



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

### Meeting Minutes

*Matthew Johnson, Chair*

Location: Webex Meeting

Date: February 23, 2024

Time: 2:00 p.m. – 4:00 p.m.

<b><u>Attendees:</u></b> Matthew Johnson, Chair Thomas Luchs Dawn Hautamaki Adrianna Davis Sophia Moore Judge Paul Dame Janette White Jordan Putnam Arek Butler Judge Debra Jensen	<b><u>Excused Members:</u></b> James Smith William Russell Elizabeth Ferrin Michelle Jeffs David Fureigh, Emeritus Member
	<b><u>Guests:</u></b> Sonia Sweeney Blake Murdoch Nick Stiles
<b><u>Staff:</u></b> Randi Von Bose, Juvenile Law Clerk Lisa McQuarrie, Juvenile Law Clerk Raymundo Gallardo Kiley Tilby, Recording Secretary	

## 1. Rule Related to In-Person versus Remote Hearings: (All)

Mr. Johnson thanked everyone for getting together so quickly.

Nick Stiles stated the legislature had potential legislation that was not public but was provided to the Judicial Council which prompted the Judicial Council to have to look at remote versus in-person hearings and get some form of governance into a rule. Mr. Stiles indicated that about a week ago, the Judicial Council and the Supreme Court were looking at incorporating an administrative rule, but as of a few days ago, they both decided most of the language should be found in the procedural rules. Mr. Gallardo provided this committee with a proposed draft of what the administrative rule would look like, and stated there needs to be a mechanism found within the rules where a party can reach out to the Judicial Council if a judge is not following what the rules says. Mr. Stiles expressed appreciation to the committee for getting together so quickly, and indicated he was here to answer any questions.

Mr. Johnson inquired if the document provided was just a draft at this point. Mr. Stiles stated it was, and it was put together by the Judicial Council, but then it was later decided the substance should be in the specific procedural chapters. Mr. Johnson inquired if the highlighted sections were those that they wanted this committee to add to their rule, and Mr. Stiles stated that was the bulk of it, but there also needed to be a reference in the procedural rules to Rule 2-211 of the Code of Judicial Administration for enforcement.

Judge Dame stated it appears the Supreme Court wants this committee to incorporate the draft rule, currently numbered as Rule 4-101, into their rule. Judge Dame indicated he has concerns with it, but he wants to be the faucet not the drain, so this committee needs to figure out the parameters. Judge Dame stated it seems that one interpretation of what this committee is being asked to do is to do away with Rule 29B and Rule 37B and copy the first five sections of draft 4-101 to create a new rule in the Rules of Juvenile Procedure that mirrors that. Judge Dame inquired if that is what this committee is being asked to do. Mr. Stiles responded that that is along the lines of what the Supreme Court is asking this committee to do. Mr. Stiles stated he appreciates that Judge Dame can see some issues or concerns with the draft but feels like this is a better situation than it would be if the potential legislation goes through.

Mr. Stiles stated this committee is being tasked with applying sections three and four in a manner that makes the most sense, and if that means doing away with Rule 29B and 37B, that is fine. Mr. Stiles indicated that if it is possible to tweak it some to get it into Rule 29B and 37B, so it is more seamless, that is also acceptable. Judge Dame believes subsection three and four cannot be standalone, and this committee would need to also incorporate the other sections as well which will require a complete re-write to the rules that are already standing. Judge Dame stated the rule would not make a lot of sense if only sections three and four were incorporated without the context of sections one and two. Judge Dame indicated that when those sections are added, it completely eviscerates the current revised version of Rule 29B and if that is

the case, someone can just copy Rule 4-101 and label it. Mr. Butler agreed and stated the current rule and Rule 4-101 are totally incompatible.

