



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

Meeting Minutes

David W. Fureigh, Chair

Location: Webex Meeting

Date: April 7, 2023

Time: 12:00 p.m. – 2:00 p.m.

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

1. Welcome and approval of the March 3, 2023 Meeting Minutes: (David Fureigh)

David Fureigh welcomed everyone to the meeting and asked for approval of the March 3, 2023, meeting minutes. Judge Jensen moved to approve the minutes. Sophia Moore seconded the motion, and it passed unanimously.

2. Discussion & Action - Rule 18. Summons; service of process; notice: (All)

Mr. Fureigh stated the proposed rule went out for comment and only one comment was received. The comment stated the language regarding bilingual notice is vague, and that it should outline the two languages. Mr. Fureigh does not believe that makes any difference and asked for further discussion from the committee. There was no further discussion from the committee. Mr. Fureigh asked for a motion and second to take it to the Supreme Court for approval and publication. Judge Dame moved to submit for approval and publication, and William Russell seconded the motion. It passed unanimously.

Mr. Fureigh then requested volunteers from the committee to help create the language in the summons for the form. Mikelle Ostler volunteered as the clerical representative on the committee. Raymundo Gallardo indicated they just need a few volunteers to tailor the form to juvenile court specific matters that is consistent with juvenile court law. Mr. Gallardo indicates the plan is to get some dates from the volunteers to meet with the forms committee to draft the form. He will then take the form to their committee to get it approved. Mr. Gallardo would like to meet within the next few weeks. Janette White will also volunteer to help create the form.

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 first started working with this rule to fix some of the language regarding timing and when preliminary hearings should be held based on whether youth were being held in detention or not. After amending the rule, it was approved by the Supreme Court and sent out for public comment. The proposed rule was then approved by this committee to be submitted to the Supreme Court for final publication. A few days prior to taking it back to the Supreme Court, this committee learned about a joint resolution where the rule would be further amended so the committee decided to wait and see what happened with the proposed joint resolution. Mr. Fureigh represents there have been further amendments that have to do with the hearsay portion of the rule and the type of hearsay that is allowed at the preliminary hearing.

Mr. Fureigh inquired of Mr. Gallardo if the language had already been approved and whether this committee needed to take it in front of the Supreme Court or another committee. Mr. Gallardo responded that the language has already been approved and is effective May 3, 2023, based on the legislature path of the joint resolution. That will be presented to the legal department, and they will publish it to provide notice. Mr. Gallardo said he wanted to present the amendment that was made by the legislature so the committee could see what it looks like with the other amendments previously made by this committee. Mr. Gallardo was hoping it could be approved by this committee this month so they could have the amendments by this committee and the amendments by the legislature be effective on May 3, 2023.

Mr. Fureigh asked the committee for a motion and second to submit it to the Supreme Court. Judge Dame suggested in Line 57 where it says, “but not” to state “but may not” so it mirrors the language in 1102. Mr. Fureigh indicated this committee cannot make that change as it was part of the joint resolution, but he can make that suggestion to the Supreme Court to add it. Judge Dame made a motion to submit the proposed changes to the rule to the Supreme Court for publication. Janette White seconded the motion, and it passed unanimously.

Mr. Yannelli indicated he thinks the amendment should have been “The finding of probable cause may be based on hearsay, in whole or in part...” but he knows he does not get a say.

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

Mr. Fureigh reminded the committee that this issue was carried over due to pending legislation on the issue. Mr. Fureigh stated SB 49 passed, but HB 404 did not pass. Mr. Fureigh turned the time over to Mr. Yannelli to state where he believes the issue is at this point.

Mr. Yannelli indicated he did not know where he is now with the changes that have been made, but suggested Rule 616 of the Utah Rules of Evidence does not need to apply in juvenile court because there is a rule specifically dealing with custodial interrogation of minors (Rule 27A). Mr. Yannelli stated last time this committee met, Mr. Russell pulled up HB 404, which dealt with a proposal to make a video or audio recording of custodial interrogations to mimic Utah Rules of Evidence 616, so this committee decided to wait until this meeting to see if that passed. HB 404 did not pass. SB 49, however, did pass and there were some changes there regarding custodial interrogations.

