

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 841140

February 12, 2001 - 5:15 p.m.

ATTENDEES

Judge David Roth
Robert Heineman
Judge Shauna Graves-Robertson
Professor Lionel Frankel
Kent Morgan
Judge Glen Dawson
Craig Ludwig
Judge Glenn Iwasaki
Michael Wims
Laura Dupaix
Brooke Wells
Professor Paul Cassell

EXCUSED

John O'Connell
Mary Corporon

GUEST

Tim Shea

STAFF

Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

David Roth welcomed the Committee members to the meeting and introduced the new Committee member, Judge Shauna Graves-Robertson, a justice court judge from Salt Lake County. Judge Glenn Iwasaki moved to approve the minutes of the November meeting. Kent Morgan seconded the motion. The motion carried unanimously.

II. JURY COMMITTEE REPORT

David Roth welcomed Tim Shea to the meeting and asked Mr. Shea to lead the discussion on the Jury Committee recommendations. Mr. Shea stated that he would highlight the most significant proposed changes and noted that the Civil Procedure Committee has already approved its changes for public comment.

Mr. Shea stated that one of the proposals is to allow jurors to take notes during the trial. The notes could be used during deliberation. Mr. Shea also stated that a proposed change would allow the judge to withhold access to an exhibit if there are safety concerns about the exhibit. Kent Morgan

noted that it is difficult to determine the Committee's intent from the proposed language and suggested that a Committee note be used to explain the intent.

Judge Glenn Iwasaki stated that he was bothered by the inclusion of depositions in the rule, when depositions are not authorized in deliberations in any event. Judge Iwasaki stated that the new language could open the way for a jury to demand review of depositions. Laura Dupaix suggested changing the language to distinguish between depositions and exhibits. Rob Heineman questioned whether any criminal trials would have depositions, as he has never seen one. Kent Morgan stated that they are very rare, but possible. After brief discussion, the Committee members agreed that the language should be altered to distinguish between depositions and exhibits.

Mr. Shea discussed the proposed changes to the method of selecting juries. Mr. Shea stated that the traditional method is the "strike and replace method" and an alternative is being proposed, called the "struck method." Judge Iwasaki stated that the Third District Court is already using the struck method. Mr. Shea stated that the strike and replace method is more efficient, while the struck method gets more people involved. In both instances, the objective is to keep the process random.

Rob Heineman questioned why the Jury Committee did not just pick one of the alternatives. Mr. Shea stated that the Committee did not only want one because judges around the state are currently using one or the other.

Mr. Shea stated that another proposal is to allow a preliminary statement to the jury pool. Kent Morgan suggested clarifying language in the rule and noted that the Committee note does not give an idea of what can be said in the preliminary statement. David Roth stated that most judges will want to do the preliminary statement themselves. Mr. Morgan questioned whether the judge could preclude a preliminary statement. Ms. Dupaix expressed the opinion that the language implicitly gave the court authority to refuse to allow the preliminary statement.

Mr. Shea stated that the next proposed change was intended to lower the bar on challenges for cause. The proposed changes focus not just on the state of mind, but on a totality of circumstances. Mr. Shea stated that many practitioners have agreed with the proposed changes, while other practitioners have been troubled by the requirement that a judge be "convinced" of a juror's impartiality.

Mr. Morgan voiced an objection to the proposal stating that he believed the current standard set forth in Irwin v. Dowd to be the correct standard. Ms. Dupaix questioned whether the Jury Committee was unanimous on this proposal. Mr. Shea stated that all the Committee members agreed with the concept. Judge Iwasaki expressed his opinion that the proposal did not necessarily lower the bar, but simply require a judge to make findings on challenges. Mr. Heineman expressed an opinion that the proposal is what the Supreme Court has been trying to do for a while.

There was brief discussion about whether the Committee should propose a different concept. Tim Shea proposed letting the rules go out for public comment and then recommending changes, if any, after that time. The Committee members agreed with this proposal.

Professor Paul Cassell suggested that the existing language on death penalty biases is one-sided and should be changed to reflect the fact that a juror can be excused for being overly biased in favor of or against the death penalty. Michael Wims agreed stating that the Weatherspoon case said that jurors were excludable at both ends of the spectrum. The other Committee members agreed to this change.

Mr. Shea stated that the proposed change to the alternative juror practices is not significant. Mr. Wims noted that the new language would preclude an alternative juror from hearing, for instance, the sentencing portion of a proceeding if problems had arisen between the conviction proceeding and the sentencing proceeding. Mr. Wims suggested adding an exception for capital cases. Judge Roth questioned whether there were other cases in which jurors would come back for the penalty phase. Mr. Morgan stated that there could be others. Mr. Wims suggested an exception for "bifurcated proceedings." Ms. Dupaix stated that the language must also make clear that the exception is only for the second proceeding.

Mr. Shea stated that the proposed changes to Rule 19 would allow for different periods when juror instructions could be given. Ms. Dupaix questioned whether it was appropriate to require objections to oral instructions before the jury retires. Ms. Wells stated that she believed the language to be too limiting. Ms. Wells stated that there have been times when her office has needed to review a transcript in order to clarify the judge's statement, before making an objection. Mr. Shea stated that the reason for the proposal is to give the opportunity to the judge to correct mistakes before the jury begins deliberations. Mr. Wims suggested letting the rule go out for public comment, and maybe someone would suggest a good alternative. The Committee members agreed to this suggestion and agreed to the rules being published for public comment as proposed by the Jury Committee and as amended by the Committee.

II. RULE 11

Laura Dupaix explained that the proposed Rule 11 form had been finalized, after receiving Committee member's suggestions, and was now ready for a final vote. Rob Heineman expressed an opinion that the form should include language related to collateral consequences. Mr. Heineman stated that there are times when defense counsel simply forget to advise their clients of these problems and language in the form would help cure that. Ms. Dupaix agreed that it may be a good idea to advise defendants of collateral consequences, but it should not be put in the form because it is not legally required. Ms. Wells stated that she did not see any problem with putting in language informing a defendant that there may be collateral consequences and the defendant must further investigate to find out what those consequences may be. After brief discussion, Professor Paul Cassell made a motion to include an open-ended sentence which would state that there "may be other consequences to a plea of guilty." Rob Heineman seconded the motion. The motion failed with Laura Dupaix, Kent Morgan, Michael Wims, Judge Glenn Iwasaki, Judge Glen Dawson and David Roth voting against the motion and Rob Heineman, Professor Lionel Frankel, Craig Ludwig, Brooke Wells and Professor Paul Cassell voting in favor of the motion.

Kent Morgan then moved to adopt the form as proposed by Laura Dupaix. Michael Wims seconded the motion. The motion carried unanimously. The Committee agreed that the form should be published for public comment, submitted to the Supreme Court for approval, published as a part of the Court Rules Annotated, and translated into other languages, with Spanish being first.

III. ADJOURN

There being no further business, the meeting adjourned at 6:40 p.m. The next meeting of the Committee will not be scheduled until after the end of the public comment period.