

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

April 18, 2005 - 5:15 p.m.

ATTENDEES

Laura Dupaix
Judge Bruce Lubeck
Craig Ludwig
Professor Erik Luna
Judge Sheila McCleve
Vincent Meister
John O'Connell
Judge Thomas Willmore

EXCUSED

Julie George
Judge Shauna Graves-Robertson
Robert Heineman
Steven Major
Michael Wims

GUESTS

Rick Schwermer
Judge Michael Kwan

STAFF

Matty Branch
Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

Michael Wims was unavailable for the meeting and therefore Laura Dupaix conducted the meeting. Ms. Dupaix welcomed the Committee members and guests. The minutes from the previous meeting were approved.

II. JUSTICE COURT APPEALS

Judge Michael Kwan was invited to the meeting to share the perspectives of the Board of Justice Court Judges on the proposed revision to Rule 38. Judge Kwan stated that the proposed rule takes away an important decision from a neutral arbiter. Judge Kwan stated that there are circumstances in which a defendant is a threat to public safety or is a flight risk. In those circumstances, there may be a need to "forthwith" the defendant after a conviction. Judge Kwan stated that he was not aware of any circumstances in which a certificate of probable cause has been unreasonably denied. Judge Lubeck noted that the Board's issues can be resolved by having a judge set appropriate conditions for release when an appeal is filed. John O'Connell suggested that the justice court judge could be in the position to do that. Judge Kwan noted that bail and other conditions do not guarantee that someone will be held. Mr. O'Connell stated that the certificate requirement for justice court appeals is inappropriate because a defendant is required to show the right to a new trial, but a new trial is automatically granted.

Professor Erik Luna stated that there are two potentials involved. The first is the potential for a defendant to slip through the system between the justice court and the district court. The second is that an innocent defendant will be held too long. Judge Kwan noted that the person who might be held too long has a remedy in the certificate of probable cause.

Laura Dupaix stated that at the recent oral argument in Lucero v. Kennard, Chief Justice Durham and Justice Wilkins both hinted that an automatic stay may be helpful in justice court appeals. Ms. Dupaix noted that the real sticking point seems to be Rule 27, because it does not adequately address justice court appeals.

Rick Schwermer noted that the Board of Justice Court Judges, the Board of District Court Judges and the Judicial Council oppose the proposed revisions to Rule 38. Mr. Schwermer also suggested that the Legislature does not view the trial de novo as a complete do-over because the Drivers License Division and others will take action immediately upon a justice court conviction. Mr. Schwermer stated that it may be a mistake in light of the opposition to move the rule proposal through. Mr. Schwermer suggested that a subcommittee be formed to review the rule in light of the opposition and in light of the Supreme Court's decision in Bernat v. Allphin.

Professor Luna agreed that Rule 38 should be tabled and that input should be received from the Boards. Professor Luna suggested that the Boards submit language to the Committee. Ms. Dupaix suggested that the Boards start with Rule 27. Judge Thomas Willmore then moved to table Rule 38 and to form a subcommittee to review Rule 27 and receive from input from the Boards. Professor Luna seconded the motion. The motion carried unanimously. A subcommittee was formed to review Rule 27. The subcommittee will consist of Judge Bruce Lubeck, representatives from both of the boards of judges, Vincent Meister or his designee and Rob Heineman or his designee. Staff will assist the subcommittee in its work.

III. RULE 40

The Committee received one comment on Rule 40. John O'Connell stated that he has reviewed the federal rule and it is clear in the federal system that the magistrate records the testimony and that the court keeps the records. Judge McCleve noted that those issues should be discussed by the search warrant subcommittee and proposed as new amendments, if appropriate. Judge McCleve then moved to approve Rule 40 as published for public comment. Craig Ludwig seconded the motion. The motion passed, with John O'Connell casting a dissenting vote.

IV. NEXT MEETING/ADJOURN

The next meeting is scheduled for August 29, 2005. The Committee will discuss the search warrant rules, reports on Crawford v. Washington, and reports from Rule 27 subcommittee. There being no further business, the Committee adjourned at 6:15 p.m.