



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

Meeting Minutes

David W. Fureigh, Chair

Location: Webex Meeting

Date: March 3, 2023

Time: 12:00 p.m. – 2:00 p.m.

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

1. Welcome and approval of the February 3, 2023 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 February 3, 2023, meeting minutes. Judge Dame made a few grammatical changes. Mr. Russell also requested a change to the word predisposition, and clarifies he meant propensity. With those amendments, Mr. Russell moved to approve the minutes. Matthew Johnson seconded the motion, and it passed unanimously.

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

Mr. Fureigh stated he presented the proposed rule to the Supreme Court, along with Mr. Gallardo and Mr. Johnson. Mr. Fureigh indicated there was a lot of discussion and questions asked by the justices and Mr. Fureigh relayed the feedback to the committee. The Supreme Court indicated they did not necessarily like the “i.e.” approach in the proposed rule, and was concerned it may not match the intent of the legislature.

Mr. Fureigh outlined that another concern the justices raised was regarding section four of the proposed rule. The justices felt like section four of the proposed rule altered the sequence of events as required in the statute. The justices believe that the statute indicates the youth is taken to detention first, and the report is filed after, whereas the proposed rule indicates that the youth could not be admitted to detention until after the form was completed and signed by the officer or individual taking the youth to detention, which is contrary to the intent of the legislature. The justices also commented that they did not believe a rule can direct a detention facility as to what to do, or not do, in a particular situation.

Mr. Fureigh stated the justices did not believe they could require anyone to attest that what they are doing is free from bias. The Supreme Court felt that requiring a form to include this language adds a requirement to the statute that is not there, and that the statute already outlines the list of requirements that must be included in the form and the free from bias language is not one of them. There was also discussion about how everyone has biases, and the justices do not believe they can ask someone to say that their decision was completed free of bias in making their decision.

Mr. Yannelli stated he recalls Ms. Jeffs bringing up that issue in a prior meeting. Ms. Jeffs agreed and stated that has been her concern all along based on the trainings she has received regarding unconscious biases. Mr. Fureigh stated he understands where the Supreme Court is coming from, and outlined that he did not hide anything from the justices with regard to law enforcement feedback. Mr.

Fureigh also stated he went into the reasoning behind the proposed rule, and outlined to the Supreme Court that this committee understood it would not alleviate people from having biases but may at least cause the individual to pause and ensure the decision was not made based on some sort of bias. Mr. Fureigh outlined that the letter that was submitted to the Supreme Court for the reason behind the proposed rule was very thorough, and the justices applauded this committee for what they are trying to do but did not feel like we could ask that question on the form.

Mr. Fureigh asked Mr. Johnson and Mr. Gallardo if he had missed anything, and Mr. Johnson agreed it was a good summary of the feedback and concerns.

Mr. Fureigh stated he has a suggestion regarding the form. Mr. Fureigh outlined that JJYS is represented by the Attorney General's Office, and that Ms. White has been in contact with Mollie McDonald regarding the proposed rule and the form. Ms. McDonald indicated she would work with this committee and JJYS to develop a state-wide form. Mr. Fureigh stated he does not believe this committee needs to make a change to the rule, as JJYS could incorporate a lot of what was proposed in this rule into their form. In reviewing the statute, Mr. Fureigh indicated there is no statutory requirement for how the form should look, so Mr. Fureigh suggested the form could include some of that "i.e." language without having them specifically outlined in the rule. Mr. Fureigh stated he would be happy to work with the AAG that represents JJYS in developing a form that is better, as one of the concerns brought up by this committee was the lack of consistency in the forms throughout the state. As far as the language regarding bias, Mr. Fureigh does not think JJYS can put that in their form, and would guess the Supreme Court is not going to approve that requirement either.

Mr. Yannelli asked Mr. Fureigh if he asked the Supreme Court to give a draft of what they wanted. Mr. Fureigh stated the Supreme Court was not suggesting something else, but noted one of the justices stated if the language was more simplified and mirrored the statute, they would be more inclined to consider it. Mr. Fureigh stated the justices did not make a lot of comments as to why they did not like the "i.e." language, but stated they wanted it to be simplified, and expressed concern that it added language that was not otherwise in the statute.

