



## Utah Supreme Court's Advisory Committee on the Rules of Juvenile Procedure

### Meeting Minutes

*David W. Fureigh, Chair*

Location: Webex Meeting

Date: December 2, 2022

Time: 12:00 p.m. – 2:00 p.m.

<b><u>Attendees:</u></b> David Fureigh, Chair Judge Paul Dame Sophia Moore William Russell Michelle Jeffs Janette White Chris Yannelli Mikelle Ostler Carol Verdoia, Emeritus Member	<b><u>Excused Members:</u></b> Arek Butler Jordan Putnam Judge Debra Jensen Kristin Fadel Matthew Johnson
	<b><u>Guests:</u></b> Judge Michael Leavitt
<b><u>Staff:</u></b> Raymundo Gallardo Kiley Tilby, Recording Secretary	

**1. Welcome and approval of the November 4, 2022 Meeting Minutes: (David Fureigh)**

David Fureigh welcomed everyone to the meeting and welcomed Judge Leavitt as a guest regarding the first agenda item. Mr. Fureigh then asked for approval of the November 4, 2022, meeting minutes. Sophia Moore moved to approve the minutes. Michelle Jeffs seconded the motion, and it passed unanimously.

**2. Discussion - Rules of Evidence and Rules of Juvenile Procedure: (Judge Leavitt; All)**

David Fureigh reminded the committee of the proposed change to the Rules of Evidence to take out references to juvenile court proceedings, and to amend Rule 101 and 1101 of the Utah Rules of Evidence. Mr. Fureigh stated Judge Leavitt wanted to bring the changes to the juvenile rules committee. At the last committee meeting, William Russell brought up a few concerns and provided a document setting forth some considerations and talking points with regard to a few of the juvenile rules that may need some further discussion as a result of the proposed change to the Rules of Evidence. Mr. Fureigh inquired of the committee if there needs to be any changes made to the Rules of Juvenile Procedure, or if there are any further recommendations for Judge Leavitt to take back to the Rules of Evidence committee.

Judge Leavitt clarified that it was always his intent to amend Rule 101, 1101, 412, and 615 of the Rules of Evidence. Specifically, his intent is to propose changes to those rules clarifying the definitions section in Rule 101 that it includes juvenile court, make changes to Rule 1101 in the scope section, and remove any reference to juvenile court in Rule 412 and 615. Judge Leavitt represents he is trying to maintain what he thinks has been the rule all along and clarify the rules of evidence to indicate that if there are changes that need to be made in juvenile court, that the Juvenile Rules Committee make those changes. Judge Leavitt stated he appreciates Mr. Russell's analysis because it is helpful but indicates he does not believe those specific changes would need to take place now in order for him to move forward with his proposed changes to the Rules of Evidence.

Judge Leavitt further represented he made an additional proposed change to Rule 101(c) to clarify what is already outlined in Rule 1101 of the Rules of Evidence. Specifically, the change states, "To the extent the above definitions and the Utah Rules of Juvenile Procedure conflict, the provisions of the Utah Rules of Juvenile Procedure shall govern." Judge Leavitt stated he believes this language is consistent with Rule 1101 and would give this committee the authority to make any changes that need to be made regarding the applicability in delinquency proceedings.

Chris Yannelli represented he likes the change that has been made to Rule 101(c) and appreciates that it gives this committee the flexibility to go through the rules that Mr. Russell has identified and make changes as needed.

Judge Dame stated there are already a number of rules that modify applicability of the Rules of Evidence in juvenile court proceedings, including Rule 90, Rule 13(b), Rule 22(k), and Rule 27A. Judge Dame is in favor of Judge Leavitt's approach as he believes it will provide clarity and would also give authority to this committee to make modifications as necessary regarding the applicability of any of the Rules of Evidence. Judge Dame outlined his support for the proposed changes and expressed appreciation to Judge Leavitt for bringing it to this committee's attention.

William Russell indicated his support to the amendment of Rule 101(c) to make it more specific. Mr. Russell stated as previously pointed out by Judge Dame, it gives this committee the ability to go back and look at each rule and create a freestanding juvenile rule for their evidentiary or practice needs. Mr. Russell then went through his concerns to the rules that the change may affect. Mr. Russell specifically pointed out Rule 609 as it uses the word "conviction," and indicates that rule may need to be immediately addressed.