Mr. Stiles stated the request from the Supreme Court is to incorporate section three and four, but if this committee feels like section one and two also need to be incorporated, this committee can do that. Judge Dame believes this committee would have to incorporate subsection one because it includes a witness, who may be hostile to both sides, to request to appear via telephone. Judge Dame stated subsection one completely does away with response times to motions and allows the court to make their own determination and tell the parties this critical witness is allowed, because there is a presumption to allow it. Judge Dame stated he doesn't want to be negative or waste time if the Supreme Court is essentially telling this committee to deal with it because this is what they want us to do. If the Supreme Court does not want this committee to have discretion or judgment in analyzing whether the changes they are suggesting are good or problematic, then Judge Dame does not want to waste time doing that. Judge Dame indicated if this committee is not tasked with doing that, and the Supreme Court doesn't want to hear the feedback from this committee, then it is a matter of cutting and pasting it because subsections three and four don't make sense without definitions of one.

Judge Dame stated subsection one allows witnesses to make a request because they are defined as a participant. Ms. White said that's the first thing she saw is that this rule includes parties and witnesses. Ms. White stated witnesses have very different reasons why they need to be in court, and judges should have discretion with a party. Ms. White stated if a parent has COVID and they are willing to participate in trial virtually, that is very different than allowing a party to confront a witness in person. Judge Dame stated one of the things to also consider is constitutional requirements of the right of confrontation whether that applies to termination of parental rights or delinquency. Mr. Putnam stated there may be an in-between ground, and maybe the Supreme Court is essentially asking this committee to cut and paste, but his proposal is that this committee use draft 4-101 and then make changes to the things that are problematic.

Ms. Sweeney stated she wants to underscore what Mr. Stiles had shared at the outset as to the history behind the task and the possible bill that they were confronted with that would have been far more prescriptive. Ms. Sweeney stated it is fair to say that the proposed legislation significantly reduced the judicial discretion than what is being proposed in draft 4-101. Ms. Sweeney outlined that this is the best attempt to be responsive to what the legislature was communicating to them, but within realms of what people thought might be workable. Ms. Sweeney believes Mr. Putnam's suggestion is a good one. Although Mr. Stiles is not able to guarantee the Supreme Court's reception to the proposed changes this committee may make, she believes they would be open to hearing the concerns and may be accommodating to the unique issues to juvenile court. Judge Dame stated his concerns are worse for district court than they are for juvenile court so he can't say they are unique to the juvenile court. Ms. Sweeney indicated she assumes each committee will be addressing those

concerns and the various ways the language in 4-101 could be problematic. Judge Dame doesn't want to send Mr. Gallardo and Mr. Johnson to the Supreme Court with something they didn't ask for.

Mr. Stiles stated Mr. Putnam and Ms. Sweeney hit the nail on the head that this committee could incorporate the substance of 4-101, and then amend it as necessary to make sense to the juvenile court. Mr. Stiles indicated if those amendments require some changing of the language, if those changes still accomplish what the original rule was intending to accomplish, they should be received well. Mr. Stiles indicated the court, for the last 18 months, has been working with all the advisory committees on this exact issue, but the court hasn't pressed it and has instead been receiving feedback.

Ms. Von Bose had a question on what the Supreme Court has highlighted. Ms. Von Bose stated the timber is that this committee wanted to preserve discretion to the court as much as possible which is why this committee drafted Rule 29B as they did. Ms. Von Bose stated that the part that overrides that is where it says the court "must accommodate." Ms. Von Bose inquired if there was wiggle room in the "must" language. Mr. Stiles stated the proposed rule says unless the court finds good cause. Judge Dame stated the language that gives him the most heartburn is giving a non-party witness the authority to e-mail the court 25 hours before a trial and ask to appear by telephone without notice to the other side or allowing the other parties to address it. Judge Dame stated that eviscerates due process and allows the court to make a reasonable decision alone without the parties having an opportunity to say why they shouldn't be allowed to testify remotely. Judge Dame stated this language doesn't allow for due process or other basic concepts of fundamental fairness which is his real concern.

