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

*The meeting is scheduled
in conference rooms B & C (W19)

September 20, 2016
12:00 p.m. - 2:00 p.m.

Agenda

1. Welcome and approval of minutes	-	Patrick Corum	Tab 1
2. Rule 22 with memorandum and public comments	-	Judge Brendan McCullagh	Tab 2
3. Rule 4,6 public comments	-	Patrick Corum	Tab 3
4. Rule 38 public comment	-	Patrick Corum	Tab 4
5. Rule 18 – beginning deliberations anew	-	Patrick Corum	Tab 5
6. Continued discussion of pretrial procedure rules	-	Judge Brendan McCullagh	
7. Post-judgment sanctions rule	-	Judge Brendan McCullagh	
8. Rule 24(d) proposal	-	Patrick Corum	Tab 6
9. Other business Rule 14 subpoenas, Peremptory challenges Rules reorganization			
10. Adjourn			

Tab 1

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

July 19, 2016

ATTENDEES
Patrick Corum – Chair
Judge Elizabeth Hruby-Mills
Judge Vernice Trease
Professor Jensie Anderson - by phone
Jeffrey Gray
Blake Hills
Craig Johnson
Maureen Magagna
Ryan Stack
Cara Tangaro
Douglas Thompson
Tessa Hansen – Recording Secretary

EXCUSED
Judge Brendan McCullagh
Brent Johnson

I. WELCOME/APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting. Mr. Corum welcomed Maureen Magagna to the committee. Ms. Magagna is the Clerk of Court in the Second District Court. Mr. Corum next discussed the May 17, 2016 minutes. A member moved to approve the minutes, another member seconded the motion. The motion carried unanimously.

II. RULES PUBLISHED FOR PUBLIC COMMENT (RULES 4, 5, 6, 22, and 38)

Mr. Corum initially discussed comments received on rules 4, 5, 6 and 22. It was noted that Utah County does not use PC statements, however, in Summit County PC statements are not used unless a warrant is issued. The committee discussed the cumbersome burden the prosecutors would face in requiring PC statements for all cases. Additionally, it was noted there could be a financial burden on the cities if more employees are needed to cover the time of preparing these. The committee discussed the recent change in Weber County, which is now using PC statements in district court.

The committee next discussed that PC is a legal requirement and a defendant's right. It was noted that even if the number was extremely high, each person facing jail-time deserves this right. It was suggested that there isn't a difference between a PC statement and a citation, other than an information would provide more information about the offense. There was concern about the burden the request imposes on cities and counties. In one small county a prosecutor noted she works alone, without staff, and is barely able to keep up with the current workload.

The committee discussed the possibility of requiring PC statements for felonies, but not for minor offenses.

The majority of defendants in justice courts are issued citations. Currently, the rule is not clear on whether justice courts are included. The committee discussed inviting Ryan Robinson to a future meeting to discuss this.

Mr. Corum stated he will follow up with Brent Johnson on this issue.

III. RULE 18

The committee next discussed rule 18. There was a small change to the rule then it was sent to the Supreme Court without a public comment phase.

IV. RULE 6 - REWRITE

The committee then discussed rule 6. Rule 6 had a minor change then was sent to the Supreme Court, along with rules 4 and 5, on an emergency basis without prior sending it out for public comment. The Supreme Court approved the rules subject to public comment. The three rules were effective July 1, 2016.

Craig Johnson submitted an amended proposal to rule 6. It was discussed that this change is needed to comply with Utah Code § 77-20-1, which was amended May 10, 2016. The amendment would address § 77-20-1(2)(c). The committee addressed Mr. Johnson's proposed amendment to section (e)(3)(A). A member moved to approve the amendment to rule 6, another member seconded the motion. The motion carried unanimously.

The committee discussed rule 6(c). Currently the rule does not comply with § 77-20-1(2)(c). There was discussion on whether to list the statutes related to this rule in rule 6(c) or whether to rephrase the wording to add "subject to . . . ." It was noted that none of § 77-20-1(2) is listed in rule 6(c)(2). The comments received reflected concerns about whether someone can be denied bail in any case. After discussion by the committee, Craig Johnson stated he will revise rule 6 and distribute it for comment and vote.

V. RULE 22

The committee discussed the Supreme Court's recommendation that the rule be amended to narrow the time-frame after sentencing. The committee addressed the comments received.

The question presented was what defines "illegal sentence." Currently, judges have discretion on this; however, amending the rule will take that away. Typically times for appeals end 30 days after sentencing. It was noted that the rule should be defined. There is direction through case law that specifically addresses illegal sentences. It was noted that the statute presumes sentences to be concurrent unless noted at sentencing.

After further discussion, the committee decided to table this issue until Judge Brendan McCullagh is in attendance, since the amendment was his creation.

VII. RULE 38

The committee briefly discussed rule 38. Currently, the rule states a person has 30 days to file a notice of appeal, however, the statute now says a person has 28 days for an appeal from a justice court. A member moved to approve the amendment to rule 38(b)(1), another member seconded the motion. The motion carried unanimously.

VIII. OTHER BUSINESS/ADJOURN

With Judge McCullagh not being able to attend this meeting the committee was unable to discuss the remaining issues. The meeting was then adjourned at 1:30. The next meeting will be held September 20, 2016.

Tab 2

Rule 22. Sentence, judgment and commitment.

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c)(1) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(c)(2) If the defendant is convicted of a misdemeanor crime of domestic violence, as defined in Utah Code ~~Section~~ § 77-36-1, the court shall advise the defendant orally or in writing that, ~~as a result of the conviction~~ if the ~~current~~ case meets the criteria of 18 U.S.C. § 921(a)(33), then pursuant to federal law, it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering ~~an illegal~~ the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) T~~t~~he court may correct a sentence ~~or a sentence imposed in an illegal manner, at any time~~ when the sentence imposed:

(e)(1) exceeds the statutorily authorized maximums;

(e)(2) is less than statutorily required minimums;

(e)(3) violates Double Jeopardy;

(e)(4) is ambiguous as to the time and manner in which it is to be served;

(e)(5) is internally contradictory; or

(e)(6) omits a condition required by statute or includes a condition prohibited by statute.

(f) A motion under (e)(3), (e)(4), or (e)(5) shall be filed no later than one year from the date the facts supporting the claim could have been discovered through the exercise of due diligence. A motion under the other provisions may be filed at any time.

~~(f)~~(g) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code ~~Ann.~~ § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

Rule 22 The proposed changes to the rule will set out in more detail the circumstances under which a court may correct a sentence.

3 thoughts on "Rules of Criminal Procedure – Comment Period Closed August 14, 2016"

1. **Douglas Thompson**
   June 30, 2016 at 8:58 pm

The proposed change to the rule unnecessarily limits the power of trial level courts to correct illegal sentences. Instead of allowing these courts to solve problems in an efficient and convenient way, as Rule 22(e) has previously done, this change forces any out-of-the-ordinary illegal sentence to be challenged through some other exotic and likely expensive method. In reality, for most people effected by an illegal sentence, justice will go unrealized, and the illegality will persist. Limiting the jurisdiction of the trial level courts from even reviewing their own illegal sentences is a mistake. These are supposed to be courts of broad jurisdiction. These are the courts where the mistakes were made. These are the courts where people have been represented, where their former attorneys can easily raise the problem to the attention of the judges who can easily fix them. Limiting jurisdiction of these courts even further is unnecessary and will be a hinderance to most people's access to justice.

2. **Michael Kwan**
   June 30, 2016 at 9:39 pm

While this rule is open, we should change the word "shall" in Line 4 to "may". The time constraints in the rule have been determined to be non-mandatory and as a practical matter, any pre-sentence investigation and report takes longer than 45 days to complete. In the alternative, the phrase ", when practical," can be inserted after the word "shall" in Line 4.

3. **Robert Van Dyke**
   July 1, 2016 at 5:00 pm

The proposed changes to rule 22 should include the ability to amend the sentence when the written document does not conform to what was pronounced in court. This has been a significant problem since rule 26 was changed to require the court to prepare the sentence instead of the parties. Under this process the parties do not get to review the written document until after it is signed by the judge. Under rule 22 there seems to be no remedy if a court clerk makes a mistake in the initial drafting and the judge signs the document without catching the mistake. A couple of examples in criminal cases would be failing to include a term of probation like obtaining substance abuse or sex offender treatment or including a higher number of jail days than was actually ordered in court. There needs to be a

mechanism to fix this. I would prefer that rule 26 be amended back so that the parties prepare these documents and finalize them before the court issues them.