Mr. Yannelli stated SB 49 changed Utah Code 80-6-206 with additions. The juvenile rule on admissibility, Rule 27A, already referenced 80-6-206, so he believes since there was a proposal in HB 404 to say there should be a video recording and that did not pass, that Rule 616 of the Utah Rules of Evidence does not apply in the juvenile court and Rule 27A and Utah Code 80-6-206 do apply. Mr. Yannelli thinks this committee needs to move forward and outline that since the Utah Rules of Evidence do apply in juvenile court, Rule 616 should be excluded from the applicability in juvenile court.

Judge Dame indicated the Utah Courts website uses the term “minor” in Rule 27A, but Westlaw and Nexus say “child.” Judge Dame inquired if this committee could contact someone who handles the Utah Court’s website and let them know that is an error and should say “admissibility of evidence given by a child.” Mr. Gallardo will bring that up and believes it can be a simple fix. Mr. Gallardo was able to locate the last amendment to Rule 27A in January 2022 and it was changed to “child,” so he will get that fixed.

Judge Dame stated the other question he had was Rule 616 of the Rules of Evidence deals with admissibility. The title of 27A seems to deal with admissibility, but there is nothing in the body of the rule that does. Judge Dame stated the inference could be made, but it might be helpful for the sake of clarity to add something to the end of Rule 27A that any failure to comply with the provisions in Utah Code 80-6-206 means it is not admissible. With that addition, Judge Dame agreed that Rule 616 would not apply, but that is the only gap that he sees. Judge Dame inquired of the committee if anyone else had that same concern. Mr. Fureigh said he believed that was assumed based on the title. Mr. Yannelli stated he does think Rule 27A was trying to say that if you comply with the statute, it is admissible.

Michelle Jeffs indicated the statute should specifically state the remedy. Ms. Jeffs noted that other states have that language, and she personally believes it should be in the statute and not in the rule. Judge Dame stated they likely did not put it in the statute because they felt it would be overstepping their mandate which is reserved for the Supreme Court.

Mr. Yannelli asked the committee if others agreed with his assessment that Rule 616 of the Utah Rules of Evidence is not applicable in juvenile court because Rule 27A and Utah Code 80-6-206 govern. Mr. Yannelli also inquired if this committee needs to specifically state that Rule 616 of the Utah Rules of Evidence does not apply to juvenile court. Mr. Fureigh does not believe this committee needs to specifically identify that because he anticipates the change to the language in the Utah Rules of Evidence would be that the rule applies unless the juvenile rules address it. Since there is already a rule that addresses that issue, Mr. Fureigh does not think anything further needs to be added as he agrees that Rule 27A applies and Rule 616 of the Rules of Evidence does not apply in juvenile court.

Judge Dame suggested this committee may want to look at amending Rule 43 of the juvenile rules to specifically outline that Rule 616 does not apply. Mr. Fureigh stated his thought was that Rule 43 and the language in the Rules of Evidence

already does that. Mr. Fureigh expressed concern that if this committee specifically excludes Rule 616, he can see someone going in and making the argument that because it was not specifically excluded all others must apply. Judge Jensen thought Judge Leavitt was seeking to amend the language that all the Rules of Evidence would apply to the juvenile court unless outlined otherwise in the juvenile rules. Judge Jensen believed they anticipated all the Rules of Evidence to apply unless this committee thought otherwise. If there was a rule that this committee thought should not apply, they should specifically state it.

