

# MINUTES

## UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, March 4, 2009  
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Lincoln Davies, Jonathan Hafen, Thomas R. Lee, Cullen Battle, Barbara Townsend, Honorable Anthony B. Quinn, Leslie W. Slaugh, James T. Blanch, Francis J. Carney, Todd M. Shaughnessy, Janet H. Smith, Anthony W. Schofield, Steven Marsden, Honorable Derek Pullan, Lori Woffinden

EXCUSED: David W. Scofield, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Matty Branch

STAFF: Tim Shea, Trystan B. Smith

GUESTS: Ed Havas, Alan Mortensen, Paul Simmons, Peter Summerill

### I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m., and entertained comments from the committee concerning the January 28, 2009 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. REINTRODUCTION OF COMMITTEE MEMBERS.

At Mr. Wikstrom's request, those committee members who were not present at the January 28<sup>th</sup> meeting briefly disclosed the nature of his/her legal practice in accordance with Rule 11-101(4).

### III. RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

Mr. Wikstrom welcomed our guests, and asked Mr. Carney to summarize the committee's past discussions concerning the proposed revisions to Rule 35.

Mr. Carney summarized the key issues as (1) the need for production of prior reports by medical examiners, and more specifically, the distinction between professional and non-professional medical examiners (defined as whether the examiner performed ten or more examinations in a year), (2) whether to allow, by default, video-recording of examinations, (3) video-recording medical examinations when a plaintiff's attorney directs her client to a

physician for treatment, (4) whether a party should be allowed to move to strike a proposed medical examiner for bias, and (5) the terminology of a Rule 35 medical exam (for example, whether to label the examine “independent”).

Mr. Havas summarized his concerns with the present rule and provided examples of abuses by defense experts, for example, inconsistencies with the report and the examination, inaccuracies, bias, and boiler-plate reports.

Mr. Slauch questioned whether a provision in Rule 35 that would allow an opposing party to challenge the appointment of certain examiners would only create more litigation.

Mr. Carney questioned the effectiveness at trial of cross-examining a medical expert with the expert’s prior reports. Mr. Lee further questioned the need for an automatic disclosure of prior reports.

Mr. Shaughnessy and Ms. Smith questioned why the committee should treat medical experts differently from any other expert.

Judge Pullan questioned why examinations would only be allowed upon showings of good cause. He further questioned why the good cause language would not create more litigation over whether good cause had been shown.

After extensive discussion, the committee debated asking members of the personal injury bar to jointly meet and present to the committee a revised Rule 35 that the plaintiff and defense bars could agree on. Mr. Wikstrom concluded the committee discussions and asked Mr. Carney to invite a select group of defense lawyers to discuss their ideal Rule 35 at a future meeting.

#### **IV. SIMPLIFIED CIVIL PROCEDURES.**

Mr. Wikstrom brought simplified civil rules back to the committee.

Mr. Wikstrom recently attended the 2009 Civil Rules Summit in Denver and summarized the Summit’s agenda. He asked the committee to consider and discuss if it adopted a set of simplified rules what the committee hoped to accomplish. In summary, the committee discussed shortening the time of litigation, decreasing the cost of litigation, increasing the number of trials, and increasing access to justice.

Mr. Carney noted that any proposal that required early judicial intervention would be difficult to implement in the current economic climate.

Judge Pullan suggested ideally the committee would see more cases filed with an amount in controversy under \$150,000.

The committee discussed gathering demographic data concerning from litigants, and data concerning the cost of litigation from lawyers.

Mr. Lee questioned whether the courts were prepared to dedicate more resources for more trials to give people better access to justice.

Mr. Davies suggested that any model would also require reducing the length of trials to alleviate the anticipated increase in the number of trials.

Mr. Wikstrom asked that the committee discuss at the next meeting whether it should move forward with a set of simplified rules before it begins to analyze the proposed simplified rules the Institute submitted to the committee.

**V. AUDIO RECORD AND TRANSCRIPT OF HEARINGS; RULE 52. CORRECTION OF THE RECORD..**

Mr. Wikstrom asked that the committee address Rule 52 at a future meeting.

**VI. RULES 50, 52, 59, 60.**

Mr. Wikstrom asked that the committee address these rules at a future meeting.

**VII. RULE 58B. SATISFACTION OF JUDGMENT.**

Mr. Wikstrom asked that the committee address Rule 58B at a future meeting.

**VIII. 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, March 25, 2009, at the Administrative Office of the Courts.