Tab 3

Rule 4. Prosecution ~~of public offenses~~ by information.

(a) ~~Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.~~ A prosecution may be commenced by filing an information. The information shall be filed in a format required by rules of the Judicial Council.

(b) ~~An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. If issued, the information shall include the citation number. Failure to include the number will not affect the court's jurisdiction. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they may be identified without setting forth a copy. However, details concerning such things may be obtained through a bill of particulars. Neither presumptions of law nor matters of judicial notice need be stated.~~ An information shall contain:

(b)(1) If known, the defendant's name, date of birth, and last known address.

(b)(1)(A) If the name of the defendant is not known, the prosecution shall identify the defendant as John or Jane Doe, and shall provide any known identifying information.

(b)(1)(B) Other identifying information may be provided in accordance with rules of the Judicial Council, provided the information does not include non-public records.

(b)(2) Numbered counts using the name given to the offense by statute or ordinance, or stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge.

(b)(2)(i) The prosecution may allege alternate theories of the same offense in a single count or in multiple counts.

(b)(3) The names of any adult witnesses on whose evidence the information is based.

(b)(3)(A) Failure to include the names does not render an information invalid.

(b)(3)(B) Upon request of the defendant the prosecution shall provide the names of witnesses that were not included in the information, unless the court finds good cause for relieving the prosecution from the obligation.

(b)(4) A booking number if the defendant was arrested and detained on charges related to the information. Any pretrial release conditions shall be included, such as:
(b)(4)(A) monetary bail or other pretrial release conditions set by the magistrate when determining probable cause at arrest;

(b)(4)(B) whether the defendant was denied pretrial release;

(b)(4)(C) whether the defendant was released to a pretrial supervision agency; and

(b)(4)(D) whether the defendant is in custody.

(c) An information shall contain or be accompanied by a statement of facts sufficient to support probable cause for the charged offense or offenses. The information need not include facts such as time, place, means, intent, manner, value, and ownership unless necessary to charge the offense. Supporting physical materials such as money, securities, written instruments, pictures, statutes, and judgments may be identified using names or by describing the documents. Neither presumptions of law nor matters of judicial notice need be stated.

~~(c)~~(d) The court may strike any surplus or improper language from an indictment or information.

~~(d)~~(e) The court may permit an information to be amended at any time before trial has commenced so long as the substantial rights of the defendant are not prejudiced. If an additional or different offense is charged, the defendant has the right to a preliminary hearing on that offense as provided under these rules and any continuance as necessary to meet the amendment. The court may permit an ~~indictment or~~ information to be amended after the trial has commenced but before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an ~~indictment or~~ information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

~~(e)~~(f) When facts not set out in an information ~~or indictment~~ are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at ~~arraignment~~ initial appearance or within ~~14~~ 10 days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.

~~(f)~~(g) An ~~indictment or~~ information ~~shall not be held~~ is not invalid because any name contained therein may be incorrectly spelled or stated~~.~~; nor because a disjunctive clause is used instead of the conjunctive. It shall not be necessary to negate any exception, excuse or proviso contained in the statute creating or defining the offense.

(h) An information shall be reviewed for sufficiency by a judge of the court in which it is filed. If the judge determines from the information, or from any supporting statements or affidavits, that there is probable cause to believe the offenses have been committed and that the accused committed them, the judge shall proceed under rule 6. If the judge determines there is not probable cause, the judge shall return the information to the prosecutor and dismiss the case without prejudice if a sufficient information is not filed within two weeks.

~~(g) It shall not be necessary to negate any exception, excuse or proviso contained in the statute creating or defining the offense.~~

~~(h) Words and phrases used are to be construed according to their usual meaning unless they are otherwise defined by law or have acquired a legal meaning.~~

~~(i) Use of the disjunctive rather than the conjunctive shall not invalidate the indictment or information.~~

~~(j) The names of witnesses on whose evidence an indictment or information was based shall be endorsed thereon before it is filed. Failure to endorse shall not affect the validity but endorsement shall be ordered by the court on application of the defendant. Upon request the prosecuting attorney shall, except upon a showing of good cause, furnish the names of other witnesses he proposes to call whose names are not so endorsed.~~

~~(k) If the defendant is a corporation, a summons shall issue directing it to appear before the magistrate. Appearance may be by an officer or counsel. Proceedings against a corporation shall be the same as against a natural person.~~

Rule 004: Sets forth in detail the required contents of an information. The new provisions will require statements about pretrial release.

Rule 005: Repealed.

Rule 006: The proposed changes create a presumption in favor of summonses over warrants. The rule establishes the requirements for issuing a warrant. The rule also describes the required content of summonses and warrants.

25 thoughts on "Rules of Criminal Procedure – Comment Period Closed August 15, 2016"

1. **Samuel D. McVey**
   July 1, 2016 at 2:47 pm

Re Rule 4. We are requiring a first appearance with an information withing 96 hours (4 days) of probable cause statement approval. With a requirement to add all of this additional data in the information, I doubt prosecutors can review the evidence, screen the case and draft an information within 96 hours. It is extremely difficult for them to do it now and almost impossible to do it over a long weekend. Thus, this amendment is not practical and ignores the effort to get someone before a magistrate quickly.

2. **Bruce Lubeck**
   July 1, 2016 at 3:37 pm

Rule 6-In my anectodal experience where the Salt Lake County has recently been asking for summons, it is not working well. I have never had one single case where I know if the summons was served. While I imagine someone from AOC can determine the real numbers, it would be my observation that less than one third of the summoned defendants appear for initial appearance as scheduled, and I thin at best one fourth. Thus, as a practical matter we are simply issuing warrants in most of the cases 5-6 weeks after the information is filed. For whatever reasons the summons are not being served or obeyed in the great majority of the cases so far filed in Salt Lake County.

3. **Jeremy Snow**
   July 1, 2016 at 4:29 pm

These are needed changes, especially the changes to Rule 006. Arrests almost always cause great disruption to people's lives, sometime resulting in the loss of jobs and other collateral consequences. Arrest also makes it much more difficult for people to find and hire legal representation, causing some to take ill-advised pleas in order to get out of jail sooner. In almost all circumstances a summons is sufficient to begin the process as almost all people do appear in court upon receipt of a summons. A summons keeps families intact, defendants working, and makes it easier for defendants to get good legal representation.

4. **Robert Van Dyke**
July 1, 2016 at 4:39 pm

I am concerned about the language of rule 6(g)(1) which limits the execution of the warrant to within the state. This could be used to argue that felony warrants cannot be listed on the NCIC system because they are not valid outside the state. If a defendant is arrested outside the state on a felony warrant and held for extradition it could be used to claim false arrest, to claim that extradition is not allowed, or to suppress subsequent evidence that is found based on the "illegal" arrest. The language of 6g1, if necessary, should include provisions about the valid execution of the warrant in jurisdictions outside the state by peace officers who are authorized to arrest in those jurisdictions or language that clarifies that this type of arrest is not limited by the rule.

5. **Annie Taliaferro**
July 1, 2016 at 4:50 pm

The amendments to Rule 6 is a must. Warrants should NOT automatically go out for those accused.
A couple of additional comments.

Under (c)(1), I think that a judge needs to make a finding, "based upon a showing under oath" by the one seeking a warrant, that the defendant will likely not appear on a summons or there is substantial danger of a breach of peace, injury, etc.

To issue a warrant just because the "defendant's address is unknown" is ripe for abuse. it is all too easy for a law enforcement officer to say "we don't know the address," especially with out of State clients. There should be some showing that a summons was at least tried to be served.

Also, there should be some showing, under oath, made by those seeking the warrant, that the person is likely to not appear or there is some kind of danger. This would not be an onerous burden, but would stop abuses in those cases where the defendant clearly knows they are being investigated, the investigation lasts for many months, many times an attorney is involved and is actually having a dialogues with either law enforcement or the prosecution, and upon filing the case, a warrant goes out anyway when there is absolutely no good reason.