Judge Dame asked Mr. Fureigh if the Supreme Court gave any indication as to why they did not believe they could direct a facility to do something. Mr. Fureigh stated the rules are procedures for the court, and they did not believe a rule could direct a facility on what to do or not do. Mr. Russell stated he believes it is likely also a separation of powers issue.

Mr. Russell stated he sees some of the points the Supreme Court comments were directed to. Mr. Russell commented that it sounded like the Supreme Court wanted a more de minimis rule that references the statute, and stated he is willing to go back to the drawing board. Ms. Moore asked if the Supreme Court was not wanting a Rule 6 at all, and Mr. Fureigh indicated they did not specifically state that, but he got the impression they did not believe it was necessary.

Mr. Johnson stated the Supreme Court did not state that a rule was not needed, but they outlined concern regarding the examples, the free from bias language, and that the rule directed a facility on what they can and cannot do. Mr. Johnson stated he remembers Ms. Verdoia stating previously that it is easier to keep a rule and make changes than it is to lose a rule and bring it back. Mr. Johnson outlined this committee could do a more de minimis rule that references the statute, and maybe include a few subsections from the statute.

Judge Dame asked Mr. Fureigh if the Supreme Court had any concern with the requirement of a declaration. Mr. Fureigh responded that they did not mention that. Judge Dame stated the major benefit of keeping the rule is to keep the declaration requirement, which he believes is one of the main goals Judge Beck wanted to accomplish by amending the rule.

Mr. Russell inquired as to Mr. Fureigh's suggestion again. Mr. Fureigh proposed that maybe the committee could accomplish something similar without having a rule by working with JJYS to create a form that includes the items outlined. Mr. Fureigh stated that other than the four things that need to be included in the form, there are no other mandates as to what can or cannot be in the form. This committee could also ask JJYS to include some of the "i.e." language that was outlined in the proposed rule. Mr. Fureigh has heard in the past that these forms do not contain all the requirements that the statute requires, which would be the benefit of creating a state-wide form. As far as the declaration, the Supreme Court did not address that too much, and Mr. Fureigh believes JJYS could add a declaration to their form if they wanted to.

Ms. White stated there is also a concern that there are different forms being used at different facilities and there is not one uniform form. Mr. Fureigh agreed and stated another reason why JJYS would be willing to work with this committee is to create a state-wide form. Mr. Fureigh stated DCFS has had a big focus lately on having state-wide forms so there is consistency throughout the state, and he believes JJYS would be in support of that as well. Mr. Yannelli stated there needs to be uniformity with the form and stated Blake Murdoch attended a few meetings ago and expressed his willingness to assist with the development of that form. Mr. Fureigh agreed, and stated he thinks he could convince JJYS to come up with a state-wide form that everyone is using that has all the requirements in the statute and contains the items this committee is requesting, with the exception of the free from bias language.

Mr. Yannelli stated he does not want to speak for Judge Beck, but he agrees with Judge Dame that the declaration was an important piece of this. Judge Beck agreed. Judge Beck stated he is agreeable with Mr. Fureigh's suggestion and believes most, if not everything, could be accomplished with the form. Judge Beck outlined if there was a state-wide form, that would be great. Judge Beck further expressed that the declaration is important, and that the constitution outlined that it must be supported by oath or affirmation. Judge Beck understands that it is not

specifically required in the statute, but there are constitutional principles that support it. Judge Beck agreed that if there is a form, Rule 6 does not need to be amended at all. Mr. Yannelli and Mr. Russell expressed support for that position as well.

Mr. Fureigh stated he will work with the AAG that works with JJYS regarding the form and will report back to this committee on whatever their decision is. Mr. Fureigh will share the proposed form with this committee if a new form is developed, and the committee can then decide at that time if they need to amend the rule or not. Ms. Verdoia agreed the issue is likely a separation of powers issue, and agreed this committee's concerns could potentially be addressed through the form.

