Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

MEMORANDUM

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

To: Board of Juvenile Court Judges
Advisory Committee on Rules of Civil Procedure
From: Tim Shea
Date: June 7, 2010
Re: Expungement

I have been assigned responsibility for revising our information and forms for expungement in light of HB 21. House Bill 21 does not affect expungement of juvenile court records, but my review shows that we have some inconsistencies in our current rules, information and forms.

I recommend that CJA 7-308 be repealed. This rule contains nothing that is not already in Section 78A-6-1105, Expungement of juvenile court record, or URJP 56, Expungement. Rule 7-308 also contains some provisions that are contrary to the statute or other rules.

Rule 7-308 Provision	Other Law
Paragraph (1), eligibility	Subsection 78A-6-1105(1)(a).
Paragraph (2), clerk schedules hearing and notifies county attorney and juvenile probation	URJP 56(b). Rule 7-308 does not require notice to the agencies with records, although this is required by Rule 56 and Subsection 78A-6-1105(1)(e).
Paragraph (3),p etitioner shall obtain a Right of Access Certificate from the Bureau of Criminal Identification	Subsection 78A-6-1105(1)(d) The statute calls this the a "criminal history report."
Paragraph (4), hearing. (findings and order)	Subsection 78A-6-1105(2)(b)
Paragraph (5), order (method of sealing records)	To the extent that the rule regulates sealing court records, it the point is covered by Rule 4-205. To the extent that the rule governs sealing agency records, it conflicts with Subsection 78A-6-1105(3).
Paragraph (5), petitioner responsible for serving the order	Subsection 78A-6-1105(3)

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I also recommend that URJP 56 be amended to delete the requirement that the petitioner "obtain and file ... verifications from local law enforcement agencies in every community in which the petitioner has resided during the entire time period covered in the minor's record stating whether petitioner has a criminal record." These "verifications" are not required in the statute and are not mentioned in the forms or instructions on our website. From the description, they seem to duplicate juvenile court records during the petitioner's minority and the criminal history report after the petitioner reached adulthood.

I recommend that paragraph (d)(2) of Rule 56 be deleted because it conflicts with Subsection 78A-6-1105(3). It also conflicts with paragraph (c) which provides that the records are to be sealed "as provided in Section 78A-6-1105."

I recommend that paragraph (d)(3) of Rule 56 be deleted because it conflicts with CJA 4-205.

Most of the rest of Rule 56 is already covered by Section 78A-6-1105, but there may be some advantage to having the procedural provisions in the rule as well as the statute.

Finally, it appears that most people are unaware of the requirement of Section 78A-6-1105(4), which provides that only the subject of the expunged record (presumably the petitioner) can request that an expunged record be unsealed. (See highlighted text in subsection (4).

Encl. CJA 7-308. Expungement procedures.
URJP 56. Expungement.
Section 78A-6-1105. Expungement of juvenile court record.

Rule 7-308. Expungement procedures. (Repeal)

Intent:

To establish uniform expungement procedures in the Juvenile Court.

To establish the responsibility of the court clerks in the expungement process.

Applicability:

This rule shall apply to the Juvenile Court.

Statement of the Rule:

(1) Eligibility of petitioner. Individuals seeking expungement of juvenile court records are not eligible to obtain an expungement unless:

(A) one year has elapsed from the time that the juvenile court terminated jurisdiction over the individual seeking expungement or one year has elapsed from that time that the individual was unconditionally released from a Youth Corrections secure facility;

(B) the individual is 18 years of age or older; and

(C) the individual has paid the required filing fee.

The court, in its discretion, may approve exceptions to paragraphs (B) and (C).

(2) Responsibility of the clerk. If the petitioner meets the foregoing criteria or is exempted by the Court, the clerk shall provide and assist the petitioner in the preparation and filing of expungement forms. The forms will include a petition and proposed order. Upon filing the petition, the clerk shall calendar the matter for hearing. The clerk shall notify the county attorney of the scheduled hearing and notify the Juvenile Probation Department of the pending petition.

(3) Responsibility of the petitioner. The petitioner shall complete the petition and obtain a Right of Access Certificate from the Bureau of Criminal Identification.