Thank you for your consideration of my comments. And thank you for recognizing that there is a presumption for release pending cases, and there actually is a presumption of innocence until proven guilty… (ok, that is the defense attorney in me). 

Ann Taliaferro
Brown Bradshaw & Moffat

6. **Timothy L. Taylor**
July 6, 2016 at 4:39 pm

Thank you for considering the following comments from the Utah County Attorney's Office regarding proposed changes to Rule 4 of Utah Rules of Criminal Procedure

Under Subsection (b) of proposed changes to Rule 4, the prosecutor is being asked to provide a substantial amount of information in commencing a prosecution. Here are concerns we have with a few of the requests:

4(b)(3): "The names of any adult witnesses on whose evidence the information is based."

In cases submitted to a prosecutor's office, the police report may contain names of primary witnesses, collateral witnesses, police officers and victims. In screening a case for potential charges, a prosecutor may give varying degrees of credence to the different types of witnesses in the police report. However, being required to list the names of any adult witness on whose evidence the information is based groups everyone into a single category and does not reflect the degree to which a prosecutor may have relied upon a certain witness to file criminal charges. In other words, what is the benefit of simply listing the names of a witness without providing context about the witness' involvement in the case? The real value of a witness will only be realized when the defense counsel reviews the police report and not by simply placing a name on an information.

In addition, witness and victim names listed on an information will be available in a public document but these individuals may not want their names to be made public at the outset of a case. Will a prosecutor be required to list the identity of a government informer and will this conflict with Rule 505 of the Utah Rules of Evidence?

Finally, this is going to take a considerable amount of time for a prosecutor to identify and list the witnesses for every information that is filed. However, the names of all witnesses and victims are provided immediately through police reports to defense through the discovery process. Listing the names of witnesses and victims in an information seems to be a duplication of efforts and does not appear to substantially benefit the court, the defendant or defense counsel. Because the defense is entitled to the police reports shortly after an information is filed, what is the benefit of listing witness names on the information? Listing the name of the case officer on the information–as the person who collected and organized all the evidence–is more efficient and accurately conveys that the information is based on the evidence collected by the officer.

4(b)(3)(B): "Upon request of the defendant the prosecution shall provide the names of witnesses that were not included in the information, unless the court finds good cause for relieving the prosecution from the obligation."

Rule 16 of the Utah Rules of Criminal Procedure requires the prosecution to provide discovery to the defendant or defense counsel. The names of the witnesses should be listed in the discovery. Is there some reason why a separate rule is needed for the prosecution to provide the names of witnesses when the names will be already be contained in the discovery? Once again, we are not certain what this proposed rule change is trying to accomplish when Rule 16 already covers this issue.

4(b)(4): “A booking number if the defendant was arrested and detained on charges related to the information. Any pretrial release conditions shall be included, such as:
(b)(4)(A) monetary bail or other pretrial release conditions set by the magistrate when determining probable cause at arrest;
(b)(4)(B) whether the defendant was denied pretrial release;
(b)(4)(C) whether the defendant was released to a pretrial supervision agency; and
(b)(4)(D) whether the defendant is in custody.”

In the Fourth Judicial District, we do not have a pretrial release program. When a person is arrested, a judge sets bail and the amount of bail is listed on the probable cause statement. The defendant’s case is then set for an initial appearance. Since we do not have a pretrial release program–and because many other jurisdictions in Utah do not have pretrial release programs–many prosecutors will recite the same statement on every information: “Pretrial release program not available.” In addition, from the time an information is prepared until the defendant’s initial appearance, the defendant’s custody status may change. Due to the fact that a person’s custody status often changes prior to an initial appearance, we are not sure who benefits by listing a person’s custody status on an information. Finally, a person may be released from custody on the pending case for which the information is being prepared but will still be held on other matters. Trying to determine which case/cases a person is being held on is not always simple. We do not oppose listing a defendant’s booking number on the information but respectfully request that the other proposed conditions in 4(b)(4) be removed.

4(f): “When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment initial appearance or within 14 10 days thereafter, or at such later time as the court may permit.”

This proposed rule change requires a defendant to file a bill of particulars at the initial appearance or within 10 days thereafter. Since the initial appearance will normally occur before a defense attorney has received any discovery from the prosecutor, we foresee defense attorneys filing a bill of particulars with every case in order to meet this deadline. Therefore, the prosecutor would have to respond to a bill of particulars before the defense attorney has normally even reviewed the discovery. We believe that the bill of particulars should still be filed after the arraignment because the discovery will often provide context about the nature and cause of the charged offenses.

In the case of State v. Mitchell, 571 P.2d 1351 9 (Utah 1977), the Utah Supreme Court stated, “A bill of particulars need not plead matters of evidence, Section 77-21-9(1) [this code section was later repealed] was designed to enable a defendant, where the short form information is used to have the stated particulars of the charge which he must meet. The bill of particulars was not intended as a device to compel the prosecution to give an accused person a preview of the evidence on which the State relies to sustain the charge.”

If a separate proposed rule change–Utah Rule of Criminal Procedure 4(h)–becomes effective, the prosecutor will no longer file a “short form information” but must include a probable cause statement within each information. A probable cause statement will normally inform a defendant of the nature and cause of the offenses charged. A bill of particulars–filed early on in the prosecution process– will not only cause additional filings by both the defense and prosecution, we believe that filing a bill of particulars at the initial appearance is not beneficial. We respectfully submit that requiring the bill of particulars to be filed after arraignment will reduce unnecessary filings and will be more beneficial after a preliminary

hearing is held in order to help defense address any outstanding issues about the nature and causes of the charged offenses.

4(h): “An information shall be reviewed for sufficiency by a judge of the court in which it is filed. If the judge determines from the information, or from any supporting statements or affidavits, that there is probable cause to believe the offenses have been committed and that the accused committed them, the judge shall proceed under rule 6.”

According to this proposed rule change, a judge shall review each information to determine whether there is probable cause that an offense has been committed and that the defendant committed the offense. How is this different from a preliminary hearing requirement? Pursuant to URCrP 7(i)(2), “If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part.”

This proposed rule states that after a judge reviews an information, supporting statements and affidavits, the judge shall determine whether an offense has been committed and the defendant committed the offense. Isn’t this the same standard a judge uses at a preliminary hearing to bind a person over for trial?

We understand that a person charged with a class A misdemeanor or a felony has a right to a preliminary examination. However, it may be confusing to ask a judge to use the same standard in reviewing an information as the judge who conducts a preliminary examination.

Thank you for your willingness to consider these comments.

Timothy L. Taylor
Utah County Attorney’s Office

7. **Sandi Johnson**
July 8, 2016 at 5:14 pm

I have concerns with the proposed changes to Rule 6. Rule 6(c) requires a summons to be issued, and then lists the circumstances under which a warrant would be authorized. First, as I understand the proposed rule, a summons must be issued unless the judge finds two circumstances: a danger to the community, or information the defendant will fail to appear. However, this appears to conflict with Utah Code 77-20-1(1) which states that there are additional circumstances under which a defendant is not entitled to bail: capital felony, committing new felony charges while out of custody on pending felonies or while on probation/parole, or violating a material condition of release while previously on bail. Utah Code 77-20-1(4)(d) also allows the denial of the right to bail for a defendant who violates a jail release agreement. I believe that all of the circumstances listed in 77-20-1 should be included in the rule as exceptions to the summons requirement.

Also, the proposed Rule 6(e)(3)(A) states that the amount of bail should be the “lowest amount reasonably calculated to ensure the defendant’s appearance at court.” When determining the amount of bail, the factors contained in Utah Code 77-20-1(2) should be

considered, which directs the court to impose conditions that "will reasonably: (a) ensure the appearance of the accused; (b) ensure the integrity of the court process; (c) prevent direct or indirect contact with witnesses or victims by the accused, if appropriate; and (d) ensure the safety of the public." Therefore, when determining the amount of bail, more should be considered than just what amount will ensure the defendant's appearance.

Regarding Rule 4, I agree with the comments made by Mr. Taylor regarding the listing of witnesses on the Information. Witnesses are listed in the discovery provided to the defendant or defense counsel almost immediately after the initial appearance. Requiring them to be listed in a public document raises issues with privacy and safety concerns.

