Agenda
Advisory Committee on Rules of Civil Procedure

October 22, 2008
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Approval of minutes	Tab 1	Fran Wikstrom
Simplified Civil Procedures	Tab 2	Fran Wikstrom
Final recommendations on amendments to Rules 6, 45, and 103	Tab 3	Tim Shea
Rule 30(b)(6) designation of trial witnesses	Tab 4	Rich Humphreys
Canfield Request	Tab 5	Tim Shea
Rule 26	Tab 6	Leslie Slaugh

Committee Web Page: http://www.utcourts.gov/committees/civproc/

Meeting Schedule

November 19, 2008
January 28, 2009
February 25, 2009
March 25, 2009
April 22, 2009
May 27, 2009
September 23, 2009
October 28, 2009
November 18, 2009
January 27, 2010

Tab 1

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, September 17, 2008
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Jonathan Hafen, David W. Scofield, Cullen Battle, Barbara Townsend, Honorable Anthony B. Quinn, Leslie W. Slaugh, James T. Blanch, Francis J. Carney, Todd M. Shaughnessy, Anthony W. Schofield, Steven Marsden, Honorable Derek Pullan, Matty Branch, Lori Woffinden

EXCUSED: Janet H. Smith, Judge R. Scott Waterfall, Lincoln Davies, Thomas R. Lee

STAFF: Tim Shea, Trystan B. Smith

GUEST: Rebecca Love Kourlis, Executive Director, Institute for the Advancement of the American Legal System

I. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and introduced Rebecca Love Kourlis, former Justice of the Colorado Supreme Court. She is the founder and Executive Director of the Institute for the Advancement of the American Legal System. Mr. Wikstrom provided Ms. Kourlis with some background on the committee's previous discussions concerning simplified discovery.

Ms. Kourlis summarized the Institute's work and research for the committee. She indicated the Institute maintains a database of different jurisdictions' rules of civil procedure from across the world. She discussed the work of a joint task force on discovery between the American College of Trial Lawyers and the Institute, and the task force's observations that in seventy-five (75%) percent of civil cases discovery was a problem. She indicated the joint task force planned to look at a set of concepts or principles for overhauling the current rules. In that context, Ms. Kourlis asked the committee to describe its goals and desires for simplified discovery rules.

Mr. Wikstrom and Mr. Carney indicated concerns about proportionality and in what cases simplified rules should be applied. Judge Nuffer noted his observations that discovering the adverse party's case has benefitted the process by allowing parties to know the deficits in their own case and settle cases without the need for a trial. Judge Pullan expressed his concerns about the current discovery rules and the lack of access to justice.

Mr. Shaughnessy questioned whether fee-shifting or a "loser pays" system had any affect on simplifying or decreasing the amount of discovery. Ms. Kourlis indicated the empirical data did not support fee-shifting as an alternative.

Ms. Kourlis indicated that the Oregon Bar was satisfied with their state discovery rules, but the Arizona Bar was dissatisfied with its rules. She further indicated that Utah would be on the forefront of re-examining its rules, and would have to be cautious and periodically re-evaluate the effectiveness of any changes.

Ms. Kourlis was asked what model she would recommend. She suggested requiring the plaintiff and defendant to put their respective cases on the table at the outset (for example disclosing witnesses, the subject matter of testimony, and material documents) in the complaint and in a responsive pleading. She would advocate early judicial intervention for case management. She would also suggest the judicial control of experts. In terms of document disclosure and particularly e-discovery, the requesting party would have to show the need for additional document requests beyond some presumed, limited discovery. If warranted, the requesting party could then be responsible to pay for it.

Mr. Wikstrom suggested specifically referencing proportionality. For example, limiting discovery in proportion to the amount in controversy and/or revising the rules to only allow discovery of admissible evidence.

The committee discussed pleading with particularity and disclosing all facts, documents, and witnesses as a part of the complaint and responsive pleading, and the limitations on a party's ability to introduce evidence that was not initially disclosed.

The committee also discussed e-discovery—the process and the cost.

Ms. Kourlis suggested the committee begin by gathering feedback from the Bar to allow lawyers to be invested in the concepts and principles for a simplified process. She discussed developing a position paper outlining the proposals and discussing the issues with members of the Bar. She also suggested gathering the input of consumers of legal services to address their concerns in the process.

Finally, the committee discussed a pilot program where cases would be randomly picked for expedited discovery.

Mr. Wikstrom thanked Ms. Kourlis for joining us, and asked the committee to continue its discussions at the next meeting.

II. 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, October 22, 2008, at the Administrative Office of the Courts.

Tab 2

The following colloquy is an exaggeration—but only slightly:

> Client: "How much justice can I get?"
> Lawyer: "How much can you afford?"

We have a marvelous system of civil justice—for those who can afford it. It is designed to discover every single fact that may bear some relevance to every issue in the case. Discovery has become the "tail" that "wags the litigation dog." Civil trials are a rarity. Cases are discovered to death and then resolved by motion or mediation. But what of the cases that are never brought because the amount in controversy will not justify the cost of litigation? Are the legal needs of the middle class being met when few can even afford to hire a lawyer?

Do we meet the lofty goals stated in Rule 1, i.e., do the Rules "secure the just, speedy, and inexpensive determination of every action"? Most would agree that they do a pretty good job of providing a "just" result, but few would admit that they achieve "speedy and inexpensive" justice.

According to a recent national survey of trial attorneys from both plaintiff and defense oriented practices, our system of discovery in civil cases is broken. 85% of those respondents said the system is too expensive; 87% said that electronic discovery increases the costs of litigation; and 94% said that litigation costs are an important factor in driving cases to settle.

