

MINUTES

**Rules of Criminal Procedure
Committee Meeting**

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

October 26, 2010

ATTENDEES

Laura Dupaix
Judge Brendan McCullagh
Judge Michele Christiansen
Judge Vernice Trease
Craig Ludwig
Patrick Corum
Steven Major
Todd Utzinger
Brent Johnson

EXCUSED

Craig Barlow
Professor Amos Guiora
Vincent Meister

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. Craig Ludwig seconded the motion. The motion carried unanimously.

II. RULE 11 AND PADILLA

Laura Dupaix reminded committee members that she had proposed a new paragraph in the Rule 11 statement to address the U.S. Supreme Court's directive that attorneys discuss immigration issues with their clients. The proposal had been circulated to judges and the committee had received comments. Judge Brendan McCullagh believes that this belongs in Rule 7 and that judges should address this at the first appearance. Judge McCullagh stated that he advises defendants at the beginning of their cases so that if they have concerns, they can research before they enter a plea. Ms. Dupaix questioned whether defense attorneys would want this information at such an early stage. Judge Vernice Trease stated that she makes certain that she does not elicit incriminating information.

Ms. Dupaix stated that even if the advisement is given at the beginning, it would not prohibit putting language in the Rule 11 statement. Ms. Dupaix stated that this could be a fail safe to make certain that the information is in the record. Judge Trease stated that, whether the language is in the form or not, judges will still verbally advise during the plea colloquy. Patrick

Corum stated that the language "may be consequences" is incorrect, because there will be consequences to those defendants. Mr. Corum stated that this issue can become very complicated and cannot be resolved by putting a few sentences into the form. Ms. Dupaix stated that might be the case, but putting it in the form is the right thing to do. Judge McCullagh suggested that it be in the attorney certification, with the attorney certifying that the attorney has advised the client. Ms. Dupaix stated that would not prevent defendants from coming back later and claiming that the attorney may have certified that, but it didn't really happen. Ms. Dupaix stated that putting the language separately will eliminate those arguments.

Todd Utzinger stated that the committee is trying to resolve two different doctrines through this language: ineffective assistance of counsel and knowingly and voluntarily entering a plea. Mr. Utzinger stated that the committee cannot resolve the Padilla issue with one paragraph, no matter where it is placed. Mr. Utzinger suggested that the committee may be moving too quickly, because there hasn't been time to assess the impact of Padilla. Judge McCullagh stated that the committee should try to anticipate and resolve as much as it can.

Ms. Dupaix asked for a vote on whether committee members favor putting language in the Rule 11 statement. Everyone agreed to having a paragraph in the statement. Judge Trease stated that the language must warn that a guilty plea will have consequences. Judge McCullagh stated that this will take care of ninety percent of the cases. Judge McCullagh suggested that this be put in Rule 7 and in the plea statement. Mr. Corum suggested that new language be drafted and then circulated for discussion. Ms. Dupaix stated that she will draft new language and circulate the proposal.

III. RULE 36

Mr. Corum stated that he has created a proposal but has not had an opportunity to distribute that yet. Mr. Corum stated that he will email the proposal to staff for circulation prior to the next meeting.

IV. RULE 14

Vincent Meister was not meeting and therefore this issue will be discussed at the next meeting.

V. RULE 4

Ms. Dupaix stated that her office has occasionally received complaints from prosecutors stating that they sometimes want to amend informations before preliminary hearings, but judges won't allow the amendments based on the language in Rule 4. Ms. Dupaix stated that the prosecutors will then dismiss the case and refile. Ms. Dupaix suggested that prosecutors not have to do this, in the interests of judicial economy. Ms. Dupaix proposed an amendment to Rule 4 that would allow amending informations any time prior to the preliminary hearing. After bindover amendments will only be allowed if the court determines that the amendments will not prejudice the defendant. Judge McCullagh noted that the practice used to be that a prosecutor

would file a complaint first, and then an information would be filed after bindover. Judge McCullagh stated that Rule 4 was based on that previous practice and the rule should be amended to reflect current practice. Judge McCullagh stated that amending informations in misdemeanor cases should also be addressed. Judge McCullagh suggested that, in misdemeanor cases, a prosecutor be able to amend an information up to the point that the judge determines that amending the information would no longer be fair to the defendant.

Mr. Corum stated that this issue usually arises during the preliminary hearing when a prosecutor amends a one count information to a 15 count information. Mr. Corum noted that the proposed language would permit such an amendment because the cut-off point is after bindover. Judge McCullagh suggested putting in language allowing for continuances when the defendant has not had sufficient prior notice of the amendment. Ms. Dupaix stated that she will draft new language based on the committee's comments and bring that to the next meeting.

VI. RULE 17, 18, AND 19 SUBCOMMITTEE

Judge McCullagh stated that his subcommittee has not met. Judge McCullagh stated that the Rules of Criminal Procedure need to be reorganized and that will address any concerns about Rules 17, 18, and 19. Judge McCullagh stated that he will submit a statement at the next meeting as to why and how reorganization should occur.

VII. OTHER BUSINESS/ADJOURN

The committee did not have any other business. The committee scheduled its next meeting for January 18, 2011. The meeting adjourned at 6:30 p.m.