

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

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AGENDA

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 13, 2007 - 5:15 p.m..

1. WELCOME AND APPROVAL OF MINUTES Laura Dupaix
2. RULE 15.5 REPORT Judge Brendan McCullagh
3. RULE 8 REPORT Patrick Corum
4. RULE 6 Judge Brendan McCullagh
5. OTHER BUSINESS
6. ADJOURN

**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.**

Approved as is
11/13/07

Rule 15.5. ~~Visual recording~~ Out of court statement ~~ors~~ and testimony of child victims or child witness of sexual or physical abuse - Conditions of admissibility.

(1a) In any case concerning a charge of child abuse or of a sexual offense against a child, the oral statement of a victim ~~or witness~~ younger than 14 years of age ~~may be~~ which was recorded prior to the filing of an information or indictment, ~~and is~~ upon motion and for good cause shown ~~is~~ admissible as evidence in any court proceeding regarding the offense if all of the following conditions are met:

(a1) the child is available to testify and to be cross-examined at trial, either in person or as provided by law, or the child is unavailable to testify at trial, but the defendant had a previous opportunity to cross-examine the child concerning the recorded statement, such that the defendant's rights of confrontation are not violated.

(2) no attorney for either party is in the child's presence when the statement is recorded;

(b3) the recording is visual and aural and is recorded on film ~~or~~, videotape or ~~by~~ other electronic means;

(c) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent, and (4) the recording is accurate and has not been altered;

(d5) each voice in the recording is identified;

(e6) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party;

(f7) the defendant and his attorney are provided an opportunity to view the recording before it is shown to the court or jury; and

(g8) the court views the recording before it is shown to the jury and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence; and

(h) the child is available to testify and to be cross-examined at trial, either in person or as provided by Subsection (2) or (3), or the court determines that the child is unavailable as a witness to testify at trial under the Utah Rules of Evidence. For purposes of this subsection "unavailable" includes a determination, based on medical or psychological evidence or expert testimony, that the child would suffer serious emotional or mental strain if required to testify at trial.

(2b) In any criminal case concerning a charge of child abuse or of a sexual offense against a child, ~~the court may order~~, upon motion of the prosecution a party, and for good cause shown, may order that the testimony of any witness ~~or victim~~ younger than 14 years of age be taken in a room other than the court room, and be televised by closed circuit equipment to be viewed by the

jury in the court room. All of the following conditions shall be observed:

(a~~1~~) Only the ~~presiding~~ judge, attorneys for each party and the testifying child (if any), persons necessary to operate equipment, and a counselor or therapist whose presence contributes to the welfare and emotional well-being of the child may be within the room during the child's testimony. The defendant may also be present during the child's testimony unless he consents to be hidden from the child's view, or the court determines that the child will suffer serious emotional or mental strain if ~~he is~~ required to testify in the defendant's presence, or that the child's testimony will be inherently unreliable if ~~he is~~ required to testify in the defendant's presence. If the court makes that determination, or if the defendant consents:

(i~~A~~) the defendant may not be present during the child's testimony;

(ii~~B~~) the court shall ensure that the child cannot hear or see the defendant;

(iii~~C~~) the court shall advise the child prior to his testimony that the defendant is present at the trial and may listen to the child's testimony;

(iv~~D~~) the defendant shall be permitted to observe and hear the child's testimony, and the court shall ensure that the defendant has a means of two-way telephonic communication with his attorney during the child's testimony; and

(v~~E~~) the conditions of a normal court proceeding shall be approximated as nearly as possible.

(b~~2~~) Only the ~~presiding~~ judge and ~~attorneys~~ an attorney for each party may question the child.

(e~~3~~) As much as possible, persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror so the child cannot see or hear them.

(d~~4~~) If the defendant is present with the child during the child's testimony, the court may order that persons operating the closed circuit equipment film both the child and the defendant during the child's testimony, so that the jury may view both the child and the defendant, if that may be arranged without ~~violation of~~ violating other requirements of Subsection (2~~1~~).

