



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

**Meeting Minutes
March 19th, 2024**

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		
Matthew Hansen	X		
Judge Denise Porter	X		
Janet Reese	X		
Lori Seppi	X		
Karin Fojtik	X		
Judge Kristine Johnson		X	
Adam Crayk		X	
Lindsey Wheeler		X	

Agenda Item 1: Welcome and Approval of January 16th, 2024 Minutes

Doug Thompson welcomed the members of the Committee and announced that minutes from the last meeting will be circulated via email for the Committee to review and approve.

Agenda Item 2: Report from the Supreme Court on Rule 9A

Doug then addressed the feedback from the Supreme Court on Rule 9A, which Doug presented to the Court at its last conference. In general, the Court recommended changes to clean up some of the language used throughout the Rule. The Court also struggled to understand how to define the term “subsequent court proceeding” in the Rule and suggested removing the term. Doug asked the Committee whether anyone had concerns or questions about these changes. Karin considered a title change to the Rule, but Doug and Karin agreed that the Rule should remain changed. After discussion concluded, Karin moved to approve the recommended changes to Rule 9A made by the Supreme Court, William Carlson seconded the motion, and without opposition, the motion carries. The Rule will be sent back to the Supreme Court for consideration and published for public comment.

Agenda Item 3: Proposed Amendment to Rule 17(k)

Doug then turned the Committee’s attention to Rule 17(k), and asked Lori Seppi to take over discussion of the proposed amendments to the Rule. Lori explained to the Committee that prior to 2001, the Rule provided that a jury could take all court instructions, exhibits, and papers into deliberations, other than depositions. However, in 2001, the Rule was amended to state that a jury may take all court instructions and exhibits into deliberations, except those that the court determines the jury should not take. Lori then summarized portions of the advisory committee notes to the Rule and reviewed the facts and holdings of *State v. Wyatt* about whether evidence that is testimonial in nature should go back to the jury during deliberations. Lori then noted that the Supreme Court included a footnote in its opinion in *Wyatt* for the Committee to address whether additional guidelines should be built into Rule 17(k) about whether exhibits should be withheld from the jury based on a risk of undue emphasis. Lori reviewed suggested amendments to the Rule 17(k) that include using the language regarding undue emphasis or undue advantage to one side or another. Lori then invited

Doug to continue the discussion. Doug agreed that this is a Rule amendment the Committee should pursue, including addressing what materials are appropriate for the jury to consider and whether the common law rule should apply to the Rule or not. Judge Porter also discussed the possibility of undue advantage towards a party when body camera footage is included in the materials made available to the jury for deliberations. David Ferguson discussed that a related issue may exist where a jury goes back to view certain exhibits, like videos multiple times and the jury begins to see or develop impressions about things that don't exist in the materials. Doug also explains that the rule shouldn't create an incentive to admit evidence where it otherwise wouldn't be admitted, meaning if the rule allows unfettered access to videos, a party may choose to admit the evidence via a recorded video, instead of live testimony. William Carlson also offered that there is a distinction between taking depositions or recorded testimony back into the jury deliberations, and body camera footage of the scene of the alleged crime, and each scenario creates a fundamentally different problem or scenario for the jury. Will expressed caution about hamstringing juries from accessing certain exhibits or evidence that limits their fact finding efforts. Judge Schaeffer-Bullock also agrees that the Rule could be construed as an expression of distrust in the jury if we limit their ability to access certain evidence admitted in the trial and instruct them on how they may deliberate on that evidence. Judge Schaeffer-Bullock also expressed concern about the disparate opinions among the bench about how to use the discretion afforded by the Rule to determine whether evidence of the same type or characteristic could create undue advantage through undue emphasis. Karin Fojtik added that a second evidentiary hurdle could be created against a party and could trigger due process issues for defendants if evidence becomes unavailable for review by the jury in deliberations but is highly relevant to their case. Doug asked the Committee to weigh in on the definition of the term "exhibit," which is not defined in the Rule. Judge Porter offered that anything tangible that is admitted as evidence in the trial is an exhibit, which could include something physical like a photo, USB drive, data file, etc. Lori also explained that depositions and testimony are not exhibits, even if they are reduced to transcripts or written medium that could be made available to the jury. Other exhibits, like a recorded CJC interview, are testimonial in nature and share the same characteristics as deposition testimony or live testimony, and accordingly, should not go back with the jury. What remains uncertain are things like police interrogations, body camera interviews, and other similar items. After the discussion, Doug invited the Committee to decide what direction the Committee should head with the Rule. Karin wondered whether the Court should weigh in on the Committee's direction, but Doug explained that the Court is hesitant to give that direction, and defers to the Committee's

discretion. Committee members also expressed hesitation with defining the term “testimonial in nature” within the Rule, given the lack of clarity and guidance available from recent case law. Lori suggested simply planting the term, “testimonial in nature” within the Rule, and allowing courts to grapple with what the term means and how it applies in their own cases. Judge Schaeffer-Bullock also offered that the term could have its own exceptions, like hearsay, where evidence might be offered that is itself testimonial in nature, but not being offered for the purpose of the testimony presented, but something else. For example, a body camera video being offered not for the words a defendant spoke, but how he spoke them (i.e., in a DUI case for slurred speech). Matt Hansen also provided some insight about his experience with jurors requesting to exhibit, like recordings, again during deliberations, including that bailiffs often accompany the exhibit and play it for the jurors so it can’t be manipulated, that judges don’t tell jurors certain evidence won’t go back with you when that evidence is first introduced, and that if a juror has watched a video once, its unlikely that unfair advantage is created by them watching the video again. Doug and Karin also provided insight from their experiences with the subject for the Committee’s discussion. Following all the discussion, Lori volunteered to create a proposal for the Committee’s next meeting.

Agenda Item 4: HB209 and Request to Amend Rule 12.5

Doug then addressed HB209 and its effect on Rule 12.5, but stated that the Committee would consider this item at its next meeting when Bryson is available to lead that discussion.

The meeting was adjourned at approximately 1:15pm. The Committee’s next meeting will be May 21st at 12:00pm via Webex.