



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

### Meeting Minutes

*Matthew Johnson, Chair*

Location: Webex Meeting

Date: September 1, 2023

Time: 12:00 p.m. – 2:00 p.m.

<p><b><u>Attendees:</u></b> Matthew Johnson, Chair William Russell Elizabeth Ferrin Adrianna Davis Dawn Hautamaki Thomas Luchs Judge Paul Dame Jordan Putnam Janette White James Smith Judge Debra Jensen David Fureigh, Emeritus Member Carol Verdoia, Emeritus Member</p>	<p><b><u>Excused Members:</u></b> Michelle Jeffs Sophia Moore Arek Butler</p>
	<p><b><u>Guests:</u></b> Mikelle Ostler Sonia Sweeney Jacqueline Carlton, Office of Legislative Research and General Counsel</p>
<p><b><u>Staff:</u></b> Randi Von Bose, Juvenile Law Clerk Raymundo Gallardo Kiley Tilby, Recording Secretary</p>	

**1. Welcome and approval of the August 4, 2023 Meeting Minutes: (Matthew Johnson)**

Mr. Johnson welcomed everyone to the meeting and indicated Mr. Gallardo will be directing things today as he is driving. Mr. Gallardo indicated at the last meeting, they failed to do introductions pursuant to Rule 11-101(4) of the Judicial Council Code of Judicial Administration. Mr. Gallardo indicated that rule directs this committee that the new committee members disclose the general nature of their legal practice. Each of the attending members introduced themselves and the nature of their practice. The guests and staff also introduced themselves.

Mr. Johnson asked for the Committee's approval of the August 4, 2023, meeting minutes. Judge Dame proposed some grammatical changes, and the changes were made. With the amendments, Judge Dame moved to approve the minutes. Mr. Russell seconded the motion, and it passed unanimously.

**2. Discussion - Juvenile Court Bilingual Notice: (Mikelle Ostler; All)**

Mr. Gallardo stated Ms. Ostler is present at the committee meeting to introduce the Juvenile Court Bilingual Notice. Ms. Ostler indicated there are four documents that include in-state, out-of-state, dependency, neglect and abuse, and termination proceedings. Ms. Ostler indicated they took the notice to the Forms Committee, and the Forms Committee helped with the first draft and made some suggestions. The Forms Committee has approved the notices and have indicated they will consider any additional proposed changes or feedback that this committee has. Mr. Gallardo stated Ms. Ostler and Ms. White helped with the drafting of the notices and worked with the forms committee on this project. Mr. Gallardo indicated the forms committee was about to approve them at their meeting last month, but Mr. Gallardo requested time to allow this committee to look at them and provide feedback. Ms. White stated it was an interesting process and she spoke to the committee about the importance of indicating on the notice that the individuals need to come to court or there would be serious consequences for their non-appearance.

Judge Dame requested a change to the out-of-state notice to include the 10-day language after the initial hearing, consistent with Rule 19A. Judge Dame indicated that rule also applies to those who reside out-of-state. Judge Dame also proposed adding that they use whatever deadline comes first. The committee agreed with the proposed changes, and Mr. Gallardo made the changes during the committee meeting.

Mr. Putnam inquired about why it was decided to include the bilingual notice in Chinese and Vietnamese. Mr. Putnam indicated he has not worked with those families and believes there may be a greater need for other languages, including Tongan, Samoan and the families from Sudan. Ms. White stated the languages were

chosen by the forms committee, and they prepared them. Ms. Ferrin indicated there is also a community of those who speak Marshallese. Ms. Ferrin suggested that instead of doing the entire notice in those other languages, that they perhaps include a notice like those at the court that indicates if they need assistance in interpreting the document, to let someone know. Mr. Gallardo stated he will share the feedback with the forms committee.

Mr. Gallardo stated he will let the forms committee know about the change that was made regarding the 10 days after the hearing for the out-of-state summons and let the forms committee know they can go ahead with the approval of the bilingual notice. Mr. Gallardo believes the forms committee will likely approve them through e-mail, as they won't be meeting again until October and they wanted to get it approved this month. Mr. Gallardo also reminded the committee that alongside this is Rule 18, which was amended to include language that directs the AG's office or clerks to include the bilingual notice. Mr. Gallardo stated that Rule 18 has already been approved by this committee to be published as of November 1<sup>st</sup>.

