

## **MINUTES**

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

**November 30, 2011**

**PRESENT:** Francis M. Wikstrom, Chair, Honorable Lyle Anderson, Francis J. Carney, Terrie T. McIntosh, Honorable David O. Nuffer, Honorable Kate Toomey, Trystan B. Smith, W. Cullen Battle, Honorable Todd M. Shaughnessy, Jonathan O. Hafen, Honorable Derek P. Pullan, Janet H. Smith, Leslie W. Slaugh, Robert J. Shelby

**PHONE:** David W. Scofield

**EXCUSED:** Barbara L. Townsend

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

#### **I. CROSS-REFERENCES BETWEEN REVISED RULES 37 AND 26.**

Judge Shaughnessy and Tim Shea led a discussion regarding cross-referencing issues resulting from revisions to Rules 37 and 26. The committee discussed potential redundancy between Rules 37(h) and 26 disclosure requirements. There was a motion to eliminate reference to Rule 26 subparagraphs and to instead simply refer to Rule 26 as the standard for disclosure. The motion was seconded and approved. Notice will be sent to the Supreme Court indicating the committee's view that these changes are technical in nature.

#### **II. APPROVAL OF MINUTES.**

Mr. Wikstrom entertained comments from the committee concerning the October 26, 2011 minutes. The committee unanimously approved the minutes.

#### **III. AWARD OF CERTIFICATES.**

Diane Abegglen presented awards to committee members on behalf of the Utah Supreme Court for their participation in designing and proposing for the Supreme Court's approval the simplified rules of discovery recently enacted by the Supreme Court.

#### **IV. COMMENTS ON PROPOSED RULE 26.2.**

The committee turned to comments from the Bar regarding proposed Rule 26.2. Mr. Carney moved that the committee amend the operative deadline to be "the event giving rise to the claim" throughout Rule 26.2, including b(2), b(5), b(7), b(8), c(3), c(4), and c(5). Mr. Carney's motion was seconded and approved by the committee.

The committee next discussed how to treat extremely sensitive, but unrelated medical treatment, which would require disclosure under the plain language of the rule as drafted. Mr. Carney raised the example of sensitive medical treatment that is completely unrelated to the event giving rise to the suit. The committee discussed the possibility of including language in the note to address this tension and/or including language in the rule indicating that protective orders may be an option under these circumstances. Judge Pullan noted the potentially chilling effect of requiring disclosure for “any reason” where the treatment is sensitive and clearly unrelated to the injury, e.g., rape trauma counseling where the plaintiff has sued for a whiplash injury. A motion was made to insert the words “except to the extent Plaintiff moves for a protective order”, at the outset of the disclosure requirements, which flags for parties and the court that extremely sensitive, unrelated topics are outside the scope of the mandatory disclosures if a protective order is sought. This motion was approved. A motion was then made to include language in the committee note acknowledging the possibility that situations may arise, in rare circumstances, where a party has been treated for a highly sensitive, private condition, which is wholly unrelated to the claim at issue in the case, and that those situations may warrant further protection and exception from the disclosure requirements. The committee approved this language for the note.

The next issue raised was the disclosure of social security numbers by plaintiffs. The committee discussed whether and when social security numbers and other sensitive information should be disclosed and, if so, whether confidentiality protections should be built into the rule. The committee discussed including a provision expressly mandating that the information disclosed under this part of the rule shall be used only for purposes of the litigation, etc. The committee generally discussed whether making these disclosures mandatory warrants the imposition of confidentiality protections under the rule. A motion was made to include a provision stating that all non-public information disclosed under these rules may only be used for purposes of the litigation absent a court order to the contrary. This motion was seconded and approved by the committee.

Mr. Carney suggested adding language similar to that contained in existing Rule 9(l), requiring disclosure of persons/entities to whom/which a party may seek to allocate fault and a basis for that allocation. After significant discussion on this point, the committee decided to add language specifically referencing the information required by 9(l) in 26.2(c)(5).

A motion to approve Rule 26.2 as amended was approved.

The committee voted in favor of a motion to recommend that the Supreme Court approve the rule immediately.

## **V. RULE 83 – VEXATIOUS LITIGANTS.**

The committee tabled discussion on these proposed amendments to the next meeting.

## **VI. FREQUENTLY ASKED QUESTIONS REGARDING THE NEW RULES.**

A frequently asked question and proposed response prepared by Judges Pullan and Shaughnessy were circulated to the committee prior to the meeting. The proposed question and answer addressed the showing necessary to have an undisclosed witness or evidence excluded under the revised rules. The committee adopted this Question and Answer to be posted on the committee's web page. This will be the first entry. Mr. Wikstrom requested volunteers from the committee to address the remaining questions that have been compiled by committee members after presentations to the Bar. Judge Pullan volunteered to do Questions 5 and 8 on Mr. Carney's list. Mr. Battle then discussed the questions he has identified and the draft answers he has prepared.

## **VII. ADJOURNMENT.**

The meeting adjourned at 6:00 p.m. The next meeting will be held on January 25, 2012 at 4:00 p.m. at the Administrative Office of the Courts.