Judge Dame pointed out that Rule 101(b)(7) addresses that concern as it specifically defines "conviction" to include an adjudication in a juvenile delinquency case or proceeding. Mr. Russell expressed concern that it may be in conflict with part (c) of that rule and may be a convoluted.

Mr. Russell further stated if the committee majority thought Rule 404(c) was as offensive to the juvenile court as he personally believes it is, the committee would need to discuss and vote on whether to eliminate Rule 404(c). Under Judge Leavitt's proposed amendment, Rule 404(c) would be fully invoked in juvenile court. Mr. Russell clarified that he is in support of Judge Leavitt's proposed amendments, in large part, with a few exceptions as he had previously outlined.

Judge Leavitt stated Mr. Russell has valid points and indicates the purpose of his proposed amendment is to clarify that the Rules of Evidence apply in juvenile court proceedings, and then allow this committee the ability to make changes to the Rules of Juvenile Procedure as they see fit. Judge Dame and Mr. Russell expressed appreciation to Judge Leavitt for bringing it to the committee's attention and for his willingness to accept feedback.

Judge Leavitt was excused from the meeting.

The committee had continued discussion on how to move forward knowing the proposed amendments to the Rules of Evidence would likely go into effect within the next few months. The committee agreed they would like to take a closer look at the Rules of Juvenile Procedure that the change may impact, including those rules specifically outlined by Mr. Russell, and put it on as a discussion item at the next meeting.

### **3. Discussion & Action – Rule 6. Admission to detention without court order: (All)**

Mr. Fureigh stated a few committee members had circulated the proposed change to Rule 6 to various law enforcement agencies for feedback. Michelle Jeffs sent an e-mail to the committee regarding some comments from Weber County. Mr. Fureigh stated he went through the comments, and it appears law enforcement is concerned about declaring that they considered other alternatives and that language may be too broad. Law enforcement also expressed concern about declaring that on a form without having all the information and the lack of ability to make that determination in an already tense situation. Mr. Fureigh turned it over to Ms. Jeffs and Mr. Yannelli on their thoughts and the information they gathered from law enforcement agencies.

Ms. Jeffs conveyed that she has spoken to some of the chiefs throughout Weber County and their main concern is regarding the declaration that they considered reasonable alternatives. Ms. Jeffs stated law enforcement expressed concern of not being equipped to make that declaration based on the information they have. If there is a safety concern with victims, a law enforcement officer would have to vet what the reasonable alternatives would be and determine if the alternatives would be safe. Law enforcement does not believe they would have time to make that decision.

Ms. Jeffs further reported law enforcement is concerned about the statement regarding bias and questioned the purpose of having to sign a declaration to that effect. There were a few officers who wanted some further explanation regarding what it means to sign under criminal penalty, and what the consequence would be if a judge contradicted that finding. Ms. Jeffs is still waiting to hear back from Davis County regarding their feedback and input.

Mr. Yannelli stated he is still waiting on feedback from Salt Lake County. However, the feedback from the Fourth District has been much like the feedback Ms. Jeffs received. Mr. Yannelli represents there were several law enforcement agencies who stated they did not like the proposal but were not able to articulate why. Those who were able to articulate why they did not like it had similar concerns regarding the bias and alternatives language. Mr. Yannelli reports law enforcement agencies will normally call ahead to the detention center, explain the circumstances surrounding the individual that is being taken to detention, and ask the detention center if it were someone they would accept.

Mr. Yannelli further outlined law enforcement concern that if there is an individual who was deemed dangerous or a threat to the community, what other alternatives is law enforcement supposed to consider? Will they get in trouble if they do not consider other alternatives? Will there be training provided on those alternatives and the steps law enforcement will need to take to be in compliance with this declaration? Mr. Yannelli outlined Spanish Fork Police Department indicated they would sign it without issue, but that was the minority position, as other departments found the proposal to be insulting. Mr. Yannelli requested some additional time to follow up with Salt Lake County.

Judge Dame inquired if it would be appropriate to forward the information from law enforcement to Judge Beck and invite him to the next meeting so he can have a better understanding of what appears to be predominantly negative feedback from law enforcement. Mr. Fureigh stated it would be his suggestion to invite Judge Beck to the next committee meeting since it was his proposed change.

