

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

Wednesday August 3, 2011
Administrative Office of the Courts

PRESENT: Francis M. Wikstrom, Chair, W. Cullen Battle, Terrie T. McIntosh, Janet H. Smith, Barbara L. Townsend, Honorable Kate Toomey, James T. Blanch, Robert J. Shelby, Honorable Derek P. Pullan, Honorable John Baxter, David Moore, Honorable Todd W. Shaughnessy, Trystan B. Smith, Leslie W. Slauch, Lincoln L. Davies, David W. Scofield, Jonathan O. Hafen, Steve Marsden

EXCUSED: Honorable David O. Nuffer

TELEPHONE: Lori Woffinden, Honorable Lyle R. Anderson

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

I. WELCOME TO JUDGE JOHN BAXTER.

Mr. Wikstrom called the meeting to order at 4:00 p.m. and welcomed Justice Court Judge John Baxter to the committee. Judge Baxter introduced himself. He has been a justice court judge for nine years. The committee welcomes Judge Baxter and looks forward to serving with him.

II. CONGRATULATIONS TO JUDGE SHAUGHNESSY.

Mr. Wikstrom expressed the committee's warmest congratulations to the Honorable Todd W. Shaughnessy for his appointment to the Third District Court. The committee looks forward to Judge Shaughnessy's continued membership and valued participation.

III. APPROVAL OF MINUTES.

Mr. Wikstrom next entertained comments from the committee concerning the May 25, 2011 minutes. The committee unanimously approved the minutes.

IV. SIMPLIFIED RULES OF DISCOVERY.

In a discussion guided by Mr. Wikstrom, the committee reviewed and resolved outstanding issues and comments from the bar and judiciary on a rule-by-rule basis.

Rule 1. Mr. Wikstrom discussed comments received regarding cases already in the system and whether the new rules would apply to existing cases. Mr. Wikstrom proposed that the rules apply only to cases filed after the effective date. The committee discussed whether the Supreme Court's enacting order could instruct that the new rules are prospective only, rather than completely changing Rule 1 (most amendments typically do apply to all cases immediately). Mr. Blanch suggested making the new rules prospective only for the sake of clarity. Judge Shaughnessy pointed out the complexity of having dual rule systems in place for some period of time. Ms. Smith moved to allow the new rules' application to existing cases where the parties so stipulate or the court orders. The motion was seconded. Judge Pullan amended the motion to include that this change would be part of the Supreme Court's recommended enacting order. The motion was seconded and unanimously approved.

Rule 8. The committee discussed comments regarding the tension between notice pleading and requiring the pleading of additional facts. Judge Shaughnessy suggested that the note adequately addresses this concern. The committee agreed.

Rule 9. The committee discussed a suggestion that 9(k) be amended to include the words "or motion", ie, the renewal of judgment by motion, rather than filing a new complaint. Ms. Smith moved to add this language to Rule 9(k). The motion failed.

Rule 16. The committee discussed whether to include an express definition of alternative dispute resolution processes, ie, when should the mediation occur if needed? The committee declined to address this issue because the rule is clear as drafted. Grammatical issues in Rule 16 were addressed.

Rule 26.

Summary of Expected Testimony - Comments indicate concerns over whether the rule requires an affirmative obligation to interview every witness (friendly or unfriendly) and ultimately to disclose work product. Judge Pullan suggested that the note adequately addresses these concerns but raised some concerns about a witness that counsel doesn't know what they will say. Mr. Blanch reminded the committee that this topic was discussed at length previously and the committee essentially reached the conclusion that parties need to do their best to disclose what they know. Mr. Shelby raised the issue of what to do when counsel calls a hostile witness, including the other party, in their case in chief. Mr. Shelby noted that counsel shouldn't have to disclose work product, ie, content of cross-examination, as part of disclosures under Rule 26. The committee discussed the adverse party issue at length. Mr. Wikstrom suggested possibly changing language to say identify the subjects of information "to the extent reasonably available". Judge Pullan advocated that no wiggle room be given on such an important principle. Judge Shaughnessy noted that the whole purpose is to help the other side figure out who they need to depose because depositions will now be limited. Parties already know to depose the other party. Judge Pullan argued for a carve-out for adverse parties. Mr. Hafen agreed and also advocated to add language to the advisory note indicating that with respect to a corporation or entity, the word "party" includes management-level employees. Mr. Hafen's

motion was seconded and approved by the committee.