(4) Hearing. If the Court finds, upon hearing, that the petitioner has not been convicted of a felony or a misdemeanor involving moral turpitude and has been satisfactorily rehabilitated, the Court shall execute the proposed order directing the sealing of all petitioner's records in the custody of the juvenile court and all petitioner's records in the custody of any agency or official which pertain to the subject of the expungement.

(5) Order of expungement.

(A) Upon payment of the appropriate fees, certified copies of the executed order of expungement shall be provided to the petitioner. The petitioner shall be responsible for service of the certified copies of the order to all affected agencies identified in the order.

(B) Upon receipt of the order, all agencies shall remove from their files and computers any information pertaining to the petitioner that was generated while the petitioner was under the age of eighteen years and seal said records.

(C) The clerk shall gather in one file all of the juvenile court's legal, social, and administrative files. The file shall be sealed by a wax sealant or securely fastened so

that any attempt to open the file will be evident. The petitioner's full name, address and date of expungement shall be recorded on the file.

Rule 56. Expungement.

(a) Any person adjudicated in a minor's case may petition the court for an order expunging and sealing the records pursuant to Section 78A-6-1105.

(b) Upon filing the petition, the clerk shall calendar the matter for hearing and give at least 30 days notice to the prosecuting attorney, the Juvenile Probation Department, the agency with custody of the records, and any victim or victims representative of record on each adjudication identified by petitioner as being subject to expungement who have requested in writing notice of further proceedings. ~~The petitioner shall obtain and file with the petition verifications from local law enforcement agencies in every community in which the petitioner has resided during the entire time period covered in the minor's record stating whether petitioner has a criminal record.~~

(c) If the court finds, upon hearing, that the conditions for expungement under Section 78A-6-1105 have been satisfied, the court shall order the records of the case sealed as provided in Section 78A-6-1105.

(d)(1) The clerk shall provide certified copies of the executed order of expungement to the petitioner and the petitioner shall deliver a copy of the order to each agency in the State of Utah identified in the order.

~~(d)(2) Upon receipt of the order, all law enforcement agencies shall remove from their files and computers any information pertaining to the petitioner that was generated while the petitioner was under the age of 18 years and seal said records.~~

~~(d)(3) The clerk shall gather in one file all of the juvenile court's legal, social, and administrative files. The file shall be sealed or securely fastened so that any attempt to open the file will be evident. The petitioner's full name, address and date of expungement shall be recorded on the file.~~

(d)(4) A person whose juvenile record consists solely of nonjudicial adjustments as provided for in Section 78A-6-602 may petition the court for expungement as provided for in Subsection 78A-6-1105(6).

78A-6-1105. Expungement of juvenile court record -- Petition -- Procedure.

(1)(a) A person who has been adjudicated under this chapter may petition the court for the expungement of the person's juvenile court record and any related records in the custody of a state agency, if:

(i) the person has reached 18 years of age; and

(ii) one year has elapsed from the date of termination of the continuing jurisdiction of the juvenile court or, if the person was committed to a secure youth corrections facility, one year from the date of the person's unconditional release from the custody of the Division of Juvenile Justice Services.

(b) The court may waive the requirements in Subsection (1)(a), if the court finds, and states on the record, the reason why the waiver is appropriate.

(c) The petitioner shall include in the petition any agencies known or alleged to have any documents related to the offense for which expungement is being sought.

(d) The petitioner shall include with the petition the original criminal history report obtained from the Bureau of Criminal Identification in accordance with the provisions of Subsection 53-10-108(8).

(e) The petitioner shall send a copy of the petition to the county attorney or, if within a prosecution district, the district attorney.

(f)(i) Upon the filing of a petition, the court shall:

(A) set a date for a hearing;

(B) notify the county attorney or district attorney, and the agency with custody of the records at least 30 days prior to the hearing of the pendency of the petition; and

(C) notify the county attorney or district attorney, and the agency with records the petitioner is asking the court to expunge of the date of the hearing.

(ii) The court shall provide a victim with the opportunity to request notice of a petition for expungement. A victim shall receive notice of a petition for expungement at least 30 days prior to the hearing if, prior to the entry of an expungement order, the victim or, in the case of a child or a person who is incapacitated or deceased, the victim's next of kin or authorized representative, submits a written and signed request for notice to the court in the judicial district in which the crime occurred or judgment was entered. The notice shall include a copy of the petition and statutes and rules applicable to the petition.

