



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

Meeting Minutes

David W. Fureigh, Chair

Location: Webex Meeting

Date: January 6, 2023

Time: 12:00 p.m. – 2:00 p.m.

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

1. Welcome and approval of the December 2, 2022 Meeting Minutes: (David Fureigh)

David Fureigh welcomed everyone to the meeting and welcomed Judge Beck as a guest regarding the first agenda item. Mr. Fureigh then asked for approval of the December 2, 2022, meeting minutes. Chris Yannelli requested a small change as it related to item five, paragraph five regarding the sufficiency of the victim impact statement for restitution and requested the word “not” be stricken from the minutes. With that amendment, Judge Dame moved to approve the minutes. William Russell seconded the motion, and it passed unanimously.

2. Discussion & Action - Rule 6. Admission to detention without court order: (Judge Steven Beck; All)

Mr. Fureigh introduced the first agenda item and indicated Judge Beck filed an Updated Petition to Amend Rule 6 based on the feedback that had been received from law enforcement. Mr. Fureigh stated he looked at the new proposal and if the committee decides to move forward with amending the rule, he has some suggested changes to subparagraph (b) that has been proposed.

Judge Beck stated he reviewed the feedback received from law enforcement and there were a few things that stood out. A recurring theme from the feedback was that police officers are not in the best position to ascertain whether alternatives have been considered. Judge Beck agrees that decision is a judicial decision that needs to be made by a judge, not law enforcement. As a result of that feedback, Judge Beck indicates he reworked the language in paragraph (b) so law enforcement can provide the court with all of the information they need to make a decision in that regard, including the reason the officer did not release the minor. Judge Beck stated some officers reported that when they take a juvenile to detention, they call the detention center to see if the offense qualifies as a bookable offense. As a judge, Judge Beck indicated he wants to know whether the juvenile was booked because it was a bookable offense, or because it was a bookable offense plus the juvenile is a flight risk and the parents are actively making plans to get out of the country. Judge Beck stated those are very different situations, and the statute requires officers to list the reason the child was not released. Judge Beck stated paragraph (b) of his proposal is an attempt to explicitly define the requirements that are already required and outlined in Utah Code 80-6-203.

Judge Beck further stated another comment he saw that was somewhat repeating is that the proposal was insulting. Judge Beck stated he understands having integrity questioned and that it can feel insulting. However, Judge Beck points out that these are constitutional requirements – to affirm law enforcement is telling the truth when they are detaining someone – which is outlined in his memorandum that was originally submitted. Judge Beck indicated he is more concerned about the youth of color being detained disproportionately than he is about an adult law enforcement officer being asked to sign a declaration that the reason the child is not being released is free from bias.

Judge Dame expressed appreciation to Judge Beck for his continued work on this issue. Judge Dame reiterates the four requirements that the form must include, and asked Judge Beck if the reason the focus on the third requirement (the reason the minor was not released by the peace officer) was to attempt to eliminate the disparity, as opposed to having Rule 6 include all requirements on the form. Judge Beck agreed, and stated that ideally, the form would address all four requirements, but indicated he does not believe he is the individual to write the language. Judge Beck stated he has reviewed over 20 forms and the first and second requirement seem to outline the same thing (probable cause), and the fourth requirement is something the detention staff is likely more capable of understanding than law enforcement. However, the third requirement is not being asked in the form and is not being volunteered by a great majority.

Matthew Johnson asked Judge Beck if the current form outlines a separate section where law enforcement needs to put in language detailing the steps made to release the child. Judge Beck stated there is not one, and it is something he hopes this committee will be able to accomplish. Judge Beck clarified that his concern is not as much the attempts made to release the juvenile but that he would like an indication as to why they were not released. Judge Beck provided an example to the committee that in one of the forms he reviewed, the juvenile and his parents were attempting to flee the country. Although that had nothing to do with the offense itself, Judge Beck stated the juvenile was clearly a flight risk, and law enforcement volunteered that information.

Judge Dame stated if the committee is going to rewrite Rule 6 to include what Judge Beck is suggesting, and is required by statute, Judge Dame believes Rule 6 should include all four requirements for the sake of completeness so someone is not looking at the rule and wondering why it requires the third requirement, but not the first, second, or fourth. Judge Beck agreed that is best practice and stated there are other people who may be better suited to write that language than himself.