Mr. Butler agreed with the concerns raised by Judge Dame. Mr. Butler inquired if this committee could change the timeframe to 72 hours, or even a week, that would allow time for all parties to give input. Mr. Butler doesn't think the proposed language is appropriate or a wise way to do business. Judge Jensen stated she also has an issue with the 24-hour timeframe from the clerk's perspective. Judge Jensen stated the clerks need time to wait for the judge to rule, set up a Webex meeting, send notice, etc. Mr. Butler agreed. Mr. Stiles stated all those points have merit, and if this committee feels it is undoable, he believes the Supreme Court would at least listen to that and if they don't agree, they can change it. Mr. Stiles stated if that is the position of the committee to change the timeframe, maybe the court would be receptive to that. Mr. Stiles also indicated one of the reasons for these committees to draft it and not the Judicial Council is because this committee has expertise in this field.

Mr. Johnson stated the Supreme Court is looking at this committee to incorporate a lot of this language, so if this committee drafts something to include some of the language but make changes that are more feasible for juvenile court, then he can go before the Supreme Court and explain. Mr. Johnson indicated it sounds like the Supreme Court is behind the "8-ball" with legislators pushing some kind of rule that

would hamstring the courts and the judges. Mr. Johnson stated the Supreme Court/AOC drafted this as quickly as they could and sent it off the committees to be incorporated. Mr. Johnson indicated he doesn't feel comfortable cutting and pasting it and then have to amend it later. Mr. Johnson proposed that if this committee can amend some of the language now, that would be more productive than just cutting and pasting.

Judge Dame stated the problem with Rule 29B, is it is simple and clean-cut in distinguishing between evidentiary and non-evidentiary hearings, and that distinction is not even considered in 4-101. Judge Dame stated this committee can try to re-do it and minimize the concerns we have if that's what the Supreme Court wants us to do, but it's not consistent with what this committee came up with in Rule 29B. Mr. Stiles stated it would be ideal if the criminal, civil, and juvenile rules are all similar in how they handle this issue versus having differing rules. Having said that, Mr. Stiles doesn't think it would be wrong if this committee wanted to incorporate 4-101, but also send up Rule 29B and say that is the preference.

Ms. Sweeney stated she believes presenting something "in the alternative" would also be appropriate. Ms. Sweeney stated one of the proposals would be on the nose responsive to what it appears they are requesting by using the language in 4-101, but this committee can also maintain that it believes there is a better approach as already drafted in Rule 29B. Ms. Sweeney stated this committee can do that, and then let the Supreme Court decide what they think is best for the judiciary.

Mr. Butler would propose to re-write the rule basically as they have it but would propose changing the timeframe in section 3(b) to something more than 24 hours and adding a statement, "so long as the court can hear input from all parties prior to making a decision." Mr. Butler stated if the Supreme Court doesn't like that, they can let us know.

Ms. White stated she may have missed it at the beginning, but inquired what group or individual is behind pushing the legislation regarding this issue. Mr. Stiles stated the proposed legislation was a result of some legislators and constituents noticing an inconsistency in courts allowing remote hearings. One example being two attorneys who have a similar hearing type outside the Wasatch front, one attorney will be allowed to appear remotely while the other must drive to another city to hold the hearing their colleague was able to do from their office. Mr. Stiles stated there are other folks who are raising this issue from an access to justice standpoint. Judge Dame inquired if anyone has discussed with the legislature that these issues are procedural and not substantive, so it is outside of their authority. Mr. Stiles responded that the legislature could amend rules of procedure by a 2/3 vote, but he thinks the decision from the Judicial Council was to work with the legislature instead of using a hardline approach in passing an administrative rule. Ms. White wants the court to be able to be flexible, and indicated she has always seen the court be accommodating to the parties and their counsel. Ms. White stated witnesses are a different concern. Ms. White believes this committee can incorporate a lot of the

language in draft 4-101 into our rule, but still make changes. Ms. White indicated Judge Dame's emotion about this is very valid and that she would be furious if one of her witnesses sent an e-mail to the court to appear telephonically and nobody got to weigh in on it. Ms. White proposed this committee could use the language in 4-101 for the parties, but subpoenaed witnesses maybe need to have a separate rule. Mr. Stiles stated those are good points.

