

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, March 26, 2008
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, James T. Blanch, Todd M. Shaughnessy, Honorable Anthony B. Quinn, Honorable Derek Pullan, Lincoln Davies, Anthony W. Schofield, Lori Woffinden, Francis J. Carney, Leslie W. Slauch, Jonathan Hafen, Thomas R. Lee, Judge R. Scott Waterfall, David W. Scofield, Barbara Townsend

EXCUSED: Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Janet H. Smith, Cullen Battle, Matty Branch, Steven Marsden

STAFF: Tim Shea, Trystan B. Smith

GUESTS: Dan McConkie, Steve Walkenhorst, Steve Combe, Lynn S. Davies, D. Chris Purcell, Michael Litchfield, Thomas W. Seiler, Robert B. Sykes, Mark Dunn, Todd Turnblom, Tajha Ferrara, Henry Heath, Scott DuBois, Stephen Trayner, John Lund, Mark Taylor, Kevin Swenson

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the February 27, 2008 minutes. No comments were made and Mr. Wikstrom asked for a motion that the minutes be approved. The motion was duly made and seconded, and unanimously approved.

II. RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

Mr. Wikstrom invited the four spokespersons from the personal injury bar to address the committee regarding the proposed changes to Rule 35.

Mr. Sykes spoke on behalf of the plaintiffs bar. Mr. Sykes began his comments by observing that a number of states customarily allow videotaping of Rule 35 medical examinations. Mr. Sykes relayed an anecdote about a neurosurgeon incorrectly reporting the medical history of a plaintiff. He stressed the importance of recording medical examinations to memorialize the plaintiff's reporting to the examiner. Mr. Sykes further expressed his concerns about the amounts paid to examiners and the potential for bias of the professional witness.

Mr. DuBois, Utah Defense Lawyers Association (UDLA) president, presented a petition against the proposed changes.

Mr. Trayner spoke on behalf of the defense bar. Mr. Trayner began his comments indicating that the majority of states do not allow the recording of medical examinations. He further indicated that a defendant does not have full access to the plaintiff whose medical condition is the most germane evidence in the case, explaining a defendant only has one opportunity to access the plaintiff and his or her medical condition.

Mr. Trayner expressed his concern about the proposed changes, and his belief that the proposed rule change would be patently unfair. Mr. Trayner reiterated the overwhelming number of states do not allow the amendments currently proposed. He indicated that only Arizona and California allow the recording of examinations. Mr. Trayner further expressed concern about the provision requiring the production of past reports. He noted concerns about the privacy of the patient and the disclosure of a redacted report to strangers to the litigation. Mr. Trayner also expressed his concern regarding the effectiveness of cross-examining experts using prior reports, and having a “mini-trial” on every report.

Mr. Carney shared with the guests the committee’s prior thought processes about the proposed rule changes.

Mr. Davies addressed his concerns about video recording the examination. He indicated the recording allows the plaintiff to “play to the camera,” fundamentally changing the nature of the examination. Mr. Davies indicated the examiners he spoke to felt more comfortable with audio recordings.

He recommended that the committee remove the video recording provision. He did not believe the proposed rule changes provided a level playing field because the defendant would not have the opportunity to video record the plaintiff’s examination with his or her treating physician, or record an examination with a physician plaintiff’s counsel referred his client to.

Mr. Davies also indicated that there are only a handful of doctors who handle these examinations because of the difficulty of retaining doctors to act as experts. Mr. Davies noted that often the examiner is the sole doctor who has the complete medical history of the plaintiff before reaching his or her opinions. He indicated that rarely a treating physician has access to a patient’s past medical history, and the medical records of concurrent treaters. Mr. Davies concluded his remarks indicating his belief that the proposed rule changes were intended to harass expert doctors, and discourage their participation.

Mr. Seiler addressed his observations on behalf of the plaintiffs bar. The thrust of his concern was an examiner taking a second deposition as a part of obtaining a history. He further expressed his support for video recording and noted his clients’ reporting regarding discrepancies in what occurred during the examination.

Mr. Carney and Mr. Wikstrom questioned why the committee should not adopt a rule that also required a plaintiff’s treating physician seen after a lawyer’s retention to produce prior reports and video record that physician’s examination.

Mr. Wikstrom noted that the committee was in its initial stages of consideration of the proposed rule changes. He invited the guests in attendance to submit any and all comments to the committee for their consideration.

III. RULE 6, ET AL. TIME.

Mr. Shea brought Rule 6 back to the committee. Mr. Wikstrom asked that the committee address Rule 6 at the next meeting.

IV. SB 205. UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT.

Mr. Shea addressed Utah's adoption of the Uniform Interstate Depositions and Discovery Act. He indicated he did not believe a rule change was needed to conform to the Act.

Mr. Wikstrom suggested the committee postpone further discussion regarding the Act until after the 3 other states considering adoption of the Act pass the legislation.

V. OVERALL EVALUATION OF URCP.

Mr. Wikstrom asked for volunteers to examine other jurisdictions' expedited discovery rules, and bring back to the committee the best practices and concepts from these jurisdictions. He asked the committee to conceptualize the appropriate application of the expedited discovery rules.

Judge Pullan volunteered to examine Colorado. Mr. Hafen volunteered to examine Arizona. Mr. Schofield volunteered to examine New Mexico. Judge Waterfall, Mr. Scofield and Mr. Davies volunteered to examine Canada. Mr. Carney, Mr. Blanch and Mr. Shaughnessy volunteered to examine the federal rules.

VI. ADJOURNMENT.

The meeting adjourned at 5:45 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, April 23, 2008, at the Administrative Office of the Courts.