I also agree with the comments made by Mr. Taylor regarding the bill of particulars issue in Rule 4. In addition to his comments about retaining the requirement that it be filed after arraignment, I don't believe the deadline should be changed to 10 days. In 2014, the rules committee specifically changed all deadlines less than 30 days to a uniform 7/14/21/28 days, so changing this rule to a 10 day deadline would contradict the uniformity the rules committee tried to create.

Thanks

8. **Paul Wake**
July 13, 2016 at 9:47 pm

Re.: 004
I'm pretty much in agreement with Mr. Taylor. And, I wish more Salt Lake County people didn't think the state ends at their county borders; sometimes it seems that folks up there think rules need do no more than conform to what folks there think practice should look like.

Re.: 006
The provision limiting bail to only an amount calculated to get an appearance does not track the actual purposes (note the plural) of bail. I'm told some deputy county attorneys will be clarifying that at the next rules committee meeting, so I'll leave further explication to them.

9. **Mary Corporon**
July 14, 2016 at 5:05 pm

I appreciate the comments that it is hard to serve a summons and to track service of a summons. It is also hard to be arrested and held in jail for three or four days. The impact of issuing a warrant and preferring a warrant to a summons is that it shifts the burden of something that is difficult from the system at large to an individual person and his/her family, often with devastating effect. I have seen over and over again that clients lose their jobs if they are arrested and unable to go to work for even a day or two. This can have a cascading consequence of them losing their cars, their homes, their children, and so forth. The lesson of recent inquiries into places like Ferguson is that even misdemeanor warrants can drag a person down and keep them down forever, out of all proportion to the offenses they are

accused of. Warrants should not issue as a matter of course, especially in cases where the ultimate sentence imposed might not be as long as the period of incarceration if there is a conviction. Then, of couse, there are actually innocent people who are caught up in the system, who should not ever be incarcerated.

We are the most incarcerated society on the planet. There is a huge financial impact to taxpayers of incarceration. I believe the greatest cost is from people losing work and being unable to pay bills and keep their lives together, and not from actually feeding and housing people in jail. If we are going to have a system in which we do not over-incarcerate, it should begin with at least giving people the opportunity to show up on a summons, as this proposed rule would encourage, especially for misdemeanors and non-violent felony offenses. Even if a majority do not show up, and a warrant eventually has to be issued, the benefit of allowing people the chance to be responsible would be significant.

10. **Ryan Robinson**
July 15, 2016 at 4:06 pm

Rule 4(c) places a new and significant burden by requiring that all informations include a probable cause statement. The current practice of most city and county offices around the state for high volume class B, C and infraction cases when NOT seeking a warrant is to include only a list of charges in the information. As the court isn't relying on the statement as a basis for a warrant, the list of charges has proven to be a sufficient charging document for many years.

Because no legal writing is currently required to complete an information, typically this document can be prepared by an administrative assistant or secretary. However, those cases that do require a probable cause statement typically need to be written by a lawyer or paralegal or at least an employee with a superior level of training and experience in legal writing. For our office where we file thousands of misdemeanors a year in the West Valley Justice Court, this added obligation will be very difficult to accomplish without adding additional (and better qualified) employees. I have heard from several colleagues around the state that have the same concern.

This proposal feels like a problem in search of a solution and is an unnecessary additional burden on prosecution offices, especially those with a high volume of misdemeanor cases. I propose it be removed from this draft.

Rule 4(b)(4) requires the prosecution to list all bail and pretrial conditions that were issued by the magistrate to be included in the information. This is another onerous burden that presupposes the prosecution even has access to this information. Rarely do I in practice have knowledge of what bail and conditions were imposed by a magistrate upon initial arrest. Chasing down that information would be another difficult burden.

Of course, every county has different pretrial agencies (or many have none at all). This proposal supposes a statewide uniformity that doesn't exist.

Possibly, an amendment, that add "if readily available to the prosecutor" could serve as a compromise?

Rule 6(e)(3)(a) requires that bail be set at the lowest amount reasonably calculated to ensure their appearance in court. This requirement ignores 3 of the 4 legislative purposes for considering a bail amount set forth in Utah Code 77-20-1 which states:

(3) Any person who may be admitted to bail may be released either on the person's own recognizance or upon posting bail, on condition that the person appear in court for future court proceedings in the case, and on any other conditions imposed in the discretion of the magistrate or court that will reasonably:
(a) ensure the appearance of the accused;
(b) ensure the integrity of the court process;
(c) prevent direct or indirect contact with witnesses or victims by the accused, if appropriate; and
(d) ensure the safety of the public.

To eliminate the other factors would allow a serial killer, or serial domestic abuser, serial drunk driver, etc., to successfully argue for minimal bail as long as he can show a strong commitment to making his court appearances, despite any evidence that shows that the offender is an extreme danger to the public.

This subsection should either be eliminated or amended to more consistently match 77-20-1.

Ryan Robinson
Chief Prosecuting Attorney
West Valley City

11. **Ryan Robinson**
July 15, 2016 at 4:08 pm

Rule 4(c) places a new and significant burden by requiring that all informations include a probable cause statement. The current practice of most city and county offices around the state for high volume class B, C and infraction cases when NOT seeking a warrant is to include only a list of charges in the information. As the court isn't relying on the statement as a basis for a warrant, the list of charges has proven to be a sufficient charging document for many years.

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Of course, every county has different pretrial agencies (or many have none at all). This proposal supposes a statewide uniformity that doesn't exist.

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This subsection should either be eliminated or amended to more consistently match 77-20-1.

Ryan Robinson
Chief Prosecuting Attorney
West Valley City

12. **Niel H. Lund**
July 15, 2016 at 7:07 pm

I share the concerns of Mr. Robinson, Mr. Taylor, and Mr. Van Dyke, so I will not re-sate their concerns here. Please read and consider their comments carefully.

13. **Samantha Smith**
July 15, 2016 at 8:51 pm

I agree with the comments by Mr. Robinson regarding 4(c). This would place a significant burden on prosecutors.

14. **Nicholas C. Mills**
July 18, 2016 at 1:58 pm

I agree with the comments of Mr. Robinson and Mr. Taylor.

Further, requiring a probable cause statement to accompany every information (see proposed rule 4(c)) seems to be ineffective for many low-level offenses. For example, a probable cause statement accompanying an Information for offenses like speeding, discharging a firearm within city limits, or intoxication (among other misdemeanors) would serve little, if any, practical purpose. Most of the information that would be contained in the probable cause statement in those cases is readily apparent by reading the charging document itself.

Nicholas C. Mills
Associate City Attorney
Layton City

15. **Marlesse D. Jones**
July 18, 2016 at 4:23 pm

I agree with the comments of Mr. Robinson and Mr. Taylor, as well as Mr. Mills and Ms. Johnson. Please consider them carefully.
I'm very concerned that the proposed changes within rule 4(c) go far beyond the purpose of notice and wades into Discovery. The amount of time needed by misdemeanor prosecution offices to satisfy these changes will create a significant burden that we are not equipped to handle.
Additionally, the proposed rule 6 exhibits a disregard for the safety of victims, witnesses and the public in general. The current rule has the balance needed in the interest of justice for all sides.

16. **LeEllen McCartney**
July 18, 2016 at 5:14 pm

As the Wayne County Attorney, I concur in the thoughtful and articulate comments of Mr. Taylor of the Utah County Attorney's office. Specifically, the additional requirements for filing an information in proposed Rule 4(c) for traffic infractions and B or C Misdemeanors will create a huge burden on prosecutors for small, rural counties. Here in Wayne County, I do not have an administrative staff, secretary, or deputies. It is just me. At our current workload level it is difficult to stay abreast of the requirements. The additional requirements for a

probable cause statement, listing of all adult witnesses, and bail and pretrial conditions would be impossible to fulfill for lower-level crimes.

I also agree with Mr Taylor that listing name of individuals on a public document, such as in information, may create privacy or safety concerns; or may have a negative impact on undercover enforcement operations. Finally, Rule 16 of the Criminal Rules of Procedure already require discovery to defendant and defense counsel. There is no need to do so on the information.

I ask you to please be aware of the additional burden these proposed rules place on small and rural jurisdictions.

17. **Randall McUne**
July 19, 2016 at 4:57 pm

I agree with the comments by Timothy Taylor and Ryan Robinson, especially whereas the proposed new requirements in Rule 4 will add substantially to the workload for smaller offices like the one in which I work with little to no benefit to the Defendant, who can obtain the same information in the non-public discovery process.