Judge Dame asked Judge Beck about the changes to the language that the committee had previously made to his proposal. Judge Beck stated he agrees with the changes that were previously made. Judge Dame stated he understands the reason for the proposal Judge Beck has made and understands why law enforcement might feel insulted. However, after discussions with Judge Beck, Judge Dame indicated that as professionals in the juvenile system, there is frustration in the disparate treatment of youth and the proposal is something the juvenile system can do to focus everyone on that and attempt to reduce the disparate treatment.

Mr. Yannelli asked Judge Beck about (b) and states the last line of (b) says, "...the detention facility shall not accept the minor for detention if this section of the form is not completed." Mr. Yannelli asked Judge Beck for clarity if that was the repercussion, if it was statutory, or if Judge Beck believed it would be a good remedy. Judge Beck responded that he believes it is statutorily mandated because

it is a "shall." The statute outlines that when a child is taken to detention, a written report "shall" be promptly filed. Judge Beck indicated the proposed language is to emphasize that it is not a voluntary part of the form. Judge Beck stated he is not asking the detention center to make a finding as to whether it is sufficient, but is only asking that they make sure that something is included in that part of the form. Judge Dame stated he would hope the detention center would allow law enforcement an opportunity to correct the form, rather than turn them away or release the minor. Judge Beck agreed.

William Russell stated he would make a proposal to JJYS to make a new form that had that separate section as the proposed rule provides to state the last and separate reason, that is separate from the probable cause section. Judge Dame indicated it is a procedural rule because it requires the form to include those separately and is an attempt to get compliance with the statute. Judge Dame stated the committee would need to work with JJYS to have the form available state-wide before the rule is passed. Mr. Fureigh asked if there is somewhere that directs JJYS to create a form. Judge Dame stated there is not, but JJYS will need to develop a form. Judge Beck stated in the forms he reviewed, there were different versions of the form. The committee then discussed working with JJYS to develop a form and brainstormed the contents of the form, how it would be formatted to include each section in the statute, etc. Blake Murdoch stated he could work with JJYS to create a form so there is consistency. Judge Dame requested the ability to review the draft form before it is published. The committee further discussed there will likely need to be training to law enforcement throughout the state if the amendment to Rule 6 is passed and a new form is created.

The committee then discussed bias. Mr. Yannelli indicated internal biases exist and law enforcement needs to be aware of that. Michelle Jeffs stated the majority of the consensus she heard was that if what is being asked is, "are we free from racial bias?" However, Ms. Jeffs indicated bias could be a lot broader than that and there was concern expressed about how law enforcement could certify that it was free from bias when unconscious bias may exist that they are not even aware of. Judge Beck stated the constitution requires this, and it is not meant to be offensive, but rather is an opportunity to allow law enforcement time to pause and reflect.

Judge Dame stated he is happy to work on drafting another option on subpart (b) before the next meeting. Judge Dame indicated he is thinking the rule will outline that the form must have separate sections, which address each of the requirements under the statute. Judge Dame further stated the committee could then work with JJYS on the form to work on the different sections. Mr. Russell asked Judge Dame for clarification on the proposed changes and indicated he believes Judge Dame and Judge Beck working together to come up with a redraft would be ideal. Mr. Gallardo will send the redline version to Judge Dame and Judge Beck with the changes the committee had previously made.

Mr. Yannelli has some concern about the proposed language that states, "The detention facility shall not accept a minor for detention if this section of the form is not completed." Mr. Yannelli stated he agrees there is a reasonable presumption

that could happen, but since that remedy is not spelled out statutorily, he would not be in favor of that. Mr. Yannelli is concerned about the detention facility releasing the minor on a technicality. Judge Beck responded and proposed the following language, "The detention facility shall not accept a minor for detention until the form is fully completed." Mr. Yannelli indicated that will alleviate his concern. Judge Dame and Ms. Jeffs agreed that is a good suggestion.

Mr. Fureigh summarized the committee plan on how to move forward with Rule 6. Mr. Fureigh stated Judge Beck and Judge Dame will work on the proposed language and bring it to the next committee meeting for discussion. Mr. Fureigh further stated Ms. Jeffs had expressed the possibility of sending it back for law enforcement feedback, which can be addressed at the next committee meeting when the proposed changes have been made. Mr. Yannelli indicated he is still waiting on feedback from Salt Lake County and has not heard back.

3. Discussion & Action – Rule 22. Initial appearance and preliminary examination in cases under Utah Code section 80-6-503: (All)

Mr. Fureigh stated the committee had previously amended Rule 22 to clarify the time frames to conduct a preliminary hearing, as well as made some citation corrections and stylistic changes. Mr. Fureigh stated he took the proposal to the Supreme Court, and they adopted it. The proposed change went out for public comment and the comment period closed last month. No comments were received. Mr. Fureigh asked the committee for a motion to take it back to the Supreme Court and ask them to publish it. Judge Dame moved to send the amendment to the Supreme Court for publishing, and Janette White seconded the motion. The motion carried unanimously.

