

## MINUTES

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

**Wednesday September 28, 2011**  
**Administrative Office of the Courts**  
**Francis M. Wikstrom, Presiding**

PRESENT: Francis M. Wikstrom, Chair, W. Cullen Battle, Terrie T. McIntosh, Janet H. Smith, Trystan B. Smith, Leslie W. Slaugh, Honorable Todd W. Shaughnessy, Honorable Kate Toomey, Francis J. Carney, Honorable David O. Nuffer

TELEPHONE: Robert J. Shelby

EXCUSED: Barbara L. Townsend, James T. Blanch, Timothy M. Shea, David W. Scofield

STAFF: Sammi V. Anderson, Diane Abegglen

#### **I. APPROVAL OF MINUTES.**

Mr. Wikstrom entertained comments from the committee concerning the August 3, 2011 minutes. The committee unanimously approved the minutes.

#### **II. RULE 26.2 DISCLOSURES.**

Mr. Carney introduced and led a discussion on Rule 26.2, a proposed disclosure rule applicable to personal injury actions only. Mr. Carney explained that Rule 26.2 is intended to take the place of the standard interrogatories that have been used in personal injury cases for some time. Mr. Carney noted that there are no interrogatories now allowed in Tier 1 and that Rule 26.2 is intended to make that more fair. The committee, receptive to proposed Rule 26.2 and appreciative to Mr. Carney for his work, turned to a discussion of the specific items required under the Rule 26.2 disclosures.

Mr. Carney discussed the issue of Medicare Eligibility information. Mr. Smith explained that this information should be produced with the initial disclosures because there is now no other mechanism by which to receive this information in a Tier I case. Mr. Smith also suggested requiring disclosure of whether the plaintiff is currently receiving Medicare or eligible for Medicare, as well as plaintiff's social security number and HICN number. The committee considered the privacy concerns implicated by such a requirement. Mr. Slaugh opined that a general requirement to disclose ten years employment or medical history is too onerous and that five years is more proportionate. Mr. Slaugh also opined that investigative reports should be produced when they are in the possession of defendant, counsel or insurer's counsel. Regarding the statement of the amount of insurance coverage applicable to the claim, the committee discussed and approved the requirement of a statement of the amount of self-insured retention, to

the extent applicable. Judge Toomey suggested that stylistic changes be made to render the language consistent throughout Rule 26.2 and volunteered to spearhead that effort. As for timing, Mr. Battle suggested and the committee confirmed that the Rule 26.2 disclosures are to be included under the Rule 26(a) disclosure requirements.

With respect to the scope of Rule 26.2, the committee discussed and concluded that Rule 26.2 disclosures for "personal injury" should apply to any action seeking damages out of personal physical injuries or illness. This is intended to apply to all tort actions seeking damages out of physical or emotional injury, including, for example, emotional torts, privacy torts and employment torts. To the extent physical injury or damage is alleged, parties are required to make disclosure under Rule 26.2. The proposed comment's earlier reference to Section 104(a) of the Internal Revenue Code was stricken.

The committee subsequently approved proposed Rule 26.2 by e-mail consensus and the rule has been sent to the Bar for comments.

### **III. COLLABORATIVE LAWYERING.**

Brian Florence attended the meeting to help the committee understand collaborative lawyering and whether the committee should consider an amendment regarding the subsequent disqualification of lawyers that earlier participated in the collaborative lawyering process. Mr. Florence gave his opinion that there is no need for the issue to fall under any formal rule of law, Ethics, Civil Procedure or otherwise, because the contract that attorneys sign under the collaborative lawyering agreement is self-executing. Mr. Florence stated there has never been a problem with lawyers refusing to withdraw. The committee concurred. Ms. Abegglen asked the committee to prepare and submit a written recommendation to this effect.

### **IV. DISCOVERY DISPUTES.**

Mr. Wikstrom circulated a one-page memorandum used by an Arizona judge that requires discovery disputes to be settled according to an extremely short and simplified procedure. The committee discussed the wisdom of adopting such a procedure, as well as the wisdom in various judges adopting pre-trial orders to set forth exactly how they want discovery disputes resolved.

### **V. VEXATIOUS LITIGANTS.**

The subcommittee on proposed Rule 83 (Vexatious Litigants) reported that it has approved the version circulated to the committee. Judge Toomey reported that the Board of District Court Judges has also reviewed and approved the proposed rule. Judge Nuffer explained that the federal courts have standing orders that deal with the same issues, but offered his opinion that a rule would be preferable to standing orders. Ms. McIntosh raised a concern about the criminal penalties associated with the redundancy prohibitions in the proposed rule. Judges Toomey and Shaughnessy, together with Mr. Slauch, explained the nature of vexatious litigation as defined under the proposed rule, the procedural safeguards in the rule and the small number of litigants to whom the proposed rule will apply. Judge Toomey moved to approve and

send out for comments. The committee unanimously approved.

#### **VI. RULE 65C.**

Judge Toomey asked that discussion on Rule 65(c) be postponed until a representative of the courts can be present to address issues associated with citing to a statute in a civil procedure rule. Discussion on the proposed amendments was tabled.

#### **VII. RULE 4.**

Judge Toomey led a discussion on the proposed amendments to Rule 4. Judge Shaughnessy discussed the case law regarding service by publication, observing that service by publication is not supposed to be a rote exercise. It is designed to maximize the potential of reaching the party. With this in mind, the amendments allow for the possibility that service may need to be published in a language other than English or in a paper of a different general circulation. The amendments were approved.

#### **VIII. COMMITTEE NOTES RE DISCOVERY RULES.**

Mr. Wikstrom asked committee members to review Mr. Shea's memorandum regarding revisions to and/or replacements of advisory committee notes in light of the committee's revisions to the rules of discovery. Barring responses to the contrary, it will be assumed that the committee is in agreement with Mr. Shea's memorandum and publication of the new rules will proceed accordingly.

#### **IX. CLAIM PRECLUSION OF SMALL CLAIMS JUDGMENTS.**

Justice Durrant instructed the Committee in the case of *Allen v. Moyer* to include a notice to all small claim litigants that they must bring all claims in one action or risk the assertion of claim preclusion in a subsequent case. Mr. Carney suggested inserting such an express notice on the Court's web page for small claims, the small claims Affidavit and Summons and the Checklist for the Affidavit and Summons. The committee discussed revising the language of the notice to acknowledge that small claims parties may knowingly waive some claims by proceeding under the jurisdictional threshold of small claims court on certain claims. The committee unanimously approved the changes to the small claims forms.

#### **X. FALL FORUM.**

Judge Shaughnessy discussed the Fall Forum and noted that there were three separate panels prepared to address the new rules. One panel, comprised of Judge Pullan and Messrs. Marsden and Slaugh, will address fact discovery. The second, comprised of Messrs. Shelby and Carney, as well as Judge Shaughnessy, will address expert discovery. The third panel will address the new disclosure requirements. It will be comprised of Mr. Battle, Judge Shaughnessy and Ms. Smith. The Fall Forum will be held on November 17 and 18, 2011. Many thanks to these committee members for their participation.

**XI. ADJOURNMENT.**

The meeting adjourned at 5:40 pm. The next committee meeting will be held at 4:00 p.m. on Wednesday October 26, 2011.