Additionally, it invites motions to dismiss in petty cases based on any perceived inadequacies in the Information, which would likely result in a process that could take longer than just holding a trial, especially in the case of infractions. The proposed rule change exempts a lack of witness names from this fear, but that clearly leaves all other perceived inadequacies open for such a motion. That motion can be filed seven days prior to trial under Rule 12, leading to a delay in the trial while the parties submit motions and memoranda, subsequent filings of amended Informations that can also be challenged, and even a possible appeal and/or the filing of a new case if the amended filing is not satisfactory.

18. **Jeff Buhman**
July 20, 2016 at 4:41 pm

I agree with Mr. Taylor's above comments. I suggest the following changes to the proposed rule:

Proposed language: 4(b)(3): "The names of any adult witnesses on whose evidence the information is based."

For the below reasons I recommend that this subsection be modified to read: " (b)(3) The names of the law enforcement officer on whose evidence the information is based.

In cases submitted to a prosecutor's office, the police report may contain names of primary witnesses, collateral witnesses, police officers and victims. In screening a case for potential charges, a prosecutor may give varying degrees of credence to the different types of witnesses in the police report. However, being required to list the names of any adult witness

on whose evidence the information is based groups everyone into a single category and does not reflect the degree to which a prosecutor may have relied upon a certain witness to file criminal charges. In other words, there is no benefit to simply listing the names of a witness without providing context about the witness' involvement in the case. The real value of a witness will only be realized when defense counsel reviews the police report–not by simply placing a name on an information.

In addition, if this rule is passed as written, witness and victim names listed on an information will be available in a public document–but these individuals may not want their names to be made public at the outset of a case. For example, prosecutors should not be required to list the identities of a government informer; further, such a requirement conflicts with Rule 505 of the Utah Rules of Evidence. Similarly, prosecutors should not be required to list the names of victims of physical or sexual abuse, particularly when the abuse might have occurred when the victim was under the age of 18, but at the time of the information being filed is over 18.

Finally, if implemented this new requirement will take a considerable amount of time for a prosecutor to identify and list the witnesses for every information that is filed. This is an unnecessary burden on prosecution offices. The names of all witnesses and victims are timely provided to the defense pursuant to Rule 16 of the Utah Rules of Criminal, so listing the names of witnesses and victims in an information is an unnecessary duplication of effort without any substantial benefit for the court, the defendant or defense counsel.

Proposed language: 4(b)(3)(B): "Upon request of the defendant the prosecution shall provide the names of witnesses that were not included in the information, unless the court finds good cause for relieving the prosecution from the obligation."

For the below reason I recommend this subsection be deleted from the proposed rule.

As mentioned above, Rule 16 of the Utah Rules of Criminal Procedure already requires the prosecution to provide discovery to the defendant or defense counsel. The names of the witnesses are provided in discovery. There is no reason for a new rule requiring the prosecution to provide what it is already required to provide in discovery.

Proposed language: 4(b)(4): "A booking number if the defendant was arrested and detained on charges related to the information. Any pretrial release conditions shall be included, such as:
(b)(4)(A) monetary bail or other pretrial release conditions set by the magistrate when determining probable cause at arrest;
(b)(4)(B) whether the defendant was denied pretrial release;
(b)(4)(C) whether the defendant was released to a pretrial supervision agency; and
(b)(4)(D) whether the defendant is in custody."

For the below reasons, I suggest that (b)(4)(A), (B), (C) and (D) be deleted from the proposed rule.

In the Fourth Judicial District we do not have a pretrial release program. When a person is arrested, a judge sets bail and the amount of bail is listed on the probable cause statement. The defendant's case is then set for an initial appearance. Since we do not have a pretrial release program–and because many other jurisdictions in Utah do not have pretrial release programs–many prosecutors will recite the same statement on every information: "Pretrial release program not available." In addition, from the time an information is prepared until the defendant's initial appearance, the defendant's custody status may change and the

prosecutor may not know. In fact, in cases where the accused was not arrested, the prosecution may believe the person is out of custody, but he or she may have been later arrested in another jurisdiction. In short, we agree with listing a defendant's booking number on the information but request that the other proposed conditions in 4(b)(4) be removed.

Proposed language: 4(f): "When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment initial appearance or within 14 10 days thereafter, or at such later time as the court may permit."

For the reasons below, I recommend this rule not be changed from its current, existing form.

This proposed rule change requires a defendant to file a bill of particulars at the initial appearance or within 10 days thereafter. However, the initial appearance will normally occur before a defense attorney has received any discovery from the prosecutor, or defense counsel will not be "on board" before the 10 day period expires. Defense counsel will therefore either file a bill of particulars with every case in order to meet this 10 day deadline, or will miss the deadline all together. In the cases where defense counsel is appointed or retained within the 10 days and files a bill of particulars, the prosecutor would have to respond to the bill before defense counsel has even had the chance to review discovery (and, in almost all cases, the discovery provided will provide the exact information sought in a bill of particulars). This would, in most cases, lead to duplication of effort for the defense counsel and the prosecution.

The rule in its current form (where the bill is filed after arraignment) allows defense counsel to review the discovery materials provided and, if items may be missing, to request them through additional discovery requests or, in rare cases, through a bill of particulars after the arraignment.
Timing a bill of particulars after a preliminary hearing (in the case of a class A or felony charge) or arraignment allows defense counsel time to address any outstanding issues about the nature and causes of the charged offenses long before trial, but well after discovery is provided.

Proposed language: 4(h): "An information shall be reviewed for sufficiency by a judge of the court in which it is filed. If the judge determines from the information, or from any supporting statements or affidavits, that there is probable cause to believe the offenses have been committed and that the accused committed them, the judge shall proceed under rule 6."

For the reasons below, I recommend this new subsection be deleted from the proposed rule.

According to this proposed subsection, a judge shall review each information to determine whether there is probable cause that an offense has been committed and that the defendant committed the offense. This is an unnecessary burden on judges and any protections provided by this subsection are already—and more fully–provided for in Utah Rule of Criminal Procedure 7(i)(2) relating to preliminary hearings for class A and felony offenses: "If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order that the defendant be bound over to answer in the district court." This new rule is duplicative of URCrP 7 and should be deleted.

Jeff Buhman
Utah County Attorney

19. **Rachel Snow**
July 20, 2016 at 8:54 pm

I agree with the comments submitted by Mr. Taylor, Ms. Johnson, and Mr. Robinson. The proposed amendments to Rule 4 will substantially increase the workload of misdemeanor prosecutors and smaller offices with no benefit to be gained.

The proposed changes to Rule 6(e)(3)(a) would eliminate the protective aspect of bail and allow a dangerous offender to reenter the community simply because the individual has good court attendance.

20. **Ivy Telles**
August 2, 2016 at 10:30 pm

I concur with the comments submitted by Tim Taylor, Sandi Johnson, Ryan Robinson, LeEllen McCartney, Randall McUne, Nicholas Mills, and Jeff Buhman. They have adequately addressed most of my concerns with some of the proposed rules. I want to share some additional thoughts on the proposed changes to 4(c).

The requirement to include PC statements on informations does little if anything to benefit the court or defendants. But because this change will substantially increase prosecutors' workloads, it will, however, work a disservice to victims, officers, defendants, and other parties interested in having cases filed in a timely manner. This increase in workload would also increase the time it takes to file charges, and thus lengthen the time it takes defendants to resolve their cases. Such a burden should not be placed on the community without clear and convincing reasons as to how defendants are actually prejudiced by the filing of misdemeanor informations without PC statements. I do not see why a PC statement should be required for informations filed in justice court cases where a warrant is not being requested. The significant increase in prosecutor workloads substantially outweighs the infinitesimal benefits derived from this proposed change.

A second concern is that the proposed change to 4(h) will backdoor-in quasi-preliminary hearings for justice court cases. There is a reason preliminary hearings are not required in Class B misdemeanors and below. The proposed change would create authority for justice court judges to hold private preliminary hearings at the filing of the case.

For the reasons above, and for reasons stated in others' comments, I propose that these sections be deleted from the proposed rules.

