

DRAFT

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 84111

May 17, 2016

ATTENDEES

Patrick Corum- Chair
Judge Brendan McCullagh
Judge Elizabeth Hruby-Mills
Judge Vernice Trease
Professor Jensie Anderson
Jeffrey Gray
Blake Hills
Craig Johnson
Ryan Stack
Cara Tangaro
Douglas Thompson

EXCUSED

Tessa Hansen

STAFF

Brent Johnson

I. WELCOME / APPROVAL OF MINUTES

Patrick Corum welcomed the Committee members to the meeting. Judge Vernice Trease moved to approve the minutes from the March 16, 2016 meeting. Jeffrey Gray seconded the motion. The motion carried unanimously.

II. RULES PUBLISHED FOR PUBLIC COMMENT: RULE 18 AND RULE 38

Mr. Corum first discussed rule 18. He noted that Judge James Blanch's comment was well-taken regarding additional peremptory challenges. Mr. Corum suggested the Committee reinsert the peremptory challenge language. Brent Johnson stated this addition would not require the rule to again be published for public comment. The Committee briefly discussed the issue of

jury deliberations. The Committee discussed Judge Derek Pullan's comment regarding deliberations and whether they must or should "begin anew." The Committee believes that even by telling a jury to begin anew, it's human nature to remember what has already been seen and heard. It was stated that the federal rules have a provision in place where the alternate jurors are not released during deliberations. The Committee agreed that having the term "may" inserted into the rule would give judges the discretion to replace a juror, rather than using the term "shall." Rule 18 was tabled for further research and discussion.

The Committee next discussed rule 38. The committee discussed the comments that were received. It was questioned whether there was caselaw to support the amendment regarding appeals. Judge Vernice Trease stated there was recent caselaw supporting this. Judge Trease believes it is not necessary to list the caselaw in a committee note. The Committee noted there was some merit to the comment from Brian Haws regarding sections (e)(6) and (f)(6). Mr. Johnson stated the case referenced by Mr. Haws was lost by the defense. He further stated the appellate courts agreed that someone is not allowed to withdraw an appeal after a guilty plea or verdict. The Committee decided to add the language "prior to plea or trial" and remove the word "judgment" and publish the rule for comment. Ryan Stack moved to approve changing the language in section (f)(6) as stated above. Judge Brendan McCullagh seconded the motion. The motion carried unanimously.

It was noted the other issues need not be discussed further. Judge McCullagh then moved to approve rule 38 with a recommendation to the Supreme Court that they adopt the draft of rule 38 that went out for public comment. Mr. Stack seconded the motion. The motion carried unanimously.

III. HB 381

Mr. Johnson stated H.B. 381 (Standards for Issuance of Summons) was being presented to the Committee so they could ensure that the rules follow the statute because the bill is now in effect. Mr. Johnson noted that this should be addressed immediately. After brief discussion, it was decided the standards should be included in the new rules. The Committee discussed bail issues, including the higher amounts being set for defendants who don't have the funds to cover it, essentially giving the defendant no bail. The Committee felt it was best to include this new language into rule 6(b) or rule 6(c). The Committee discussed, in depth, various ways to word the language regarding service of a summons.

Judge Brendan McCullagh recommended to send the revised rule 6 to the Supreme Court with a recommendation that they adopt the rule on an emergency rule-making basis subject to public comment and review after the public comment period. Douglas Thompson seconded the motion. The motion carried unanimously.

IV. UPDATE ON RULE 22

Mr. Johnson stated rule 22 was published for public comment. After that the Supreme Court asked the Committee to research and see if there is a way to refine the standards of

“ambiguous or internally contradictory” and see if other states have defined these terms. The Supreme Court also wanted research from other states on time-limits. Mr. Johnson noted this is still in the pipeline and is waiting for the Supreme Court to consider potential changes. Mr. Johnson stated the federal system has time-limits.

V. PRETRIAL RELEASE COMMITTEE RULE CHANGES

Judge McCullagh stated he is waiting on all of the pretrial rule changes. There are also JRI issues that he is waiting on.

Judge McCullagh received a couple of comments on rule 7. Judge McCullagh stated the rule 7 changes are still in line with Title 77, Chapter 20. He noted rule 7 tightens time-lines a bit, but these are mostly procedural. Judge McCullagh stated once due process is initially satisfied, release conditions may only be modified if there has been a material change in circumstances, as per Title 77, Chapter 20. Judge McCullagh stated the Board of District Court Judges unanimously recommended a single, uniform practice throughout the state. This recommendation was also adopted by the Judicial Council. Judge McCullagh has been trying to incorporate this practice into the rule.