Mr. Gallardo indicated he does not believe the committee needs a motion to move forward with the bilingual notice. Mr. Johnson expressed appreciation for the work on this.

### **3. Discussion - Notice of Right to Appeal: (All)**

Mr. Gallardo stated the next issue is the committee looking at amending Rule 46 of the juvenile rules based on Rule 52 of the appellate rules. Mr. Gallardo stated the suggestion for this committee to review this rule came from the vice chair of the appellate rules and GAL Martha Pierce, based on a recent case regarding the issue of appeals in child welfare. Mr. Gallardo indicated they did not make any particular suggestion for change but wanted this committee to discuss whether changes needed to be made. Mr. Gallardo indicated the appellate rules committee also invited anyone from this committee to join in their discussion at their next meeting, as they recognized they do not have a lot of experience on their committee regarding child welfare appeals.

Ms. Verdoia stated she has spoken with their appellate attorney and she is also the back-up appellate attorney, so she has reviewed everything surrounding this issue. Ms. Verdoia indicated they don't disagree with the proposal, except one area that allows a response to a motion to be filed within 28 days. Ms. Verdoia stated she believes this is excessively long. Ms. Verdoia reminded the committee that they previously went in and changed the post judgment motion timeframe from 28 days

to 14 days because it didn't make sense to have a 15-day appeal period and a long period for responding to a motion or filing a post judgment motion. Ms. Verdoia stated the AG's office is fine with shortening the deadline to 14 days, consistent with post judgment motions. Ms. Verdoia indicated this committee can change in the juvenile rule that notice be provided at adjudication, but the statute will also have to be changed at some point. Ms. Verdoia is not sure this committee can change the rule until the statute is changed, but she is happy to listen to any discussion that disagrees with that perspective.

Judge Dame stated he had the same concern as outlined by Ms. Verdoia. Judge Dame stated the legislature needs to make the change in statute and then this committee would follow that. Judge Dame indicated if there is a conflict between a rule and a statute, if the conflict involves a procedural matter, the rule supersedes statute. However, if it is substantive, the statute would supersede the rule. Judge Dame believes it would be best to avoid having a conflict altogether, and it makes more sense to see if the legislature is willing to change it in statute.

Ms. Verdoia stated this issue would be a pretty rare occurrence as most individuals are represented by counsel and most attorneys understand the time deadline requirements. However, Ms. Verdoia indicated this occurs occasionally, and occurred in this particular case, when the attorney failed to file the appeal on time by a day or so. Ms. Verdoia stated the whole principle is not punishing the client for the ineffectiveness of counsel, and she doesn't believe anyone disagrees with that notion. Ms. Verdoia indicated the AG's office argued in that appeal that it was appropriate to have some sort of rule, and we think there should be some expeditious timelines when that should be required to be filed and would like time certain for responding to a motion to be shorter.

Mr. Gallardo recapped that what he can take back to vice chair of Utah Rules of Appellate Procedure from this committee, is a recommendation that in their proposed rule, they shorten the timeframe from 28 days to 14 days. Additionally, regarding their recommendation to amend our rule, this committee does not believe they should do that yet until the legislature makes a change in statute. The Committee then pulled up Rule 46 and reviewed it. Ms. Verdoia stated that until things are changed, the courts can provide that notice after adjudication. Ms. Verdoia indicated she sees lots of adjudication orders that have that specific notice at the end of the order that any appeal must be filed within 15 days. Ms. Verdoia is not sure if every

court uses the same language, but she agrees Mr. Gallardo should tell the chair this committee can't make any changes until the statute changes for consistency purposes. Mr. Gallardo will take that feedback to the committee.

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

Mr. Gallardo stated the next agenda item is Rule 22. Mr. Gallardo reminded the committee about the hard work they have put into working on this rule. Mr. Gallardo stated the proposed rule was sent out for public comment and the comment period closed on July 29<sup>th</sup> with no comments received. Mr. Gallardo indicated the next step is this committee taking that rule to the Supreme Court for publishing. Mr. Johnson asked the committee for any additional comments or changes before they take it to the Supreme Court for final publication and requested a motion from the committee. There was no further discussion. Mr. Russell moved to submit the rule to the Supreme Court for final publication. Ms. White seconded the motion, and it passed unanimously.