Ivy Telles
Summit County Attorney's Office

21. **Blair T. Wardle**
August 9, 2016 at 8:36 pm

I, too, agree with the comments submitted by Tim Taylor, Sandi Johnson, Ryan Robinson, LeEllen McCartney, Randall McUne, Nicholas Mills, and Jeff Buhman.

I am afraid that the Rules Committee is presuming prosecutors have access to information that we, in fact, do not. The changes to rule 4 require the information to include a booking number and any pretrial release conditions. These requirements should be removed.

As a prosecutor I never know the booking number. In fact, if I ever need the booking number, I get it from the court. Additionally, including a booking number on an information serves no apparent purpose. Therefore, it is a useless rule that imposes an unnecessary burden.

I also don't always know the pretrial release conditions. Often times a judge will speak with the defendant in person or via video without my involvement at all. As such, there may be pretrial release conditions that I am completely oblivious about. In particular, the rule requires the inclusion of conditions such as: monetary bail, whether the defendant was released to a pretrial supervision agency, whether the defendant is in custody. All of these conditions are often unknown to the prosecutor, but will typically be contained in the court's notes. Because it is the court imposing the conditions, the court will have access to the information. It makes no sense to require a prosecutor to inform the court about the conditions that the court imposed. Such a rule is redundant and imposes a unjustified burden on the prosecutor, the judge, and the supervising agencies.

Finally, and most importantly, rule 4 is too overbroad. It will have a far-reaching, undesirable effect on justice courts. It would require a probable cause statement on every information, including all traffic violations. There are hundreds, if not thousands, of informations filed every week on cases where a defendant was issued a citation for a traffic violation, but then subsequently pleaded not guilty. This rule would require a probable cause statement on these offenses as well. As such, this rule would be completely unworkable.

I do not see any legitimate purpose to requiring a probable cause statement on informations. I believe that it is extremely rare for a person to be completely oblivious about the basis for their charges. But in the rare case where that does occur, a motion for a bill of particulars can be filed to clear up any confusion.

But if the committee feels that a PC statement is necessary, then it seems like there is a compromise that can be had on this issue. At most, a probable cause statement should only be required on cases that are initiated by information. That is, if a person was initially issued a citation, then a probable cause statement should not be required on a subsequently filed information.

I would implore the rules committee to give serious consideration to the concerns addressed in these comments by the prosecutors. Although the committee's intentions might be well-meaning, I feel they are not well thought out. These changes pose a serious likelihood of creating a number of significant detrimental effects and I would recommend that the committee reconsider these rule changes.

Blair T. Wardle
Box Elder County Deputy Attorney

22. **Valerie M. Wilde**
August 9, 2016 at 11:03 pm

The Salt Lake City Prosecutor's Office opposes the changes to Rule 4 of Utah Rules of Criminal Procedure. The proposed changes in Rule 4(b)(3) –(c) to (h) would create a significant burden to prosecuting offices that doesn't currently exit and there doesn't appear to be any real need for the changes.

Our office filed over 7,000 informations in 2015, and is on track to file over 8,000 in 2016. These cases range from Class B Misdemeanors to Infractions. The additional burdens imposed by the proposed Rule 4(b)(3)-(c) and (h) would significantly disrupt the filing of informations. Our office isn't currently staffed to handle the significant burden of complying with the proposed requirement of preparing a probable cause statement on all informations. Currently, probable cause statements are prepared only when a warrant is requested. If the proposed rule goes into effect our office, and I assume other jurisdictions around the state, will need to increase staff (at taxpayer cost) to prepare the probable cause statements.

Likewise, requiring the prosecution office to list all bail and pretrial conditions presupposes access to this information. Our office currently relies upon access to the jail's offender management system (OMS) but this access is limited in scope and directly controlled by that organization.

Rule 4(h) will also place an additional burden on judges in high volume jurisdictions to review each information and make a probable cause determination on every information filed. Current state law and the Rules of Criminal Procedure already provide for a probable cause determination in order to incarcerate or when the court issues a warrant. A probable cause determination has never been required based upon a person's promise to appear. If prosecution offices around the state are not staffed to meet this new requirement, those jurisdictions will need to make judgment calls about which cases to file. Assuming only the more serious charges receive attention it sends a direct message to law enforcement to spend their time wisely. This will have a direct impact on a community's ability to police itself for less serious crimes.

Valerie M. Wilde
Division Administrator, Salt Lake City Prosecutor's Office

23. **Tony Baird**
August 11, 2016 at 3:56 pm

The Cache County Attorney's Office compliments the Committee and the Council for their efforts to make the judicial system better. We all want to see improvements where they can be made. We would like the Rules Committee to consider the following concerns regarding

the proposed changes to Rules 4 and 6. We would further request the Rules Committee to not approve the rules for adoption in their current form.

Rule 4

To begin, of general concern is that many of the proposed changes to Rule 4, collectively, make an information far more than just a charging document that is intended to give summary notice to a defendant. Our position is that many of these proposed changes make the information un-necessarily complicated. The changes may actually lead to greater confusion in the process, not less, for criminal defendants.

Further, from the perspective of a state's attorney, the process of preparing an information will now be a much more laborious undertaking and, in our opinion, unnecessarily duplicate work that will take place at arraignment, preliminary hearing, and even more so during the discovery process.

More specifically, we are concerned about the requirement of under subsection (b)(3) which will now require that the prosecutor list the names of any adult witnesses on whose evidence the information is based. Informations are public documents. From past experience, we know that many adult witnesses do not want their names revealed on a charging document. For example, rape victims are most generally reticent to reveal their identity and do not want their names to appear on court documents. Rape victims desire privacy, and frankly, they should be afforded it. Also, another example is that of a confidential informant working for a drug task force. Rule 505 recognizes the need to protect such witnesses. There are extreme safety concerns in these cases. In sum, a blanket rule that requires the listing of all adult witnesses is imprudent in these, and many more, types of cases. We believe that there will be a chilling effect on concerned citizen reports to law enforcement. It is one thing to have your name appear in a police report but entirely another to have it broadcasted throughout the public domain by it appearing on a public court document. We note that subsection (b)(3)(A) states that if the prosecutor fails to include the names of adult witnesses on the information, the information will still be valid. Respectfully, we wonder what the point of the requirement is if failing to comply with it has no real consequence.

Also of concern is subsection (b)(3)(B). This provision appears to duplicate the discovery requirements already set forth in Rule 16. Under subsection (c), the requirement that all informations be accompanied by a probable cause statement will be work intensive for prosecutors and staff and, in our estimation, will not materially assist defendants or defense counsel in the proceedings. We believe that informations should remain summary notice pleadings. We note that in the case of offices handling large volumes of class B and C misdemeanors and infractions such a requirement will be particularly burdensome. Much of the time with regard to such simple charges, as we see it, the probable cause statement will simply be a regurgitation of the bald allegations in the information. For example, a probable cause statement for a stop sign violation would probably read something like this: "On August xx, 20xx, in Cache County, Utah, at the intersection of Sam Fellow Road and 3200 North, Deputy Diligent observed defendant fail to stop at the stop sign as required by law. How would this be helpful to a misdemeanor traffic offender? Finally, we see the proposed subsection (h) as creating a substantial amount of unnecessary work for judges and prosecutors. Judges will now be required review evidence up front and will need to make a probable cause determination at the time an information is filed with the Court in order to determine if they will even accept a charging document. Prosecutors will now need to include or attach to their proposed informations any supporting statements and/or affidavits to sufficiently establish probable cause, much in the same way we are required to do at a

preliminary hearing. Where Utah Rule of Criminal Procedure 7(i) already sets forth the process for the State having the burden to produce sufficient evidence for a bindover at a preliminary hearings for all felonies and class A misdemeanors, subsection (h) seems unnecessary and duplicative as a preliminary hearing safeguard is already in place to protect criminal defendants.

Rule 6

We are concerned about the proposed change made to the language in subsection (a) setting forth the process whereby warrants of arrest or summonses are issued by magistrates. The old language indicated that this process took place "Upon the filing of an information" but this language has been removed and has been replaced with "upon the acceptance of an information by a judge."

