MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, April 28, 2010
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Honorable Anthony B. Quinn, Terrie T. McIntosh, Honorable David O. Nuffer, Leslie W. Slaugh, Lincoln L. Davies, James T. Blanch, Trystan B. Smith, Anthony W. Schofield, Janet H. Smith, Todd M. Shaughnessy, Lori Woffinden, Cullen Battle, Honorable Lyle R. Anderson, Honorable Reuben Renstrom, Jonathan O. Hafen

PHONE: Honorable Derek P. Pullan

EXCUSED: Barbara L. Townsend

STAFF: Tim Shea, Sammi Anderson

GUESTS: Associate Chief Justice Matthew Durrant

I. WELCOME TO ASSOCIATE CHIEF JUSTICE DURRANT AND PRESENTATION OF CERTIFICATES TO JUDGE QUINN AND FORMER JUDGE SCHOFIELD.

Mr. Wikstrom called the meeting to order at 4:00 p.m. Justice Durrant thanked Judge Quinn and former Judge Schofield for their work on the bench and in the committee. Mr. Wikstrom echoed Justice Durrant's comments and expressed sincere thanks for Judge Quinn's and former Judge Schofield's participation on the committee.

II. INTRODUCTIONS.

Pursuant to Utah Supreme Court Rule 11-101(4), the following committee members formally introduced themselves: Todd M. Shaughnessy and Francis J. Carney.

III. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the March 24, 2010 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.

IV. SIMPLIFIED RULES OF CIVIL PROCEDURE.

The committee continued its discussions regarding the simplified rules.

A. Rule 26.

Mr. Davies suggested and the committee agreed to remove the expert disclosure requirement from the Rule 26(a)(1) initial disclosures.

The committee discussed whether electronic information should be treated differently in light of the proportionality rules. Ms. McIntosh noted that electronic discovery is sometimes massive and may deserve separate treatment. Mr. Shea expressed concern regarding treating this differently from Rule 37. Mr. Wikstrom noted that proportionality should be referenced. Mr. Shaughnessy suggested acknowledging that electronic discovery is its own animal, requiring a showing that the cost of obtaining the discovery is proportionate to the need. The committee discussed the question of who bears the burden to demonstrate undue burden or proportionality. Judge Nuffer noted that only the party in possession of the electronic discovery can identify specific components of undue burden and expressed concern about creating two different standards. Committee determined to eliminate the language from 26(b)(3) except ll. 93-96, providing that the party claiming that electronic information is not reasonably accessible shall describe the source, the nature and extent of the burden, the nature of the information not provided, etc. In other words, the party claiming undue burden must demonstrate that the information is not reasonably accessible without undue burden or cost. The committee unanimously agreed to revise the language accordingly.

The committee discussed Rule 26(a)(3) and whether experts should be required to produce the data, compilations, etc., that underlie the expert's opinions and/or conclusions in his or her report. The concern expressed was that if one cannot take the expert's deposition, one may not be able to prepare to cross-examine the expert at trial without the underlying data or other information. Mr. Slaugh expressed concern about the stiffness of the penalty because the parties don't know everything early on and need to have flexibility to address issues as they arise at trial. The committee agreed to revise the sanction on p. 20, l. 51, to state that an expert may not testify in a party's case in chief concerning any matter "not fairly disclosed" in the expert report. The committee also agreed to incorporate the federal requirement that an expert must produce the data, exhibits, and other information that the expert "relied upon" in reaching opinions or conclusions. The committee unanimously approved these changes.

Judge Nuffer also noted that the December 2010 amendments to the Federal Rules of Civil Procedure will protect drafts of expert reports and communications. These will now fall under the work-product section of Rule 26. The Federal Rules also clarify as to which experts must provide reports: non-retained experts must only provide an opinion statement, not a report. The committee expressed interest in clarifying this point in the Utah Rules of Civil Procedure as well. Mr. Wikstrom suggested that the two items from the federal amendments be incorporated into the draft revised rules and highlighted so that the committee can fully consider how the federal amendments would fit within the revised rules.

B. Rule 35.

Mr. Wikstrom reintroduced the topic of what disclosures are required by an examining expert under Rule 35. The first issue discussed by the committee is whether the report from the physical examination must be produced or whether it need only be produced if that expert is called to testify in the party's case in chief. Judge Pullan opined that under this rule, a party is coming to the court and asking for an order allowing the physical examination of another party. The examined party is therefore entitled to a copy of the report. The committee agreed that if a physical examination is conducted, a report must be prepared and disclosed to the examined party. Further, if the examining expert is going to testify at trial, the expert must provide a report, including the expert's findings and conclusions, pursuant to Rule 26(a)(3).

Mr. Wikstrom then raised the issue of whether the examining expert should be required to disclose his or her reports and transcripts of expert testimony during the prior four years. Mr. Carney attempted to summarize the concerns that have been expressed by the plaintiff's bar as to why these disclosures should be required. Mr. Shaughnessy commented that there is no good answer as to why to treat these "professional" experts different than any other "professional" expert.

Judge Pullan asked whether the committee was saying that this type of expert is more prone to abuse than others. Mr. Slaugh responded that, because the defense has only one opportunity to examine the plaintiff, the defense is primarily motivated to retain an expert that is likely to give a report that is favorable to the defense. Mr. Davies and Mr. Smith disagreed, emphasizing that the primary motivation behind the physical examination is to see whether the defense is evaluating the case correctly. If the examination is not favorable to the defense, the report and/or examination will have value for settlement purposes and for more expediently resolving the case. Mr. Smith stated that a defense lawyer is not shopping for an expert, but is using the physical examination for purposes of case evaluation.

Mr. Carney stated that Utah is the only jurisdiction of which he is aware that requires the disclosure of prior reports and testimony. The committee observed that the federal rules also do not include this requirement. However, Mr. Carney also expressed concern that parties would simply serve subpoenas, leaving the trial judges to address the issue on a case by case basis without guidance. Mr. Davies pointed out that there should be parity. If plaintiff's counsel can get prior reports and testimony under the rule, defendant's counsel should get the equivalent.

Mr. Shaughnessy moved to strike the language on p. 37, ll. 15-16, requiring the disclosure of reports and transcripts of testimony for the four years prior. Mr. Battle seconded. A vote was taken. Six in favor. Five opposed. Mr. Wikstrom indicated the language would be removed for now but revisited at the next meeting when more of the committee is present.

C. Rule 37.

Mr. Wikstrom suggested revisions to Rule 37, specifically that p. 40, ll. 15-16 be revised to reference a document subpoena and that p. 41, ll. 55-56 be revised to confirm that the party

seeking discovery has the burden to show that discovery is needed. Mr. Wikstrom noted that this is consistent with the requirements for burdens throughout the simplified rules. The committee agreed with these changes.