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

Mr. Fureigh stated this was put back on the agenda as Mr. Yannelli was not able to attend the last meeting. Mr. Fureigh summarized that after the committee had some discussion regarding Rule 404(c) and Rule 609, Mr. Russell felt better about it but may propose something in the future. Mr. Fureigh outlined this committee wanted to provide Mr. Yannelli an opportunity to be heard on this issue.

Mr. Yannelli stated that for those who are not familiar with that rule, it is a felony prosecution rule that an electronic recording be made when a statement is given to law enforcement. Mr. Yannelli outlined that a few meetings ago, this committee discussed Rule 27A which references Utah Code 80-6-206. Utah Code 80-6-206 deals with interrogation of a child which is different than Rule 616, so given there was already a rule and statute dealing with an interrogation of a child, it was not necessary to make changes. Mr. Yannelli outlined that Rule 27A and the statute have different requirements than Rule 616. For example, in an interrogation of a child, the parent must be notified and present when a waiver is given. Mr. Yannelli believes the juvenile rule has greater safeguards for the truth because a parent or trusted adult is there pursuant to the law. Mr. Yannelli stated his opinion is that this committee doesn't need Rule 616 because there is already a specific rule and statute in place.

Mr. Yannelli then stated he believes there was another change to that rule and suggested that perhaps this committee should wait. Mr. Yannelli outlined that the legislature looked at the prong of Utah Code 80-6-206 because the law requires the parent to be present when the waiver is given, which was turning out to be a pain because often times parents were unavailable to be there and law enforcement was left waiting. Mr. Yannelli believes one of the changes proposed to be made to Utah

Code 80-6-206 is that the parent has to be notified, but no longer has to be physically present.

Mr. Russell pulled up H.B. 404 and stated the change allows a parent to appear via video if they cannot make it to the station. Mr. Russell then outlines at the very end of Utah Code 80-6-206, the proposal was to add language that law enforcement make an audio recording or audio/video recording that accurately records a custodial interrogation of a child. Mr. Russell indicated he did not know if this had been passed but was just learning about this proposed change today. Mr. Yannelli stated if it passes, it is a non-issue. Ms. Verdoia checked the status and indicated it passed the house, but it is stuck in the senate rules so they will know after midnight today.

Judge Dame suggested this committee hold off on any action until they see what happens with H.B. 404. The committee agreed to continue this discussion at the next committee meeting.

4. Discussion & Action – Rule 29C. Victim Restitution Orders: (All)

Mr. Fureigh stated that at the last meeting Mr. Russell stated there were some proposed statutory language change in the legislature regarding this issue. Mr. Fureigh inquired if there was an update regarding this proposal. Mr. Russell responded that he received a text within the last hour that the proposed bill had passed, and it was awaiting the governor's signature. Ms. Verdoia confirmed that was correct. Mr. Fureigh suggested this committee wait and see if the governor signs it and if it goes into effect, it may alleviate some of the concerns or issues Mr. Russell had. Mr. Russell agreed that it takes significant steps, although it is not a perfect solution.

Judge Dame expressed concern regarding the language in the statute and the confusion it may cause, specifically as it references the victim's attorney in the first part but only references the victim later in the proposed statute. Mr. Yannelli agreed there is already confusion by the proposed language. Ms. Verdoia inquired if this was on any of the committee members' radars to alleviate any confusion. Mr. Yannelli responded that he knows there were several organizations and individuals working on this issue and making compromises. Mr. Russell also indicated he knows there were people working on it and many discussions on how to reach a consensus on the interpretation to at least get some guidance. Mr. Russell stated the proposed legislation is better than nothing, though still problematic.

The committee agreed to look at this at the next committee meeting to see if there is anything further this committee needs to do.

5. Discussion – The Judicial Council’s Green Phase Working Group Report, and Supreme Court Memo: (All)

Mr. Fureigh stated that the committee set this matter over because they wanted to see what other committees were doing and get input as to the terms they were going to use. Since the last committee meeting, they have received a memo from the Supreme Court requesting feedback. Mr. Gallardo stated this committee could comment at a Supreme Court conference, and anyone, including the public, can comment through the public comment site. Mr. Fureigh inquired how the committee would like to move forward.

