

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

MEETING MINUTES

WebEx Video Conferencing
May 19, 2020 – 12:00 p.m. to 2:00 p.m.

APPROVED

MEMBERS:	PRESENT	EXCUSED	GUESTS:
Douglas Thompson, <i>Chair</i>	•		Jacqueline Carlton
Judge Patrick Corum	•		
Jeffrey S. Gray	•		STAFF: Brent Johnson - excused Minhvan Brimhall (recording secretary)
Judge Elizabeth Hruby-Mills	•		
Blake Hills	•		
Craig Johnson	•		
Joanna Landau	•		
Keri Sargent		•	
Judge Kelly Schaeffer-Bullock	•		
Ryan Stack	•		
Cara Tangaro	•		
Matthew Tokson	•		

1. Welcome and approval of minutes:

Douglas Thompson welcomed the committee members to the meeting. The Committee discussed the March 17, 2020 minutes. There being no changes to the minutes, Jeff Gray moved to approve the minutes. Judge Corum seconded the motion. The motion was unanimously approved.

2. Rule 6:

At a recent Board of District Court Judges bench meeting, a question came up as to whether rule 6 requires a review of the probable cause statement when it contains FTA information at the time a summons is issued. The requirement to review the probable cause statement was removed when a summons is issued, but the Board noted it is unclear if the statement should be reviewed when FTA information is available. Judge Corum asks if the committee needs to consider language modification to 6(c) and (d) to clarify this process.

Mr. Thompson recalled that the rule is intended to keep probable cause review in circumstances such as this but the court does not need to review the probable cause statement when issuing a summons.

The committee reviewed subsections 6(c) to (e) and considered inferences that would be applied when referencing subsections (e) to (c) and (d). Judge Corum will put together language recommendations for the committee to consider and send out via email for discussion.

3. Rule 22 – final approval:

Rule 22 was discussed at a previous meeting. Mr. Johnson had recommended updating the rule to put into practice that clerks will automatically email the jail with the court's order for detention. The committee approved the modified language to rule 22. The rule was published for public comment with no comments coming back for review. The rule is ready for final approval by the Supreme Court.

With no further discussion, Craig Johnson moved to approve the rule. Judge Shaeffer-Bullock seconded the motion. The motion unanimously passed. Rule 22 will go to the Supreme Court for final approval.

4. Rule 8 – final approval:

Rule 8 was approved by the Supreme Court for public comment. One comment was received for this rule. The rule stems from discussions with Neil Hamilton regarding the appointment of counsel in capital cases. The committee modified language to clarify that appointment as defense counsel required experience in defense cases and representation of a defendant, and the committee updated language regarding in-person CLE's. The comment received came from a former prosecutor who felt it was unfair to disqualify him as defense counsel because of the lack of experience in capital cases. The commenter is now in private practice. The Supreme Court asked this committee to review the received comment.

The committee discussed the concerns raised the commenter. Many members of the committee had spoken with other prosecutors in various areas of the State and they did not express the same concerns as of the commenter. The committee noted that this does not change the rule or the necessary requirements to be appointed as counsel in capital cases. CLE requirements can be obtained through other means by way of the State Bar, which may include video and online training. The committee discussed and recommended removal of "in person" from section (b)(3) because of the increase in remote learning.

With no further discussion, Judge Corum moved to approve rule 8 as modified. Mr. Gray seconded the motion. The motion unanimously passed. Rule 8 will now go the Supreme Court for final approval.

5. Rule 16 - update:

Mr. Thompson has drafted a memorandum to the Supreme Court for discussion of the committee's approved modifications of rule 16. Mr. Thompson and Mr. Johnson will be meeting with the Supreme Court within the next week.

6. Rule 19 - discussion:

Rule 19 stems from amendments to body cam legislation from the 2020 legislative session. The legislature decided to create possible remedies for violation of the body cam requirement if a police officer turns off his/her body cam. There is possibility for a jury to inference evidence that would have been on the video as an adverse to the State's position. The legislation also created a few more exceptions in dealing with domestic violence victims, and consultation with a superior officer – which can be muted or turned off. The court's subcommittee discussed with legislative the appropriateness of rules versus statutes. The subcommittee was unable to come to an agreement with the proponents of the bill, but decided to propose changes to the rule, and not to the bill. Language of the new statute includes a reference to rule 19. Section 77-7a-104.1 references adverse jury instructions that is in accordance with rule 19.

The committee discussed briefly the concerns of the court. Mr. Thompson noted that the committee can draft amendments to rule 19 to address how adverse jury instructions would be used. The court has indicated they are not comfortable with what was discussed with the legislatures but would not recommend language changes at this time. The committee determined that no action is needed on rule 19 at this time. The committee proposes taking proposed change to rule 19 out of circulation for the time being and wait to see how the statue might be applied to the rule.