The committee will get final input from Salt Lake and Davis County and invite Judge Beck to the next committee meeting to discuss where to go from here.

#### **4. Discussion & Action - URJP Rule 18: (Judge Paul Dame; Sophia Moore)**

Mr. Fureigh stated at the last committee meeting, the committee decided to proceed with potentially amending Rule 18 to require a bilingual notice form be sent out for service in juvenile court proceedings. Mr. Fureigh represents Judge Dame and Sophia Moore agreed to work on the proposed language and their proposals have been provided in the materials. Mr. Fureigh also inquired of Raymundo Gallardo if there was an update regarding the creation of the form.

Mr. Gallardo indicated there was no update in regard to the form as he was waiting for the committee to make the amendments and then would work with the forms committee whenever we are ready to develop the form. The committee discussed wanting to ensure the form was ready and available prior to the amendment going into effect. Mr. Gallardo represented the amendment would not go into effect until May 1, 2023, and if the approval process goes beyond that date, it would not be until November 1, 2023. Mr. Gallardo will work with the forms committee to ensure the form is ready and available prior to the amendment going into effect.

Mr. Gallardo stated in reviewing the style guide, the style guide recommends using the word "will" when referencing the court. Mr. Gallardo proposed changing the language in line 75 and 105 of the amended rule to "will" instead of "must." Judge Dame reviewed the style guide and is agreeable to making that change.

Mr. Fureigh asks for approval of the amendment to Rule 18. Ms. Moore moves to approve the rule, with the changes as proposed by Mr. Gallardo. Janette White seconded the motion. No opposition is received, the motion carries. Mr. Fureigh represents he will take the proposed amendment to the Supreme Court and if they approve it, it will be sent out for comment.

#### **5. Discussion & Action - Rule 29C. Victim Restitution Orders: (William Russell)**

Mr. Fureigh stated the final agenda item was a proposed new rule to Rule 29 regarding victim restitution orders. Raymundo indicated he changed some of the "shall" language to "must" and "will" to comply with the style guide.

Mr. Russell indicated that as he previously mentioned at the last meeting, he has noticed a disparity of process in his district, as well as the districts throughout the state, regarding how restitution is handled. Mr. Russell expressed concern that a victim impact statement, loaded into CARE by a probation officer months before disposition, would be deemed adequate notice for the defense to respond without documentation. Mr. Russell stated the statute is clear restitution must be handled within 90 days of disposition and that the request for victim restitution must be submitted. Mr. Russell indicated the statute is not clear what is meant by "submitted" and does not clarify if it must be submitted to the court or served. Mr. Russell believes the due process clause would say the claim for restitution would need to be served on the parties. The source of the frustration is there is no process, and practitioners and judges don't know what to do with the restitution process and cases are sometimes being left languish until the 90 days has run. Mr. Russell has no intention of depriving victims of legitimate claims for restitution but believes it's important to have a process so the courts can move through these claims expeditiously.

Mr. Yannelli asks for clarification to Mr. Russell's proposed rule that restitution shall be based on the minor's ability to pay. Mr. Russell stated that subparagraph (e) of his proposed rule indicates the court will make a finding on the minor's ability to pay. Mr. Russell stated the victim must have documentation, which is required by statute and file a request for victim restitution which the statute is silent on. Mr. Russell then stated the next prong would be for the court to find causation, which is required by case law, under the proximate cause analysis that the conduct of the juvenile proximately caused the claimed damage sought in restitution. Finally, the court would have to make a finding that the minor has the ability to pay.

Mr. Yannelli inquired if the proposal would be that they litigate the case, and then hold a separate restitution hearing where the prosecutor would have to show the offense proximately caused the victim's material loss. Judge Dame responds that is how it should be done right now under due process and further stated if the parties agree on a restitution amount, no evidentiary hearing would be required. Judge Dame further stated the proposal would need to address restitution in non-

adjudicated offenses where the minor agreed to pay restitution and proposed to make a change to subparagraph (e) to include that language. Mr. Russell agreed.

Mr. Yannelli stated he understands the issue with the victim impact statement. However, the way he reads subsection (c) from a prosecution stand-point, is that the victim impact statement uploaded into CARE is sufficient for victim restitution. Mr. Yannelli is concerned that victims are being sent the victim impact statement and asked what financial and material loss they have, but this proposed rule would indicate that is no longer sufficient.