Judge McCullagh then discussed rule 4. He stated the justice courts are going to electronic filing soon. The Committee noted that the process of using either a warrant or a summons varies throughout the state with the Third District issuing more warrants than summonses. The Committee discussed rule 4(i). Judge McCullagh said that prior to electronic filing if an information was received by the court and there was an error, the court would return the information for correction. However, with electronic filing that doesn't happen because once an information is filed a case number is assigned. With electronic filing, if an information is identified for correction then a tracking number is assigned. If within two weeks the amended information hasn't been refiled the case would be dismissed. The Committee discussed the various ways throughout the state that criminal cases are filed. Most include PC statements. It was noted that last year there were 12,693 cases filed in Salt Lake County. Of those cases 1,015 requested a summons, 6,516 requested a warrant. That leaves just over 5,000 cases unaccounted for. These would include persons in custody when the case is filed. When a warrant is issued, however, it is served immediately upon the inmate. In Summit County last year, 411 criminal cases were filed, 97 of those with a summons and 80 with a warrant.

The Committee then readdressed rule 4(c). Judge McCullagh stated that most cases filed in the West Valley Justice Court are by citation. Judge McCullagh stated he would like to see paragraph (i) left as is and instead change paragraph (c) from “may contain” to “shall contain” so that when a judge reviews what has been presented he or she will have a better understanding of what the case is about and therefore will be able to make a more educated decision moving forward.

Judge McCullagh explained his idea on revising rule 9 to state that if an information is not filed within 96 hours a person who has not posted bail will automatically be released on their own recognizance.

Judge McCullagh motioned to send rules 4, 4a, and 4b out for public comment with a repeal of rule 5. Jeffrey Gray seconded the motion. The motion carried unanimously. Judge McCullagh will work on amending rules 7 and 9 for the next meeting.

VII. OTHER BUSINESS/ADJOURN

The Committee scheduled its next meeting for July 19. The meeting adjourned at 2:00 p.m.



Brent Johnson <brentj@utcourts.gov>

challenging the constitutionality of a law

1 message

Tim Shea <tims@utcourts.gov>

Thu, Jun 2, 2016 at 3:11 PM

To: Patrick Corum <pcorum@sllda.com>, Carol Verdoia <cverdoia@utah.gov>

Cc: Brent Johnson <brentj@utcourts.gov>, Katie Gregory <katieg@utcourts.gov>

Carol and Patrick,

The appellate rules committee has just approved for comment a draft rule that would require all parties to serve their briefs on the AG when any party challenges the constitutionality of a statute. There will be a parallel provision for serving the county or municipal attorney when challenging the constitutionality of a local ordinance. The procedures are different, but the concepts are the same as those in URCP 24(d).

During the committee's discussions, several people raised the circumstance in which a criminal or juvenile case was delayed or parties suffered adverse consequences because a party had not followed URCP 24(d). Since there is no counterpart in the rules of criminal or juvenile procedure, URCP 24(d) applies, but frequently even experienced criminal and juvenile practitioners are not aware of it.

The appellate rules committee recommends that your respective committees consider drafting a rule similar to Rule 24(d) so parties might more reasonably be expected to timely notify the AG or county or municipal attorney when challenging the constitutionality of a law.

Thank you,
Tim

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Rule 25A. Challenging the constitutionality of a statute or ordinance.

(a) Notice to the Attorney General or the county or municipal attorney; penalty for failure to give notice.

(a)(1) When a party challenges the constitutionality of a statute in an appeal or petition for review in which the Attorney General has not appeared, every party must serve its principal brief and any subsequent brief on the Attorney General on or before the date the brief is filed.

(a)(2) When a party challenges the constitutionality of a county or municipal ordinance in an appeal or petition for review in which the responsible county or municipal attorney has not appeared, every party must serve its principal brief and any subsequent brief on the county or municipal attorney on or before the date the brief is filed.

(a)(3) If an appellee or cross-appellant is the first party to challenge the constitutionality of a statute or ordinance, the appellant must serve its principal brief on the Attorney General or the county or municipal attorney no more than 7 days after receiving the appellee's or the cross-appellant's brief and must serve its reply brief on or before the date it is filed.

(a)(4) Every party must serve its brief on the Attorney General by email or mail at the following address and must file proof of service with the court.

Email

notices@agutah.gov

Mail

Office of the Utah Attorney General

Attn: Utah Solicitor General

320 Utah State Capitol

P.O. Box 142320

Salt Lake City, Utah 84114-2320

(a)(5) If a party does not serve a brief as required by this rule and supplemental briefing is ordered as a result of that failure, a court may order that party to pay the costs, expenses, and attorney fees of any other party affected by that failure.

(b) Notice by the Attorney General or county or municipal attorney; amicus brief.

