



Utah Supreme Court Rules of Criminal Procedure Committee

Meeting Agenda

Doug Thompspon, Chair

Location: WebEx Meeting: <https://utcourts.webex.com/meet/brysonk>

Date: January 16th, 2024

Time: 12:00 p.m. – 2:00 p.m. MST

Action: Welcome and approve November 11 th , 2023 Minutes	Tab 1	Doug Thompson
Discussion: Update on Rules 17.5 and 18.5	Tab 2	Doug Thompson and David Ferguson
Discussion: Update from the probation consolidation subcommittee		Doug Thompson and Meredith Mannebach
Discussion: Update on proposed bench warrant Rule		Doug Thompson

<https://www.utcourts.gov/rules/urcrp.php>

Meeting Schedule for 2024:

March 19th

May 21st

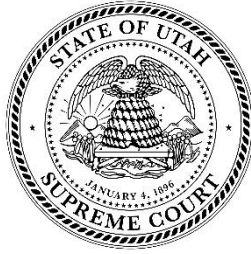
July 16th

September 17th

November 19th

Rule Status:

Tab 1



**Utah Supreme Court
Rules of Criminal Procedure Committee**

**Meeting Minutes
November 11, 2023**

Committee members	Present	Excused	Guests/Staff Present
Douglas Thompson, Chair	X		Bryson King, Staff
Judge Kelly Schaeffer-Bullock	X		Amber Stargell, Rec. Secretary
Matthew Tokson		X	
William Carlson		X	
David Ferguson		X	
Meredith Mannebach	X		
[Vacant]		X	
Judge Denise Porter		X	
Janet Reese	X		
Lori Sepi	X		
Karin Fojtik	X		
Judge Kristine Johnson	X		
Adam Crayk		X	

Item #1: Meeting Minutes 9/19/2023

Doug Thompson welcomes the Committee to the Meeting and introduces its newest member, Judge Kristine Johnson from the Third District Bench. Doug then addresses the meeting minutes. Lori Seppi requests a correction to the minutes. With that change, Karin Fojtik moved to approve the minutes and Lori Seppi seconds the motion. Without opposition, the motion carries and the minutes are approved.

Item #2: Rule 8 Discussion

Doug Thompson then addresses the proposed URCrP Rule 8. Doug reviews the suggested changes to the rule from public comments, specifically from Judge McCullough. Doug begins by addressing the suggestion to clarify when the right to counsel attaches. Then, Doug addresses a suggestion to simplify judges' colloquies when discussing the right to counsel with a criminal defendant. With that overview, Doug invites the Committee to discuss the suggestions. Several Committee members discuss the waiver of the right to counsel, and the subsequent colloquy, to clarify what governing laws should be included in the colloquy and the extent of the judge's responsibility to review those laws. Karin Fojtik asks whether a provision related to the appointment of standby counsel would be included in the Rule. Doug asks whether anybody in the Committee thinks the rule should include a provision related to standby counsel. Judge Johnson and Lori Seppi oppose the inclusion of that provision, and Lori offers to ask colleagues in her office (LDA) about their opinion on the subject. Judge Schaeffer-Bullock also addresses the issue of victims being questioned by their alleged perpetrators when counsel or standby counsel is not appointed, but agrees it may be an issue that exists outside the scope of Rule 8. The Committee also discusses scenarios where a defendant may revoke their waiver of counsel as a means to frustrate or delay judicial process. Doug and Lori propose language to address this possibility, while leaving discretion for judges to restrict this behavior. Doug reviews the remainder of the language in the Rule, which was pre-approved by the Committee. Karen Fojtik makes additional suggestions regarding qualification of appointment as counsel in certain cases where attendance of CLEs is a requirement. Doug suggests that the Committee highlight these provisions and ask the Supreme Court to weigh in on the language. Karen also addresses substantive issues related to those provision, such as whether counsel must have prior criminal experience to qualify for appointment, or specifically criminal defense experience. Judge Schaeffer-Bullock supports including the word "criminal" in the provision. After conclusion of the discussion, Lori Seppi moves to approve the language in the Rule and submit it to the Supreme Court for consideration. Judge Schaeffer-Bullock seconds the motion. With no opposition, the motion passes and the language will be sent to the Supreme Court.

Item #2: Rule Updates

Doug reminds the Committee that Rules 17.5 and 18.5 are Rules David Ferguson agreed to work on and lead in subcommittee. The Committee will review those rules as they progress in subcommittee. He also addresses the probation consolidation subcommittee that was previously led by Ryan Peters who, after being confirmed as a juvenile court judge, has retired from the Committee. Doug explains that the subcommittee will need to be restarted and asks if anybody from the Committee would be interested in participating. Meredith Mannebach and Amber Stargell volunteer to participate. Meredith agrees to help lead the subcommittee.