Judge Dame expressed the same concern. Judge Dame stated the victims are provided with the victim impact statement, which is a form given by probation, which outlines what the victim is asking for. This proposed rule would indicate if the victim didn't comply with a separate rule, then they would be barred from being entitled to restitution. Mr. Yannelli also stated on the victim impact statement, it specifically asks the victim if there is anything else they want the court to know, which gives the victim the impression that they are communicating with the judge. Mr. Yannelli expresses appreciation for the work Mr. Russell put into the proposed rule and likes the structure it provides, but requests additional time to pass it around to other prosecutors for their feedback. Ms. Jeffs agreed and indicated she would pass it around in her jurisdictions as well.

Mr. Russell stated the reason he drafted the proposed rule was to elicit candid feedback. Mr. Russell represented he knew subparagraph (c) would be the biggest issue and the rule was not crafted as a "fix all," but he tried to demonstrate his frustration with probation seeking something for a victim without complying with the statute and without proper notice. Mr. Russell indicated appropriate documentation needs to be provided, defense counsel needs to be served, and the prosecuting attorney needs to file a Motion for Restitution. That way, as a member of the bar, they can look at the legal theory of causation and hopefully they have also looked at the minor's ability to pay. Mr. Russell represented that the lack of process or procedure now is a due process flaw, and he does not know how else to fix the problem other than to change the victim impact statement or to require the prosecutor to file a Motion for Restitution that has a law-trained pair of eyes looking at legitimate, provable amounts. Mr. Russell reiterated that he understands subsection (c) needs to be reworked, but there has to be a better way than the lack of process there is now.

Judge Dame indicated the lack of due process is a huge concern. Judge Dame stated that a victim, at an evidentiary hearing, would be required to show proof in order for the court to make an order of restitution. Judge Dame believes there is a case which establishes that victims can be a limited purpose party for purposes of restitution. Judge Dame expressed appreciation for the work that has gone into this and understands the frustration.

Mr. Russell outlined there are multiple issues surrounding restitution, and he tried to address them all in his proposed rule. Mr. Russell stated not all judges are holding formal hearings on restitution, the burden is not clear, and the concept of

admitting evidence is not uniformly followed. Mr. Russell represents part of the rule is to outline that due process requires a hearing, and there has to be admissible evidence to prove restitution is owed. Judge Dame inquired how a judge is ordering restitution without a formal hearing and evidence. Mr. Russell responded that the level of informality has been difficult for him to advise his attorneys on how to handle those situations. Mr. Russell expressed concern that informal does not mean no due process and he believes a procedure on how to handle that would be helpful.

Mr. Yannelli stated that from a prosecution standpoint, if there is no stipulation on a restitution amount, the next step would be to sit down with defense and try to figure out how to proceed. Mr. Yannelli also pointed out that he does not remember a time where restitution in juvenile court was more difficult to obtain than it is now under Utah Code 80-6-710. Mr. Yannelli indicated he is not stating that is good or bad, but that he has had to have many difficult conversations with victims where he has to advise them that they likely won't get the restitution they are requesting. Mr. Yannelli believes the pendulum has swung in favor of the minor and the victims are on the losing end. Mr. Russell responded that the process Mr. Yannelli described where two lawyers sit down in good faith occurs 80% of the time. However, his proposal would be to eliminate the radical variability out of the remaining 20% of the cases.

Janette White brought up the issue of notice and inquired if there was a way for a liaison from the court to get funding for CARE to provide notice of filings. Carol Verdoia stated she was told from the beginning that would not happen, but it would not hurt to ask. Mikelle Ostler represented part of the problem, from what she understood, was child welfare and delinquency are under the same case. If a child is dually adjudicated, CARE cannot send notice to everyone. They tried to assign attorneys by incident, but that did not affect what they could see in CARE. Ms. Verdoia also indicated attorneys shift often and it would be a moving target on who to provide notice to.

The committee was in favor of putting this on next month's agenda for the committee to get other feedback.

**6. Old business/new business: (All)**

No old or new business was discussed.

The meeting adjourned at 1:30 PM. The next meeting will be held on January 6, 2023 at 12:00 PM via Webex.