judge Shaughnessy said that this method of electronic service is very similar to service by mail or commercial courier. The defendant agrees to be served in this manner and provides an electronic

signature. Mr. Bell asked if Mr. Gleave had ever served a corporation using this system, and Mr. Gleave responded that he had not. Mr. Slaugh said that a rule would have to be specific enough to ensure security and generic enough not to endorse any particular product.

Mr. Bell said that Mr. Gleave's letter referred to his effort with the Legislature, and asked what efforts he has made. Mr. Gleave said that he had approached Rep. Oda. Rep. Oda said that the Legislature can amend the rules, but that Mr. Gleave should first present the idea to this committee.

Mr. Hafen asked for a sense of the committee. There was consensus that the idea is worth pursuing and that Mr. Shea should draft an amendment to Rule 4 for consideration.

(3) REPORT ON UTAH DISCOVERY REFORMS

Ms. Paula Hannaford-Agor and Ms. Cynthia Lee of the National Center for State Courts reported the results of their research on the civil discovery reforms put in place in 2011.

They examined data from cases filed between January 1 and June 30, 2011—before implementation of the new rules—and between January 1 and June 30, 2012—after implementation. Because there were no tiers during the earlier timeframe, they imputed a tier based on the amount of damages claimed. They confirmed the imputed tier based on judgments in those cases. Their conclusions included:

- The changes did not result in any change in filings, positive or negative. The number of new filings has been declining in Utah since the start of the great recession, but there is no change in that trend after the new rules. Declining caseloads is a national phenomenon.
- Cases are being resolved more quickly. Time-to-disposition improved at a statistically significant level overall and in every tier and in every casetype.
- Discovery disputes have declined in number and are occurring earlier in the case.
- The percentage of self-represented litigants in tier 1 cases declined, and was not affected in tier 2 or 3.
- Compliance with the amount of standard discovery is very high. Many cases have no discovery. Compliance with discovery timelines is very low. The court is not enforcing the deadlines.
- About 75% of cases with expert discovery opted for the expert's report rather than a deposition.
- There is general agreement among lawyers that the opposing side complies with required disclosures and that disclosures and standard discovery are adequate. Favorable opinions increase for Tier 2 over Tier 1 and for Tier 3 over Tier 2.
- Positive and negative opinions about whether discovery was proportional to the case is about evenly distributed.
- There is general agreement among lawyers that discovery was not completed more quickly than under the former rules, that discovery costs were not less, and that the case was not resolved more quickly. The last is contrary to the CORIS data, but the others cannot be confirmed or challenged by CORIS data.
- The expedited discovery dispute process was viewed more favorably when CORIS confirmed that there actually was a dispute.
- There is some evidence of tier inflation, pleading a higher amount to obtain more discovery.

The committee discussed reasons why tier 2 and 3 cases have increased and tier 1 cases have declined. The committee discussed how the district court might better monitor and enforce deadlines.

(4) ADJOURNMENT

The committee deferred the remaining items on the agenda and adjourned at 6:00.