

MINUTES

**Supreme Court's Advisory Committee
on the
Rules of Criminal Procedure**

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

August 24, 2011

ATTENDEES

Laura Dupaix
Judge Michele Christiansen
Judge Vernice Trease
Patrick Corum
Jeremy Delicino
Craig Ludwig
Vincent Meister

EXCUSED

Craig Barlow
Professor Amos Guiora
Judge Brendan McCullagh
Steven Major
Todd Utzinger

STAFF

Diane Abegglen
Brent Johnson

I. WELCOME / APPROVAL OF MINUTES

Laura Dupaix welcomed the committee members to the meeting. Ms. Dupaix welcomed Jeremy Delecino as the newest member of the committee. The committee members introduced themselves to Mr. Delecino.

Patrick Corum moved to approve the minutes from the last meeting. Judge Michele Christiansen seconded the motion. The motion carried unanimously.

II. RULE 15A UPDATE

Ms. Dupaix stated that the Supreme Court had approved the repeal of Rule 15A. However, the Supreme Court wants the committee to try and come up with a better rule. Staff stated that the members of the court want the committee to consider having a rule that addresses these reports as prima facie evidence. Vincent Meister stated that he believes the issue is more administrative than a rule of procedure. Mr. Meister stated that courts could just address this issue at pre-trial conferences. Mr. Meister stated the courts could ask the parties about what

evidence remains in dispute. Mr. Meister stated that most often the cases are about whether the drugs are really the defendant's and the reports are usually not used. Mr. Corum stated that the disputes are also often about Fourth Amendment issues.

Judge Vernice Trease stated that it appears as if the court might want these to be treated the same as DUI reports, which, by statute, are to be admitted without the preparer of the report having to appear. Ms. Dupaix stated that if there is a presumption that the report may be admitted, the defendant could still subpoena the preparer and others to challenge the report. Mr. Corum noted that the Rules of Evidence already provide bases for admitting and challenging. Judge Trease noted that DUI cases are different because the preparers submit certificates on the calibration of the machines.

Jeremy Delecino stated that in the Bullcoming case, the justices were skeptical that states could not meet their burdens under Melendez-Diaz because the justices didn't believe that there would be a significant increase in demand for individuals to appear and testify about reports. Ms. Dupaix stated that passing Rule 15A created the problem by requiring defense attorneys to demand appearance of individuals involved in the process in practically all cases in order to avoid ineffective assistance claims.

Ms. Dupaix suggested that staff get more information from members of the Supreme Court as to what they might be looking for in a rule. Ms. Dupaix stated that staff should report back that the committee discussed the issue and determined that Rule 15A is not useful; the system will work better without a rule; and making the report prima facie evidence will not really address the Confrontation Clause issue. Mr. Corum stated that the reports are already prima facie evidence, but the question will be whether a report is admissible in a given case. Mr. Meister stated that he believes the court is looking for ways to resolve these issues as early in a case as possible.

III. RULE 13

Ms. Dupaix reported that the Supreme Court had rejected the proposed amendment to Rule 13. Ms. Dupaix stated that the Supreme Court believes that courts already have the authority to do what Rule 13 was attempting to accomplish, and that the amendment could create confusion as to what is actually required.

IV. RULE 7

Judge Michele Christiansen distributed a proposed amendment to Rule 7 to address the requirements imposed by the Hernandez case. Judge Christiansen stated that the amendment simply adds class A misdemeanors to the provision on requiring preliminary hearings and specifically adds class B and C misdemeanors to the paragraph stating that those cases go directly to arraignment. Patrick Corum moved to approve the proposed amendments. Vincent Meister seconded the motion. The motion carried unanimously.

V. RULE 36

Patrick Corum distributed the latest version of his proposed amendment to Rule 36. Mr. Corum gave the background of the proposal. Mr. Corum stated that the important aspect is that the court have some record of the reasons for withdrawal. After brief discussion, Craig Ludwig moved to approve the proposal. Judge Michele Christiansen seconded the motion. The motion carried unanimously.

Mr. Meister then questioned whether the rule should require the court to certify reasons for withdrawal. Mr. Meister suggested that the attorney certify. After brief discussion, the committee members agreed that it should be counsel who certifies that withdrawal does not violate the Rules of Professional Conduct. Patrick Corum then moved to approve the rule with that change. Judge Vernice Trease seconded the motion. The motion carried unanimously.

VI. RULE 29

Staff explained that he had prepared changes to Rule 29 to clarify that other parties may not file an opposition to a motion to disqualify and the moving party does not need to file a request to submit for decision. Staff stated, however, that there has only been a single incident upon which the request for a change was based and that perhaps a change is not necessary at this time. Staff stated that the committee can wait to see if other complaints are received. The committee members agreed with the suggestion.

VII. OTHER BUSINESS/ADJOURN

Judge Trease stated that the committee should review the subpoena rule and the victim privilege in Rule 506, as she has seen cases in which there have been conflicts between the two provisions. Ms. Dupaix stated that Rule 14 was intended to create a procedure in response to the Gonzales case. Ms. Dupaix stated that, in Gonzales, the defendant had subpoenaed the victim's records but the victim and the prosecution were never aware of the subpoena. Ms. Dupaix stated that the committee created a procedure to ensure that the victim and prosecution are aware of any attempts to obtain victim records. Ms. Dupaix stated that Rule 506 is about admissibility while Rule 14 is about process and there shouldn't be a conflict. Mr. Meister stated that he has seen attorneys rely strictly on Rule 506 to obtain records without bringing Rule 14 into the discussion. Judge Trease stated that she will find the cases on which she has seen a problem and bring the issues back to the committee.

The committee scheduled its next meeting for October 12, 2011 at 5:15 p.m. There being no further business, the committee adjourned at 6:30 p.m.