

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

March 28, 2012

PRESENT: Francis M. Wikstrom, Chair, Honorable John L. Baxter, James T. Blanch, Steve Marsden, Terrie T. McIntosh, Jonathan O. Hafen, Leslie Slauch, Trystan B. Smith, Honorable Kate Toomey, Barbara L. Townsend

EXCUSED: Sammi Anderson, Professor Lincoln L. Davies, Honorable David O. Nuffer, Honorable Derek P. Pullan, Robert J. Shelby, Honorable Todd M. Shaughnessy

PHONE: Honorable Lyle R. Anderson, Francis J. Carney, David W. Scofield, Lori Woffinden

STAFF: Diane Abegglen, Timothy Shea

GUESTS: Michael Zimmerman

I. Approval of minutes.

Mr. Wikstrom entertained comments from the committee concerning the February, 2012 minutes. The committee unanimously approved the minutes.

II. HB 235, Offer of judgment in civil cases.

Rep. Ivory was unable to attend, so the topic will be discussed at the April meeting.

III. Rule 26.2(d).

Mr. Zimmerman represents State Farm Mutual Auto Insurance Company. His client has raised issues with the new Rule 26.2's requirement that "all non-public information disclosed under this rule shall be used only for purposes of the action, unless otherwise ordered by the court."

He noted that much information obtained in litigation goes into the insurer's database as a matter of course, and that restricting the use of this information to "purposes of the action" is unworkable and ill-defined.

Mr. Zimmerman pointed out that state regulations already restrict the use of certain private information by insurance companies, and distributed the insurance

regulation referred to in his letter, Utah Admin. R. 590-206-17. He explained that insurance companies accumulate all data from whatever source in a database and are sometimes required by law to use some of that data in a way that arguably is not “for the purposes of the action,” which is the restriction in Rule 26.2. Mr. Zimmerman also said that “non-public information” was overly broad and vague.

Mr. Zimmerman agrees with the purpose of protecting sensitive information without delaying the litigation. He referred to the effort in the federal rules to develop a very detailed “default” protective order, which specifies select information for select purposes. He proposed amending the Rule 26.2(d) to read: “All non-public information disclosed under this rule shall be used only for the purposes of the action, unless otherwise required by law or ordered by the court.”

Mr. Carney summarized the evolution of the rule. Because of the reduction in the number of interrogatories, the purpose of Rule 26.2 was to require the disclosure of information routinely produced during discovery. In the process of drafting the rule, the Committee became aware of a need for defendants to obtain Social Security numbers to comply with a new federal requirement to query the Medicaid database in order to determine if it had any lien in a potential settlement or award. When published for comment, there was a significant adverse reaction to the requirement to disclose Social Security numbers and health insurance claim numbers, which has been the subject of frequent dispute arising out of privacy concerns. So the committee originally included a restriction that the SSN could only be used to to query the Medicare database.

Mr. Carney questioned whether the state administrative regulations on privacy applied to non-customers, such as third-party claimants. He further noted that, absent a protective order, and subject to other statutory and common-law restrictions (like HIPAA), information obtained in discovery has been open to persons who are not parties to the action. It might set a precedent with many unintended consequences if a rule were to change the presumption of future availability of information obtained in discovery.

Further discussion in Committee raised the issue of other sensitive information, such as physical and mental health care information unrelated to the action, which would nevertheless have to be disclosed. Under the former rules, a party could have sought a protective order for this information, but under this rule would have to disclose it early in the case.

As a result, the rule was amended to generally include “non-public information” and to restrict its use to “the purposes of the action.”

Judge Toomey noted that the Judicial Council has classified specified records and other information into public and non-public categories.

Mr. Wikstrom asked how an insurance company would have handled information that was the subject of a protective order under the former system of discovery. Mr. Zimmerman said the order would be followed. He suggested amending the rule to restrict the use of Social Security numbers and Medicare health insurance claim numbers as originally proposed and to rely on protective orders for restrictions on other sensitive information.

Mr. Carney agreed that the original intent, and the major concern, was to prevent further disclosure of sensitive SSNs/HICNs beyond the purpose of querying the federal databases. He will work with Mr. Zimmerman and Mr. Smith to revise Rule 26.2 to achieve that end. They will contact representatives of the defense and plaintiffs' personal injury bars who were involved originally in drafting Rule 26.2.

IV. Rule 83. Vexatious litigants.

Mr. Shea said that the committee's recommendation to adopt the new rule was submitted to the Supreme Court, and the Court asked that the committee consider the two further amendments shown in the draft rule. The Board of District Court Judges has reviewed the further changes and recommends their approval.

The committee further amended Lines 8 - 10 to say "at least five claims, other than small claims actions, that have been finally determined in that person's favor." The committee approved the rule as amended. Mr. Wikstrom and Judge Toomey will present the proposal to the Supreme Court for their final action.

V. Miscellaneous discovery adjustments.

The committee approved Rule 5 to be published for comment.

The committee further amended Rule 10 to change "claim" to "case" in line 8. The objective is that each party filing a claim will designate the correct discovery tier as of that time, taking into account the aggregate damages claimed by all parties up to that point. The committee approved Rule 10, as amended, to be published for comment. Mr. Blanch will draft a section for the FAQs explaining that if a counter or cross claim increases the discovery tier, a plaintiff who can prove damages exceeding the original tier should consider amending its complaint to claim them.

The committee approved Rule 11 to be published for comment.

The committee did not approve the proposed amendment to Rule 26.

The committee further amended Rule 37 to add "is required" after "disclosure" in line 26 and in line 27 to end the sentence after "protection," deleting "from

discovery.” The committee also amended line 35 to read: “The court may make orders regarding disclosure or discovery...” Finally, the committee deleted from lines 49-50 “research, development, or commercial.” The committee approved Rule 37, as amended, to be published for comment.

VI. Rule 58A. Entry of judgment; abstract of judgment. URAP 4. Appeal as of right: when taken.

The committee confirmed that the better model is to amend URCP 58A and URAP 4 so the time to appeal runs from the date on which proof of service of the judgment is filed, rather than amending URAP 4 so a party can file a motion in the trial court to reset the time in which to appeal. Mr. Wikstrom will propose this approach to the chair of the appellate rules committee for the purpose of a joint proposal to the Supreme Court.

VII. SJR 15 amending URCP 26.

Mr. Shea advised the committee that SJR 15 amending URCP 26 has passed and is now the law. Several committee members said that the better approach would have been to amend the rules of evidence to create an evidentiary privilege, which would apply in federal and state court.

VIII. Adjournment.

The meeting adjourned at 6:00 p.m. Due to the lack of time the committee did not consider the frequently asked questions. The next meeting will be held on April 25, 2012 at 4:00 p.m. at the Administrative Office of the Courts.