Carol Verdoia stated that the language in Rule 43 of the Rules of Juvenile Procedure outlines that except as otherwise set forth herein, the juvenile court adheres to the Utah Rules of Evidence. That language is supposed to indicate that if there is a juvenile court rule that addresses it, we don't have to comply with the evidentiary rule that also addresses it which has been done in other areas. Ms. Verdoia provided the example that the Rules of Civil Procedure apply unless there is a juvenile rule that is specific. Ms. Verdoia outlines that this committee has never gone in and listed every single civil procedure rule that doesn't apply but expects that when there is a conflict between the two, we go with the juvenile rule. If the committee specifically excludes Rule 616, this committee will also need to do it for every single rule for all the other rules that this committee doesn't think should apply.

Judge Dame stated that he saw the issue regarding the Rules of Evidence differently because of the changes that were being proposed by Judge Leavitt to the language. Judge Dame was under the impression that this committee was supposed to go through and determine which rule(s) in the Rules of Evidence should not apply to juvenile court. Ms. Verdoia responded that this committee then must go in and list every single evidentiary rule that does not apply and not just Rule 616. Judge Dame believes the only one that has been discussed that does not apply to juvenile court is Rule 616 and believed that was the process moving forward. Ms. Verdoia stated this committee then needs to go through the civil rules to make it consistent with the way these rules are set up.

Mr. Russell thinks Judge Jensen's point is well taken. If he recalls, the entire hornet's nest was set up because of the change to the language in Rule 412 of the Utah Rules of Evidence because of specific language of many of these rules (rule 616, 412, etc.) that use exemptive language to criminal court. The specific exclusion outlined in Rule 412 led to Judge Leavitt's suggestion that defendant also means juvenile and criminal cases also means juvenile cases. This is what set up the hornet's nest because of the big debate about whether the criminal rape shield applied, but Rule 616 suffers from the same difficulty. Mr. Russell stated that Judge Leavitt's proposed changes have not been made, which means accused juvenile does not mean defendant and juvenile delinquency does not mean criminal proceeding yet. Mr. Russell thinks Rule 616 should apply and it currently does not as the language is written right now. Until the change is made by the Rules of Evidence committee, we are going to be stuck with the dichotomy between juvenile and felony adult prosecution. Rule 616 should be addressed by this committee in the future as to whether to import the protections of juvenile

interrogation to be recorded in some way like adult interrogations. Until the Rules of Evidence committee takes action, we are stuck with the Rules of Evidence not applying in juvenile court when they use terms like “criminal prosecution” and “defendant,” just like Rules 616 and 405 don’t apply in probate or other cases. Rule 616 has already been excluded by the language of the rule itself.

Mr. Russell further stated that as to Utah Code 80-6-206 and its application to Rule 27A, he believes the specific inadmissibility language should be present in our existing Rule 27A because the remedy should be spelled out. If the Supreme Court does not believe that is an appropriate remedy, they can address it. However, Utah Code 80-6-206 says a child may not be subject to interrogation “until and unless...” Rule 27A does not spell out the remedy and even though it might be implied as the only real remedy, Mr. Russell does not know it is exclusive and is hopeful Rule 27A can be changed to provide a remedy if law enforcement does not follow the law under Utah Code 80-6-206.

Ms. Verdoia stated that on it’s face, Rule 616 simply doesn’t apply so this committee doesn’t need a further statement that says it doesn’t apply when it is clear it doesn’t apply. Mr. Russell agreed. Judge Dame stated that until the amendments that Judge Leavitt is proposing go into effect, this committee is getting ahead of themselves.

Mr. Fureigh stated he practices child welfare, so he uses both civil rules and juvenile rules and decides which rules apply and which don’t based on the rules. If there is a rule that addresses an issue in a juvenile rule, he assumes that any civil rule that addresses that same issues does not apply because there is already a juvenile rule. Mr. Fureigh was proceeding the same way with Judge Leavitt’s proposal because part of his proposal was to include language that says the Rules of Evidence apply unless the juvenile rules say something different. Rule 43 of the Utah Rules of Juvenile Procedure also states that, so he was approaching it the same way. Mr. Fureigh agrees with Ms. Verdoia that if this committee specifically excludes Rules of Evidence, they also need to go through the other rules and do the same thing.

