

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, March 25, 2009
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Terrie T. McIntosh, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Lincoln Davies, Jonathan Hafen, David W. Scofield, Cullen Battle, Barbara Townsend, Leslie W. Slauch, Lori Woffinden, James T. Blanch, Francis J. Carney, Todd M. Shaughnessy, Janet H. Smith, Anthony W. Schofield, Steven Marsden, Honorable Derek Pullan

EXCUSED: Thomas R. Lee, Honorable Anthony B. Quinn

STAFF: Tim Shea, Matty Branch, Trystan B. Smith

GUESTS: Hon. Rebecca Love Kourlis, former Colorado Supreme Court Justice, Director, Institute for the Advancement of the American legal System (“IAALS”)
Richard Schaffler, Director of Research, National Center for State Courts (“NCSC”)
Paula Hannaford, Principal Research Consultant, National Center for State Courts

I. SIMPLIFIED CIVIL PROCEDURES.

Mr. Wikstrom introduced and welcomed our guests, Rebecca Kourlis, Richard Schaffler, and Paula Hannaford, and invited them to share with the committee their interests in our efforts to adopt simplified rules.

Ms. Kourlis noted the Institute’s broad mission is to contribute to the advancement of the American legal system, but more specifically, the Institute was available to provide hands-on assistance to states wanting to implement simplified rules. Mr. Schaffler discussed his role as director of the NCSC and the NCSC’s ability to provide logistical support to states considering adopting simplified rules. Ms. Kourlis noted their respective organizations could provide tool kits for jurisdictions wanting to impose simplified rules, for example, data collection, surveys, baseline data compilation, suggested methodologies, and model rules.

Why should we care about measurements?

Mr. Wikstrom asked the committee to discuss measurements and whether it needed or wanted to assess the effects of simplified rules before implementation.

Mr. Schauffler noted that measurements were important to verify the committee's assumptions as to why it wants to adopt simplified rules. He further noted that the committee, at the outset, is in the best position to decide the factors to use in measuring performance.

Ms. Kourlis noted that it is easier to implement changes if there is a commitment to measure the results.

Mr. Slauch questioned how much time would it take to gather baseline data before the committee could implement simplified rules.

Ms. Hannaford noted she did not believe the committee needed to delay implementation of simplified rules if it wanted to gather and analyze baseline data. Ms. Kourlis agreed.

Mr. Shaughnessy questioned how the committee would measure whether simplified rules decreased the expense of litigation.

Judge Pullan asked whether there were certain rules that could be modified or changed without engaging in measurements. He also expressed concern about delaying implementation of simplified rules while engaging in measurements.

Ms. Kourlis suggested the committee focus on (1) what it wants to achieve, and (2) what the rules should look like, and the Institute and Center would quantify and analyze the measurements.

Ms. Kourlis noted she was not aware of any current empirical data regarding the effect of simplified rules on the committee's previously stated goals.

After discussion, the committee agreed to focus on formulating a set of simplified rules, and allowing the Institute and the Center to focus on measurements.

What would be the earmarks of success? What would be expected impacts on:

Mr. Wikstrom asked the committee members to share what they hoped to be the expected outcomes from the adoption of simplified rules.

- **Costs to litigants**

The committee agreed the expectation is that costs would decrease.

- **Costs to society**

- **Number of trials**

The committee agreed the number of trials presumably would increase.

- **Length of trial**

Judge Nuffer noted that with less discovery, trials may be longer. Mr. Shaughnessy and several other committee members debated whether the length of trials would be longer with simplified rules.

- **Effect on discovery motions**

The committee debated whether simplified rules would decrease the amount of motions. Mr. Marsden noted that simplifying the manner in which discovery motions are decided may lead to more discovery motions, but a faster, more satisfying result.

- **Effect on motions**

Mr. Carney noted that if we have a fact pleading rule there would be an increase in the amount of motions, for example, motions for a more definite statement, motions to dismiss, etc.

- **Effect on time to disposition**

The committee agreed the time from commencement of the action to final disposition should be significantly faster.

- **Effect on expert depositions**

The committee agreed the amount of expert discovery should dramatically decrease, along with the number of experts.

- **Effect on e-discovery**

Mr. Davies suggested that with simplified discovery the amount and cost of e-discovery would decrease. The committee debated whether e-discovery should be measured separately from discovery in general.

- **Effect on litigant satisfaction and perception of fairness**

- **Effect on potential litigants - whether people feel they can participate in the legal system**

- **Proportionality**

The committee agreed that discovery costs in proportion to litigation costs should decrease.

- **Effect on court satisfaction**

The committee's current and past trial court judges weighed the considerations of less discovery disputes, more trials, and the interplay of summary judgment motions. Judge Pullan questioned whether judicial satisfaction should be a material factor in the committee's considerations.

- **Differentiate between success versus an unintended/intended consequence**
- **Impact on pro se filings**
- **Number of filings**

The committee agreed ideally courts would see more filings and more filings of matters with smaller amounts-in-controversy.

After extensive discussion, our guests indicated that the expectations the committee discussed were specific enough for them to engage in measurement process.

Which is the best way to proceed with simplified rules?

- **Pilot program**
 - **By type of case?**
 - **By amount of issue?**
 - **By geographical location?**

The committee debated the substance of a pilot program. The committee discussed using a class of cases, or a dollar limit. The committee further discussed potential equal protection challenges to a pilot program by the type of case.

Ms. Kourlis noted in certain jurisdictions such as Colorado the simplified rules have been ineffective because practitioners opt-out or plead a dollar amount above the minimum limit.

Mr. Slauch noted he would not be in favor of including a dollar limit because the complexity of the case is not tied to the amount-in-controversy. He suggested that a party wanting to opt-out would need to seek judicial relief to do so — an escape clause.

Mr. Davies and Mr. Shaughnessy noted an opt-out process would be impractical and undermine the purpose behind adopting simplified rules.

The committee discussed the considerations of when a party should be allowed to opt-out, and requiring client approval.

Mr. Davies suggested the idea of tiers (tied to the amount-in-controversy). He also addressed his worries about lawyers manipulating the system, and the unintended consequence of increased litigation concerning the actual amount-in-controversy to meet the simplified rules threshold.

Mr. Carney observed that expert discovery typically encompassed the majority of discovery costs. He questioned how practitioners in the state of Oregon treated the lack of expert discovery.

Mr. Wikstrom asked the committee to provide its thoughts about a pilot program versus adopting state-wide revisions.

Mr. Schaffler suggested that pilot programs can be ineffective based on where the pilot program is conducted, and the metrics used for the program.

Ms. Smith noted her concerns about how the committee measures greater access to the judicial system, when we cannot capture statistics about who failed to bring a claim and why.

Mr. Wikstrom asked the committee to consider if there was an opt-out provision should there also be conditions requiring the trial court to evaluate proportionality and/or the bases for opting out.

Several of the committee members noted that before any change could take place, it would require deliberation and extensive education for members of the Bar.

Mr. Carney questioned whether the Bar would believe there was a problem with access to justice.

Mr. Wikstrom asked the committee to decide whether it should proceed with (1) a pilot program containing an opt-out provision, or (2) state-wide revision with an opt-out provision.

Mr. Wikstrom asked the committee members for an initial vote — pilot program versus state-wide implementation. The committee expressed slightly more support for state-wide implementation.

Mr. Wikstrom concluded the committee's discussions and asked that the committee, as a starting place, discuss the Institute's draft rules at the next meeting.

II. ADJOURNMENT.

The meeting adjourned at 7:00 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, April 22, 2009, at the Administrative Office of the Courts.