Ms. Hautamaki stated she is glad someone brought up the clerk issues for the 24-hour timeframe. Ms. Hautamaki stated e-mails are quite heavy, and checking e-mails are not the first thing they do when they come to work because they are in court, helping people at the counter, etc. Ms. Hautamaki indicated 24 hours to answer a request by e-mail is going to be difficult. Ms. Hautamaki stated 72 hours would be possible, but less than that would be setting-up the court clerks for failure.

Mr. Johnson stated if it is a witness, and we are giving them that much power, especially on a termination petition or trial delinquency matter, he would argue 72 hours is not enough time. Mr. Johnson agrees with Judge Dame that having a witness be able to e-mail the courts without notifying anyone and requesting to appear remotely is problematic. Mr. Johnson agrees with Mr. Butler that this committee could make some of the changes and submit that, but he would also like to keep our proposal of Rule 29B as an alternative. Judge Dame stated he doesn't think that is possible because it is a completely different structure and there is no differentiation between evidentiary versus non-evidentiary hearings.

Judge Dame stated the meat and potatoes of litigation is being able to question a witness in the same room, not on camera. Judge Dame would not include a witness as a participant. Judge Dame is also concerned about the information that will come to a judge that would be inappropriate *ex parte* communications as they are explaining why they don't want to appear in person. Judge Dame stated that would not be subject to cross-examination and is rife with potential problems. Judge Dame stated this is the only situation he is aware of in any of the rules of procedure that would allow a witness or third party to have *ex parte* communications with the court.

Ms. White inquired if the folks that have proposed the legislation have seen this committee's proposed Rule 29B. Mr. Stiles stated the court did not approve it for public comment and tabled it, so they have not seen it. Ms. White asked if there is a liaison who can go to them and present the proposed rule. Mr. Stiles stated there is a liaison and they have been communicating with the legislators, but not specifically about the proposed Rule 29B.

Judge Dame stated there is also Rule 37B that this committee has not made changes to because they wanted to see if the Supreme Court would approve Rule 29B before making the changes to Rule 37B. Judge Dame stated Rule 29B has already been shown to the Supreme Court, they tabled it, and it didn't satisfy their requirements so it doesn't make sense to show it to them again. Ms. Sweeney stated it could be presented to the Supreme Court as option A, this committee tried to do the best we

could, here are the concerns, and options B is that this committee would suggest in the alternative to adopt what was previously presented to you. Ms. Sweeney stated that allows this committee to articulate to the Supreme Court that Rule 29B is really the best approach for the juvenile court. Mr. Johnson stated the Supreme Court did not say anything negative about the proposed Rule 29B and really liked the fact that it was short, succinct, and to the point and conveyed what needed to be done. However, they tabled it possibly because they knew this was coming down.

Judge Dame proposed a subcommittee to work on Rule 37B if the Supreme Court was positive about the proposed Rule 29B. Judge Dame stated this committee would need a second subgroup to form a new rule that would apply to both delinquency and non-delinquency to replace Rule 29B and 37B. Judge Dame indicated that the committee could incorporate the substance of Rule 4-101 but make changes this committee would hope the Supreme Court would accept unless this committee would like to work on it now. Judge Jensen and Mr. Johnson agreed this committee should start on a draft of a new rule now. Mr. Butler had to leave the meeting early, but indicated he would support removing the ability of a third-party witness to make demands to the court. He would also support making a longer time for making requests to the court.

The committee then began working on a proposed rule to incorporate the language in draft Rule 4-101.

In the language to the applicability of the rule, the committee agreed it should state, "This rule applies to civil, criminal and delinquency matters in juvenile courts."

