

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 84114-0241

February 3, 2010 - 5:15 p.m.

ATTENDEES

Craig Barlow
Matty Branch
Patrick Corum
Laura Dupaix
Professor Amos Guiora
Craig Ludwig
Steve Major
Judge Brendan McCullagh
Vincent Meister
Judge Vernice Trease
Todd Utzinger

EXCUSED

Judge Michele Christiansen

GUESTS

Pat Nolan
Scott Reed

STAFF

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

Laura Dupaix welcomed the committee members to the meeting. Ms. Dupaix welcomed Todd Utzinger as a new committee member, replacing Julie George. Craig Barlow noted one typographical error in the minutes. With that change, Vincent Meister moved to approve the minutes. Craig Barlow seconded the motion. The motion carried unanimously.

II. HB 251

Laura Dupaix welcomed Scott Reed and Pat Nolan to the meeting. Mr. Reed stated that his office had been working on a proposal to address an issue created by the United States Supreme Court's decision in Melendez-Diaz. Mr. Reed stated that they had proposed a bill in the Legislature to address the problem, but Rick Schwermer suggested that the issue is procedural and should be addressed through Supreme Court rule.

Mr. Reed stated that, in Melendez-Diaz the defendant had objected to the admission of a report on cocaine because the defendant was not able to question the individual who prepared the report. The trial court admitted the report. Mr. Reed stated that the U.S. Supreme Court held that is a Confrontation Clause issue and the defendant is entitled to question the individual who prepared the report, if the defendant requests such. Mr. Reed stated that Justice Scalia had suggested that a state could adopt a notice and demand rule, which would require the prosecutor to give notice of an intent to submit a report and a defendant could then demand the right to confront the preparer. Patrick Nolan stated that the rule proposal before the committee is essentially the same language proposed by HB 251. Mr. Nolan stated that the proposal is modeled after motions to suppress under Rule 12, in which there is a requirement that the movant show some legal basis for the motion.

Judge McCullagh stated that, under Melendez-Diaz, all a defendant needs to do is say "I want to examine the witness" and that right must be granted. Judge McCullagh stated that the rules of criminal procedure not require any showing for a jury trial which is a constitutional right, and he suggested that this should be the same for these types of cases.

Judge Vernice Trease asked if there was any reason for the sixty day time frame governing when an objection must be filed. Mr. Reed stated that there wasn't a particular reason, but it is tied to the time necessary to prepare the reports. Ms. Dupaix noted that the expert witness statute has a thirty day requirement. Mr. Barlow stated that thirty days is inadequate.

Judge Trease stated that this will create a problem for technicians because in the vast majority of case a test is not done unless it is fairly certain that the case will go to trial. Judge Trease stated that this will now be done much more often. Ms. Dupaix noted that there would also be a problem when there are speedy trial requests.

Ms. Dupaix asked whether the committee members were seeing many objections yet under Melendez-Diaz. The members stated that they were not seeing many. Professor Amos Guiora asked Mr. Reed and Mr. Nolan if they had researched what other states are doing. Professor Guiora asked whether sixty days is standard. Mr. Nolan stated that sixty days is fairly standard but some states are requiring it earlier and some are requiring it later. Todd Utzinger stated that this will result in defense attorneys creating a standard objection. Steven Major stated that he cannot remember any cases in which a defendant argued that a substance was not drugs.

Mr. Barlow asked what the sanction would be for not objecting in time. Mr. Reed stated that the right would be waived. Mr. Barlow asked what would happen if a defendant claimed that the defendant did not know about the right and therefore requests a continuance. Mr. Barlow suggested that a judge will not punish a defendant if the lawyer was at fault for not objecting. Professor Guiora stated that he believed a rule could be much shorter and simpler. Mr. Meister agreed, but stated that the sixty day requirement is important. Ms. Dupaix asked whether prosecutors will usually request a test as soon a case is bound over. Mr. Meister stated that they will often do this, but will also evaluate whether the case is likely to settle.

Professor Guiora asked Mr. Reed and Mr. Nolan what will happen next with HB 251. Mr. Reed stated that the bill is going forward and will be before the committee the following morning. Mr. Reed stated that they need to get something done and if it is not done by rule they need to move forward with a statute. Mr. Meister stated that whether a rule or statute is adopted the practice will probably be the same, but a rule might provide guidance. Laura Dupaix asked the committee members whether they wanted to take this on through a rule. The committee members stated that they would like this done by rule but did not think a rule could be done by the end of the legislative session. The committee members suggested working on a rule and then having any statute repealed at the time a rule is passed. The committee agreed to discuss this at its next meeting.

III. RULES 17, 18, AND 19 SUBCOMMITTEE

Judge Brendan McCullagh stated that the subcommittee did not have anything to report.

IV. RULE 11 AMENDMENT

Judge Brendan McCullagh proposed an amendment to Rule 11 which would require justice courts to obtain written waivers of counsel in all cases involving class B misdemeanors and some class C misdemeanors. Judge McCullagh stated that this is necessary to create a written record if the conviction is subsequently collaterally attacked. Judge McCullagh stated that there is a requirement in the Rules of Judicial Administration for justice court judges to complete an enhancement sheet, but the real issue is the Rule 11 waiver of counsel. Professor Guiora asked what would be the consequence for failing to put it in writing. Professor Guiora suggested that this is only a recommendation without consequence. Judge McCullagh stated that the consequence would be that the conviction is subject to collateral attack, because there would not be a record that the defendant knowingly waived counsel.

Ms. Dupaix suggested that this should remain in the Rules of Judicial Administration because it is more of a record-keeping issue. Mr. Meister stated that this is primarily a training issue so the justice court judges know to get this in writing. The committee members agreed that this should be in the Rules of Judicial Administration. Judge McCullagh stated that he will pursue that course.

V. RULE 8 SUBCOMMITTEE

Laura Dupaix reported that the subcommittee does not have anything new to report. Ms. Dupaix stated that she is now on the Appellate Representation Task Force and will wait until the Task Force finishes its work before any recommendations are made, because the work of the Task Force might address some of these issues.

VI. RULE 40

Mr. Meister stated that it does not appear as if there will be a need to make any changes to Rule 40. Mr. Meister stated that there had been some technical concerns because the E-warrant system does not allow sealing of documents beyond twenty days. Mr. Meister stated that the system will be changed. Mr. Meister stated that he might propose changes after the technical changes are made, but at this time it is a technical issue and not a rule issue.

VII. SUBPOENA RULES

Mr. Meister stated that Rule 14 has several cross-references to other rules, particularly on service, and he suggested that there is a need to bring those provisions together into one rule. Judge McCullagh asked what the problem has been. Mr. Meister stated that there are occasionally problems with making certain that an individual has been served with a subpoena, particularly material witness subpoenas, and the court is left with the question as to how it can enforce the individual's failure to appear if the court is not certain that the individual was actually served. Ms. Dupaix suggested that Mr. Meister propose changes and bring those back to the committee. Craig Barlow stated that he will help with the drafting.

VIII. RULE 36

Patrick Corum stated that Rule 36 does not provide enough direction on withdrawals of counsel. Mr. Corum stated that the rule, for example, does not require counsel to state the grounds for withdrawal or to state whether there will be prejudice to

the defendant if withdrawal is granted. The committee decided that this issue would be discussed at the next meeting.

IX. OTHER BUSINESS/ADJOURN

The committee decided to schedule its next meeting in April to give the subcommittees additional time to work on their projects. Staff was instructed to circulate an email to set a date. The meeting adjourned at 6:45 p.m.