

**Supreme Court's Advisory Committee
on the Rules of Criminal Procedure**

MEETING MINUTES

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
November 19, 2019 – 12:00 p.m. to 2:00 p.m.

APPROVED

MEMBERS:

PRESENT EXCUSED

	PRESENT	EXCUSED
Douglas Thompson, <i>Chair</i>	•	
Jensie Anderson		•
Judge Patrick Corum	•	
Jeffrey S. Gray		•
Judge Elizabeth Hruby-Mills	•	
Blake Hills	•	
Craig Johnson	•	
Joanna Landau	•	
Keri Sargent	•	
Judge Kelly Schaeffer-Bullock	•	
Ryan Stack	•	
Cara Tangaro		•

GUESTS:

STAFF:

Brent Johnson
Minhvan Brimhall (recording secretary)

1. Welcome and approval of minutes:

Douglas Thompson welcomed the committee members to the meeting. The Committee discussed the September 17, 2019 minutes. There being no changes to the minutes, Doug Thompson moved to approve the minutes. Keri Sargent seconded the motion. The motion was unanimously approved.

2. Report from rules 9 and 9A subcommittee:

The Supreme Court approved the proposed amendments to rules 9 and 9A on November 18. The rules will be effective as soon as an order is signed by the Chief. The rules require additional public comment. That process will start at the same time as the rules are published as effective.

The subcommittee had previously met to discuss potential changes. Many of the subcommittee's ideas were substantive and may require legislative input. The subcommittee recommended that the Pretrial Release Committee create a

subcommittee that includes legislative participation to further review proposed changes to the rules and potential statutory changes. Mr. Johnson reminded the committee of the task force that was formed to study pretrial issues. There were many legislative proposals that were recommended from that task force that did not pass. Because those proposals did not pass there were difficulties in accomplishing many of the goals of that group. The proposal to the Supreme Court was to reconstitute what happened in the past and study the issues that blocked those proposals. The Supreme Court recommended that the Court and the Judicial Council form a joint committee. This proposal needs to be discussed with the Judicial Council but will likely require representation from a member of the Rules of Criminal Procedure committee. More information will be forthcoming about the creation of the committee.

3. Rule 14 :

Rule 14 returned from public comment and received two comments. The Supreme Court has asked that committees review and respond to each comment received. The Supreme Court is interested in knowing why the comments were accepted or rejected by the committees. This process began with the Civil Procedures committee, and the Supreme Court requests that all committees engage in a similar practice. Following this meeting, Mr. Johnson will provide a memorandum to the Supreme Court outlining the reasons for acceptance or rejection of the comments. For future practice, this committee will review received comments prior to the meeting to allow time for discussion.

Mr. Thompson noted that the committee previously discussed case law regarding privileged information. The committee thought that the wording used in the rules was consistent with that case law. The committee felt that the word “non-public” took away from the language in case law and did not relate to anything identifiable. Mr. Thompson’s preference is to use language that is legally defined, as opposed to “non-public.”

Judge Corum noted that “non-public” is a substantive change in the law, but is not a part of case law or a statutory requirement. Many judges use the term “non-public” very broadly because it is not defined in case law.

Mr. Thompson noted that the committee has discussed and debated the proposed changes to the rule extensively. Unless additional amendments are needed, Mr. Thompson recommends proceeding with the proposed changes as currently written. The committee relied on the motion made at the last meeting to send the rule to the court for final review.

4. Follow-up on probation consolidation rule subcommittee:

Michael Drechsel spoke to the committee several months ago regarding consolidation of probation cases and the possible formation of a subcommittee with the task of creating such a rule. The proposed rule essentially allow a judge to handle cases previously

assigned to other judges. The Judicial Council originally recommended the rule follow the track of the Code of Judicial Administration, but later felt it may be better suited to the Rules of Criminal Procedure. There is a current proposed rule the subcommittee would review.