If the intent here is to weed out incomplete informations or affidavits, we feel that the language should say as much. As currently drafted, the language is much broader and may be used to argue against the executive prerogative. We see a possible separation of powers issue. As to subsection (c), we believe that it should mirror the statutory language found in U.C.A. 77-7-5(1). The proposed language of this subsection appears to create a heightened standard for the issuance of an arrest warrant that is not consistent with the language set forth in the Utah Code. For instance, the proposed language requires the court to make a finding that the defendant poses a substantial danger of a breach of peace, injury to person or property, or danger to the community. Whereas, U.C.A. 77-7-5(1)(b) simply requires the Court to find that a warrant is necessary to (i) prevent risk of injury; (ii) to secure the appearance of the accused; or (3) to protect public safety and welfare.

Where elected officials in our Utah Legislature have passed a law that specifically sets forth when a magistrate may issue a warrant, we believe that any associated procedural rules should model the legislative enactment. To not do so, presents a separation of powers issue.

Lastly, we find the language in subsection (g)(1) problematic. It could be interpreted to exclude the placement of felony warrants on NCIC and the service of warrants issued in the State of Utah in other states.

Thank you for your time in considering our comments and request to not approve the rules for adoption in their current form.

Sincerely,

Tony Baird, Chief Deputy
Spencer Walsh, Chief Prosecutor

24. **Curtis Tuttle**
August 11, 2016 at 6:16 pm

On behalf of the Salt Lake City Prosecutor's Office, I'm in agreement with the comments already made by Mr. Robinson, Mr. Taylor, Mr. Buhman, Ms. Telles, and other prosecutors and I share their concerns. The proposed changes in Rule 4(b)(3)-(c) and (h) would create a

significant burden to prosecuting offices that doesn't currently exist, and there doesn't appear to be any real need for the changes.
Our office filed over 7,000 informations in 2015, and is on track to file over 8,000 in 2016. These cases range from Class B Misdemeanors to Infractions. The additional burdens imposed by the proposed Rule 4(b)(3)-(c) and (h) changes would significantly disrupt the filing of informations. Our office isn't currently staffed to handle the significant burden of complying with the proposals, and my assumption is that other offices around the state aren't either. As stated by Mr. Robinson, if the proposals were put into effect, prosecuting offices across the state would have to increase staffing (at taxpayer cost) with people qualified to fulfill the new requirements. Rule 4(h) also seems to place a new significant burden on judges working in high volume jurisdictions to review each information and make a probable cause determination on every information filed. If the purpose behind the rule proposal is to ensure the judge makes a probable cause determination on misdemeanor and infraction level cases, it would be more efficient for the prosecutor to simply give a verbal factual basis for the charges at the arraignment. But as Ms. Telles stated, this just creates a backdoor quasi-preliminary hearing that has long been deemed unnecessary for misdemeanor and infraction level cases.

Curtis Tuttle
Assistant Salt Lake City Prosecutor

25. **G. Mark Thomas**
August 12, 2016 at 8:20 pm

Proposed Rule 4(b)(3) is duplicative of discovery rules that already require notification to defendants of the names of witnesses. It is inefficient to create a rule that duplicates work.

Proposed Rule 4(b)(4) requires information that may not be readily available to the prosecution at the time of the filing of the information. This information may be of interest for the courts and legislature as they consider changes in the law, but it is placing a burden on the prosecution office to become a gatekeeper of information they usually do not track.

Proposed Rule 4(c) requires the prosecutor to prepare a statement that they can neither swear to, or attest to its truthfulness. All charges prepared by the prosecution are on reliance of outside witnesses. All evidence and statements supporting an information is also provided to defendant in the form of discovery. The information requested by this proposed portion of the rule is unnecessary to inform the defendant of charges against him or her. This may be a preferred format used by some prosecution offices, but is not needed. There should not be a rule that mandates a format for a criminal Information that requires a probable cause statement.

I also agree with other comments that there are more reasons to issue a warrant than currently proposed in proposed Rule 6, and would urge language that would give courts more discretion when to issue warrants.

Tab 4

Rule 38. Appeals from justice court to district court.

(a) Appeal of a judgment or order of the justice court is as provided in Utah Code Section 78A-7-118. A case appealed from a justice court shall be heard in a district courthouse located in the same county as the justice court from which the case is appealed. In counties with multiple district courthouse locations, the presiding judge of the district court shall determine the appropriate location for the hearing of appeals.

(b) The notice of appeal.

(b)(1) A notice of appeal from an order or judgment must be filed within ~~30~~ 28 days of the entry of that order or judgment.

(b)(2) Contents of the notice. The notice required by this rule shall be in the form of, or substantially similar to, that provided in the appendix of this rule. At a minimum the notice shall contain:

(b)(2)(A) a statement of the order or judgment being appealed and the date of entry of that order or judgment;

(b)(2)(B) the current address at which the appealing party may receive notices concerning the appeal;

(b)(2)(C) a statement as to whether the defendant is in custody because of the order or judgment appealed; and

(b)(2)(D) a statement that the notice has been served on the opposing party and the method of that service.

(b)(3) Deficiencies in the form of the filing shall not cause the court to reject the filing. They may, however, impact the efficient processing of the appeal.

(c) Duties of the justice court. Within 7 days of receiving the notice of appeal, the justice court shall notify the appropriate district court of the appeal packet containing:

(c)(1) the notice of appeal;

(c)(2) the docket;

(c)(3) the information or citation;

(c)(4) the judgment and sentence, if any; and

(c)(5) any other orders and papers filed in the case.

(d) Duties of the district court.

(d)(1) Upon receipt of the appeal packet from the justice court, the district court shall hold a scheduling conference to determine what issues must be resolved by the appeal. The district court shall send notices to the appellant at the address provided on the notice of appeal. Notices to the other party shall be to the address provided in the justice court docket for that party.

(d)(2) If the defendant is in custody because of the matter appealed, the district court shall hold the conference within 7 days of the receipt of the appeals packet. If the defendant is not in custody because of the matter appealed, the court shall hold the conference within 28 days of receipt of the appeals packet.

(e) District court procedures for trials de novo. An appeal by a defendant pursuant to Utah Code Ann. §78A-7-118(1) shall be accomplished by the following procedures:

(e)(1) If the defendant elects to go to trial, the district court will determine what number and level of offenses the defendant is facing.

(e)(2) Discovery, the trial, and any pre-trial evidentiary matters the court deems necessary, shall be held in accordance with these rules.

(e)(3) After the trial, the district court shall, if appropriate, sentence the defendant and enter judgment in the case as provided in these rules and otherwise by law.

(e)(4) When entered, the judgment of conviction or order of dismissal serves to vacate the judgment or orders of the justice court and becomes the judgment of the case.

(e)(5) A defendant may resolve an appeal by waiving trial and compromising the case by any process authorized by law to resolve a criminal case.

(e)(5)(A) Any plea shall be taken in accordance with these rules.

(e)(5)(B) The court shall proceed to sentence the defendant or enter such other orders required by the particular plea or disposition.

(e)(5)(C) When entered, the district court's judgment or other orders vacate the orders or judgment of the justice court and become the order or judgment of the case.

(e)(5)(D) A defendant who moves to withdraw a plea entered pursuant to this section may only seek to withdraw it pursuant to the provisions of Utah Code Ann. § 77-13-6.

(e)(6) Other dispositions. A defendant, at a point prior to ~~judgment, by~~ entering a plea of guilty or a no contest plea, or prior to commencement of trial, may choose to withdraw the appeal and

have the case remanded to the justice court. Within 14 days of the defendant notifying the court of such an election, the district court shall remand the case to the justice court.

(f) District court procedures for hearings de novo. If the appeal seeks a de novo hearing pursuant to Utah Code Ann. § 78A-7-118(3) or (4); and

(f)(1) the court shall conduct such hearing and make the appropriate findings or orders.

(f)(2) Within 14 days of entering its findings or orders, the district court shall remand the case to the justice court , unless the case is disposed of by the findings or orders, or the district court retains jurisdiction pursuant to §78A-7-118(6).

(g) Retained jurisdiction. In cases where the district court retains jurisdiction after disposing of the matters on appeal, the court shall order the justice court to forward all cash bail, other security, or revenues received by the justice court to the district court for disposition. The justice court shall transmit such monies or securities within 21 days of receiving the order.

(h) Other bases for remand. The district court may also remand a case to the justice court if it finds that the defendant has abandoned the appeal.

