

MINUTES

Supreme Court's Advisory Committee
on the Rules of Criminal Procedure

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

February 16, 2016

ATTENDEES

Patrick Corum - Chair
Judge Brendan McCullagh
Judge Elizabeth Hruby-Mills
Judge Vernice Trease
Professor Jensie Anderson
Cara Tangaro
Ryan Stack
Douglas Thompson
Craig Johnson
Blake Hills
Tessa Hansen – Recording Secretary

EXCUSED

Judge Elizabeth Hruby-Mills
Jeffrey Gray

STAFF

Brent Johnson

I. WELCOME/APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting. Judge Brendan McCullagh moved to approve the minutes. Ms. Cara Tangaro seconded the motion. The motion carried unanimously.

Mr. Corum pointed out that legislative changes proposed and enacted during the legislative session often affect this committee's work. As a result, the committee generally meets more often during, and immediately after, the session. Mr. Corum intends to reconvene the committee next month. So far no legislative action is prompting committee action.

II. RULES PUBLISHED FOR PUBLIC COMMENT

Two rules changes are currently published for public comments. Currently no comments have been received. The proposed changes affect rule 11 and 22(e). Judge McCullagh moved to send the proposed changes to the Supreme Court with a recommendation to adopt. The motion was seconded. All committee members voted in favor of recommending the proposed changes to

Rule 11 to the court, and the motion passed unanimously. All members except Mr. Thompson voted to recommend the proposed changes to rule 22(e). Mr. Thompson opposed the motion. The motion passed.

III. HB 308 UPDATE

This issue was tabled until next meeting so that Mr. Gray can discuss it with the committee.

IV. RULE 18(G) EXCUSING ALTERNATE JURORS

Mr. Corum informed the committee that he had received a request to examine the Utah rule governing the excusal of alternate jurors. Judge Blanch had a trial with alternates, and he wanted to keep the alternates on the jury during deliberations, but found that the criminal rule currently requires their excusal once deliberations begin. He asked the committee to consider adopting the federal rule relating to alternate jurors, or in the alternative, the Utah civil rule on alternate jurors. The federal rule leaves excusing jurors to the discretion of the court, as long as they are admonished. The civil rule states that jurors should be excused at the beginning of deliberations, except by stipulation of the parties.

Mr. Corum asks the committee members if they have any knowledge as to why the Utah criminal rule was promulgated to require that alternates be excused at the commencement of deliberation. Judge Trease noted that each rule has its advantages and disadvantages. Bringing in a new juror mid-way into a deliberation may not result in a fair discussion and decision. Mr. Thompson inquired into the procedure used to maintain an alternate during deliberation. Judge Trease said that the alternate would be admonished, sent home, and told that they would be called if needed, and then called at the end of the trial. Ms. Tangaro noted that giving judges more discretion, especially in the event of a long trial, is preferable. The committee members express a preference for the federal language over the civil language. Judge McCullagh proposed inserting language from the federal rule in place of the second to last sentence of the current rule. Judge Trease notes that a change also needs to be made to the second sentence so that the phrase "prior to the time the jury retires to consider its verdict" is removed.

The committee also discussed the question of whether or when the identity of the alternate jurors as alternates should be disclosed to persons other than the attorneys and the judge. The consensus of the committee was that the current language referring to the identity of the alternate jurors should remain.

Ms. Tangaro will prepare a draft of the proposed changes in time for the next meeting.

IV. PRETRIAL RELEASE CHANGES

Judge McCullagh briefed the committee on a suite of changes to proposed rules, to be titled Rules 4, 6, 7, 7A-D, 9, and 9A. Some of these proposed changes were prompted by recommendations from the board of district judges, who are trying to encourage statewide

conformity in the setting of pretrial release conditions (see rules 4 and 9). Other changes are prompted by the judicial counsel's pretrial release committee's recommendations that were adopted by the judicial counsel and then referred over to the Supreme Court. Judge McCullagh also provided the committee with a summary of the proposed changes.

Rule 4: the Information. Informations are not the only way to commence a case. Indictments, though rarely used, are still an option. Previously the rule governing Informations just used the phrase "or indictment" and subsections applying to indictment. The proposed change would limit rule to cases filed by information - screened by a prosecutor and filed with the court. Rule 4A would govern cases filed by indictment.

