

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

March 16, 2016

ATTENDEES

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

EXCUSED

Judge Elizabeth Hruby-Mills

STAFF

Brent Johnson

I. WELCOME/APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting. Ms. Cara Tangaro moved to approve the minutes. Professor Jensie Anderson seconded the motion. The motion carried unanimously.

II. UPDATE ON RULES PUBLISHED FOR PUBLIC COMMENT

Mr. Johnson informed the committee that he met with the Supreme Court earlier in March. Rule 17.5, the remote transmission rule, is approved. Rule 22 has not yet been approved. The Court wanted to consider that further and would meet to discuss it again in two weeks. Mr. Johnson thinks approval is likely. Rule 38, regarding the Manning decision, did not get referred to the Court. Because of the delay, Rule 38 will go back out to public comment with the proposed six-month deadline.

III. RULE 18(G) EXCUSING ALTERNATE JURORS

Ms. Tangaro proposes modeling proposed rule language on alternate jurors after the proposed federal rule. The federal rule gives more discretion to judges (as compared to state civil language). Ms. Tangaro has provided a copy of the proposed changes, supplanting the federal rule for the state, to Judge Blanch. The committee will look for further comment from the judge. At the end of the meeting, the committee returned to issue. The committee agreed to remove language referring to bifurcated proceedings, and add in wording from the federal rule. Ms. Tangaro moves to accept the proposed changes. Judge McCullagh seconded. The motion carried unanimously.

IV. PRETRIAL RELEASE RULES CHANGES

The remainder of the meeting will mostly be devoted to discussing proposed changes to the pretrial release rules. Mr. Corum has had the opportunity to look over proposed changes to Rules 6, 7, 9, and 4. In general he believes they look good, aside from some minor grammatical problems. Overall, he likes the changes.

But in amendment to Rule 7, which covers pretrial release, Corum asked about the section regarding probable cause determinations, found in the redline text for section 7(c). It states “if counsel are present and prepared . . . to reasonably ensure the continued appearance of defendant; integrity of judicial process; and safety of community.” Where does integrity of judicial process language come from? Judge McCullagh noted that where new language, not in the original rule, is in these proposed rule changes the new wording is likely from the statute. Mr. Corum confirmed that the language is one of four criteria (which also includes witness contact) in the statute. Judge McCullagh noted that “judicial process” covered witness contact concerns. Mr. Corum suggested just substituting the language directly from the statute. Jeffrey Grey also believes that using the statutory language is more consistent. The statute is 77-20-1(3)(a-c).

Mr. Corum suggested adding the word “waives” to the very end of Rule 7(b), and including the same language to the other relevant subsections regarding appointment of counsel.

Mr. Corum asked the committee if there are any other changes that need to be discussed. Judge McCullagh encourages the committee to consider changes and disseminate the proposed amendments in order to solicit feedback. The main bill on pretrial issues died – the legislature ran out of time. Most of the proposed rule focuses on procedural issues. Substantive matters have been removed where possible.

Judge Trease asked about rule 7B concerning witnesses at preliminary hearing. Is that on appeal? She notes that there is a lot of contention between what the rule states and the case law. The rule currently says that the defendant may call witnesses at preliminary hearings, but there is some case law to the contrary. Should the court or counsel be informing defendants at preliminary hearings that they have the right to call witnesses? Ms. Tangaro noted that she was involved with this issue currently on appeal. It was ready for argument and but the government instead agreed to allow an alleged victim be called by the defense at preliminary hearing. It is the

Campbell case. Status is that now victim is allowed to be called at preliminary hearing, with limitations. Mr. Gray noted that it is the position of the state that testimony should only be allowed if it is relevant for determining probable cause but not discovery or other purposes.

Mr. Corum would like wait to see the result of the pending appeals before turning the committee's attention to amending the rules on this issue.

Douglas Thompson asked how one determines the purpose of witness testimony. Is there some kind of preliminary factual determination made before calling the witness? Ms. Tangaro noted that some judges require a proffer when considering whether to allow testing. Judge Trease noted that it is even more restrictive: the testimony is acceptable when it could defeat a probable cause determination. Judge McCullagh pointed out that testimony for credibility alone is not sufficient, unless it gets to inherent unreliability. Judge Trease noted that the rule may need to be change to conform to case law. Judge McCullagh suggested that the committee wait for case law to develop before making rule changes. Mr. Corum agreed that the rule should be left as it is.

Judge Trease asked about the part of the rule that allows a judge to exclude spectators "at the request of either party." Judge McCullagh noted that that language should be removed.

Judge McCullagh requested edits from the committee.

Mr. Thompson asks the committee about Rule 7(c)(4) said that if the probable cause statement is presented more than 24 hours after the arrest, the judge shall order release. Judge McCullagh noted that that language was removed. He stated that that should be in a statute. The magistrate's role is to determine probable cause and set bail. The proposed remedy is substantive and should not be in the rule. It should have been in amended statute, but the legislation did not pass. McCullagh clarified that Mr. Thompson and others are arguing for language that states something to the effect of "the defendant will get released on his own recognizance after 24 hours without a probable cause statement." Mr. Corum confirmed that is the case. Mr. Thompson will draft language and provide it to the committee. Judge McCullagh noted that this was his major concern if the statute did not pass: the 24 hours deadline as well as the bail determination expiration if no charges are filed in 72 hours. Judge McCullagh noted that the language regarding bail will refer to recognizance and not simple release. The issue is likely to be considered by the legislature again next year.