4. Discussion – Rules of Evidence and Rules of Juvenile Procedure: (All)

Mr. Fureigh reminded the committee about Judge Leavitt's appearance at a few committee meetings regarding some proposed changes in the Rules of Evidence that may have an effect on the practice in juvenile court. Mr. Fureigh stated Mr. Russell created a document (Tab 4) regarding his views regarding the effect the change may have on the juvenile rules. Mr. Fureigh turned the time over to the committee for discussion.

Judge Dame stated he believes Judge Leavitt's intent is to remove the language in the Rules of Evidence that references the juvenile court so there is no confusion with the rest of the rules. Mr. Fureigh stated that was his understanding as well. Mr. Yannelli stated he thinks the issues arose because practitioners wanted Rule 412 of the Utah Rules of Evidence to apply in juvenile court and the Rules of Evidence committee had made a change to that rule. Judge Dame stated that by doing that, it implied that if it does not specifically state it applies in juvenile court, then it does not apply. Judge Dame further stated there are apparently different

views throughout the state about how the Rules of Evidence apply to juvenile proceedings.

Mr. Yannelli expressed that he believes Rule 412 of the Rules of Evidence should apply in juvenile court for delinquency. Judge Dame expressed that where this is likely heading is that the Rules of Evidence committee will delete the juvenile delinquency language in 412 and 615, will amend Rule 101 to clarify the definitions section that Utah Rules of Evidence apply in juvenile proceedings, and amend Utah Rule of Evidence 1101 to clarify that the rules of evidence apply in juvenile proceedings unless otherwise provided by Utah Rules of Juvenile Procedure. Judge Dame stated it then comes to this committee to determine whether this committee wants to make a rule that excludes any rules of evidence from juvenile proceedings. Mr. Yannelli and Mr. Fureigh agreed. Judge Dame proposed that any committee members who believe a rule of evidence should not apply in juvenile court come forward and make the argument for the committee's consideration.

Mr. Russell stated his largest concern is related to Rule 404(c) of the Rules of Evidence and expressed that he does not believe that should apply to juvenile court proceedings. Mr. Russell's proposal would be for this committee to make Rule 404(c) inapplicable to juvenile court proceedings. Judge Dame asked if that was the only one he was proposing. Mr. Russell stated that is the only one that is going to be subject to his motion. Mr. Russell then stated the other rules, including 609 (impeachment), does not make a lot of sense to him and believes it needs to be clarified. Judge Dame stated he is trying to narrow down the substantive issues that need to be addressed on this topic. Mr. Russell asked the committee if they believe Rule 609 makes sense in juvenile court as written, as he does not have an answer.

Mr. Yannelli indicated he does not believe Rule 616 of the Utah Rules of Evidence (Statements made during custodial interrogation) should apply to juvenile court. Mr. Yannelli believes Rule 27A of the Utah Rules of Juvenile Procedure already addresses that. Mr. Russell stated if Judge Leavitt's proposed amendments to the rules of evidence goes through, Rule 616 would apply to juvenile court. Mr. Russell indicated the question becomes if that rule should be broadened to include misdemeanor, as well as felony which is a big leap. Mr. Yannelli responded that is why he is suggesting Rule 616 should be dealt with because there is a specific juvenile rule that applies. If Rule 404 is not going to be something that people think should be included in juvenile court, then Rule 616 should not be included either. Mr. Fureigh asked if Rule 616 addresses the same thing as Rule 27A or if Rule 616 is in conflict with Rule 27A. Mr. Russell responded that Rule 27A was recently amended to build in the statute about parental consents as a prerequisite to admission of custodial interrogation statements by the accused child. He believes if Judge Leavitt's amendments go through, then Rule 616 will be implicated with that. Mr. Yannelli agrees that it could potentially be implicated with it. Judge Dame suggested the committee clarify the rules the committee needs to take a closer look at and get feedback. Judge Dame stated he has not made a conclusion on any of the rules and would like to hear a position from the committee members.