The proposed change would require courts to review informations, which will be filed electronically, but private metadata (such as social security numbers) will be included in separate accompanying metadata in order to protect an individual's privacy.

The proposed change will also require the identification of *adult* witnesses, but failure to do so will not render the information invalid. Section (b) (4) requires that the information also contain a booking number if the defendant was booked, as well as information regarding defendant custody status. Additionally, section (c) currently provides that a probable cause statement may accompany the information. After discussion, the committee suggested that the probable cause statement should be mandatory. This change makes proposed section (d) unnecessary. For cases filed by citation the probable cause citation is discretionary, so justice courts should not be overly burdened by this rule change.

Proposed section (i) states that informations shall reviewed for sufficiency, at the time of filing, by a judge of the court. If the document is deemed insufficient (i.e. the information has a facial defect), it will be returned to the prosecution for correction. The committee discusses the logistical problems that could result from rejecting informations regarding tracking rejected informations. Judge McCullagh believes that a case number would likely be assigned at the time of filing, regardless of the sufficiency or insufficiency of the information. It is not clear whether the case would immediately be dismissed, or whether the case would be kept open for a period of time. Mr. Corum asks if subsequent informations would be refiled under the original case number. Judge Trease educated the committee on the procedures judges currently use in reviewing and tracking cases in CORIS. The process will likely be controlled by our technological capabilities. The committee agreed that if possible, informations should be documented in the same case number.

Mr. Corum asked about how BCI and fingerprinting would be affected by this change. The committee discussed that issue.

Ms. Anderson noted that section (i) contains some grammatical errors involving the plural form of "offense." Judge Trease suggests that "magistrate" be removed in favor of "judge."

Rule 6: Warrant of Arrest or Summons. The proposed changes would standardize the criteria a judge should use in deciding whether to allow a defendant charged by information or indictment to appear by summons or by a warrant. The proposed changes clearly state that the default position should be to allow appearance by summons. This is the position unanimously approved by the pretrial release committee. The rule now includes language governing issuing warrants “for a defendant that is not a corporation” which removes the need for a separate section on corporate defendants.

Mr. Corum, Ms. Tangaro, and Mr. Thompson asked if the section of the rule allowing for the issuing of a warrant in situations where a defendant does not have a known address is prejudicial to homeless defendants. Because service to public defenders is not practicable, attorneys can at a minimum inform courts of mailing addresses for their clients on the record at the time of dismissal of cases likely to be refiled.

Subsection (d) states that a warrant shall state whether a defendant is denied pretrial release, the basis for the denial, conditions of pretrial release, including monetary bail. In determining bail, judges will be required to set bail at the lowest amount reasonably calculated to ensure the defendant’s appearance. Judge McCullagh notes that because this determination is made ex parte, bail can be properly addressed, with input from all parties, and the first appearance.

Rule 7: Proceedings before a magistrate. This rule has been broken up into Rules 7, 7A, 7B, 7C and 7D. Rule 7 concerns district judge’s responsibilities in handling initial appearances in filed cases, and provides for setting bail at initial appearances “if counsel is present and prepared.” It also allows for scheduling other matters between initial appearances and preliminary hearings.

Rule 7A concerns procedures for Class B or C misdemeanors. Judge McCullagh asks for committee input on this section. Committee members discussed the backlog of cases in justice court settings and how the rule change would affect those courts.

Rule 7B concerns preliminary hearings. Judge McCullagh directed the committee’s attention to section (d) and suggested striking the underlined language.

Rule 7C and 7D are simply reorganized and relabeled sections from the existing rule

Rule 9: Arrest without warrant. This rule language mirrors proposed statutory language. The Statutory language provides for the holding authority to release individuals after 24 hours a magistrate’s approval (or extension of time) has not been received.

Committee members are encouraged to disseminate the proposed changes for community/constituent group input.

V. POST JUDGMENT SANCTIONS RULE.

This will be addressed at a subsequent meeting.

VI. OTHER BUSINESS

The next meeting will take place on March 15. Judge McCullagh will send out electronic versions of the proposed changes. Judge McCullagh also requests questions or other input by email.