

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 15, 2015

ATTENDEES

Judge Brendan McCullagh  
Judge Elizabeth Hruby-Mills  
Cara Tangaro  
Jeffrey Gray  
Ryan Stack  
Douglas Thompson  
Craig Johnson  
Professor Jensie Anderson  
Blake Hills  
Tessa Hansen – Recording Secretary  
Brent Johnson

EXCUSED

Patrick Corum  
Judge Vernice Trease

I. WELCOME/APPROVAL OF MINUTES/INTRODUCTION OF NEW MEMBERS

Patrick Corum not being present, Brent Johnson called the meeting to order. He also suggested that the committee name a vice-chair and then asked for nominations. Committee members suggested that Judge McCullagh fill that position. He did not object.

Mr. Johnson noted that the committee has gained new members and suggested that committee members introduce themselves. New members include Judge Hruby-Mills, Ryan Stack, Craig Johnson, and Blake Hills.

Mr. Johnson asked if the committee wished to approve the minutes. Mr. Thompson moved to approve, Ms. Tangaro seconded, and the committee voted in favor.

II. RULES OUT FOR PUBLIC COMMENT

Judge McCullagh asked for an update regarding rules currently out for public comment. One commenter pointed that the proposed change to Rule 17.5 (addressing remote services) could provoke some unintended consequences as the changes relate to Rule 15.5, which deals with child witness testimony. Mr. Johnson asked for a volunteer to look into the potential conflict and report back at the next meeting. Mr. Craig Johnson accepted the assignment.

Mr. Stack expressing a concern about individuals could use expanded opportunities for remote hearings more for convenience than necessity, and this could provide an advantage to well-off defendants. Judge McCullagh noted that the rule could also benefit defendants of lesser means by allowing them to avoid travel costs and appear remotely. He also pointed out that the proposed rule change largely incorporates permissive rather prescriptive language.

Mr. Thompson reminded the committee that the proposed changes that are prescriptive (permitting a court may conduct hearings via video without agreement of the parties or waiver by the defendant) only applies to arraignments, bail hearings, and initial appearances. Ms. Tangaro noted that subsection (b) then allows for other hearings to take place remotely, but only with consent of all of the parties and the knowing and voluntary waiver of the defendant.

Mr. Johnson suggested that the committee examine both the original language and the proposed changes at the next meeting. He was asked about the impetus for the change and explained that where the technology has improved so much, hearings by video transmission are becoming more attractive as a means of providing better services, especially in the context of civil settings and child welfare proceedings. Judge McCullagh agrees that the committee should address this at the next meeting.

### III. EXPLANATION OF THE COMMITTEE PROCESS

Mr. Johnson explains the process by which this committee develops changes to the Criminal Rules and the process for approval. First the committee reviews proposals and then develops proposed rule changes. The changes are then sent out for public comment for forty-five days. The committee then reviews the comments, and considers the comments before ultimately passing the proposed changes on the Supreme Court for a decision on final action. In some cases, the committee will re-send out for further public comment before ultimately submitting a recommendation to the Court. The court may approve, reject, or modify. There are two publication dates for the court reporter each year: April 1 and November 1. This committee tries to get rules enacted with those publication dates in mind. Final action from this committee therefore needs to be sent to the Court one month in advance of those publication dates.

Judge McCullagh also noted that the Court may in some circumstances, take action immediately, i.e. in March to allow the Court to enact changes to align the rules with new legislation. Ms. Tangaro also noted that the committee engages in an ongoing effort to reorganize and clarify the existing rules.

### IV. RULE 14 - SUBPOENAS

The committee will address this at a future meeting.

## V. HB 308 UPDATE

HB 308 concerned procedures for the disposal of evidence and did not become law. This committee was approached to explore whether the issue could be addressed through the rules. Mr. Grey is waiting for more information from the proponents of the rule change and expects a more formal proposal by November. He asks that the committee address this at the next meeting.