**5. Discussion & Action – Rule 31. Initiation of truancy proceedings: (All)**

Mr. Gallardo stated that as outlined in the agenda, the Board of Juvenile Court Judges decided they would not be accepting referrals from schools for truancy. Mr. Gallardo indicated that decision came after statutory changes that indicate the juvenile court does not have jurisdiction over truancy referrals.

Judge Dame gave some background information on how he became involved in this decision. Judge Dame stated he was covering for another judge for a Board Meeting in July and the question was posed by juvenile probation wanting to know if they could accept truancy referrals for non-judicials. There was then a request for the Office of General Counsel to prepare a memorandum and they outlined the ways it could be interpreted. The Office of General Counsel did not give an opinion, but instead requested the Board look at the memo and decide. Judge Dame stated he looked into it and gave his analysis to the Board. He ultimately concluded that the juvenile court does not have jurisdiction over truancy currently, and therefore should tell probation they should not be accepting referrals for truancy. Judge Dame gave a cautionary note that his analysis has not been vetted, but there was some discussion among the board, and the Board decided to take the position that the juvenile court does not currently have jurisdiction over truancy.

Judge Dame provided the committee with his analysis of the issue. Judge Dame stated he started with the fact the Utah juvenile courts are courts of limited jurisdiction and its powers are limited to those outlined in statute. Judge Dame stated

when you look at the juvenile jurisdiction statutes, there are two main statutes. One of them is the original jurisdiction statutes, which do not include truancy or status offenses per se. Judge Dame noted that interestingly, H.B. 239, which was presented in 2017, removed truancy from Utah Code 78A-6-103. Utah Code 78A-6-103 used to include a minor who is a habitual truant from school. That language was removed in 2017. Under Utah Code 53G-8-211(4), which was in effect before that removal, stated under certain circumstances a minor could be referred to the court for being a habitual truant. The statute then set out what the court could do, which were basically administrative actions to try to address the habitual truant. Judge Dame stated then you look at Utah Code 78A-6-103.5, which is the statute dealing with the juvenile court's exclusive jurisdiction, and that also does not include truancy or status offense per se. Therefore, unless the legislature or city ordinance has made truancy a felony, a misdemeanor, or an infraction, Judge Dame does not think there is jurisdiction under the jurisdictional statutes. As far as non-judicial adjustment statutes, there is nothing about truancy in those statutes. Judge Dame indicated one of them does refer to status offenses, but if you look at truancy statutes, it appears the statute contemplates administrative penalties. Judge Dame stated H.B. 304, which is the 2023 bill, that was the genesis of this whole discussion, removed all references to truancy from that statute. Judge Dame indicated there were five of them, and they removed them all. Judge Dame stated that was an indication to him that the legislature does not want truancy handled through the juvenile court. Judge Dame indicated he is open to the possibility that the legislature really did not intend that, but under the concepts of statutory construction, we are limited in trying to look into that at this point. Judge Dame also addressed the status offense issue, and he does not believe truancy is a status offense. However, even if it was, truancy would have to be committed on school property and it is not by the nature of truancy. Judge Dame stated there is also no guidance on what the juvenile court could do even if it were forwarded to the juvenile court for truancy.

Ms. Sweeney corrected Judge Dame's statement that nobody vetted his analysis. Ms. Sweeney stated the Board of Juvenile Court Judges heard his analysis and were persuaded by it or otherwise agreed. Ms. Sweeney indicated there were two analyses outlined in the memo and one was the analysis that that Judge Dame presented. The other analysis was that it was ambiguous and should be turned to the legislature. Ms. Sweeney stated Judge Dame's position had unanimous support by the Board, and was the General Counsel's strongest analysis, which was consistent with what Judge Dame stated.

Mr. Russell stated he appreciates the comments Judge Dame made. Mr. Russell indicated he was called in on this issue about a month ago when his executive director asked him to contribute to the discussion. Mr. Russell stated he was also tasked to do an analysis on whether there was a jurisdictional basis, and he did a lot of what Judge Dame had articulated very well as far as looking at the legislature

categorically removing truancy from multiple sections. Mr. Russell indicated his conclusion was the same as Judge Dame. Mr. Russell stated whether the legislature meant to or not, they excluded truancy as a basis for referral and subsequent filing in the juvenile court as the juvenile statutes currently exist. Having said that, Mr. Russell stated he is aware that the legislature is having active and earnest discussions on how to get truancy back within the jurisdiction of juvenile court, but nobody can predict the legislative process. Mr. Russell's proposal would be to delete the language at this point unless someone disagrees.