Judge Dame stated he would like to hear from Mr. Russell on his concerns as it relates to Rule 404(c). Judge Dame further stated he does not know of any Utah case law that might be helpful on that, but he did find case law out of another state that deals with applicability of Rule 404(c) in relation to a juvenile delinquency adjudication being used in an adult criminal proceeding. Judge Dame outlined it is an Arizona case, *State v. Rose* (441 P.3d 999), that outlines once the threshold requirements are met under 404(c) of the Rules of Evidence, the juvenile's delinquency adjudication for child molestation is admissible in adult criminal proceedings. Judge Dame stated he is not sure what other conclusion states have come to and although it is not binding, Judge Dame believes it is interesting one way or the other.

Mr. Fureigh agreed that the committee should separate out the rules that are at issue as each of them are going to be different conversations and the committee is likely not able to tackle those rules in one agenda item. Now that the committee has identified the three rules, Mr. Fureigh asked the committee to bring any additional rules forward they feel might need to be looked at as a separate agenda item. Mr. Fureigh also asked that if a rule is brought forward, the committee member have some proposals for the committee's consideration. Mr. Fureigh then inquired about the hiring of a law clerk. Mr. Gallardo indicated Carolyn Sharp has been hired as a law clerk, who is present at the meeting. Mr. Fureigh then stated he is always interested in what other states are doing with regard to applying these rules of evidence in their juvenile courts. Mr. Fureigh stated any case law or statute research of other states with regard to the rules could be passed on to Mr. Gallardo and Ms. Sharp to assist with research.

Mr. Russell asked Judge Dame for the citation of *State v. Rose*, as mentioned earlier. Judge Dame provided Mr. Russell with the citation and indicated he has not done thorough research on the issue and has not read the case fully but wanted to throw it out there. Mr. Russell stated he has not been able to find anything on this issue, but he will have his clerk look at it closer and can be ready to present his position for the next meeting regarding Rule 404(c). Mr. Fureigh stated he will put it on the agenda for the next meeting, along with the other two rules outlined.

5. Discussion & Action - Rule 29C. Victim restitution orders: (All)

Mr. Fureigh stated Mr. Russell proposed Rule 29C dealing with victim restitution orders. Mr. Fureigh indicated his recollection of the issue was to provide some more consistency and direction as to how they were done by the juvenile courts. Mr. Fureigh indicated that Mr. Russell proposed the language and the committee wanted to set it over for another meeting for consideration and feedback from other prosecutors.

Mr. Yannelli stated he sent the proposed rule to other prosecutors and has not heard back. Ms. Jeffs stated she also sent it out but has not heard back, likely due to the delay in her sending it out for feedback with the holidays. Mr. Fureigh asked if the committee wanted another month to wait for feedback.

Judge Dame indicated he had a few comments on the proposal, though he would like to hear more from Mr. Russell. Judge Dame expressed concern about the proposed language not referencing at least five other statutes that deal with restitution orders. Judge Dame further stated, as far as subpart (f), that an argument can be made that under Rule 1101, that restitution hearings are part of a sentencing hearing and there is Utah case law that clarifies that in light of that, the rules of evidence do not apply to restitution hearings. Judge Dame also discussed whether Rule 29C(g), which outlines the proximate causation requirement, is procedural or substantive. Judge Dame stated there is no appellate case that clearly states proximate cause is the standard for juvenile restitution determinations. Although Judge Dame does not disagree that is the standard, Judge Dame outlined that where it is not clearly set out in a case explicitly, whether if it is more of a substantive issue and whether it should be put in a procedural rule.

Mr. Yannelli asked Judge Dame to provide the statutory references. Judge Dame provided the statutes as follows: 78A-6-120, 80-6-710, 80-3-403, 80-6-102(12), 80-6-610, and 80-6-709. Mr. Russell stated it is a good thought to amend that language, and it could be a simple fix.

Mikelle Ostler stated she had a minor suggestion to the proposed language regarding the victim impact statement. Ms. Ostler stated the victim packet is a three-part packet, which includes the victim impact statement, victim restitution statement, and contact information that is safeguarded. Ms. Ostler suggests the language be changed to specifically reference the Victim Restitution Statement, as that is the document that lists their expenses. Mr. Russell thanked Ms. Ostler for bringing up that distinction.