In the definitions, the committee does not believe a third party who is required to attend court should have that authority. The committee agreed that the witness can talk to the person who sent them the subpoena if they have an issue, and that party can decide whether they want to make the request on their behalf. The committee believes that change would eliminate a lot of concerns. Ms. Von Bose inquired if there would be a value in adding definitions to differentiate between evidentiary and non-evidentiary hearings, or if there would be a conflict in the language that comes after. Judge Dame likes that but thinks it would have to be a complete re-write of Rule 4-101. Mr. Johnson stated it might be good to add a definition of evidentiary hearing and non-evidentiary hearing to show the justices the difficulty the juvenile court faces. Judge Dame doesn't believe they need to be defined.

Ms. Hautamaki inquired if they are tied to the language regarding e-mail or letter and if so, whether that correspondence would need to be placed in the record. Judge Dame responded that if this committee takes out non-party as participant, this committee can address that once subpart three is addressed. Judge Dame proposed this committee work on subpart three first, then this committee can discuss evidentiary versus non-evidentiary.

Judge Dame stated that in subpart three, if a party is not represented, they need to make the request by motion like everyone else. Judge Dame stated that one approach, which this committee would all like but may not be acceptable to the legislature or the Supreme Court, is to state, "A participant may request that they appear or a witness to appear in person or remotely by filing a motion with the court or making a verbal request during a hearing." Judge Dame also proposed a timeframe of 72 hours, but also leave it open to allow for requests to be made the day of the hearing if something comes up like sickness or other emergencies. Judge Dame proposed adding language to include "absent exigent circumstances" to allow the freedom to address that. Ms. Moore likes that proposal.

The following language was proposed: "The motion must be filed at least 72 hours prior to the hearing unless there are exigent circumstances. The court will schedule a remote hearing related to the motion at least 24 hours prior to the hearing." Judge Dame stated the timeframe would not apply to the verbal request, because all parties would be present, and they could discuss it at the time of the hearing. Judge Dame proposed a hearing will be held at least 24 hours in advance. Judge Jensen is concerned about having to hold a hearing every time that request is received. Judge Dame proposed the timeframe be extended to allow for time to respond. Ms. Hautamaki proposed adding language for stipulated versus not stipulated. Judge Dame proposed that a stipulated motion may be filed at any time prior to the hearing, and a non-stipulated motion must be filed within 72 hours.

Judge Jensen stated even on a stipulated motion, we may still want 24 hours' notice for the clerk's sake. Judge Dame indicated the problem is, in situations where the request is being made the day of, that would not allow for 24 hours anyway. Ms. White stated the worst that could happen is the court could say they couldn't accommodate the request, and the hearing will need to be continued due to the last-minute notice.

The committee proposed the following language related to a non-stipulated motion, "A non-stipulated motion must be filed at least 96 hours prior to the hearing, unless there are exigent circumstances. If a party objects to the motion within 48 hours of the filing, the court will schedule a remote hearing at least 24 hours prior to the hearing to address the motion."

Judge Dame stated with the way this committee has restructured this, there would no longer be a presumption. Judge Jensen stated it may be a good idea to keep some of that language, not as a presumption, but factors the court may consider when making the decision.

In regard to subpart 4, the committee had no proposed changes as the intent of the language is that the court must find good cause if the request is going to be denied.

Judge Dame stated he doesn't understand subpart five as it is a bit superfluous in an implicit way and seems to be stating the obvious. Judge Dame indicated he doesn't



necessarily care if it is left in but doesn't think it is necessary. Mr. Putnam stated it may be referring to when one party requests to appear in person, they will convert the entire hearing to virtual rather than hybrid. Judge Dame stated we don't need to spend time on it and agreed it can be left in.

As far as subpart six, the committee left the language as-is.

Ms. Hautamaki inquired if this committee wants to use the term "participant" or if they would rather use the term "party or counsel" to be more clear. Ms. White stated can just use participant instead of party or attorney. Mr. Johnson stated in Rule 29B, if he recalls correctly, the term participant is used.

