

MINUTES

**Rules of Criminal Procedure
Committee Meeting**

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

January 18, 2011

ATTENDEES

Laura Dupaix
Judge Michele Christiansen
Judge Vernice Trease
Patrick Corum
Professor Amos Guiora
Craig Ludwig
Vincent Meister
Brent Johnson

EXCUSED

Judge Brendan McCullagh
Craig Barlow
Steven Major
Todd Utzinger

GUESTS

Ed Berkovich
David Walsh

I. WELCOME / APPROVAL OF MINUTES

Laura Dupaix welcomed the committee members to the meeting. Judge Michele Christiansen moved to approve the minutes from the last meeting. Vincent Meister seconded the motion. The motion carried unanimously.

II. RULE 15A

Ed Berkovich and David Walsh attended the meeting to propose repealing Rule 15A. Mr. Berkovich stated that the rule is creating the problem that it was originally designed to solve. Mr. Berkovich stated that witnesses who had not been subpoenaed into court before, are now being subpoenaed or otherwise identified as potential witnesses to testify about the chain of custody on information related to the reports. Mr. Berkovich stated that constitutionally, only witnesses who can testify as to an element of the crime can be required to testify. David Walsh presented a stack of papers showing requests that had been filed in cases involving his office. Mr. Walsh noted that LDA files a request in every case. Mr. Walsh said he understands why, because they might be risking ineffective assistance claims if they don't, but it is creating needless work for everyone. Judge Vernice Trease stated that if there is another way to address

any problem that exists, the committee should consider that option before repealing the rule. Mr. Berkovich stated that he had prepared a proposed amendment to Rule 15A, but decided not to present it at this meeting, because he feels that repealing the rule is the best course of action.

Laura Dupaix reminded committee members about how the rule was originally adopted. Ms. Dupaix stated that the 2010 legislature introduced a bill to address the issue in light of Melendez-Diaz. In order to deter the legislature from enacting a law that would have been unworkable, the committee enacted the rule. Ms. Dupaix noted that the rule was created within a very short time-frame in order to match legislative deadlines. Patrick Corum agreed that the rule should be repealed. Mr. Corum stated that there is a problem trying to address in a rule constitutional parameters that have not been fully litigated. Judge Trease noted that there is a statute on breathalyzer cases that allows certificates to be automatically admitted. Judge Trease wondered if there could be something analogous. Judge Trease wondered whether there could be a process of providing affidavits instead. Mr. Berkovich stated that there isn't really anything analogous. Mr. Berkovich stated that there are many people in the chain of custody and it would be difficult to manage even an affidavit process.

Professor Amos Guiora asked what other states are doing. Mr. Berkovich stated that he didn't know specifically, but thought that other states had reacted the same as Utah. Vincent Meister stated that there is case law in which courts have expressed the opinion that states overreacted to Melendez-Diaz. Judge Trease suggested that the rule be repealed and courts can then follow any case law that develops in this area.

After that discussion, Laura Dupaix moved to repeal Rule 15A. Patrick Corum seconded the motion. The motion carried unanimously.

III. RULE 36

Patrick Corum distributed proposed amendments to Rule 36. The amendments will require the court to make a determination that withdrawal is consistent with the Rules of Professional Responsibility before granting a motion to withdraw. Mr. Meister asked what is the impetus for the proposal. Mr. Corum stated that his office experiences many circumstances in which attorneys do some work on a case, but they withdraw and his office is appointed to represent the defendants. Mr. Corum stated that his office then spends a lot of time fixing problems that previous counsel created. Mr. Corum stated that there should be an inquiry by courts as to the reasons for withdrawing before a motion is granted. Judge Trease asked whether this is a rule issue or a judge issue. Mr. Corum stated that he has never seen an inquiry done and so it's a rule issue. Mr. Corum stated that he had thought about putting in language requiring courts to address whether the defendant would be prejudiced. Judge Trease suggested that might be a good idea because it is similar to what happens in civil cases.

Mr. Meister questioned how the amendments would change current practice. Mr. Corum stated that not much would change, except now there would be an inquiry. Mr. Corum stated that this might reduce the number of withdrawals as attorneys must evaluate their professional responsibilities before moving to withdraw.