Judge Dame inquired whether this committee wants to do something with Rule 31 or leave it and see if the legislature re-enacts something. Ms. Verdoia stated it takes a long time to get a rule back, and it is sometimes easier to keep a rule than to bring one back. Mr. Johnson agrees with that and is not sure what's going to happen with regard to the legislature. Mr. Gallardo stated he has an inquiry in to the appellate court administrator if it is possible to temporarily suspend a rule. Ms. Verdoia stated this committee has not tried to do that that she is aware of and has never heard of the ability to suspend a rule, but the court administrator may need to look into it.

Judge Dame stated he believes this committee should defer any decision on this. Judge Dame indicated he wouldn't feel comfortable right now repealing the rule. Ms. White inquired if the juvenile court is currently receiving truancy referrals. Judge Dame says he doesn't recall ever receiving a truancy referral. Judge Jensen stated she used to receive them, but she hasn't recently. Ms. Sweeney stated in the past before H.B. 304 went into effect, the court had received a total of seven truancy referrals state-wide and they were all handled non-judicially by the probation department. Ms. Sweeney indicated it would be an unusual fact pattern for a truancy to get into court.

Mr. Fureigh indicated he understood that the legislature had given truancy jurisdiction to the school districts. Mr. Fureigh stated the school districts have truancy centers and certain things they have to do to notify parents, etc., which was all turned over to the school district to handle. Mr. Fureigh stated he has an issue with leaving the rule there. Mr. Fureigh worries some people may look at that and think the court still has jurisdiction or wants to file a truancy and then probation is going to do some sort of non-judicial agreement which is not proper.

Mr. Russell stated that is where he landed as well and is what Judge Dame means by administrative remedies because it is all back to the school districts and, statutorily, the courts aren't even involved. Mr. Russell indicated he is not in a big rush to delete it and vote on it today, but he is concerned about if there is a situation in which a school district chooses to press this issue, they can say the rule requires it. Mr. Russell recognizes there is a remote possibility anything will happen, but he doesn't like the

rule in case someone chooses to activate it. Ms. White stated there may not even be a need for a rule to address.

Mr. Gallardo asked the committee if this should be placed on next month's agenda for further discussion. The committee is not comfortable making a motion to repeal the rule at this juncture and would like to have further discussion. This will be set on the agenda for October.

#### **6. Discussion & Action - Rule 17. The petition: (All)**

Mr. Gallardo stated Rule 17 was taken to the Supreme Court last month and the Supreme Court had some suggestions and a few minor changes. Mr. Johnson stated he does not have access to the materials and requested Mr. Gallardo address the committee. Mr. Gallardo went through the proposed changes as suggested by the Supreme Court.

The first suggestion and discussion was whether an "and" or "or" should be added in line 11 of the rule as presented. Mr. Russell stated any one of those can be a threshold event that allows the prosecutor to file a petition on an offense. Mr. Russell believes it should be "condition or conditions" that allow for the filing of a petition pursuant to the applicable statutes and leave it at "or."

Judge Dame stated that as a practical matter, the prosecutor is not required to list every single condition that allows the filing. Ms. Davis agrees and would prefer it be left as singular. Ms. Davis stated she is relying on information from probation or another external source, and a singular condition is all the statute requires. Judge Dame would argue to leave it as a condition that allows for the filing. Mr. Russell believes if there is one condition, they can file it and is okay with that. The committee agreed "or" should be included when referencing the statutes.

Mr. Gallardo stated the other question the court had was whether County Attorney and District Attorney should be capitalized. Judge Dame believes it should be lowercase, unless referring to a specific county or district attorney, which is also consistent with Bluebook. Ms. Davis indicated she would prefer it be capitalized, but she is not married to the idea and does not have a strong preference. Mr. Fureigh believes it should be capitalized because it is referencing a specific county attorney or district attorney office. Judge Dame disagrees because it is not referring to "Utah County Attorney," or another agency. The committee then discussed changing it to the "office of the county attorney" and the "office of the district attorney." The change was made.



Mr. Gallardo stated the Supreme Court also suggested changing “Clerk of Court” to “court clerk” in line 45 to keep it consistent with other language in the rule. Judge Dame, Ms. White, and Mr. Russell agreed, and the change was made.