Ms. Moore believes this committee still needs to account for those who are not a party or a witness. Ms. Moore stated if this committee leaves out someone who is not a party or a witness, the Supreme Court will have a problem with the proposed rule, and this committee should deal with them somehow. Ms. Moore inquired if this committee should state a participant who is not a party or a witness may appear virtually at any time. Ms. White wonders if it should be left to the court's discretion. Judge Dame inquired if it has been an issue up to this point, as he doesn't believe it has been. Ms. Moore stated this may be the issue the Supreme Court is trying to address, so she wonders if that is addressed, this committee may have a good chance of getting the rule passed.

Ms. McQuarrie stated in 3(a), she would propose that it be changed to "A participant may request that the participant or a witness appear in person or remotely by filing a motion or making a verbal request during a hearing." The committee agrees.

Ms. Hautamaki proposed that the stipulated motion be filed within 24 hours prior to the hearing. Ms. Hautamaki expressed concern that if the stipulated motion is filed the day of the hearing, chances are the clerks are not going to know it has been filed. The committee changed the language to state, "A stipulated motion must be filed at least 24 hours prior to the hearing, unless there are exigent circumstances."

Mr. Johnson inquired if this committee needs to address the issue of non-participants. Judge Dame stated if it is a problem, it should be addressed. If it is not a problem in juvenile court, he believes they should let it lie. Judge Jensen stated if they are not required to be there, they shouldn't have the ability to make those types of requests. Judge Dame believes those individuals should rely on one of the parties to make the request on their behalf.

Judge Dame stated he would like to go back to using the term "participant" rather than "party." Ms. Moore stated the reason for defining it is that this committee is excluding a witness as a participant. Judge Dame stated this committee has taken that language out completely. Judge Jensen stated that by this committee using as much of the same language as possible in 4-101 may help get the rule approved. Judge

Dame has no issue with the language of participant, and Ms. White agrees, so long as a witness is not included in that definition.

The committee discussed the title of the rule. Judge Dame stated that was the proposed language in 4-101. Ms. Von Bose stated she prefers the heading that was outlined in Rule 29B as it seems more consistent with what is happening in the rule. Ms. White proposed, "Manner of calendaring and appearance in delinquency and non-delinquency hearings." Judge Dame stated that would be redundant because it would apply to both regardless. The committee also discussed the rule number, and Judge Dame doesn't believe this committee needs to worry about that now.

Judge Dame stated he is withdrawing his prior suggestion that there be a subcommittee on Rule 37B because he believes this rule, or some variation of it, will be adopted.

Mr. Johnson inquired if this is something he needs to take a vote on since this was requested by the Supreme Court. Mr. Gallardo stated he doesn't believe a vote is needed, and he got the sense that this is what was expected of this committee whether they agreed or not. Mr. Johnson agreed and stated he will request a vote if there are changes proposed by the Supreme Court. Mr. Johnson inquired if anyone had any other issues or proposed changes regarding this rule. Mr. Johnson will provide this version to the Supreme Court and let them know this is what this committee came up with as a working draft under the limited time constraints.

Ms. McQuarrie wanted to revisit the title. Ms. McQuarrie stated as a law clerk, if someone were to ask her if there was a rule that addresses remote versus in-person hearings and she were to scan the rules, she wouldn't be able to determine this rule addressed that issue based on the title. Ms. McQuarrie proposed changing the heading to "Manner of calendaring and appearance for remote hearings." The committee agreed and the change was made. Mr. Gallardo and Mr. Johnson will present this proposed rule to the Supreme Court.

Judge Dame stated there is no authority or anything in the current rules that allow the court to also appear remotely in certain situations because there are no COVID orders at this point. Judge Dame inquired if this committee needed to put that into the proposed rule, so it allows authority to hold any hearing as remote or hybrid, including allowing the court to appear remotely. Ms. White likes having that in the rule, and Ms. Moore agreed. The committee added language that states, "The court may hold any hearing in-person, remotely, or hybrid as set forth below."

Mr. Johnson thanked everyone for their time and participation on short notice.

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

No old or new business was discussed.

The meeting adjourned at 4:10 PM. The next meeting will be held on March 1, 2024 via Webex.