Tier System - In general, the committee believes the tier system is adequately addressed in the rules and note(s) as drafted. Interrogatories under the tier system were, however, revisited. As to interrogatories under Tier 1, the committee generally believes that specialized segments of the bar should prepare specialty rules for interrogatories. The committee went on to discuss allowing interrogatories in Tier 1. Mr. Wikstrom suggested 3 interrogatories. 10 members of the committee were in favor of a small number of interrogatories in Tier 1. 8 members were opposed and in favor of offering a specialty rule based on specialized segments of the bar. Ms. Townsend moved to include 3 interrogatories in Tier 1 practice. That motion carried. However, later in the meeting, a motion was made to strike 3 interrogatories from the Tier I system. That motion also carried. There will be no interrogatories for Tier I practice. Judge Shaughnessy reiterated that the personal injury bar and other specialty bars should be invited to propose specialty disclosure rules for their sections.

Experts - Time Requirements & Content of Expert Reports. Mr. Shelby suggested that Rule 26(a)(3) as drafted addresses the concern regarding *Rimmasch* challenges. Ms. McIntosh suggested that the Committee consider giving more time for expert discovery. Judge Shaughnessy explained that the concerns expressed in the comments seem to be coming from expert-intensive cases where each side has multiple experts. He suggested those concerns could be resolved by stipulation among the parties. The committee discussed the problem of extending the time period beyond 90 days because expert discovery would then last longer than fact discovery. The committee noted that if there is one expert on each side of the case, counsel should be able to complete expert discovery in 90 days. Mr. Battle raised the issue of the due date for the written summary for non-retained experts. The committee discussed timing and what the summary should contain. Mr. Blanch noted that this distinction has now been adopted in the federal rules.

Damage Limitations based on Tier System - The committee discussed the issue of damage limitations based on pleading into a specific tier. If a party pleads as a Tier 1 case, that party is limited to Tier 1 damages, unless the party moves to amend their complaint under the rules and the other party is allowed additional discovery as warranted. Mr. Schofield noted that Rule 54(c) is currently inconsistent with that notion. The committee discussed ways to reconcile the current version of Rule 54(c) with the notion of damage limits under the new tier system. Mr. Blanch pointed out that the whole tier system falls apart if parties are not estopped from requesting and receiving damages above the amount plead in complaint, absent amendment. The committee discussed amendments to Rule 26 and Rule 54(c). Messrs. Carney, Blanch and Wikstrom proposed language to address the issue. Messrs. Blanch and Shelby suggested that any amendment should go into Rule 8(a)(3). The committee approved amendment to Rule 8(a)(3). A motion was made to strike the language "but not including punitive damages" from Rule 26(c)(4), "Definition of Damages." That motion was seconded and approved. The committee also approved amendment of Rule 54(c) to refer back to Rule 8(a)(3) as an exception.

Rule 29. The committee agreed that parties can stipulate to additional time for discovery

without certifying proportionality or discovery budgets. A court order is not required unless a trial date has been set.

Rule 30(b)(5). The committee discussed amending the rule to state that the deposition takes place where the party is located. So moved and motion carried.

Rule 30(b)(6). The committee agreed to reinsert language that was inadvertently removed during revision process.

Rule 35. The committee had no changes.

Rule 36. The committee discussed whether requests for admission should be allowed after the discovery cut off for laying foundation, authenticating documents, etc. The committee agreed that this can be handled through the pre-trial order processes.

At the conclusion of the rule-by-rule discussion, Mr. Wikstrom noted his belief that all critical items had been discussed and resolved and invited additional items of discussion from the committee. Judge Pullan raised the issue of the 3rd party plaintiff and whether they count as a "side" of discovery such that they are entitled to their own set of discovery limits. Judge Pullan noted the same issue with respect to cross claims. It boils down to how one "side" of the case is defined. Mr. Wikstrom proposed that these claims be resolved on a case by case basis by the judge and observed that the committee cannot craft a rule to deal with every contingency.

Judge Pullan then moved that the revised rules as amended be approved and submitted to the Supreme Court for approval. Judge Shaughnessy seconded and the committee approved.

The committee suggested an effective date of November 1, 2011.

V. ADJOURNMENT.

The meeting adjourned at 6:48 p.m. The next committee meeting will be held at 4:00 p.m. on Wednesday September 28, 2011.