Judge Dame stated the language in Rule 2 of the Utah Rules of Juvenile Procedure and Rule 43 have two different approaches. Ms. Verdoia proposed that this committee could change Rule 43 to be consistent with Rule 2. Judge Dame agreed that is an option. Judge Dame stated he thinks this committee is getting ahead of themselves without finding out whether the Rules of Evidence language is going to be changed.

Mr. Russell agrees this should be on our radar and states that if or when Judge Leavitt’s proposal is put into place by the Supreme Court, it’s going to substantively change several of the rules that were highlighted in the February 2023 committee meeting. Mr. Russell stated that if Judge Leavitt’s proposal goes through, the net affect would be that Rule 616 would be then incorporated into the juvenile practice because it would apply to minors with felony delinquency proceedings so it would benefit his position and gut Mr. Yannelli’s position, so

then this committee can decide if they want to exempt Rule 616. Judge Dame agrees.

Mr. Yannelli proposed that this committee should wait until Judge Leavitt's changes to the Rules of Evidence go through and then see exactly what those changes are before making any decisions. Mr. Yannelli outlined that his concern regarding the applicability of Rule 616 was raised because he was under the impression that Judge Leavitt's changes would be made. However, he still believes it is a good argument because HB 404 was going to require audio and video recordings of custodial interrogations which is the same requirement in Rule 616, but it never passed because the legislature said no.

Ms. Moore inquired if anyone had spoken to Judge Leavitt about when the changes would be made. None of the committee members have spoken to Judge Leavitt, so Judge Dame stated he is happy to talk to him and can find out where they are on that. Mr. Russell stated the precipitating factor was because the evidence committee amended Rule 412 and they changed it to apply in both juvenile and adult cases. Mr. Russell outlined that the concern was brought up to ask about the applicability of the other rules, which is what Judge Leavitt is trying to clarify.

As to adding language to Rule 27A, Mr. Russell stated his position as a defender is he wants the remedy spelled out and thinks it should be explicitly spelled out for judges and practitioners. Mr. Russell stated the statute specifically outlines that the only remedy that makes sense is exclusion. Mr. Russell would like the remedy stated instead of implied. Mr. Yannelli stated that general practice would support that the remedy is exclusion. Mr. Fureigh stated this committee also assumed that is the remedy, but if it would be better to make it clear and put it in the rule, this committee could look at that and get some proposed language. Mr. Fureigh imagines the proposed language would contain similar language to what used to be in the rule before it was amended because the previous rule had it in there. If Mr. Fureigh recalls, the committee believed that because it was in the title and because it was general practice, it did not need to be in the body. However, there have been several committee members expressing today that they would like to have the remedy outlined so this committee can propose language.

Ms. Jeffs stated she has pulled together what different states have done with this language and could send it out. Some states say nothing, some say the remedy is suppression, and some have a totality of the circumstances so this committee could look at those. Judge Dame believes that in looking at prior versions of Rule 27A, we are at inadmissibility as the remedy. Judge Dame believes this committee is trying to figure out whether to plainly spell it out or not, not whether that should be the remedy. Mr. Fureigh stated he believes the committee took out the language because they were concerned with the burden and being careful about language that would shift the burden to the defense. Mr. Fureigh stated there was also some discussion about not requiring the defense to have to take affirmative action. Mr. Russell outlined that he has to file a motion to suppress at any rate pre-trial.

The committee then discussed proposed language that should be added to Rule 27A to explicitly state the remedy. The committee proposed the following addition as subsection (c), "Any statement made by a child during a custodial interrogation is inadmissible if the custodial interrogation does not comply with Utah Code section 80-6-206."

This will be put on next month's agenda for an update on the changes to the Rules of Evidence, and for possible motion to submit to the Supreme Court.

