

## MINUTES

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

Wednesday January 26, 2011  
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Chair, Trystan B. Smith, Barbara L. Townsend, Honorable Kate Toomey, Francis J. Carney, Leslie W. Slauch, Terrie T. McIntosh, Honorable Derek P. Pullan, Janet H. Smith, W. Todd Shaughnessy, Lincoln L. Davies, Jonathan O. Hafen, W. Cullen Battle

TELEPHONE: Lori Woffinden, Honorable Lyle R. Anderson, David W. Scofield, Honorable David O. Nuffer

EXCUSED: Robert J. Shelby, James T. Blanch

STAFF: Timothy M. Shea, Diane Abegglen, Sammi V. Anderson

#### I. INTRODUCTIONS.

Mr. Wikstrom called the meeting to order at 4:00 p.m. All committee members present introduced themselves briefly pursuant to the Rules of the Utah Supreme Court.

#### II. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the December 2010 meeting minutes. No comments were made, a motion for the approval of the minutes was duly made, seconded and unanimously approved.

#### III. RULE 108. OBJECTIONS TO COMMISSIONER'S RECOMMENDATIONS AND REQUESTS FOR HEARING FROM DISTRICT COURT JUDGES.

Mr. Shea reported that proposed revisions to this rule are now back from the Board of District Court Judges. The Board recommends that a de novo evidentiary hearing on objections to a commissioner's ruling be granted based on the subject matter of the particular proceeding. Examples of proceedings that warrant a de novo evidentiary hearing include civil commitment proceedings, co-habitant abuse proceedings and child custody proceedings. For all other issues, the party may request a hearing and the district court judge will determine whether the hearing will be based on argument and proffers, or whether it will conduct a de novo evidentiary hearing. A motion was made to approve the revisions and to send the proposed revisions out for comment. This motion was seconded and unanimously approved by committee.

#### **IV. SIMPLIFIED RULES OF DISCOVERY.**

##### **A. RULE 26 - EXPERTS.**

Mr. Shaughnessy circulated revisions to Rule 26(a)(3) and the committee discussed at length expert testimony under the revised rules, including expert depositions and reports, the timing of expert disclosures, how the revised rule will work in cases involving multiple parties on one side, the treatment of non-retained experts and trial demonstratives. The committee approved the proposed changes to Rule 26(a)(3), with a revised version of the rule to be circulated. The committee also discussed the ways in which the revisions to Rule 26(a)(3) may impact Rule 35. Mr. Shea proposed changing Rule 35(b) to read that "If the party requesting the examination wishes to call the examiner as a witness, the party shall disclose the expert as required by Rule 26(a)(3)." Under this change, the medical examiner is required to give the dictated medical report completed following the examination in all events. However, if the medical examiner is then called to testify, the witness must then also meet the requirements of Rule 26(a)(3). The committee approved this change.

##### **B. RULE 26 (b).**

The committee approved Mr. Battle's changes to proposed Rule 26(b) renumbering paragraphs and adding headings. The changes are intended to clarify the structure of the revised rule.

##### **C. MULTI-TIER SYSTEM PROPOSAL.**

Mr. Davies led a discussion on a potential multi-tier system. Tier I would consist of very small cases for which no discovery would be allowed. These cases would move to resolution very quickly. Tier III would resemble the system we have today, but with limits in place, and incorporating proportionality. Tier II is where the majority of cases would be swept. Having outlined a structure for purposes of discussion, Mr. Davies then identified a host of discussion points and questions relating to the respective tiers. Mr. Davies identified rough data from the Utah state court system suggesting a very high percentage of cases claim as little as \$10,000 and are awarded amounts at judgment in that same neighborhood. Based on that data, a high volume of cases would appear to fall within Tier I. The committee discussed whether some discovery should be allowed in Tier I. Messrs. Carney and Smith noted in particular the difficulty no discovery would create in certain personal injury cases involving treating physician testimony. Judge Pullan opined that the tiered system signals proportionality and lends certainty and predictability. The committee discussed requests for extraordinary discovery and how that might look in a multi-tiered system. Mr. Wikstrom encouraged the committee to start at the highest level of abstraction and to consider the strengths and weaknesses of a multi-tier system, the problems it would answer, as well as the problems it would create, and to come to the next meeting prepared to discuss the merits of a tiered approach versus the committee's earlier proposal envisioning one set of simplified rules that would apply to all cases.

**V. ADJOURNMENT.**

The meeting adjourned at 6:03 p.m. The next meeting will be held at 4:00 p.m. on Wednesday, February 23, 2011, at the Administrative Office of the Courts.