Item #3: Bench Warrant Rule

Doug reviews a request that the Committee addresses a new Rule or an amendment to an existing Rule that requires a court to schedule a hearing or bring a defendant into court within a specified time after a defendant has been booked on an outstanding bench warrant. This may help avoid delays in cases where defendants must appear in another court but have not seen the judge who issued the bench warrant and remained detained for lengthy periods of time waiting to be seen. Doug drafted a proposal for the Committee to consider, which includes a provision that the court see a defendant within 7 days after being booked on a bench warrant. Judge Schaeffer-Bullock opposes that deadline and provides scenarios from the justice court that would make that deadline difficult to impose. Judge Johnson also provides her perspective from the district court. Amber Stargell discusses her concerns with the time limit. Judge Schaeffer-Bullock suggests that the court be required to set a hearing within a certain time rather than requiring that the defendant appear before the court within a certain time. Doug will continue to work on the Rule proposal and review it with the Committee.

Following the discussion, the meeting is adjourned. The Committee will meet again on January 16th, 2024 via Webex.

Tab 2

Draft Rule 17.5

Questions presented by the Judicial Council on a rule of criminal procedure for virtual court:

1. Should there be a rule of procedure that allows participants to request their hearing be held opposite the decision of the judicial officer?
2. Should there be a rule of procedure that provides a presumption regarding certain hearing types? (Example: non-evidentiary, status hearings, etc.)
3. Should there be a rule of procedure that provides an appeal process for challenging the decision of a judicial officer as it relates to remote vs. in-person hearings, and if so, who should consider the appeal? (Example: presiding judge)

The questions raised by the Judicial Council raise several competing concerns, particularly between the benefits of virtual court and the rights of the accused to appear in-person.

Virtual court presents tremendous improvements in access to justice. When comparing rates of in-person appearance to virtual appearance, Colorado has found that failures to appear dropped from 46% to 9%. Other jurisdictions found similar results. North Dakota saw appearances go up from 80% to nearly 100% for criminal warrant hearings. New Jersey saw failures to appear drop from 20% to 0.3% when its criminal courts went virtual.¹ Virtual appearances allow attorneys to keep costs down, it improves the diversity and quality of representation, and it allows more competition for public defender contracts in rural areas.

By the same token, courts cannot mandate that a defendant appear virtually without a waiver of in-person attendance. Art. I § 12 of the Utah Constitution specifically identifies the right of defendants in “criminal prosecutions” to “appear and defend in person[.]” This goes beyond the right of confrontation, which is identified elsewhere in that provision. The right of confrontation has specifically been recognized as requiring in-person appearance except in rare situations allowing a witness to testify outside of the presence of the accused.²

¹ Colorado Access to Justice Commission, *Remote Court Proceedings: Opportunities and Challenges in Colorado* 1, 14-15 (Dec. 2022), available at https://www.coloradoaccesstojustice.org/files/ugd/c659b2_a6f97bc9edc84f9294a6d415cf3aec3a.pdf?index=true

² *Cf. Coy v. Iowa*, 487 U.S. 1012 (1988) and *Maryland v. Craig*, 497 U.S. 836 (1990).

Moreover, waivers of fundamental rights cannot be presumed from “inaction,”³ but waivers can be made by conduct that indicate knowing and voluntary relinquishment.⁴ In conjunction with this proposal, Rules 7 and 7A should be modified to include a condition that courts notify a defendant of the right to appear in-person for court and allow the defendant to waive the right to appear in summary proceedings.

Summary

This amendment to rule 17.5 creates uniformity on when virtual access to courts is appropriate. It designates presumptions of in-person appearance for evidentiary hearings and flexible appearance in most other settings. It describes what factors a court must consider before deviating from the presumption and, when objected to, describes a review process to the presiding judge. It creates uniformity on public access to courts through virtual means and a process to continue matters through email by stipulation of the parties in lieu of written motion.

Rule 17.5. Hearings ~~with contemporaneous transmission from a different location.~~

~~(a) The court, in its discretion, may conduct the arraignment, bail hearing, and/or initial appearance with a defendant attending by contemporaneous transmission from a different location without the agreement of the parties or waiver of the defendant’s attendance in person.~~

~~(b) For any other type of hearing, the court may conduct the hearing with a defendant attending by contemporaneous transmission from a different location only if the parties agree and the defendant knowingly and voluntarily waives attendance in person.~~

~~(c) For good cause and with appropriate safeguards the court may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives the right to confront the witness in person.~~

(a) Definitions.