(2)(a) At the hearing, the county attorney or district attorney, a victim, and any other person who may have relevant information about the petitioner may testify.

(b) In deciding whether to grant a petition for expungement, the court shall consider whether the rehabilitation of the petitioner has been attained to the satisfaction of the court, taking into consideration the petitioner's response to programs and treatment, the petitioner's behavior subsequent to adjudication, and the nature and seriousness of the conduct.

(c) The court may order sealed all petitioner's records under the control of the juvenile court and any of petitioner's records under the control of any other agency or official pertaining to the petitioner's adjudicated juvenile court cases, including relevant related records contained in the Management Information System created by Section 62A-4a-1003 and the Licensing Information System created by Section 62A-4a-1005, if the court finds that:

(i) the petitioner has not, since the termination of the court's jurisdiction or his unconditional release from the Division of Juvenile Justice Services, been convicted of a:

(A) felony; or

(B) misdemeanor involving moral turpitude;

(ii) no proceeding involving a felony or misdemeanor is pending or being instituted against the petitioner; and

(iii) a judgment for restitution entered by the court on the conviction for which the expungement is sought has been satisfied.

(3) The petitioner shall be responsible for service of the order of expungement to all affected state, county, and local entities, agencies, and officials. To avoid destruction or sealing of the records in whole or in part, the agency or entity receiving the expungement order shall only expunge all references to the petitioner's name in the records pertaining to the petitioner's adjudicated juvenile court cases.

(4) Upon the entry of the order, the proceedings in the petitioner's case shall be considered never to have occurred and the petitioner may properly reply accordingly upon any inquiry in the matter. Inspection of the records may thereafter only be permitted by the court upon petition by the person who is the subject of the records, and only to persons named in the petition.

(5) The court may not expunge a juvenile court record if the record contains an adjudication of:

(a) Section 76-5-202, aggravated murder; or

(b) Section 76-5-203, murder.

(6)(a) A person whose juvenile court record consists solely of nonjudicial adjustments as provided in Section 78A-6-602 may petition the court for expungement of the person's record if the person:

(i) has reached 18 years of age; and

(ii) has completed the conditions of the nonjudicial adjustments.

(b) The court shall, without a hearing, order sealed all petitioner's records under the control of the juvenile court and any of petitioner's records under the control of any other agency or official pertaining to the petitioner's nonjudicial adjustments.

Tab 3

From: Carol Verdoia
To: Gregory, Katie
Date: 6/1/2010 4:59 PM
Subject: Fwd: Juv Rules changes

Looks like we have another issue to add to our agenda regarding URJP 29A and URCrP 15.5.

>>> Matthew Janzen <MJanzen@slco.org> 05/28/2010 11:08 AM >>>
My understanding is that you are the chair to the juvenile rules committee. I would like to suggest that when the committee meets in July, it addresses Rule 29A of the Utah Rules of Juvenile Procedure.

1 ½ years ago, the corresponding Rule 15.5 of the Utah Rules of Criminal Procedure was amended. Rule 29A (which was identical) was not updated at the time. At bare minimum, I think we need to have similar language (basically it worked out some of the Crawford issues and got rid of the need to subpoena the operator of the recording equipment at the CJC centers).

However, I think the entire rule for juvenile court needs to be re-evaluated. Why does the judge--in the capacity of magistrate--need to review and rule upon the trustworthiness and reliability of the CJC recording in a pretrial hearing? This is necessary in adult criminal proceedings where there is a different fact finder (i.e., jury). In juvenile court the fact finder at trial is the same judge that previously reviewed the recording. Why can't the rule simply state that if the child is present at trial and defense had the opportunity for cross-examination (i.e., Crawford), then the CJC recording (i.e., the prior statements of the child) may be also introduced as substantive evidence and the court will take it for the weight it deserves. My experience is that everyone involved finds it unnecessary (and some defense counsel have argued harmful to their case) that the juvenile judge reviews the CJC recording twice, let alone be required to make written findings that the evidence is "trustworthy and reliable."

I would be happy to discuss my thoughts on this matter further.

