

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

November 17, 2008 - 5:15 p.m.

ATTENDEES

Craig Barlow
Patrick Corum
Laura Dupaix
Julie George
Judge Bruce Lubeck
Craig Ludwig
Steven Major
Judge Brendan McCullagh
Vincent Meister

EXCUSED

Judge Michele Christiansen
Professor Erik Luna
Sam Harkness

STAFF

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

Laura Dupaix welcomed the committee members to the meeting. Judge Brendan McCullagh moved to approve the minutes from the last meeting. Judge Bruce Lubeck seconded the motion. The motion carried unanimously.

II. RULES 27, 27A, and 38

Judge Brendan McCullagh reviewed the comments that had been received on Rules 27, 27A, and 38. The first comment was submitted by Sam Newton. Judge McCullagh noted that Sam Newton had written an article several years ago about justice courts. Around the same time, a rule proposal was submitted to the Supreme Court that would have provided for an automatic stay of a justice court sentence. The proposal was opposed by both the Board of District Court Judges and the Board of Justice Court Judges. Judge McCullagh stated that the amendment therefore did not pass, and Mr. Newton's proposal would not be accepted because of the previous opposition.

Judge McCullagh stated that a common theme in the public comments was that the proposed process will affect the de novo appeal. Judge McCullagh stated that the proposed process will not affect the trial de novo, but only deal with the underlying sentence. Judge

McCullagh then addressed the comments submitted by Randall McUne. Mr. McUne had stated that the language “abandonment of the appeal” was more vague than the standard permitting dismissal on a failure to appear. Judge McCullagh agreed that the standard is more vague, but the proposed language complies with the Constitution.

Julie George asked whether incarcerated indigent defendants would have difficulty under this process because they would not have access to the notice of appeal form and could not make copies to serve on the prosecutor. Judge McCullagh stated that the form is not mandatory and an indigent defendant could still write a notice of appeal and send that to court. Judge McCullagh stated that the rule is more complicated than before, but he believes it provides better direction to the courts. Judge McCullagh then reviewed the changes he made to the rules after the comments. Judge McCullagh stated that no comments were received on Rule 27 and therefore changes were not made.

Judge McCullagh stated that he amended Rule 27A to change the time from hours to days because the criminal rules count days and not hours. Judge McCullagh stated that paragraph (c) had been changed to clarify in which district court the appeal will be heard. Judge McCullagh stated that paragraph (b)(1)(A) had been changed from “hearing” to “scheduling conference,” because that phrase more accurately reflects what will occur. Judge McCullagh stated that the scheduling conference is necessary to help clarify the issues on appeal and what will and will not be addressed. Judge McCullagh stated that he eliminated the language on informations in paragraph (e)(1) because there is no need to file another information. The issues that will be addressed can simply be explained to the trier of fact. Judge McCullagh stated that the changes to paragraph (e)(3) just remind district court clerks to send the case back to the justice court.

Judge McCullagh then explained the changes to Rule 38. Vincent Meister asked whether there would be any way for an individual to avoid an appeal when the individual only wants to, for example, get his or her license back. Judge McCullagh stated that he has allowed individuals to request a trial court review of such an issue. Judge McCullagh stated that most justice courts will accommodate this process. Julie George asked whether the process would allow someone to raise collateral consequences, such as immigration issues. Craig Barlow stated that the rule should not get into collateral consequences because of the difficulties in addressing all potential consequences. Judge McCullagh then moved to approve Rule 38 as amended. Steven Major seconded the motion. The motion carried unanimously. Judge McCullagh then moved to approve Rule 27A. Julie George seconded the motion. The motion carried with Patrick Corum opposing the motion, although Mr. Corum stated that the rule is well written and will clarify the process. Judge McCullagh then moved to approve Rule 27. Patrick Corum seconded the motion. The motion carried unanimously.

III. RECORDING INTERROGATIONS

Laura Dupaix stated that the committee would discuss recording interrogations and: 1) whether a rule of criminal procedure is a good idea to implement the process; 2) and if so, what

form should the rule take; and 3) what remedies will be incorporated into the rule. Judge Bruce Lubeck stated that he didn't think this should be a rule of criminal procedure because there is nothing in existing provisions that is close to this concept. Judge Lubeck stated that this should either be resolved through a statute or case law. Laura Dupaix stated that she had a question about how many states have adopted a rule on presumptive inadmissibility. Ms. Dupaix had contacted Professor Sullivan and he sent an article in which he had changed his position on presumptive inadmissibility. Ms. Dupaix stated that this would probably be best as a rule of evidence or as a cautionary jury instruction. The committee agreed that the concept of interrogations is a good idea, but the mechanism to enforce it is in question.

Laura Dupaix expressed concern over resolving the issue through case law. Ms. Dupaix stated that the case might be too fact specific and could create problems in other cases. Judge McCullagh stated that there is a benefit to a rule because the committee can anticipate potential problems. Mr. Barlow stated that he did not think a rule would get past the Legislature and that it is not practical to do anything other than promote the best practices statement. Vincent Meister agreed that the best practices statement is the appropriate mechanism. Mr. Meister stated that prosecutors can currently go to law enforcement and encourage the process by telling them that the process will improve prosecutions.

Patrick Corum stated that he would like to see a model jury instruction created. Mr. Corum stated that a jury instruction could be submitted to the court and if a judge denies or allows the jury instruction it could be litigated and case law would be developed. Julie George asked whether a written *Miranda* warning is currently promoted in a best practices statement. Mr. Meister stated that it is not. Steven Major stated that in Davis County law enforcement officers generally have a defendant sign a written *Miranda* warning. Mr. Major stated that approximately 75% of all confessions come in the field, and not in a police station.

Laura Dupaix stated she would like to let this issue play-out by having law enforcement officers implement the best practices statement. Mr. Meister stated that this could be worked into POST training on an annual basis. Judge Lubeck asked why this issue had been presented to the committee. Laura Dupaix stated that Wally Bugden and Tara Isaacson had written to the Supreme Court and asked that the Criminal Procedure Committee consider a rule. Mr. Major stated that if a process is to be adopted, it should be a rule of evidence and not a rule of criminal procedure.

Judge Lubeck asked whether the committee needed to submit a detailed report to the Supreme Court explaining the committee's position. Laura Dupaix stated that the committee needs to report back in some manner. Matty Branch stated that the committee did not need to submit a long response but should submit a letter explaining the committee's position. Laura Dupaix stated that the letter would mention the best practices statement; that the concept, if adopted, should be done by legislation or a rule of evidence; and that a jury instruction could be requested by the parties, or the parties could at least argue the issue in individual cases.

IV. OTHER BUSINESS/ADJOURN

The committee noted that it did not have any pressing business. There are some issues, such as a report from the Rule 8 subcommittee, but there is no hurry to have those addressed. The committee therefore did not schedule another meeting. Staff was instructed to e-mail committee members at a later date to set a meeting. There being no further business, the committee adjourned at 6:45 p.m.