(1) In-Person Proceeding. A court hearing at which all parties, counsel, and other participants are physically present in the courtroom.

(2) Flexible Proceeding. A court hearing where parties, counsel, and other participants may elect to appear in person in the courtroom or appear virtually without seeking prior authorization from the court.

³ *Barker v. Wingo*, 407 U.S. 514, 526 (1972) (“Such an approach, by presuming waiver of a fundamental right from inaction, is inconsistent with this Court’s pronouncements on waiver of constitutional rights. The Court has defined waiver as an intentional relinquishment or abandonment of a known right or privilege. Courts should indulge every reasonable presumption against waiver, and they should not presume acquiescence in the loss of fundamental rights.”).

⁴ See e.g., *State v. Wanositik*, 2003 UT 46.

(3) **Virtual Appearance.** An appearance at a court hearing by computer or electronic device that includes simultaneous video and audio transmission. Virtual appearances may include appearing by telephone without video transmission if authorized by the court.

(b) Presumptively In-Person Proceedings. All criminal proceedings must be presumptively held in-person. A defendant may waive the right to an in-person appearance or proceeding.

- (1) The court may accept the waiver and allow a proceeding to be conducted by virtual appearance except that the defendant may not waive an in-person appearance in a trial in which the highest-level offense is a felony.
- (2) The court will not accept a waiver if a victim as described in article I section 28 of the Utah Constitution indicates a desire to be heard in-person at an important criminal justice hearing.
- (3) The court will not issue a warrant for a defendant who appears virtually to an in-person proceeding unless the court determines that the defendant has willfully used the virtual appearance to evade a required in-person appearance.

(d) Virtual Access to Courts. A link to a virtual transmission allowing parties, counsel, other participants to participate, and the public to attend court must be prominently displayed on the court's website. The link must be accompanied by instructions that:

- (1) a member of the public who records or streams any proceedings without prior authorization may be held in contempt.
- (2) any individual who is a witness to a case or has personal knowledge related to a case may be required to terminate virtual attendance to protect the integrity of the proceedings and may be held in contempt if the person fails to abide by an order from the court to do so.
- (3) a participant who is disruptive may be required to terminate virtual attendance and may be subject to contempt.
- (4) not all proceedings are open to virtual access.
- (5) by opening the link to attend court virtually, a defendant who is scheduled for court that day is waiving the right to appear in-person for that proceeding.

(h) Factors to consider in allowing virtual attendance.

- (1) The following non-exhaustive list of factors may be used to determine whether a defendant should be allowed to waive in-person appearance as allowed by this rule.

- (A) The likelihood of a resolution if the proceeding is conducted in-person;
- (B) The ability for parties to efficiently conduct the hearing virtually (*e.g.*, introduce evidence, make objections, and examine witnesses virtually);
- (C) Technological barriers that impede movement in the case such as the speed and quality of an internet connection;
- (D) The impact a virtual attendance would have on the availability for language interpretation or communication with individuals with disabilities;
- (E) An agreement by the parties to hold the hearing virtually including, if applicable, an express waiver by the defendant to the right of confrontation;
- (F) The cost and time savings to any party or participant including the lack of reasonably available childcare;
- (G) Transportation limitations of any party or participant;
- (H) Weather and safe travel;
- (I) The disability of a party including any illness;
- (J) The difficulty for counsel to travel to the court's jurisdiction for the proceeding;
- (K) Impact on employment of a party or participant;
- (L) Unavoidable scheduling conflicts of the parties or participants preventing the matter from moving forward in a timelier way;
- (M) The anticipated length of the proceeding;

(i) **Continuances and scheduling by email.** For any non-evidentiary matter in which the parties stipulate to a continuance or request a sooner date, the parties may inform the court of the stipulation by email no later than one day before a proceeding is set to take place in lieu of written motion. An email address for which the court may accept stipulations provided in this rule must be displayed on the court's website.

(j) Denial of virtual attendance to the public. The court may prohibit virtual attendance by the public for any in-person or flexible proceeding by weighing similar considerations to those given in the Utah Code of Judicial Administration 4-401.01(2)(b). The court may also prohibit virtual attendance for proceedings in a Problem Solving Court, or in an evidentiary hearing in which exclusion is invoked through Utah Rule of Evidence 615 and the court determines that an admonishment to virtual attendants consistent with part (d) of this rule would not adequately ensure that the order of exclusion would be followed.

(dk) Nothing in this rule precludes or affects the procedures in rule [15.5](#).