The committee recognized some issues that would need to be addressed by the subcommittee in drafting a rule. The rule would allow a defendant with a criminal history to be seen by the same judge each time a new offense is created. This would reduce caseload for many districts who have defendants being tried in one district, while another case is opened in another district. The committee recommended representation on the committee from someone in Third District who is familiar with caseload history from that district. This would allow a broader perspective of the issues involving larger districts. The committee also discussed including representation from AP&P on the subcommittee. Judge Corum, Judge Hruby-Mills, and Keri Sargent are willing to participate on the subcommittee as representatives from this committee.

Mr. Thompson will arrange a meeting with those invited to join the subcommittee.

5. Unsworn declarations:

The Legislature passed a law 2-3 years ago that says any place in the law where an affidavit is required and unsworn declaration may be used instead. The Rules of Civil Procedure committee has gone through their rules and made changes to include unsworn declarations where affidavits are stated. Does this committee want to do the same thing? Mr. Johnson notes that this step is not necessary, as the Legislature has not gone through the codes to make those changes.

No action is needed for this item.

6. Rule 16 – proposed changes:

Proposed changes to rule 16 will be going to the Supreme Court for review and then out for public comment. No further action is needed at this time.

7. Rule 12 – proposed changes:

Mr. Thompson was contacted by Nancy Sylvester with proposals to rule 12. The amendments would make rule 12 consistent with the rules of Appellate Procedure and the Rules of Civil Procedure in instances where a statute or ordinance is being challenged as unconstitutional. The amendments also include notifying the attorney general's office when state statutes are being challenged and to local officials when city and county ordinances are being challenged. Mr. Thompson proposes alternative amendments to the amendments proposed by the Rule of Civil Procedure Committee. Mr. Thompson proposes placing the burden of giving notice on the prosecutor. Mr. Thompson explains that placing the burden on the prosecutor would be more reliable, and action by the AG's office would be more timely. Mr. Thompson notes that if notice is not given on time it does not mean the defendant could not challenge the case, but

would allow for continuation of the case. Mr. Thompson also notes that “motions to challenge the admissibility of eyewitness identifications” has been added to section c.

The committee discussed the proposed amendments by the Rules of Civil Procedure Committee and Mr. Thompson. The committee believes that the moving party would be the better party to provide notice to the AG’s office as it would require that they take responsibility and ownership in filing the motion to challenge. The committee discussed recommending the inclusion of additional statements detailing the reasons for the motion.

With no further discussions, the committee made two motions.

Ryan Stack moved to change (c)(1)(f) to (c)(1)(F) for consistency with other subsections of the rule. Judge Hruby-Mills seconded the motion. The committee unanimously approved the motion.

Judge Hruby-Mills moved to accept the proposed language from the Rules of Civil Procedure Committee requiring the moving party to provide notice of unconstitutional challenges to the Office of Attorney General. Judge Shaeffer-Bullock seconded the motion. The committee unanimously approved the motion.

8. Rule 36:

Cara Tangaro has drafted proposed amendments to rule 36 that would simplify the process to withdraw from a case at sentencing. Ms. Tangaro will discuss the proposal at another meeting.

9. Other business:

The national background check system for weapons is requiring that misdemeanor crimes of domestic violence be listed to the database. Because not every domestic violence case falls under that category, it is difficult to include that information in the database. In discussing options, Mr. Johnson notes that some have leaned towards placing the burden on the prosecutor to list somewhere on the case that, if convicted, the domestic violence would constitute a misdemeanor crime of domestic violence. When e-filed the case would be flagged and be reported to the database. Utah is not currently sending the information over and the system is not currently set up to do so.

The committee discussed that the process may need to be reviewed as part of rule 11 and a process needs to be outlined. A judge would need to notify defendants that convictions of certain domestic violence cases would be sent to a federal database. It would be up to a federal judge to determine if the offense would be applicable in determining a person’s ability to pass a weapons background check. The pressure for states to report misdemeanor domestic violence cases is coming from the federal government. The feds are threatening to remove federal funding for non-compliance.

10. Adjourn:

With no other business, Craig Johnson moved to adjourn the meeting. Judge Hruby-Mills seconded the motion. The committee voted to adjourn. The meeting adjourned at 1:20 pm. The next meeting is scheduled for January 21 at 12 pm (noon) in the Café Meeting room (formerly Executive Dining Room).