

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

February 23, 2004 - 5:15 p.m.

ATTENDEES

Mary Corporon
Laura Dupaix
Judge Shauna Graves-Robertson
Rob Heineman
Judge Bruce Lubeck
Craig Ludwig
Steven Major
Judge Sheila McCleve
Vincent Meister
John O'Connell
Michael Wims

EXCUSED

Professor Erik Luna
Judge Thomas Willmore

GUEST

Tim Shea

STAFF

Matty Branch
Brent Johnson

I. WELCOME AND APPROVAL OF MINUTES

Michael Wims welcomed the Committee members to the meeting. John O'Connell noted one typographical error in the previous minutes. With the correction, the minutes were approved.

II. RULES 17 AND 19

Michael Wims welcomed Tim Shea to the meeting. Mr. Shea explained several proposals for amendments to the rules of criminal procedure. Mr. Shea stated that one proposed change would eliminate the requirement that the judge, at each recess, admonish the jury about discussing the case. Another proposed change would allow jurors to talk amongst themselves, but not about the case. Mr. Shea stated that the second change brings the rule in line with case law.

John O'Connell suggested that the rule change does not accomplish the objective. Vincent Meister proposed including the admonishment that jurors cannot talk to "another juror" about the case. The Committee unanimously accepted this proposal.

Mr. Heineman stated that he is in favor of retaining the requirement to admonish at each recess. Mr. Heineman recognized that the failure to admonish will not be reversible error, but it is still a good idea.

Ms. Dupaix questioned whether studies had been done by the Jury Committee on this issue. Mr. Shea stated that the concern is that a judge may be responsible when the admonishment is not given. Ms. Dupaix agreed that jurors should be periodically reminded. Judge Lubeck questioned why this is more important than other instructions. Judge Lubeck stated that judges do not periodically remind jurors about the other instructions. Mr. Heineman stated that judges can remind jurors fairly quickly and easily. Judge Lubeck agreed that a judge would never be reversed on this issue, but every time a judge does not do it, the judge is violating the rule. Craig Ludwig suggested including language that a judge admonish jurors "as frequently as practicable." John O'Connell suggested including a phrase which states that "the judge shall so instruct the jury at the outset of the trial and shall remind them as the court deems appropriate." After brief discussion, the Committee approved the proposal with Robert Heineman and Mary Corporon dissenting.

Tim Shea stated that the proposal in Rule 19 is in response to State v. Reyes. This case had held that, based on Rule 17, it was error for the judge not to advise the jurors on all instructions at the conclusion of the evidence. Mr. Shea stated that the Board of District Court Judges had proposed changes to Rule 17 and 19. The proposals would only require a judge to give instructions that had not yet been given, and that the judge was free to remind jurors on any other instructions.

Mary Corporon suggested that it is often a good idea to give certain instructions at the beginning of trial and after the evidence has been presented. John O'Connell stated that instructions should be given at the end and that if the judge wants to give instructions at the beginning that is fine. Ms. Dupaix noted that the jury will always have the written instructions going into deliberations. Ms. Dupaix stated that her office is currently involved in two other cases involving preliminary instructions that were not read again at the end of evidence. Robert Heineman proposed including language which would state that "at the conclusion of the evidence, the court shall instruct the jury on all matters of law material to the jury's deliberations." Mr. Heineman also suggested that the rule include language stating "regardless of whether previously given." After further discussion, Laura Dupaix moved to table the proposal until the Supreme Court has an opportunity to address these issues. John O'Connell seconded the motion. The motion carried unanimously. The Committee agreed that Rob Heineman's proposal should remain as a tabled amendment.

III. JUSTICE COURT APPEALS

It was reported that both the Board of District Court Judges and the Board of Justice Court Judges had voted to oppose the proposed amendments to Rule 38, Justice Court Appeals. The

Committee members had received a copy of the letter from the Board of Justice Court Judges. Judge Lubeck noted that the subcommittee had anticipated all of the objections. Mr. Wims stated that the issue before the Committee is whether to publish the rule for public comment or to study the rule further. After brief discussion, Steven Major moved to publish the rule for public comment. Mary Corporon seconded the motion. The motion carried with Judge McCleve, Vincent Meister and Judge Shauna Graves-Robertson voting against the motion.

Robert Heineman asked whether the Committee should respond to the letter. Mr. Wims stated that he will draft a letter informing the Board that the Committee had voted to publish the rule for public comment and that it will consider all comments received at the end of the comment period.

IV. RULE 27

Laura Dupaix distributed a proposed rule change which would require counsel to serve the Attorney General's Office in felony cases, when seeking a certificate of probable cause. The Committee members suggested alternative language. After brief discussion, the Committee unanimously voted to approve Ms. Dupaix's proposal, with the changes made by the Committee.

V. RULE 11

Staff provided background on his discussions with the Board of District Court Judges about the proposal to require district court judges to inform defendants about enhanced penalties. The proposal had originated with the DUI Committee and the Board of District Court Judges had agreed with the proposal. The Board of District Court Judges felt that the proposal would help provide clear information in enhancement cases. After brief discussion, Mary Corporon moved to have the discussion at the next meeting. Laura Dupaix seconded the motion. The motion carried unanimously.

VI. OTHER BUSINESS

Michael Wims noted that Judge Lyle Anderson had submitted a suggestion to include in the rules a requirement that a judge conduct a colloquy when a prisoner appears for trial in prison clothing. John O'Connell moved to have the discussion on this proposal put over to the next meeting. Steve Major seconded the motion. Robert Heineman then moved to not change the rules at all. Judge McCleve seconded the motion. John O'Connell then withdrew his motion. The vote on Mr. Heineman's proposal was unanimous. The Committee agreed that Judge Anderson should be notified of the Committee's action.

Mr. Wims noted that the Committee needed to address an issue related to 402 motions. The current rule requires motions to be brought ten days before sentencing. Mr. Wims suggested that a subcommittee review the rule to determine whether any changes are necessary, given the fact that most motions are made after sentencing, and often years after sentencing. A subcommittee of Michael Wims and Robert Heineman was formed to review the issue.

VII. NEXT MEETING/ADJOURN

The Committee scheduled their next meeting for April 19, 2004. The Committee adjourned at 6:45 p.m.