What does all of this mean? It reflects a growing national consensus that our civil justice system is in need of substantial repair – repair designed to make the system more efficient, less costly, less complex, and ultimately more accessible.

The United States is the only major common law jurisdiction in the world that has not undertaken broad and deep systemic civil justice reforms. In fact, we are still operating with basic Federal Rules that were adopted in 1938, when computers and copy machines had not been conceived. The intention of the drafters of those Rules was to prevent trial by ambush and the Rules were based on two assumptions: notice pleading and liberal discovery. For decades, those principles worked to create generally fair outcomes, with proportionate costs because there just wasn't that much information to discover. In Utah, we have generally followed the Federal Rules.

Now, in the heart of the Information Age when emails, text messages, voice mails, and multiple drafts of documents are multiplying at a rate that we can only begin to understand, those principles need to be reexamined. Is it still appropriate to operate with a premise that discovery is open season – all information is good information, and the more the better? Are we not creating a system that is going to implode from sheer weight of available information and the cost and delay involved in seeking it?

The rest of the world has come up with some good ideas to address these issues. In the United Kingdom, documents are exchanged even in advance of litigation in accordance

with a set of expectations or "protocols" developed by practice area. In some countries, , there is an affirmative duty on each party to the litigation to produce relevant documents as attachments to the complaint and answer. In Canada, in some simplified cases, discovery is prohibited completely, and in all other cases, it is strictly limited. Depositions of experts are not allowed in many other common law countries, and interrogatories are limited or disallowed without court approval. There is also a specific focus on case management by the judges – so that the judge, not the attorneys, is in control of the pre-trial process.

Recently, in British Columbia, a task force charged with civil justice reform proposals observed that the time for "tinkering" has passed. If we were to build a system now, without any of the existing structure, what would it look like? Instead of a system driven by the principles of notice pleading and liberal discovery, how about a system in which each party has to disclose what it knows in the pleadings, and discovery is limited?

The Supreme Court Advisory Committee on the Rules of Civil Procedure is wrestling with these issues. We are looking for solutions to the very real problems plaguing civil litigation. Rather than just tinkering with the Rules, we are taking a step back and trying to conceptualize a set of rules that will better serve our state in this information age.

Here are some of the issues we will be considering:

Should the scope of discovery be limited? In this age of exponential information growth, is the standard of "reasonably calculated to lead to the discovery of admissible evidence" too broad? Do we need to strengthen the concept of "proportionality" currently stated in Rule 26(b)(3)(C) so that discovery costs may not exceed a certain percentage of the amount in controversy absent special circumstances?

Should fact pleading be required instead of notice pleading? Should the plaintiff be required to produce all documents that support her claim as soon as counsel for the defendant appears? Should the defendant be required to produce all documents supporting his defenses at or near the time of the answer? What should be the penalties for failure to disclose? What is the duty of supplementation? Should there be special disclosure rules developed by the specialty bars for particular types of cases such as divorce, collection cases, personal injury, or medical malpractice?

Should the discovery rules be designed for the garden variety smaller case rather than the "bet the company" case? Should we drastically reduce the default limits on discovery to force lawyers to be more reasonable at the outset when they discuss a discovery plan? It would not be expected that these limits would be sufficient in most cases, or in any case. The point would be to put pressure on counsel to be reasonable and to reach an agreement if possible. Even if the lawyers agree, should the clients be required to certify that they have discussed the proposed discovery and the proposed budget and agree? What about cases where one party has most of the information? If counsel cannot agree, how should the judge get involved and what standards should apply.

Should contention interrogatories and requests for admission be limited or prohibited without agreement of the parties or court permission?

Should there be a concept of "cost-shifting" or a "co-pay" requirement to force parties to be more focused and efficient in their discovery requests? How should we deal with the concept of a "litigation hold" as it applies to electronic data?

What should be done about experts? Should the proponent be required to "pre-file" the opinion as a report or transcribed testimony with the proviso that he cannot testify beyond the report on direct at trial? Would such a requirement eliminate the need for a deposition? If a *Rimmasch* challenge is filed, could it be resolved on the basis of the report?

Change is never comfortable, and wholesale changes to the discovery rules will be particularly unsettling. This process will challenge each of us to lay aside our economic interests, and our plaintiff or defense orientation, and truly focus on what is best for the citizens of Utah – who deserve access to a fair, affordable and trustworthy civil justice system. As we consider these issues, we welcome your input.

Tab 3

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: October 16, 2008
Re: Comments to published rules

The comment period for the following rules has closed, and they are ready for your final recommendations.

URCP 006. Time. Repeal and reenact. Conforms the computation of time to the days-are-days approach of the Federal Rules of Civil Procedure. Deadlines of less than 30 days in several rules will be extended to a uniform 7/14/21 days. The list of deadlines proposed to be amended is attached. If Rule 6 is approved, those rules will be amended to change the deadlines as indicated, but the rules will not be published for comment. Deadlines not listed are not proposed to be amended.

URCP 045. Subpoena. Amend. Permits a person affected by a subpoena to object.

URCP 103. Child support worksheets. Repeal. Eliminates the requirement that parties send a copy of their child support worksheet to the AOC.

Encl. Draft rules
Comments

Rule 6. Time.

~~(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.~~

~~(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.~~

~~(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action that has been pending before it.~~

~~(d) Notice of hearings. Notice of a hearing shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.~~

~~(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him~~