Matthew B. Janzen

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Rule 15.5. Out of court statement and testimony of child victims or child witnesses of sexual or physical abuse - Conditions of admissibility.

(a) In any case concerning a charge of child abuse or of a sexual offense against a child, the oral statement of a victim or other witness younger than 14 years of age which was recorded prior to the filing of an information or indictment is, upon motion and for good cause shown, admissible as evidence in any court proceeding regarding the offense if all of the following conditions are met:

(a)(1) the child is available to testify and to be cross-examined at trial, either in person or as provided by law, or the child is unavailable to testify at trial, but the defendant had a previous opportunity to cross-examine the child concerning the recorded statement, such that the defendant's rights of confrontation are not violated;

(a)(2) no attorney for either party is in the child's presence when the statement is recorded;

(a)(3) the recording is visual and aural and is recorded on film, videotape or other electronic means;

(a)(4) the recording is accurate and has not been altered;

(a)(5) each voice in the recording is identified;

(a)(6) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party;

(a)(7) the defendant and his attorney are provided an opportunity to view the recording before it is shown to the court or jury; and

(a)(8) the court views the recording before it is shown to the jury and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence.

(b) In a criminal case concerning a charge of child abuse or of a sexual offense against a child, the court, upon motion of a party and for good cause shown, may order that the testimony of any victim or other witness younger than 14 years of age be taken in a room other than the court room, and be televised by closed circuit equipment to be viewed by the jury in the court room. All of the following conditions shall be observed:

(b)(1) Only the judge, attorneys for each party and the testifying child (if any), persons necessary to operate equipment, and a counselor or therapist whose presence contributes to the welfare and emotional well-being of the child may be in the room during the child's testimony. A defendant who consents to be hidden from the child's view may also be present unless the court determines that the child will suffer serious emotional or mental strain if required to testify in the defendant's presence, or that the child's testimony will be inherently unreliable if required to testify in the defendant's presence. If the court makes that determination, or if the defendant consents:

(b)(1)(A) the defendant may not be present during the child's testimony;

(b)(1)(B) the court shall ensure that the child cannot hear or see the defendant;

(b)(1)(C) the court shall advise the child prior to his testimony that the defendant is present at the trial and may listen to the child's testimony;

(b)(1)(D) the defendant shall be permitted to observe and hear the child's testimony, and the court shall ensure that the defendant has a means of two-way telephonic communication with his attorney during the child's testimony; and

(b)(1)(E) the conditions of a normal court proceeding shall be approximated as nearly as possible.

(b)(2) Only the judge and an attorney for each party may question the child.

(b)(3) As much as possible, persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror so the child cannot see or hear them.

(b)(4) If the defendant is present with the child during the child's testimony, the court may order that persons operating the closed circuit equipment film both the child and the defendant during the child's testimony, so that the jury may view both the child and the defendant, if that may be arranged without violating other requirements of Subsection (b)(1).

(c) In any criminal case concerning a charge of child abuse or of a sexual offense against a child, the court may order, upon motion of a party and for good cause shown, that the testimony of any victim or other witness younger than 14 years of age be taken outside the courtroom and be recorded. That testimony is admissible as evidence, for viewing in any court proceeding regarding the charges if the provisions of Subsection (b) are observed, in addition to the following provisions:

(c)(1) the recording is visual and aural and recorded on film, videotape or by other electronic means;

(c)(2) the recording is accurate and is not altered;

(c)(3) each voice on the recording is identified; and

(c)(4) each party is given an opportunity to view the recording before it is shown in the courtroom.

(d) If the court orders that the testimony of a child be taken under Subsection (b) or (c), the child may not be required to testify in court at any proceeding where the recorded testimony is used.