Judge Dame informed the committee that himself and Judge Jensen will be attending a juvenile judges meeting next week to address this particular topic.

Mr. Johnson stated that he was speaking with Ms. White the other day and wondered if the committee needed to put something in each of the rules, or if they could put something in Rule 18 with regards to the hearing process instead of each individual rule. Ms. White stated they also spoke about Rule 5 and including definitions for virtual hearings instead of each separate rule. Ms. Moore inquired if the Supreme Court was looking for a rule defining good cause, and stated she did not know if that would be this committee or another agency. Mr. Fureigh stated the Supreme Court is just looking for feedback at this point to get thoughts regarding what the rules should say and how they should be crafted, and then will direct the individual committees to look at it and develop the rules.

The committee then discussed the different practices within each jurisdiction regarding virtual hearings. Mr. Johnson stated each judge within Second District do things different. Mr. Putnam agreed, and stated Third District is a total mix with some judges requiring in-person hearings, some hybrid, some virtual, some are required to file a motion and others can e-mail the clerk. Ms. Moore stated this is a problem for conflict attorneys because they never know what to expect. Ms. Moore then stated the court internet is horrible, so attorneys have a difficult time appearing in person at one hearing, and then having to appear virtually for the next. Ms. Moore would like to see some consistency throughout the state.

Mr. Fureigh stated he thinks a lot of the reason behind the memo from the Supreme Court is due to the lack of direction right now, so they are looking for feedback. Mr. Fureigh then inquired if this committee wanted to submit something to the Supreme Court as a committee or handle it by individual or organization. Mr. Fureigh outlined that if this committee was going to submit something, the majority of the committee members would need to be on board on whatever feedback is given. Ms. Moore stated she thinks it would be best to wait and see what comes of it but would like to eventually have a rule at least in regard to procedure.

Mr. Johnson inquired if the Supreme Court was looking at the committee to create a whole new rule of procedure, or if the committee could add to the existing rules. Mr. Johnson noted the way the memo reads is a bit ambiguous. Mr. Fureigh

responded that he does not know yet, and thinks they are just taking feedback right now before decisions are made in regard to what the rules should look like and what they should allow. Mr. Fureigh noted this does not prevent this committee from developing or amending their own rules, but would hate to amend the rules and then have to change it again after direction is given from the Supreme Court. Mr. Johnson stated the committee should wait to prevent the committee from putting a lot of work into drafting amendments, and later having to start over. Mr. Yannelli agreed that things are still changing, and Ms. Moore noted it seemed like it changes almost daily.

Ms. White stated she understands there is inconsistency throughout the state, and even within each district, but Ms. White expressed concern that if the language is too specific, it could be problematic. Ms. White noted there is already a motion practice and she has never seen a judge deny a virtual appearance at the request of a party. Ms. Moore and Mr. Fureigh agreed that they have never seen a judge deny a virtual appearance, but acknowledged there must be some judges in the state that have since the Supreme Court has asked those specific questions.

The committee agreed not to submit feedback and would leave it up to each individual or organization to submit public comment.

6. Old business/new business: (All)

Mr. Fureigh asked the committee if any members had any old or new business they wanted to discuss. Ms. White stated there was an issue that has been brought up regarding Rule 2(a). Ms. White notes that Rule 2(a) talks about the applicability of juvenile rules and outlines that the rules of civil and criminal procedure also apply. Ms. White stated she has had a few requests to include substantiation proceedings in that section so it is clear. Mr. Fureigh stated how he has handled that in the past is to argue that substantiation proceedings involve neglect, abuse or dependency, since that is what is being challenged. Ms. White expressed concern with inconsistency across the state on how the judges handle that. Mr. Fureigh suggested Ms. White put it on the agenda and propose adding the substantiation proceedings language into Rule 2(a).

Mr. Fureigh then reminded all committee members of the in-person meeting in May and discussed the location of the meeting.

The meeting adjourned at 1:15 PM. The next meeting will be held on April 7, 2023 at 12:00 PM via Webex.