

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

September 16, 2014

ATTENDEES

Patrick Corum- Chair
Judge Michele Christiansen
Judge Brendan McCullagh
Judge Vernice Trease
Professor Jensie Anderson
Jeffrey Gray
Craig Ludwig
Cara Tangaro
Douglas Thompson

EXCUSED

Tessa Hansen
Steven Major
Vincent Meister

STAFF

Brent Johnson

GUESTS

Tim Shea
Heidi Nestel
Lori Hobbs

I. WELCOME / APPROVAL OF MINUTES

Brent Johnson welcomed the committee members to the meeting. Douglas Thompson moved to approve the minutes from the previous meeting. Judge Michele Christiansen seconded the motion. The motion carried unanimously.

II. RULE 14

The committee members welcomed Heidi Nestel to the meeting. Ms. Nestel represents the Utah Crimes Victims Legal Clinic. Ms. Nestel expressed concerns about a proposed change to rule 14 that would remove the phrase "nonpublic information." Ms. Nestel stated that, of all the rights in the Crime Victims Act, privacy is probably the most important to victims. Ms. Nestel stated that she appreciates and understands a defendant's due process rights and the need to access certain information, but she stated that victims also need to be free from harassment, and to have their privacy protected. Ms. Nestel stated that there is a concern when defense counsel seeks records such as journals, emails, social media materials, personnel files, DCFS reports, etc. Ms. Nestel stated that rule 14 contains a process for attorneys and defendants to

obtain information, and that process should be followed in order to protect privacy. Judge Brendan McCullagh stated that information is typically requested through a subpoena. Judge McCullagh stated that the process is normally for a subpoena to be served and a victim may then file an objection. Ms. Nestel stated that the problem that often arises is that the victim does not know about the subpoena. Jeffrey Gray stated that the rule should put the onus on the requester to show why the requester is entitled to the record and not to put the onus on the victim to challenge. Mr. Gray stated that the court should be involved before the records are obtained.

Judge McCullagh expressed a concern that the word "nonpublic" is not defined. Judge McCullagh stated that the rule should contain a definition. Ms. Nestel stated that for the most part attorneys are not causing problems, but there is a concern with pro se defendants. Patrick Corum suggested that the rule creates a presumption that defense counsel will harass victims. Mr. Corum stated that the rule is based on caselaw, but the rule goes beyond caselaw. Mr. Corum provided an example of a case in which he obtained phone records and through those phone records he was able to show that an alleged victim was making calls during a supposed kidnapping. Mr. Corum stated that he would not have known about that information in advance and therefore wouldn't have been able to articulate to a judge why the defense needed those records. Ms. Nestel stated that one of the big concerns is attorneys engaging in fishing expeditions. Mr. Thompson suggested that there needs to be a balance between allowing litigants to obtain records without a court order, while also including a legitimate opportunity for objections. Judge Vernice Trease suggested that a middle ground might be to develop a user-friendly form that would help facilitate objections. The committee decided that there should be an attempt to define "nonpublic." Mr. Corum volunteered to draft a proposal.

Mr. Corum also noted that the committee had received a request from Justice Thomas Lee to review rule 14 and ensure that it is consistent with Worthen. Mr. Corum stated that he will review the case and propose any necessary changes. Judge McCullagh stated that there probably isn't a reason to limit the rule to defense attorneys because victims might also want to know if a prosecutor is seeking information.

III. REMOTE SERVICES RULE

Patrick Corum welcomed Tim Shea to the meeting. Mr. Shea provided a report from the Judicial Council's Remote Services Committee. Mr. Shea stated that the committee recognized that in the coming decades litigants might appear more frequently through audio and video transmissions. The Remote Services Committee is therefore proposing rules in the different practice areas to accommodate this reality. Mr. Shea stated that the federal courts have had such rules in place for quite awhile.

Mr. Shea stated that in his research there is no uniform model for criminal cases. Mr. Shea proposes dividing criminal proceedings into three categories. Under one of the categories, a remote appearance would not be permissible unless the defendant waives the right to be present and as long as other safeguards are put in place to protect the right to confront witnesses. Mr. Shea stated that in the next category of cases the defendant could waive the right to be present. In the final category of cases, the court would have discretion to conduct a hearing with the

defendant at a different location. Mr. Shea stated that the Judicial Council has committed funds to putting the technology in place and the technology will be available by June 30 of next year. Mr. Thompson asked whether a remote appearance will still be an exception rather than the rule. Mr. Shea stated that it would be the exception and in the Remote Services Committee's survey of different communities people generally still want a defendant present with the judge. Mr. Corum stated that the committee is probably comfortable in moving forward with the third category, allowing a judge to permit remote appearances in certain cases, but Mr. Corum stated that he sees a lot of issues with the other two categories and the committee will need to carefully consider the ramifications. The committee will try to address the issues by the end of the fiscal year.

IV. RULE 7(h)(2)

Mr. Thompson submitted a proposal that will require a judge to inform a defendant about the right to a preliminary hearing at the defendant's first appearance. Mr. Thompson stated that some of the timeframes in the rule are meaningless because the preliminary hearing issue is not raised until later in the case. Mr. Gray asked what the consequences would be if the judge does not inform the defendant. Mr. Thompson stated that there would not be any consequences, but the rule would at least inform judges what they should do. Mr. Corum noted that every district is different in how they handle cases, with some of the districts having roll call hearings, some districts having first appearances, and the Third District having the ECR process. Mr. Thompson suggested that it would still be feasible for judges to inform defendants at any first appearance. Judge McCullagh suggested that the rule include a list, similar to rule 11, of the things that a judge should tell a defendant at the beginning of a case. Mr. Gray stated that if there is such a list, it should not include the same consequences as rule 11. Judge McCullagh stated that this could be addressed by putting the word "should" in the rule. Mr. Thompson also suggested that the rule could specifically state that a failure to inform the defendant does not affect the case. Mr. Thompson agreed to take on the task of creating a list.

V. RULE 40

Brent Johnson explained that at a recent meeting of the Utah Supreme Court the court expressed concerns about the language in rule 40 allowing a person with "standing" to file a motion to seal records. The members of the Supreme Court stated that standing is a term of art that does not seem to fit this situation. Mr. Johnson therefore proposed that the rule be amended to state "person with a direct interest in the records." The committee members agreed with the suggestion and the proposal will be submitted to the court without additional public comment.

VI. RULE 26

Mr. Johnson submitted proposed changes to rule 26 to address two issues. One proposal will require trial courts to create the judgment, sentence, and commitment. Mr. Johnson stated that, although somewhat controversial, most courts seem willing and prepared to move in this direction and this will help protect the rights of defendants. Mr. Johnson explained that the other change will require orders to be separate from motions. Mr. Thompson noted that the electronic filing process is already programmed to submit motions and orders as separate documents and

therefore this should not be controversial. Judge McCullagh then moved to approve the proposals. Patrick Corum seconded the motion. The motion carried unanimously.

VII. REORGANIZATION OF RULES

Judge McCullagh explained that he is working on the reorganization and will have proposals at a future meeting.

VII. OTHER BUSINESS/ADJOURN

The committee members did not have any other business. The meeting adjourned at 1:35 p.m.