(3~~c~~) In any criminal case concerning a charge of child abuse or of a sexual offense against a child, the court may order, upon motion of ~~the prosecution~~ a party and for good cause shown, that the testimony of any witness ~~or victim~~ younger than 14 years of age be taken outside the courtroom and be recorded. That testimony is admissible as evidence, for viewing in any court proceeding regarding the charges if the provisions of Subsection (2~~b~~) are observed, in addition to the following provisions:

(a~~1~~) the recording is ~~both~~ visual and aural and recorded on film ~~or~~, videotape or by other electronic means;

(b) ~~the recording equipment is capable of making an accurate recording, the operator is~~

~~competent, and~~2) the recording is accurate and is not altered;

(e3) each voice on the recording is identified; and

(d4) each party is given an opportunity to view the recording before it is shown in the courtroom.

(4d) If the court orders that the testimony of a child be taken under Subsection (2a) or (3b), the child may not be required to testify in court at any proceeding where the recorded testimony is used.

Approved

Rule 8. Appointment of counsel.

(a) A defendant charged with a public offense has the right to self representation, and if indigent, has the right to court-appointed counsel if the defendant faces a substantial probability of deprivation of liberty.

(b) In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court shall appoint two or more attorneys to represent such defendant and shall make a finding on the record based on the requirements set forth below that appointed counsel is proficient in the trial of capital cases. In making its determination, the court shall ensure that the experience of counsel who are under consideration for appointment have met the following minimum requirements:

(1) at least one of the appointed attorneys must have tried to verdict six felony cases within the past four years or twenty-five felony cases total;

(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a capital or a felony homicide case which was tried to a jury and which went to final verdict; **and at least one of the appointed attorneys must have appeared as counsel or co-counsel in, and performed substantial work on, a capital case; and**

(3) at least one of the appointed attorneys must have completed or taught within the past five **three** years an approved continuing legal education course or courses at least ~~eight~~ **sixteen** hours of which deal, ~~in substantial part,~~ with the **preparation and trial of death penalty cases and have, within the past year prior to appointment, completed at least six hours of approved continuing legal education dealing with the trial and preparation of death penalty cases; and**

(4) the experience of one of the appointed attorneys must total not less than five years in the active practice of law; **and**

(c) In making its selection of attorneys for appointment in a capital case, the court should also consider at least the following factors:

(1) whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case;

(2) the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant;

(3) the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years;

(4) the diligence, competency and ability of the attorneys being considered; and

(5) any other factor which may be relevant to a determination that counsel to be appointed will fairly, efficiently and effectively provide representation to the defendant.

(d) In all cases where an indigent defendant is sentenced to death, the court shall appoint one or more attorneys to represent such defendant on appeal and shall make a finding that counsel is proficient in the appeal of capital cases. To be found proficient to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:

(1) at least one attorney must have served as counsel in at least ~~three~~ **five** felony appeals; and

(2) at least one attorney must have attended and completed within the past ~~five~~ **three** years an approved continuing legal education course **or courses at least sixteen hours of** which deals, ~~in substantial part,~~ with the trial or appeal of death penalty cases **and have, within the past year prior to appointment, completed at least six hours of approved continuing legal education dealing with the trial or appeal of death penalty cases; ~~and~~**

(e) In all cases in which counsel is appointed to represent an indigent petitioner pursuant to Utah Code Ann. § 78-35a-202(2)(a), the court shall appoint one or more attorneys to represent such petitioner at post-conviction trial and on post-conviction appeal and shall make a finding that counsel is qualified to represent persons sentenced to death in post-conviction cases. To be found qualified, the combined experience of the appointed attorneys must meet the following requirements:

(1) at least one of the appointed attorneys must have served as counsel in at least three felony or post-conviction appeals;

(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise demonstrated proficiency in the area of post-conviction litigation;

(3) at least one of the appointed attorneys must have attended and completed or taught within the past ~~five~~ **three** years an approved continuing legal education course **or courses at least sixteen hours of** which dealt, ~~in substantial part,~~ with the trial and appeal of death penalty cases or with the prosecution or defense of post-conviction proceedings in death penalty cases;

(4) at least one of the appointed attorneys must have tried to judgment or verdict three civil jury or felony cases within the past four years or ten cases total; and

(5) the experience of at least one of the appointed attorneys must total not less than five years in the active practice of law.

(f) Mere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal.

(g) Cost and attorneys' fees for appointed counsel shall be paid as described in Chapter 32 of Title 77.

(h) Costs and attorneys fees for post-conviction counsel shall be paid pursuant to Utah Code Ann. § 78-35a-202(2)(c).