

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

MEETING MINUTES

Café Meeting Room (W18A), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
January 21, 2020 – 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:

None

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 November 19, 2019 minutes. There being no changes to the minutes, Blake Hills moved to approve the minutes. Ryan Stack seconded the motion. The motion was unanimously approved.

2. Investigative Subpoenas, Utah Code 77-22:

Mr. Thompson received an email from Mike Brown, Utah County Public Defender Association, following the November meeting. Mr. Brown presented proposed amendments to rule 14 and rule 40. Mr. Brown suggests that when a case is filed with the court, the requesting party should make the first attempt to request a search warrant with the court in which the case was filed. This suggestion stems from a case involving a dispute over discovery. Rather than allowing the judge to resolve the discovery dispute issue, a search warrant was issued and executed by a signing judge. The defense counsel felt this allowed the prosecutor to go around the discovery process.

The proposed language in rule 14 directs parties seeking a search warrant or an investigative subpoena in a pending case to do so in the manner outlined in rule 40. The idea is to cut down on “forum shopping.”

Mr. Thompson reviewed Mr. Brown’s proposed language and created a subsection (d). The section reads as:

“If you are seeking investigation that relates to an ongoing case that proceeds to authorize testimony related to a crime that has already been charged, or a crime in a single episode as defined by code, that application must be submitted to the magistrate of the court to which the case is assigned. The application to another magistrate or court may only occur if the assigned court is unavailable and the applicant demonstrates that waiting for the assigned court could result in a loss or destruction of evidence.”

Mr. Thompson noted that there may be times when timing is of the essence. The amendment would place the burden on the filing party to define why the warrant is necessary to be filed that day. The subpoenas would be filed on on-going cases. The proposed language would be the same for rule 40.

The committee discussed that the language may not apply to rule 14 as any subpoenas made by deuces tecum must be in filed in the assigned court. The current process requires that all subpoenas be submitted through e-file in which any judge is able to sign for the warrant, thus eliminating the process of going behind a judge’s back in seeking a warrant. Mr. Thompson states that the amendments would not apply to any case that has not been filed. Following further discussions, the committee was unable to come to a consensus on the proposed language. Mr. Thompson would like to have judges weigh in on the proposed amendments and recommends holding this item over for further discussions at another meeting. Jeff Gray suggests that language to the proposed amendment should include language from any rules in which a warrant would apply.

With no further discussions, and no motions made, this item will be tabled over to a future meeting for further discussion.

3. Rule 4, 6, 38 – back from public comment: no comments received

Rules 4, 6, and 38 are back from public comment. No comments were received for these rules. The rules are ready to move forward to the Supreme Court for final approval.

With no further discussions, Cara Tangaro moved to approve the rules as proposed and forward to the Supreme Court for final approval. Mr. Stack seconded the motion. All those in attendance preliminarily approved the motion. A final vote for approval will be sought via email from those who were unable to attend the meeting.

4. Rule 22:

In a recent meeting with the clerks of court, the clerks expressed concerns that law enforcement officers are not complying with the rule on commitment orders. They are not filing returns when defendants are committed to jail or otherwise incarcerated. The clerks suggest a language change to reflect current practices with the court sending commitment order to the jail and nothing that in the docket.

With no further discussions, Ms. Tangaro moved to approve the updated language to rule 22 as proposed and send to Supreme Court for approval to post for public comment. Mr. Gray seconded the motion. All those in attendance preliminarily approved the motion. A final vote for approval will be sought via email from those who were unable to attend the meeting.

5. Rule 9 and 9A – back from public comment:

Rules 9 and 9A have returned from public comment. One comment was received for these rules. The received comment reflects concerns that have previously been addressed by the committee. The subcommittee on rules 9 and 9A has met to discuss concerns about the rules. The subcommittee made substantial recommendations to amend the rule in an attempt to avoid a complete revision of the rules. The rules are currently effective subject to any changes that may be made at a future time.

Mr. Thompson states that the Board of District Court Judges expressed concerns regarding the impact these rules will have on rural areas. Rural areas do not hold regular first appearance calendars and do not meet as often as suburban locations. A major challenge for rural areas is getting pre-trial services to defendants who are not in close proximity to a courthouse, or are arrested in a county that is different from the county in which the warrant was issued.

The committee discussed the use of “magistrate.” A magistrate in a county other than where the warrant was issued may be able to determine if a person is eligible for pre-trial services, but would not be able to determine a bail amount or conduct the initial hearing. The committee expressed concerns of potential confusion this may cause. Mr. Johnson will review and provide clarification of the responsibility of a judge and a magistrate, and create new language to be presented at a future meeting. Mr. Thompson noted that protection in (b)(1) is good if it is determined who is supposed to conduct the review, or good if it is determined the type of review being held. If just a paper review there should be no reason it cannot be the issuing judge that completes the review. Mr. Thompson also notes that (d) protects the defendant from being held longer in detention than necessary.

Mr. Johnson states that the intent of rules 9 and 9A stems from the pre-trial risk assessment tools that are generated when a defendant has been arrested on a warrant. The original intention of the tool was to give judges a way to determine the level of risk

of a defendant and set an appropriate bail amount. Only the judge at the pre-trial hearing would see the assessment after the person has been arrested and awaiting the initial court appearance. Ms. Tangaro expressed concerns that some counties may deem this to be the other county's problem and kick it back to the issuing county to hear the matter. Ms. Tangaro suggests that the rules provide direction and clarification as to which county is responsible to hear the matter, and review the arrest warrant and pre-trial risk assessment.

Following further discussions, and because of the sensitive nature of these rules, Mr. Johnson recommends any decision and further discussion be held over for a future meeting to allow more committee members to voice their concerns. The committee could make proposed changes and then distribute those changes to committee members to vote via email in the interim.

With no motion or vote, this item will be tabled over to a future meeting for further discussion.

6. Other business – SB 23:

The Legislature is considering SB 23. The Judicial Council has asked the committee to review the bill and determine whether there are matters that should be addressed in rule rather than in statute. Mr. Thompson recalls that section (b) is a repeat of rule 14 and that the committee had previously made amendments to that section.

The committee discussed implementing a mechanism by which the defense on the case could see the records of the victim. The bill appears to address information gathered from a national drug database. Mr. Thompson clarified that the changes the committee made to rule 14 were meant to say that any party seeking that type of information would still need to go through the process outlined in the rule. And any information in the drug database may be covered by rule 14 as privileged. If the information is privileged it will require review by the court, but if not, the party will at least get notice of the subpoena. Mr. Johnson does not believe the information is privileged because it is in a database. Rule 14 would need to be amended to account for this type of information. This would also create a new substantive right for the victim.

Mr. Thompson recommends that the committee's response to the bill's sponsor be that subsections (b), (c), and (d) overlaps with rule 14 and belong better in a rule. The committee also recommends that procedural steps be incorporated into the rule.

Mr. Thompson states that the court is reviewing the committee's proposals to rule 16 tomorrow.

Mr. Johnson will communicate with the court's legislative liaison, Michael Drechsel, the committee's response to the bill and its connection to rule 14, and that the committee will work with the legislature to address any concerns.

6. Adjourn:

With no other business, the meeting adjourned without a motion. The meeting adjourned at 1:20 pm. The next meeting is scheduled for March 17 at 12 pm (noon) in the Café Meeting room (formerly Executive Dining Room).