

Minutes

Advisory Committee on the Rules of Civil Procedure

February 24, 2016

Present: Lyle Anderson, Rod Andreason, John Baxter, Evelyn Furse, Jonathan Hafen, Presiding, Kent Holmberg, James Hunnicutt, Terrie McIntosh, Amber Mettler, Leslie Slauch, Trystan Smith, Kate Toomey, Lori Woffinden

Excused: Sammi Anderson, Steven Marsden, Derek Pullan, Heather Sneddon, Barbara Townsend,

Staff: Tim Shea, Nancy Sylvester

Guests: Lane Gleave

(1) APPROVAL OF MINUTES.

The minutes of January 27, 2016 were approved as amended.

(2) RULE 4. PROCESS

Mr. Shea reviewed the changes that the committee had requested at the last meeting.

Mr. Gleave proposed an amendment that would expressly mention “electronic download” as a permissible method of personal service and a permissible method of service by mail. Mr. Shea said that he had anticipated electronic download as a permissible method of delivery for the proposed acceptance of service. He does not see an electronic download as the equivalent of personal service. He said that the committee, when first reviewing the proposal, saw electronic download as the equivalent of acceptance of service.

Mr. Slauch said that the proposed requirements for acceptance of service were too burdensome, and that they would interfere with the common practice among lawyers of accepting service on behalf of a client. Mr. Andreason agreed. Mr. Shea said that the draft was modeled after waiver of service, but that if the conditions required for waiver were inappropriate for acceptance, those conditions should be removed.

Mr. Shea said the rule needs to be platform-neutral, so that Mr. Gleave’s method would qualify, but so would other methods that meet the requirements. He is concerned that “electronic download” does not sufficiently describe the requirements that will give the court the assurance that the defendant has been served. With personal service, that assurance is provided by the statement of a third-party. With waiver, service by mail and the proposed acceptance of service, that assurance is provided by an acknowledgment from the defendant.

Mr. Slaugh volunteered to draft a proposal for acceptance of service.

Judge Furse said there does not appear to be proof of service required for service by mail. Mr. Slaugh said that it is included in paragraph (e)(2), proposed for amendment as (f)(2). The committee decided it would be clearer to have that as a separate paragraph.

Judge Furse asked whether the existing paragraphs (d)(1)(J) and (d)(1)(K), governing service on the state and an agency of the state, were correct. Mr. Holmberg said that they were not, and he volunteered to draft an amendment.

(3) RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

Mr. Shea briefly described his understanding of the committee's intent to treat the Rule 35 report as different from an expert's report under Rule 26. He said that if there is ambiguity in the rule, it should be clarified so that the point does not have to be litigated in each case.

Mr. Smith said that there are some disputes over whether satisfying the report requirement of Rule 35 also satisfies the expert report requirement of Rule 26(a)(4). He said the primary dispute is over the deadline for delivering the Rule 35 report. There is no deadline in Rule 35. The district court judges are split. Some require the report to be delivered within a reasonable time after the examination; others do not require that it be delivered until the time for an expert's report under Rule 26(a)(4). Mr. Smith said this sometimes affects the burden of proof depending on whether a report is used to establish or rebut an element of the case.

Ms. Mettler suggested that if the Rule 35 report is treated as the equivalent of an expert's report, but the examiner is not designated as an expert, the report would never have to be delivered. If there are facts or conclusions adverse to the defendant, the plaintiff would never learn of them. Mr. Slaugh said that an examination under Rule 35 is different from other expert examinations because the examiner is not of the plaintiff's choosing and yet he or she will conduct an invasive medical exam. For this reason a Rule 35 report should always be delivered.

Mr. Hunnicutt asked whether the plaintiff ever benefits medically from the Rule 35 examiner's report. Mr. Smith said that this happens occasionally since the Rule 35 examiner sometimes is able to develop a more complete history and prognosis than the plaintiff's physician.

Judge Furse reviewed federal Rule 35, which requires that the report be delivered "upon request." She said this would likely be treated as a request for the production of a document, with the deadline for delivery established by that rule.

The committee decided to invite Mr. David Bridge and Mr. John Ray to a future meeting to discuss the policies. Mr. Shea said that the options seemed limited: adopt

something similar to the federal rule; anticipate that the request would be made immediately after the examination and establish a deadline of 28 days after the exam; or establish the deadline as simultaneous with the expert's report under Rule 26(a)(4).

(4) REVIEW COMMENTS TO RULES 9, 26.1, 26.2, 41, 54, 58A, 58C, 73

Ms. Sylvester described the changes she had already incorporated based on the comments. These are indicated by the comment being struck through. She reviewed with the committee the comments to Rules 9, 26.1, and 26.2. The committee further amended Rule 9 and 26.2 in accordance with some of the comments. Other comments were discussed, but the committee made no changes as a result. The committee decided that a comment suggesting substantive changes to text not proposed for amendment would be treated as a new request. These will be added to the request list. There were no comments to Rule 41. The committee will resume with the comments to Rule 54.

(5) ADJOURNMENT

The remaining matters were deferred, and the committee adjourned at 6:00.