(b)(1) Within 14 days after service of the brief that presents a constitutional challenge the Attorney General or other government attorney will notify the appellate court whether it intends to file an amicus brief. The Attorney General or other government attorney may seek up to an additional 7 days' extension of time from the court. Should the Attorney General or other government attorney decline to file an amicus brief, that entity should plainly state the reasons therefor.

(b)(2) If the Attorney General or other government attorney declines to file an amicus brief, the briefing schedule is not affected.

(b)(3) If the Attorney General or other government attorney intends to file an amicus brief, that brief will come due 30 days after the notice of intent is filed. Each governmental entity may file a motion to extend that time as provided under Rule 22. On a governmental entity filing a notice of a

31 intent, the briefing schedule established under Rule 13 is vacated, and the next brief of a party will
32 come due 30 days after the amicus brief is filed.

33 **(c) Call for the views of the Attorney General or county or municipal attorney.** Any time a party
34 challenges the constitutionality of a statute or ordinance, the appellate court may call for the views of the
35 Attorney General or of the county or municipal attorney and set a schedule for filing an amicus brief and
36 supplemental briefs by the parties, if any.

37

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Rules of Criminal Procedure Committee
From:  Brent Johnson, General Counsel
Re: Rules published for public comment
Date: July 18, 2016

Since I may not be at the meeting on Tuesday I want to provide the committee with an update on rules that have been published for public comment. The Supreme Court approved rule 17.5, on remote communications, and rule 38, on reinstating appeals, both with effective dates of November 1. Rule 38 was adopted as proposed by the committee. The court made one change to rule 17.5. In paragraph (c) the court removed the language allowing the court to permit testimony “in its discretion.” The court replaced that language with “for good cause.” The reason for this change was to make the standard consistent with the standards in the other rules of procedure.

As you may have seen, rule 22 is once again out for public comment. I am attaching a copy of the rule. As I mentioned at the last meeting, the court wanted me to research the standards in other jurisdictions. The court was particularly interested in whether the standards could be refined and whether any jurisdictions had adopted time-limits. Based on my research, I proposed the new sections. I also added language on time-limits, at least for motions based on certain allegations. The court refined the proposal and approved this version for public comment. The committee will have the opportunity to provide input and other recommendations on the rule.

**The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.**

1 **Rule 22. Sentence, judgment and commitment.**

2
3 (a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for
4 imposing sentence which shall be not less than two nor more than 45 days after the verdict or
5 plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence,
6 the court may commit the defendant or may continue or alter bail or recognizance.

7
8 Before imposing sentence the court shall afford the defendant an opportunity to make a statement
9 and to present any information in mitigation of punishment, or to show any legal cause why
10 sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to
11 present any information material to the imposition of sentence.

12
13 (b) On the same grounds that a defendant may be tried in defendant's absence, defendant may
14 likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a
15 warrant for defendant's arrest may be issued by the court.

16
17 (c)(1) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and
18 shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the
19 sentence. Following imposition of sentence, the court shall advise the defendant of defendant's
20 right to appeal and the time within which any appeal shall be filed.

21
22 (c)(2) If the defendant is convicted of a misdemeanor crime of domestic violence, as defined in
23 Utah Code Section § 77-36-1, the court shall advise the defendant orally or in writing that, ~~as a~~
24 ~~result of the conviction~~ if the current case meets the criteria of 18 U.S.C. § 921(a)(33), then
25 pursuant to federal law, it is unlawful for the defendant to possess, receive or transport any
26 firearm or ammunition. The failure to advise does not render the plea invalid or form the basis
27 for withdrawal of the plea.

28
29 (d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth
30 the sentence. The officer delivering ~~an illegal~~ the defendant to the jail or prison shall deliver a
31 true copy of the commitment to the jail or prison and shall make the officer's return on the
32 commitment and file it with the court.

33
34 (e) ~~The court may correct a sentence or a sentence imposed in an illegal manner, at any time~~
35 when the sentence imposed:

36
37 (e)(1) exceeds the statutorily authorized maximums;

38
39 (e)(2) is less than statutorily required minimums;

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41 (e)(3) violates Double Jeopardy;

42
43 (e)(4) is ambiguous as to the time and manner in which it is to be served;

44
45 (e)(5) is internally contradictory; or
46

47 (e)(6) omits a condition required by statute or includes a condition prohibited by statute.

48

49 (f) A motion under (e)(3), (e)(4), or (e)(5) shall be filed no later than one year from the date the
50 facts supporting the claim could have been discovered through the exercise of due diligence. A
51 motion under the other provisions may be filed at any time.

52

53 ~~(f)~~(g) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in
54 accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a
55 mentally ill offender committed to the Department of Human Services as provided by Utah Code
56 ~~Ann.~~ § 77-16a-202(1)(b), the court shall so specify in the sentencing order.