

## MINUTES

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

Wednesday March 23, 2011  
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Chair, Trystan B. Smith, Francis J. Carney, Terrie T. McIntosh, Honorable Kate Toomey, Honorable Lyle R. Anderson, James T. Blanch, Honorable Derek P. Pullan, Lincoln L. Davies, Robert J. Shelby, W. Cullen Battle, W. Todd Shaughnessy, Honorable David O. Nuffer, Steven Marsden, Leslie W. Slaugh, Jonathan O. Hafen

EXCUSED: David Moore, David W. Scofield, Barbara L. Townsend, Lori Woffinden

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

#### I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:00 p.m. Mr. Wikstrom entertained comments from the committee concerning the February 23, 2011 meeting minutes. No comments were made, and a motion for approval of the minutes was duly made, seconded and unanimously approved.

#### II. REPORT FROM CHAIR.

Mr. Wikstrom reported that he and Mr. Shea met with the Supreme Court at the Court's request and shared with the Court the committee's progress on the simplified rules of discovery, including presentations to the Bar and feedback from the Bar and its constituencies, both oral and written. Messrs. Wikstrom and Shea shared their impression that the Court is generally enthusiastic and positive regarding the changes.

#### II. SIMPLIFIED RULES OF DISCOVERY.

The committee reviewed the most recent version of the rules with an eye toward determining whether the current version faithfully captures the committee's progress to date.

The committee discussed whether Rule 26 should mention the availability of third-party subpoenas and whether a prohibition on serving parties with subpoenas should be made express, as other standard discovery mechanisms are available for party discovery. The committee further discussed whether third-party subpoenas should also be limited in terms of number and the discovery time limits. Mr. Slaugh pointed out that the real question is whether a subpoena is

"discovery". If so, subpoenas are subject to discovery cut off dates. The committee discussed that there is case law on this point, ie, subpoenas do constitute discovery, but could nevertheless make the rule express to eliminate confusion. The committee raised possible amendments to make clear that subpoenas are discovery and subject to the discovery time limitations. Judge Pullan suggested adding the actual methods of discovery back into 26(c)(1), because that is the first place that methods of discovery are discussed. The methods will then expressly include subpoenas such that subpoenas are clearly part of discovery and its time limitations. Mr. Wikstrom suggested the language say specifically that discovery includes subpoenas under Rule 45 other than to compel attendance for a hearing or a trial. So moved and seconded. The committee unanimously approved. The committee also noted that Rule 35 medical examination should be included in the definition of "methods of discovery" and should be subject to the discovery time limitations.

The committee engaged in extensive discussion about the budgeting certification requirement in Rule 26(c)(5)(A). The committee thought that signing just by the attorney should be enough. Mr. Carney moved that the attorney certify that a discussion with his or her client regarding the discovery budget has occurred, and that extraordinary discovery is necessary and proportional. The motion carried and the committee took up the wordsmithing.

The committee discussed how to address claims involving non-monetary relief and what tier of discovery these claims should fall within. The committee agreed that absent accompanying damage claims in excess of \$300,000, claims for non-monetary relief will be allowed standard discovery as permitted in Tier II.

The committee engaged in a lengthy discussion concerning the requirement for a summary from a non-retained expert witness. This would probably run contrary to the intent of the Supreme Court expressed in the recent case of *Drew v. Lee*. Other members countered that an attorney ought to know at least something about the testimony of non-retained experts, and should be obligated to provide that information to the other side. Mr. Carney and Mr. Blanch felt that the requirement for a "summary" would lead to incessant motions to the effect that the summary was not extensive enough, and asked that the Advisory Committee Note be amended to make it clear that only a summary, and not a report, was required.

The committee discussed whether to change the rule governing how depositions are recorded, witnesses are sworn, etc. The central question is whether court reporters are really necessary. Their elimination could result in a significant savings in deposition costs. A motion to remove sub-paragraph (c) of Rule 28 was made and seconded. The motion failed. The committee expressed a willingness to revisit this issue once the simplified rules have been sent out for official comment.

Judge Pullan and Messrs. Shaughnessy and Blanch agreed to draft an Advisory Committee Note on Rule 26 for discussion at the next meeting. Mr. Shaughnessy proposed that they attempt to address the issue regarding the level of detail required in witness summaries as part of the Committee Note, for discussion at the next meeting.

### **III. ADJOURNMENT.**

The meeting adjourned at 6:18 p.m. The next meeting will be held at 4:00 p.m. on Wednesday April 27, 2011.