With no further discussions, committee members agreed the proposal may be an appropriate action at time, however, no formal motion or vote was taken. This item is held over for further discussion at a future meeting.

7. Rules 9 and 9A – final approval:

Rules 9 and 9A came back from public comment with no comments received. The committee discussed and made no changes to rule 9. The committee discussed and made minor changes to rule 9A. The committee recommended moving "within 48 hours after arrest" to the end of the paragraph for better readability.

With no further discussions, Mr. Gray moved to adopt the changes as modified. Judge Corum seconded the motion. The motion unanimously passed. The rule will go to the Supreme Court for final approval.

8. Rule 17 - discussion:

Due to the restrictions related to COVID-19, concerns have arisen regarding waiving a jury trial. Court committees are addressing how to conduct jury trials in light of current

restrictions, as they are not happening right now. A judge proposed amending the rule of eliminate the requirement that a prosecutor agree to waive a jury trial. The Supreme Court decided not to suspend the provision, but also did not prohibit discussion by this committee. The judge asked for a proposal to be sent to this committee for discussion.

The committee discussed other sources of substantive right to a jury trial. Mr. Gray noted that a defendant has a right to a jury trial but not a right to a bench trial and the State has as much of an interest in a jury trial as the defendant would. Several members of the committee would oppose any changes to the rule to eliminate a prosecutor's consent and noted that many prosecutors would also oppose the same. Mr. Thompson asked if, other than this rule, is there something that gives the prosecutor the right to object to a bench trial, and suggested research would be helpful. The committee agreed that this would be a big change to the rule and additional research is needed before making any recommendations to modify the rule. Blake Hills volunteered to research this matter and will discuss his findings at a future meeting, or he will communicate with committee members via email prior to the next meeting.

Mr. Brent Johnson noted this is not an urgent request; however, the judge who asked for the review would like an answer as soon as possible. This item will be held over for review at another meeting.

9. Expungement rule:

The expungement rule has been in discussion over the past year since legislation passed during the 2019 session. The rule was discussed by the Policy and Planning Committee in April. The committee decided the Rules of Criminal Procedure Committee should review the rule, specifically portions of the rule directly related to the Rules of Criminal Procedure. Mr. Johnson notes other committees have reviewed the rule but the final review and decision-making falls on this committee. The rule will address an automatic process for reviewing cases eligible for automatic expungement and the Judicial Council will need to approve the process identify. The court's IT department will be developing a program to pull cases eligible for expungement. Those cases will then be forwarded to the presiding judge and prosecutor for review and decision whether to expunge. There are rule changes that will be required and the rule will need to be modified and refined before it can go to the Supreme Court for review.

The committee did not have further discussion on this item. No committee vote was taken. This item will be discussed at the July meeting.

10. Update on restitution rule:

Due to his participation with the court's Pandemic Response Team, Mr. Johnson has been unable to finalize a draft on the restitution rule. The majority of the work is completed, but needs fine-tuning. Mr. Jonson will have a proposed draft for discussion at the next meeting.

11. Update on probation consolidation:

Due to issues related to JRI and statutory requirements, Mr. Thompson proposes the committee start from scratch in drafting a rule regarding probation consolidation. Mr. Thompson noted the ideas are good but many portions of the statute are replicated or the changes would undermine the new process. The last rule had some ambiguous language and is no longer practical. Mr. Thompson stated that starting fresh would allow the committee to address how the rule could be more efficient. Mr. Thompson would like to consider something more useful and could help courts in multiple jurisdictions in cutting down on multiple hearings. Mr. Thompson will be meeting with Judge Taylor to discuss new ideas for the rule and will have a draft for the committee to discuss at a future meeting.

12. Other business:

Ms. Joanna Landau asked whether changes can be made to rule 7 that would help ensure defendant had counsel at first appearance. Pretrial rules allow discussion of release conditions at initial appearance. A public defense attorney could be present at those hearings even when one is not yet appointed to the case. Ms. Landau has heard of judges declining to address bail because the prosecutor referenced rule 7(c)(1) and is not prepared to address bail at that time. Is the current language appropriate or do prosecutors need to say they are not ready to address bail?

The committee discussed Ms. Landau's concerns. A judge should be able to address bail at the initial appearance if counsel is present and ready to proceed. The prosecution can object and ask for bail to be addressed at another hearing. Courts have the ability to address bail early due to programs like WebEx and Zoom and this could avoid bail hearings from being extended too far out on the calendar. The committee discussed other issues with the rule and determined that more research is needed to better address the concerns and make rule changes. Ms. Landau will research the rule, and concerns surrounding the rule, and will provide an update at a future meeting.

13. Adjourn:

With no other business, the meeting adjourned without a motion. The meeting adjourned at 1:25 p.m. The committee discussed and voted to meet for the July meeting on July 21. The meeting will be at 12 pm (noon) via Webex Video Conferencing.