Mr. Johnson asked for a motion from the committee to send this rule for public comment. Ms. White made the motion, and Mr. Luchs seconded the motion. The motion passed unanimously.

## **7. Discussion & Action - Rule 56. Expungement: (All)**

Mr. Gallardo brought the committee’s attention to line 9 and 10 that is being proposed to be deleted. Mr. Gallardo stated he reviewed it with the assistant juvenile court administrator, and it was discussed to remove the language in line 9 and 10 because the petitioner, in practice, does not identify each adjudication.

Mr. Fureigh stated he needs to think about that proposal because the DCFS records are very specific, and each is a different investigation. Mr. Fureigh stated some of the records might be expungable, but others may not. Ms. Verdoia stated in the definition of juvenile record, it specifically exempts juvenile adjudications under Utah Code Title 80, Chapter 3. Mr. Fureigh stated that resolves his concern.

Judge Dame stated the Bluebook prohibits the use of “et. seq.” so he wanted to bring it to the committee’s attention. Judge Dame indicated it is used in other rules, but wanted to see if the committee wanted to change it while the rule was being changed. The change was made to remove “et. seq.” to include all the applicable statutes.

The committee agreed the language in line 9 and 10 should be removed.

Mr. Russell proposed additional changes to Rule 56. Mr. Russell stated he compared the language in line 11, 12 and 13 and believes it is problematic and above that which is required in the statute. Mr. Russell stated he has run into various problems with this for youth that have served LDS mission or have been in the military. Mr. Russell points out this requirement in the rule does not reflect the real world they practice in to get these expungements. Mr. Russell indicated you do not write a letter to the various agencies and inquire if they have a criminal record because that is not what they do. There are also issues with obtaining criminal background in other states. Mr. Russell indicated that language is problematic for the practitioner to apply in the real world, and there is also ambiguity as to where the petitioner has resided and the legal definition of residence. Mr. Russell stated the statute simply says the petitioner must provide the Utah BCI criminal record print out with their petition, but the rule as written now requires all sorts of ambiguous hoop-jumping at all corners of the globe. Mr. Russell made a request to the committee to eliminate the requirement of the rule because it does not comply with the statute, and it is not practical.

Judge Dame indicated he does not believe it should be in the rule because it is not procedural, it is substantive. Judge Dame stated this committee doesn't have the authority to enact substantive law in a rule. Besides the practical concerns, Judge Dame doesn't know where the requirement came from and does not believe it is appropriate. Mr. Russell stated the petitioner cannot look under every stone to get the waiver, and the petitioner is still required to take an oath to swear to the other requirements outlined in the statute.

Ms. Verdoia stated she was trying to remember if there used to be a requirement and she looked at Utah Code 80-6-1004(2)(c) and wondered if that is where it came from. Ms. Verdoia believe that statute leaves it open-ended to allow the court to state they want more information if there was ever a conviction. Mr. Russell stated that version will be repealed as of October 1, 2023, and replaced with Utah Code 1004.1 through 1004.5. The language in Utah Code 80-6-1004 was moved to 1004.1. After discussion on the issue, the committee agreed that language should be removed from the rule.

Judge Dame made an additional suggested change to the language in line 13-15 to instead state, "The court may waive the hearing as provided in 80-6-1004.1(4)(d)." That change was made by the committee.

Mr. Gallardo stated the committee added subsection (f) to include automatic expungements. Mr. Gallardo indicated he had a discussion with the AOC and juvenile court administrator, and they suggested this committee not give them as much direction, and just refer to the statute. Mr. Gallardo stated that during their discussion, it was also brought to his attention that there is also an administrative rule, Rule 4-208, that gives some direction regarding the district court and their automatic expungements that they will be looking at to guide their process as well.

Various changes were made to Rule 56 based on the comments and discussion. Mr. Johnson requests a motion to send for public comment. Mr. Russell made the motion, and Ms. Ferrin seconded. The motion passed unanimously.

#### **8. Discussion – Rule 52. Appeals: (All)**

Based on the time constraints, this agenda item will be placed on the agenda for October.

#### **9. Old business/new business: (All)**

No old or new business was discussed.

The meeting adjourned at 2:00 PM. The next meeting will be held on October 6, 2023 at 12:00 PM via Webex.