Ms. Dupaix stated that there was an appellate case in which a judge did not allow an attorney to withdraw because the trial was to occur within a few weeks. Ms. Dupaix stated that she believed the appellate court had reversed the conviction because the attorney was forced to handle a case and the attorney might not have been prepared. Mr. Corum noted that tying withdrawal to the Rules of Professional Responsibility might help address such situations. Judge Trease suggested adding language that the attorney state the specific grounds for the motion. Mr. Corum agreed that this would be a good addition. Professor Guiora asked whether Mr. Corum had ever seen any requests denied. Mr. Corum stated that he had seen requests denied, such as when defendants are trying to cycle through attorneys to continually delay a case. Mr. Corum noted, however, that the vast majority of motions are granted. Mr. Corum stated that he will consider the discussions of the committee and present new language at the next meeting.

IV. RULE 4(d)

Laura Dupaix reminded committee members about the basis for her proposal. Ms. Dupaix stated that some judges deny motions to amend informations made before or during preliminary hearings because the rule states that informations may not be amended to add or change charges. Ms. Dupaix stated that those judges require prosecutors to dismiss the cases and refile. Ms. Dupaix stated that when circuit courts existed, informations were not filed until after the preliminary hearing. Allowing amendments up to the time of bindover would therefore be consistent with that practice. Ms. Dupaix stated that there is no reason why the same principle cannot be extended to the time of trial unless the substantial rights of the defendant are impacted. Mr. Corum stated that he found the language to be somewhat confusing. Professor Guiora agreed. Mr. Meister stated that motions to change or add charges are frequent and this amendment would be helpful. Ms. Dupaix stated that, because some committee members found the language to be confusing, she will work with the language and bring a new proposal to the next meeting.

V. PADILLA AND RULE 11

Ms. Dupaix stated that she hasn't had time to work on this issue. Judge Trease stated that the Third District has amended its Rule 11 statement to include language similar to the language Ms. Dupaix originally proposed. Judge Trease suggested adding this language to the official form. Judge Michele Christiansen moved to have the Third District Court's language put into the Rule 11 statement. Judge Trease seconded the motion. The motion carried unanimously.

VI. RULE 14

Mr. Meister stated that there are current problems with trying to determine which provisions apply to criminal subpoenas. Mr. Meister noted that there are several Rules of Criminal Procedure and Rules of Civil Procedure that address criminal subpoenas and there are often questions about which provisions apply in particular situations. Mr. Meister stated that, for example, the rules might apply to investigative subpoenas. Mr. Meister stated that the Rules of Civil Procedure require that notice of a subpoena be given to parties and those affected by the subpoena. Mr. Meister stated that there are two problems with applying this provision to investigative subpoena cases. Mr. Meister stated that giving notice to those who are being investigated might defeat the purpose of the investigation as those individuals might destroy important evidence. Mr. Meister also stated that the notice provisions mean that there may be significant delay between the time that the subpoena is issued and the time that the information may actually be obtained. Mr. Meister stated that this often frustrates victims as cases move slowly.

Ms. Dupaix asked whether Mr. Meister will be proposing an amendment or whether he would like a subcommittee to help him. Mr. Meister stated that he would like a subcommittee and he may also recruit Paul Boyden to help with drafting. The committee members agreed that having one rule to address all subpoena issues would be helpful, and to avoid confusion. A subcommittee was formed with Vincent Meister, Craig Barlow, and Todd Utzinger.

VII. OTHER BUSINESS

Judge Trease stated that there is an issue with Rule 13 and pretrial conferences. Judge Trease noted that the rule states that the accused shall be present unless the accused waives the right to appear. Judge Trease stated that defendants often are not at pretrial conferences but they should be there, because the court is addressing issues for which the defendant's participation is necessary. Judge Trease suggested adding language to the end of subparagraph (a) stating that an accused's waiver is subject to the court's approval.

After brief discussion, Judge Trease moved to approve the rule with the proposed amendment. Patrick Corum seconded the motion. The motion carried unanimously.

VIII. ADJOURN

The committee scheduled its next meeting for March 9, 2011 at 5:15 p.m. The meeting adjourned at 7:00 p.m.