(i) Justice court procedures on remand. Upon receiving a remanded case, the justice court shall set a review conference to determine what, if any proceedings need be taken. If the defendant is in custody because of the case being considered, such hearing shall be had within five days of receipt of the order of remand. Otherwise, the review conference should be had within 28 days. The court shall send notice of the review conference to the parties at the addresses contained in the notice of appeal, unless those have been updated by the district court.

(j) During the pendency of the appeal, and until a judgment, order of dismissal, or other final order is entered in the district court, the justice court shall retain jurisdiction to monitor terms of probation or other consequences of the plea or judgment, unless those orders or terms are stayed pursuant to Rule 27A.

(k) Reinstatement of dismissed appeal.

(k)(1) An appeal dismissed pursuant to subsection (h) may be reinstated by the district court upon motion of the defendant for:

(k)(1)(A) mistake, inadvertence, surprise, excusable neglect; or

(k)(1)(B) fraud, misrepresentation, or misconduct of an adverse party.

(k)(2) The motion shall be made within a reasonable time after entry of the order of dismissal or remand.

Rules of Criminal Procedure – Comment Period Closed July 24, 2016

Rule 038 Amend. The proposed amendment clarifies that a defendant may withdraw an appeal prior to entry of a plea of guilt or prior to commencement of trial.

One thought on "Rules of Criminal Procedure – Comment Period Closed July 24, 2016"

1. **Michael Kwan**
   June 9, 2016 at 10:50 pm

   Line 87: the second to last word should be guilty not guilt.

Tab 5

Rule 18. Selection of the jury.

(a) The judge shall determine the method of selecting the jury and notify the parties at a pretrial conference or otherwise prior to trial. The following procedures for selection are not exclusive.

(a)(1) Strike and replace method. The court shall summon the number of the jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted, and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. After each challenge for cause sustained, another juror shall be called to fill the vacancy , and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(a)(2) Struck method. The court shall summon the number of jurors that are to try the cause plus such an additional number as will allow for any alternates, for all peremptory challenges permitted and for all challenges for cause granted. At the direction of the judge, the clerk shall call jurors in random order. The judge may hear and determine challenges for cause during the course of questioning or at the end thereof. The judge may and, at the request of any party, shall hear and determine challenges for cause outside the hearing of the jurors. When the challenges for cause are completed, the clerk shall provide a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, including any alternate jurors, and the persons whose names are so called shall constitute the jury. If alternate jurors have been selected, the last jurors called shall be the alternates, unless otherwise ordered by the court prior to voir dire.

(a)(3) In courts using lists of prospective jurors generated in random order by computer, the clerk may call the jurors in that random order.

(b) The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant. Prior to examining the jurors, the court may make a preliminary statement of the case. The court may permit the parties or their attorneys to make a preliminary statement of the case, and notify

the parties in advance of trial.

(c) A challenge may be made to the panel or to an individual juror.

(c)(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

(c)(1)(i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.

(c)(1)(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or made upon the record. It shall specifically set forth the facts constituting the grounds of the challenge.

(c)(1)(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

(c)(1)(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

(c)(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense.

(d) A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) A challenge for cause is an objection to a particular juror and shall be heard and determined by the court. The juror challenged and any other person may be examined as a witness on the hearing of such challenge. A challenge for cause may be taken on one or more of the following grounds. On its own motion the court may remove a juror upon the same grounds.

(e)(1) Want of any of the qualifications prescribed by law.

(e)(2) Any mental or physical infirmity which renders one incapable of performing the duties of a

juror.

(e)(3) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.

(e)(4) The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.

(e)(5) Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by the defendant in a criminal prosecution.

(e)(6) Having served on the grand jury which found the indictment.

(e)(7) Having served on a trial jury which has tried another person for the particular offense charged.

(e)(8) Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it.

(e)(9) Having served as a juror in a civil action brought against the defendant for the act charged as an offense.

(e)(10) If the offense charged is punishable with death, the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions of the court and the juror's oath in subsection (h).

(e)(11) Because the juror is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense.

(e)(12) Because the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury.

(e)(13) Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.

(e)(14) Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

(f) Peremptory challenges shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(g) ~~The court may direct that alternate jurors be impaneled. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be selected at the same time and in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, and privileges as principal jurors. Except in bifurcated proceedings, an alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict. The identity of the alternate jurors may be withheld until the jurors begin deliberations.~~ The court may impanel alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties. Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror. The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(h) When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

Tab 6

Utah State Courts

Brent Johnson <brentj@utcourts.gov>

challenging the constitutionality of a law

1 message

Tim Shea <tims@utcourts.gov> Thu, Jun 2, 2016 at 3:11 PM
To: Patrick Corum <pcorum@sllda.com>, Carol Verdoia <cverdoia@utah.gov>
Cc: Brent Johnson <brentj@utcourts.gov>, Katie Gregory <katieg@utcourts.gov>

Carol and Patrick,

The appellate rules committee has just approved for comment a draft rule that would require all parties to serve their briefs on the AG when any party challenges the constitutionality of a statute. There will be a parallel provision for serving the county or municipal attorney when challenging the constitutionality of a local ordinance. The procedures are different, but the concepts are the same as those in URCP 24(d).

During the committee's discussions, several people raised the circumstance in which a criminal or juvenile case was delayed or parties suffered adverse consequences because a party had not followed URCP 24(d). Since there is no counterpart in the rules of criminal or juvenile procedure, URCP 24(d) applies, but frequently even experienced criminal and juvenile practitioners are not aware of it.

The appellate rules committee recommends that your respective committees consider drafting a rule similar to Rule 24(d) so parties might more reasonably be expected to timely notify the AG or county or municipal attorney when challenging the constitutionality of a law.

Thank you,
Tim

URAP025A.pdf
18K

Rule 25A. Challenging the constitutionality of a statute or ordinance.

(a) Notice to the Attorney General or the county or municipal attorney; penalty for failure to give notice.

(a)(1) When a party challenges the constitutionality of a statute in an appeal or petition for review in which the Attorney General has not appeared, every party must serve its principal brief and any subsequent brief on the Attorney General on or before the date the brief is filed.

(a)(2) When a party challenges the constitutionality of a county or municipal ordinance in an appeal or petition for review in which the responsible county or municipal attorney has not appeared, every party must serve its principal brief and any subsequent brief on the county or municipal attorney on or before the date the brief is filed.

(a)(3) If an appellee or cross-appellant is the first party to challenge the constitutionality of a statute or ordinance, the appellant must serve its principal brief on the Attorney General or the county or municipal attorney no more than 7 days after receiving the appellee's or the cross-appellant's brief and must serve its reply brief on or before the date it is filed.

(a)(4) Every party must serve its brief on the Attorney General by email or mail at the following address and must file proof of service with the court.

Email	Mail
notices@agutah.gov	Office of the Utah Attorney General Attn: Utah Solicitor General 320 Utah State Capitol P.O. Box 142320 Salt Lake City, Utah 84114-2320

(a)(5) If a party does not serve a brief as required by this rule and supplemental briefing is ordered as a result of that failure, a court may order that party to pay the costs, expenses, and attorney fees of any other party affected by that failure.

(b) Notice by the Attorney General or county or municipal attorney; amicus brief.

(b)(1) Within 14 days after service of the brief that presents a constitutional challenge the Attorney General or other government attorney will notify the appellate court whether it intends to file an amicus brief. The Attorney General or other government attorney may seek up to an additional 7 days' extension of time from the court. Should the Attorney General or other government attorney decline to file an amicus brief, that entity should plainly state the reasons therefor.

(b)(2) If the Attorney General or other government attorney declines to file an amicus brief, the briefing schedule is not affected.

(b)(3) If the Attorney General or other government attorney intends to file an amicus brief, that brief will come due 30 days after the notice of intent is filed. Each governmental entity may file a motion to extend that time as provided under Rule 22. On a governmental entity filing a notice of a

intent, the briefing schedule established under Rule 13 is vacated, and the next brief of a party will come due 30 days after the amicus brief is filed.

(c) Call for the views of the Attorney General or county or municipal attorney. Any time a party challenges the constitutionality of a statute or ordinance, the appellate court may call for the views of the Attorney General or of the county or municipal attorney and set a schedule for filing an amicus brief and supplemental briefs by the parties, if any.