## VI. RULE 7 REWRITE UPDATE

Judge McCullagh explained that the Judicial Council's Study Committee is looking at pretrial release and bail issues this year. The committee meets shortly, and another, final meeting should adopt recommendations, including those of the District Court board of judges. Judge McCullagh suggests waiting for that process to conclude (with final recommendations headed for the Supreme Court) before proposing a more substantial rewrite/reorganization of Rule 7. The reorganization organized by this committee could then incorporate the new changes.

Judge McCullagh pointed out that one problem with Rule 7 is that it tries to accomplish too much and addresses too many procedures in one place. Currently, Judge McCullagh is developing a rule broken out into sub-sections that are organized in a more coherent manner.

Judge McCullagh also anticipates proposed changes to Rule 6 to make issuing summons mandatory in more instances (i.e. unless there is a demonstrated breach of the peace or reason to believe that a defendant will not appear.)

Mr. Thompson suggested that it seems like proposals to substantively change Rule 7 are a little premature. His proposed changes to Rule 7(h)(2), which concern advising defendants of their rights to a preliminary hearing, could be incorporated into a future draft reorganization of the Rule.

Ms. Anderson asked if the committee was interested in simplifying and clarifying language. Judge McCullagh stated that changes to make the rules more clear and understandable would be welcome as these rules are likely read by more lay persons than others.

## VII. RULE 22 – *STATE V. HOUSTON*

Proposed changes to Rule 22 arose from the Supreme Court's language and direction in *Houston*, which suggested a narrowing of ruling Rule 22. The new language would allow for correcting functionary mistakes in sentencing. Ms. Anderson noted that there is currently a petition for cert on *State v. Houston* before the United States Supreme Court.

## VIII. RULE 11 and 22 – DV Warning

The committee also proposes a change to subsection (c)(2) of Rule 22. Judge McCullagh informed the committee about interest, especially among domestic violence victim advocates and

treatment providers, in revisiting Utah's very broad definition of the word cohabitant as the nexus for domestic violence. They propose limiting it to better track federal definitions of "intimate partner" in order to ensure that the gun rights limitations will actually apply to state DV convictions. (Currently, only the new assault DV statute, which includes "strike" and "attempt to strike" language" may meet federal parameters for this purpose).

Mr. Thompson suggested that the (c)(2) language align with court *Padilla* compliance warnings. Mr. Johnson noted that swapping "may be unlawful" for "is unlawful" would adequately inform defendants of potential federal consequences of DV pleas, without having to make a statement on the status of the law. Ms. Anderson suggested that in this context "inform" is a more appropriate term than "advise." Mr. Thompson also pointed out that citing the specific federal statute could be problematic in the event that the statutory reference changes. Mr. Johnson proposed striking the reference and instead simply state that the caution should be given in the event that a case meet the criteria of federal law.

Ms. Tangaro suggested including language that would also advise defendants convicted of felonies of federal gun consequences. Because all felons are restricted persons, however, this is not necessary, and Judge McCullagh noted that the committee has an interest in keeping the rules as narrowly tailored as possible.

Ms. Tangaro proposed that the committee recommend the changes discussed above, including changes to subsection (e) and mirroring changes to Rule 11. Mr. Johnson seconded. There was no further discussion. Mr. Thompson abstained. The remaining members of the committee voted in favor.

## IX. RULE 18, PEREMPTORY CHALLENGES

The committee received a proposal to reduce the number of preemptory challenges. The committee discussed limiting or possibly eliminating preemptory challenges at the last meeting, and Mr. Jonson agreed to research the history of preemptory challenges and gather information on how other states are addressing this issue. The committee discussed some possible benefits and pitfalls to removing preemptories. Mr. Johnson will continue to gather information for the committee's consideration.

## X. OTHER BUSINESS

Judge McCullagh anticipates addressing the changes to rules addressing pretrial procedures in the coming months. The next meeting will be on November 17, 2016. Ms. Hansen will likely not be in attendance.