Tab 4

From: Paul Wake
To: Gregory, Katie; Verdoia, Carol
Date: 3/23/2010 8:31 AM
Subject: URJP Committee

I would appreciate the opportunity to discuss with the committee whether there should be a juvenile rule similar to, or referencing, the new criminal rule 15A. Following United States v. Melendez-Diaz, the legislature this year ran HB 251, but before they passed it the Utah Supreme Court quickly produced this brand new criminal rule, Rule 15A (see http://www.utcourts.gov/resources/rules/approved/2010-02/URCrP015A.pdf). With that rule in place, the legislature figured the problem was fixed, and it dropped HB 251. Criminal Rule 15A basically says that the prosecution doesn't have to bring into court each and every person who ever handled a bit of evidence sent to the crime lab, but can instead rely on the toxicology report, unless the defense gives timely notice in advance of trial that it wants all those people at trial to establish chain of custody or the accuracy of the report or whatever. It's nice that the adult system has a fix for the problem, but it occurred to me that in the delinquency realm, we don't have the same fix. I'm wondering if we should. Thanks.

--
Paul Wake

Rule 15A. Scientific, Lab, and Analytical Reports - When prosecution required to produce foundation and chain of custody witnesses.

(a) In all prosecutions in which an analysis of a controlled substance or other evidentiary sample is conducted, a sworn copy of the analytical report signed by the director of the laboratory or the analyst, technician, or forensic scientist conducting the analysis, shall be admitted as prima facie evidence of the report's contents and conclusions and of the chain of custody pertaining to any sample tested.

(b) The defendant may, however, require that the prosecution produce the preparer of the report or chain-of-custody witnesses for cross-examination at trial by filing a written demand with the court and the prosecutor no less than 30 days before trial or 15 days after receiving the report, whichever is later. The court shall extend the demand time for good cause shown.

(c) If a written demand is filed, the prosecution shall be entitled to a continuance upon a showing that the prosecution, despite reasonable efforts, is unable to procure the attendance at trial of the preparer of the report or chain-of-custody witnesses. The time within which a trial is required to begin shall be extended by the length of the continuance.

(d) Failure to timely file a written demand waives the defendant's right to challenge the admissibility of the report or the sample's chain of custody on the ground that the prosecution did not call the preparer of the report or chain-of-custody witnesses.

MEMORANDUM

TO: **Juvenile Rules Committee**
FROM: Paul Wake
SUBJECT: Criminal Rule 15A
DATE: March 26, 2010

May need to scan + send out for July mtg.

I would appreciate your consideration and discussion the juvenile rules committee should consider.

In *Melendez-Diaz v. Massachusetts*, the U.S. Supren state drug lab analyses are subject to the confrontation claus notice and demand statutes are constitutional, in that a state prosecution in advance if they want the prosecution to bring report is what it says it is.

The Utah legislature ran HB 251 this year to create a notice and demand statute. However, at the same time the Utah Supreme Court hurried through a new criminal rule, Rule 15A, that covers the same ground. At least, it sort of does. Since it's a criminal rule, it doesn't apply to delinquency proceedings because it wasn't adopted by the juvenile rules. Rule 15A states:

> **Rule 15A. Scientific, Lab, and Analytical Reports - When prosecution required to produce foundation and chain of custody witnesses.**
> (a) In all prosecutions in which an analysis of a controlled substance or other evidentiary sample is conducted, a sworn copy of the analytical report signed by the director of the laboratory or the analyst, technician, or forensic scientist conducting the analysis, shall be admitted as prima facie evidence of the report's contents and conclusions and of the chain of custody pertaining to any sample tested.
> (b) The defendant may, however, require that the prosecution produce the preparer of the report or chain-of-custody witnesses for cross-examination at trial by filing a written demand with the court and the prosecutor no less than 30 days before trial or 15 days after receiving the report, whichever is later. The court shall extend the demand time for good cause shown.
> (c) If a written demand is filed, the prosecution shall be entitled to a continuance upon a showing that the prosecution, despite reasonable efforts, is unable to procure the attendance at trial of the preparer of the report or chain-of-custody witnesses. The time within which a trial is required to begin shall be extended by the length of the continuance.
> (d) Failure to timely file a written demand waives the defendant's right to challenge the admissibility of the report or the sample's chain of custody on the ground that the prosecution did not call the preparer of the report or chain-of-custody witnesses.

When the Utah Supreme Court implemented this rule, the legislature dropped HB 251.

It seems to me that the same standard should apply in delinquency trials. I'm wondering if we should advance an identical rule, or adopt this one by reference, perhaps as a new Rule 43(d) (something like "Use of scientific, lab, and analytical reports shall be governed by Utah R. Cr. P 15A.")?