

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 84111  
Council Room

January 15, 2019  
12:00 p.m. – 2:00 p.m.

**Attendees**

Douglas Thompson, Chair  
Professor Jensie Anderson – by phone  
Judge Elizabeth Hruby-Mills  
Blake Hills  
Craig Johnson  
Joanna Landau  
Judge Kelly Schaeffer-Bullock  
Keri Sargent  
Ryan Stack  
Cara Tangaro

**Excused**

Judge Patrick Corum  
Jeffrey S. Gray

**Guests**

Joseph Wade

**Staff**

Brent Johnson  
Jeni Wood – recording secretary

**1. WELCOME/APPROVAL OF MINUTES**

Douglas Thompson welcomed the committee members to the meeting. Mr. Thompson introduced Joseph Wade from the Office of Legislative Research and General Counsel.

The Committee discussed the November 20, 2018 minutes. There being no changes to the minutes, Douglas Thompson moved to approve the minutes. Craig Johnson seconded the motion. The motion carried unanimously.

**2. INTRODUCTION OF NEW MEMBER**

Mr. Thompson introduced Joanna Landau, Director of the Indigent Defense Commission, as the newest member of the committee.

### **3. RULE 22**

Brent Johnson said the Supreme Court would like the committee to address whether a trial court “must” or “may” correct an unconstitutional sentence and whether there should be a time-limit for filing motions. Judge Elizabeth Hruby-Mills expressed a preference for using the word “shall” rather than “must.” Mr. B. Johnson noted there appears to be a trend in legal writing to use must instead of shall. Mr. Thompson recommended changing “may” to “must” in section (e)(1). Mr. Thompson stated that a trial court should not have discretion to ignore a decision that a sentence is unconstitutional.

Cara Tangaro believed there should not be a time-limit to file motions and section (e)(3) should remain as is. The committee agreed.

Judge Kelly Schaffer-Bullock addressed the word “execution” in section (e)(2). After brief discussion, Mr. B. Johnson recommended removing the words “execution of” in the first sentence.

Ms. Tangaro moved to approve rule 22 as amended, removing the words “execution of” in section (e)(2), change “would be” to “is” on line 38 in section (e)(2), replacing “may” with “must” in (e)(1) and (e)(2), changing “shall” to “must,” leaving the rule without time-limitations. Mr. Thompson seconded the motion. The motion carried unanimously. The rule will be sent to the Supreme Court to be approved for public comment.

### **4. RULE 14**

Mr. Thompson recommended adding “privileged” to section (b)(1). Caselaw creates a concern that a party could receive victims’ privileged information from a third-party without notification to the victim or parties in the case. Mr. Thompson recommended adding the following language to section (b)(5): “any party issuing a subpoena for non-privileged records pertaining to a victim must serve a copy of the subpoena upon the victim or victims’ representative either through counsel or facilitated through the prosecutor for an unrepresented victim.” The committee agreed with Mr. Thompson’s proposed changes.

Mr. Thompson next addressed the advisory committee note. Mr. Thompson noted the Rules of Civil Procedure already address the requirements of subpoenas. Ms. Tangaro was concerned about when a prosecutor should be involved in issues about victims’ records. Mr. Thompson wanted the rule to create a duty for prosecutors to ensure service and notification to victims. The burden should be high to obtain privileged information in order to avoid a party from attempting to silence a victim before trial.

Mr. Thompson suggested adding to section (b)(3) that a prosecutor must make reasonable efforts to provide copies of documents to a victim within 14 days. Judge Schaffer-Bullock asked how a prosecutor could notify a victim if they don’t have contact information. Mr. C. Johnson said the rule should be written requiring a prosecutor to use due diligence.

Mr. Stack said any proposed advisory note changes should fall in line with changes to section (b)(7). Ms. Landau recommended the committee review H.B. 53. Joseph Wade recommended reviewing proposed H.J.R. 3.

Mr. Thompson will revise the rule and send it to the committee. Mr. Stack reserved his statements of concern pending review of the amended rule proposal.

**5. RULE 7B UPDATE**

Cara Tangaro said there are cases that have not been resolved yet that may affect this rule. This rule will be removed from the agenda until decisions have been made in the current cases.

**6. RULE 804 UPDATE**

Mr. Hills noted there was concern because of the Supreme Court ruling on preservation of witness testimony. The Rules of Evidence Committee does not want to amend rule 804. They want this committee to amend rule 14 to address witnesses who are not likely to show for testimony. Mr. Hills will research and review possible deposition rule changes.

**7. COMMITTEE NOTE REVIEW**

**Rule 11** – Mr. C. Johnson moved to eliminate the advisory note. Mr. Stack seconded the motion. The motion carried unanimously.

**Rule 14** – This item was tabled until further edit of the rule.

**Rule 18** – This item will be tabled until the next meeting.

**Rule 40** – Mr. Thompson recommended incorporating the information from the first sentence in the committee note into the rule.

Mr. Thompson moved to amend rule 40 adding in language from the committee note: “Terms used are intended to be interpreted liberally in order to facilitate remote communications as a means of applying for and issuing search warrants while at the same time preserving the integrity of the probable cause application and the terms of warrants that are authorized.” And to delete the remainder of the committee note. Judge Schaeffer-Bullock seconded the motion. The motion carried unanimously.

**8. RULE 9A SUBCOMMITTEE REPORT**

Mr. Thompson said the subcommittee has not been formed yet. Mr. Thompson will discuss this with Brent Johnson.

**9. STATE V. OGDEN AND NEW RESTITUTION RULE**

Mr. Thompson will address this at the next meeting.

**10. RULE 7D**

Mr. B. Johnson proposed integrating former rule 7(d) into rule 9A, which already contains similar information. The committee agreed. Mr. B. Johnson will prepare a proposed rule amendment for a future meeting.

**11. OTHER BUSINESS**

Mr. B. Johnson said that the Supreme Court would like to take processes out of statutes and put them into rules. Mr. B. Johnson presented proposed rule 28A as an example. The Supreme Court has not decided if they will assign this task to each committee or if they will form an independent committee to review and propose changes reflecting their recommendations. Committee members will be involved at some point.

Mr. Hills will forward to Mr. B. Johnson a public comment from a source that was unable to post the comment on the public comments section. Mr. B. Johnson noted all comments received in this manner should be forwarded to him.

**12. ADJOURN**

The meeting adjourned at 1:20 p.m.