Ryan Stack shared his thoughts on rule 7A concerning proceedings for arraignment on Bs and Cs. It refers to initial appearance. Should it be called something else, i.e. "first appearance", given that it's referring to lower misdemeanors? Judge McCullagh agrees.

Under Rule 7(c) governing on pretrial releases, how does this work with crime victims and the right to address bail? Judge McCullagh suggested that prosecutors should provide notice to victims regarding their right to appear at initial appearances where bail is set. Mr. Stack noted that would require prosecutor to give victims the option of being present for these early appearances, and that could be difficult. Blake Hills noted that victims have a right to be present at every critical stage of the proceedings. But a hearing could be reset if the prosecutor informs

the court that he needs more time to contact a victim. Judge McCullagh suggested that seems appropriate. Judge Trease commented that the language that states that “if counsel are present and prepared” refers to prosecutor too, and allows for a continuance in the event that a victim cannot be present at this setting. She also asked if section D is necessary or if we need to have a rule dictate when a judge sets a bond hearing. Judge McCullagh believed that the protections in the rule are appropriate, given the relative positions of the defense vs. the machinations of the criminal justice system.

Mr. Stack asked what does this does to the 10 day bail issue. Does it gut it? Judge McCullagh said yes, but that is acceptable because it is the prosecutor is bringing the charges to the defendant. It is the defendant that suffers from prosecutorial delays. Because the prosecutor has the chance to set bail ex parte first, it’s reasonable to address bail at first setting, if the defendant wants to. Mr. Thompson worries about a delay causing a defendant to be incarcerated for a significant time without a bail determination. Mr. Stack agrees, but still has concerns in subsection of victim cases... the way it is written now, the hearing only gets a 7 day notice. Judge McCullagh asks whether the language can be read to incorporate victim rights protections as well as defendant's rights. Mr. Grey suggested that the Judge can make that determination. Judge McCullagh asked what procedural safeguards are then in place to prevent mischief. Mr. Stack noted that it is not a typical practice to have a victim available for an initial appearance. Ms. Tangaro observed that if a victim is not available, regardless of the stage of the proceedings, a prosecutor has a problem with their case.

Mr. Corum noted that the crime victim’s act doesn’t parse out distinctions among victims. It doesn’t single out person-crimes. Judge Trease believed it refers to “natural persons.” The committee asked how this new procedure could work in the third district. Are the public defenders able to address bail at that setting? Generally, public defenders are appointed at the initial appearance, and defendants are not represented at that stage. In Utah County, defenders are present at appointment at first appearance and defendants are allowed to address bail. Judge Trease believes that keeping “prepared” undefined is appropriate but the rule then says a hearing shall be set in 7 days. Should we set an exact number of days? Judge McCullagh noted that the committee should not be drafting rules to accommodate lawyer capacity at the expense of the rights of the accused. Judge McCullagh wondered how the committee might settle on a number. The committee continued to discuss this issue at length, with particular attention paid to the deadlines proposed in the rule changes. Mr. Corum suggested that Mr. Stack attempt to make a draft of proposed changes to this subsection that will balance victim interests with those of a defendant's.

Mr. Corum discussed making the rule differentiate between situations where the defendants are not ready.

Mr. Corum also asked the committee to discuss rule 7A in the completed draft regarding time limits for pretrial conferences for lower level misdemeanors. Subsection (c)(2) states that a pretrial should be set within 14 days if the defendant is in custody, and within 28 if the defendant is not in custody. Judge Trease noted that is very short, especially for the district court. Mr. Gray asked if the time can be waived. The committee thought a right can always be waived. Judge

McCullagh suggested adding “unless waived” to this section. Mr. Corum noted that according to the new rule, a trial should be set not had within the proposed time frames. The committee discussed the effect that this change would have on the justice courts. “For good cause shown” language was considered and rejected. These time limits create an analog to a defendant’s right to a preliminary hearing within 10 or 14 days. The committee also agreed that rule should be edited to specify that a defendant has a right to a pretrial within 14 days if they are being held on that case.

Mr. Corum asked the committee to take a hard look at the proposed rules and to make further edits before the next meeting. Judge McCullagh will be making edits concerning the release after 24 hours issue, as well as the 72 hour limit.

V. POST JUDGMENT SANCTIONS RULE.

This will be addressed at a subsequent meeting.

VI. PEREMPTORY CHALLENGE RULE

There is a trend toward removing the option of peremptory challenges and limiting attorneys to for-cause strikes. Mr. Corum and other members find the issue intriguing. Mr. Johnson noted that in the last discussion, there was a U.S. Supreme Court case that might affect challenges. He will look into it and report back to the committee.

VII. OTHER BUSINESS

The next meeting will take place on May 17.