Judge Dame stated another thing the committee may want to consider is distinguishing between "submitting" and "filing." The rule requires them to file, as opposed to submit, and the statute requires them to submit which have different definitions. Mr. Yannelli outlined he believes that is part of the frustration that led to the development of the proposed rule by Mr. Russell. Mr. Yannelli stated when there is not an agreement or stipulation as to restitution, it is those scenarios Mr. Russell is trying to tighten up with the rule. Mr. Yannelli thinks the rule changes some of what is in the statute. Mr. Yannelli outlined that he understands why Mr. Russell wants a rule developed but indicated there will be situations where defense or prosecution may be disappointed. Mr. Yannelli believes the statute already provides some timelines, and this might be one where we have to live with the statute. Mr. Yannelli further stated that the rule Mr. Russell is proposing adds additional requirements that could or should be statutory that are not there but are just things that must be negotiated in practice. Mr. Yannelli indicated he was looking at subpart (d) in the proposed rule regarding supporting documentation and is concerned that may preclude the prosecution from submitting a request if the victim believed they provided the documentation but did not.

Mr. Yannelli and Mr. Russell then discussed the definition of "submitted." Mr. Russell stated the term "submitted," as referenced in the statute, is not clear. Mr.

Yannelli agreed that the statute could be clearer. Mr. Russell stated practitioners and judges need to have guidance on what the practices and procedures in juvenile court are so they can govern themselves like professionals. Further, Mr. Russell would like to be able to go to his client and give them some semblance of predictability about what the rules are and what the judges are looking at in making the determinations because it is not clear right now. Mr. Russell would like some basic rules and clarity of what to expect, rather than each judge making different procedures.

Mr. Fureigh stated Mr. Russell will go back and look at things based on Judge Dame's feedback. Mr. Yannelli and Ms. Jeffs will also get some input from the prosecutors. This will be placed on the agenda for the next committee meeting.

6. Discussion - The Judicial Council's Green Phase Working Group Report: (All)

Mr. Fureigh stated he glanced at the report and wanted to point out that back in 2016, this committee developed a couple of rules dealing with remote attendance at hearings. Mr. Fureigh outlined the committee developed Rule 29B for delinquency cases and Rule 37B for child welfare cases. Mr. Fureigh stated he recalls doing research surrounding that regarding the confrontation clause and how it applies in child welfare versus delinquency, which is why the committee ended up with two separate rules. Mr. Fureigh outlined that was pre-COVID, and suggested the committee look at those two rules and adjust the language as needed. Mr. Fureigh suggested the committee look at those rules. The report is asking the court to still consider doing at least some hearings virtually.

Mr. Gallardo stated he read the report and believes the bottom line is that the recommendation to the Judicial Council is that the determining person is the judicial officer whether to hold in-person, virtual or a hybrid hearing. If it is held in person, and a party requests a virtual appearance, that they show good cause. One of the recommendations to the Supreme Court is to define what "good cause" means to allow that party to appear virtually, or vice versa, if it is a virtual hearing, to have the hearing in person. Appendix C of the report gives several recommendations on the Rules of Juvenile Procedure that the committee should review again and consider amending again.

Mr. Fureigh stated he would have to look at the other rules to see if they require in-person attendance. Judge Dame stated the report references Rule 26 which requires a minor to appear in person, but if you look at the rule, it does not require they appear in person. It just outlines they have the right to appear in person. Judge Dame indicated the "good cause standard" is going to be quite a task in that context. Judge Dame believes what they are wanting is a definition of good cause and nothing comes to mind on how to specifically define that. Ms. White states each case is case-specific and there are certain situations that would apply in one hearing that would be apply in another. Ms. White believes they should leave it so each individual judge can determine what is appropriate for the specific situation. Judge Dame agreed and indicated it has not been an issue for him, and does not

know how you define good cause for this purpose as there are lots of reasons why one would object to an in-person versus remote. Mr. Russell also agreed this is a core judicial function.

Mr. Fureigh inquired if Mr. Gallardo knows what other committees are doing. Mr. Gallardo indicated he does not know and stated this committee may be one of the first that is reviewing this issue. Mr. Gallardo stated there is supposed to be a meeting with all other advisory committees and Mr. Gallardo believes one of the reasons for the meeting is to discuss this report and how they would like each committee to pursue this. Mr. Fureigh asked Mr. Gallardo to raise that issue. Mr. Gallardo stated he will raise the issue and represent that this committee does not see a need to define good cause.

The committee members agreed to take the rules outlined in the report and look at them. Judge Dame will look at Rule 7 and Rule 9. Ms. White will look at Rule 13 and Rule 18. Ms. Jeffs will look at Rule 22 and Rule 23A. Mr. Butler will look at Rule 26 and Rule 29B. Mr. Putnam will look at Rule 34 and Rule 37B. Mr. Johnson will look at Rule 50.

7. Old business/new business: (All)

No old or new business was discussed.

The meeting adjourned at 1:54 PM. The next meeting will be held on February 3, 2023 at 12:00 PM via Webex.