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

Mr. Fureigh stated this was put on the agenda to see where we were at with the issue. Mr. Fureigh stated that at the last meeting, it was determined that the legislature had passed some changes to the restitution statute and Mr. Russell may have some amendments. Mr. Russell indicated he believes nobody got what they wanted, and everyone was hoping the legislature would provide a model of clarity. Mr. Russell stated his proposed amendments to Rule 29C have been largely gutted due to the latest legislation. Mr. Russell walked through each of the subsections in his proposed language and compared them to the legislative change. Mr. Russell stated the statute has now given enough guidance that due process is announced and requires legal eyes-on. At this point, Mr. Russell does not believe any action needs to be taken and his motion should be tabled as the need he had is largely gone.

Judge Dame stated he thinks there will be some interpreting in SB 186 as well due to the conflicting language throughout the statute of "victim" and "victim's attorney." Judge Dame stated this was discussed as part of the legislative update at his judicial conference that went on this week and there was some discussion about the intent of the legislature.

Mr. Russell states this should be tabled to determine how it plays out in court and this committee can bring it back if needed.

6. Discussion – Supreme Court Memo: Remote vs. In-person hearings: (All)

Mr. Fureigh stated Judge Dame and Judge Jensen were going to attend the board of juvenile judges meeting. Mr. Fureigh inquired if they received any feedback from that meeting on how to proceed. Mr. Fureigh further stated this committee initially determined they weren't going to submit any feedback as a committee but members could do so individually, but it was added to the agenda today to see if there was any additional feedback.

Judge Dame stated he and Judge Jensen did attend the board of juvenile judges meeting and provided their feedback on the issue. The board ultimately decided they wanted to poll the juvenile court judges on how they were handling court hearings. They then sent a summary of how judges in the state are handling those

issues and it was not consistent, even within districts. Judge Dame stated they then reached out to juvenile court practitioners who regularly appear in juvenile court for their feedback on how things were going. Judge Dame stated the general feedback was that even though there is a variety of approaches that are being enacted throughout the state, practitioners reflected overall satisfaction. Many attorneys noted that having the ability to have virtual hearings allowed great access to justice without placing financial or time-off work burdens, and no one asked for a rule to be created. Judge Jensen stated the board of juvenile judges does not feel like a rule needs to be enacted at this point.

Mr. Fureigh stated the juvenile rules already have a rule that governs that, although the terminology may be outdated. Judge Dame agreed and outlined that the rules provide flexibility to each judge. Judge Jensen inquired if this committee thought the definitions should be changed as the Green Phase Report used the term virtual instead of remote conferencing. The committee then discussed the terminology. Mr. Fureigh stated that unless a committee member feels strongly that the terminology needs to be changed, he believes remote conferencing covers it. Mr. Russell and Judge Dame agreed.

7. Old business/new business: (All)

Mr. Fureigh asked the committee if any members had any old or new business they wanted to discuss. Mr. Russell stated he has heard rumors about new committee members and asked for any updates. Mr. Fureigh stated they did receive applications as they were short attorney generals, and they try to keep balance on the committee from the different organizations. Mr. Fureigh stated they asked the Supreme Court to add two additional members to this committee and selections have been made. Mr. Fureigh is meeting with the Supreme Court to get their approval so he cannot announce who they are yet. However, once they have been approved, he is hoping they can attend the meeting in May.

Mr. Fureigh stated they also have a few members on the committee whose terms will expire this summer, like Ms. Ostler and Mr. Yannelli. The rules only allow two terms to be served. There are also a few committee members whose first term is up, and they have the option to renew so they are waiting on a few of those. Mr. Fureigh then stated his term is up as he served two terms as a member and as Chair. It is anticipated the co-chair, Mr. Johnson, will take his position but he also has to be approved by the Supreme Court.

Mr. Fureigh reminded everything that the next meeting will be in person. For those further away, it will be a hybrid meeting so they will be able to attend virtually if needed. Lunch will be provided.

The meeting adjourned at 2:00 PM. The next meeting will be held on May 5, 2023 at 12:00 PM in person and via Webex.