

Meeting Summary

MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

Friday, September 26, 2014
Minnesota Judicial Center Room 225

Members present:

Hon. Mark Wernick, Chair
Helen R. Brosnahan
David Brown
Scott Christenson
Martin J. Costello
Richard Kyle
Hon. Michelle Larkin
Daniel K. Lew
Jessica Merz-Godes
Julie A. Munkelwitz
Robert Plesha
Timothy Richards
Michael Spindler-Krage
Greg Widseth
Hon. Jodi Williamson
Karen Kampa Jaszewski, Staff Attorney
Aaron Zurek, Staff Attorney

Members absent:

Hon. David Lillehaug, Liaison Justice
Andrew Birrell
Frederic Bruno
Prof. Ted Sampsell-Jones
Hon. Robert Tiffany

Guests present: Carla Heyl, Sarah Novak, Patrick Busch, Karen Mareck, Ann Peterson, Chris Channing, and Tom Miller

Welcome and Introductions. Committee Chair, Judge Mark Wernick, welcomed all members and guests, and all members introduced themselves.

Update Since Last Meeting. Staff Attorney, Karen Jaszewski, provided a brief update on the status of committee matters since last meeting. The proposed amendments to the General Rules of Practice establishing a pilot program to allow for audio and video coverage of certain criminal proceedings have been posted for public comment. Written submissions are due November 18, 2014, and a public hearing will be held December 16, 2014. Reports are currently being prepared on the Committee's proposed rule amendments regarding appeals and discovery of documents.

eFS Demo. Business Process Specialist Chris Channing demonstrated the basic functionality of the E-Filing System (“eFS”), including the following: user registration and personalization of the system, registration for eService, adding service contacts, the filing and service function, and post filing/service information.

eCharge/eCitation Demo. Minnesota BCA eCharging Project Manager, Tom Miller, provided an overview of the eCharging/eCitation process. He explained that eCharging is a service allowing law enforcement, prosecutors and courts to electronically prepare and file complaints. Authorized agencies may use the eCharging interface, or can create their own web-based interface to access the BCA service from their records management system. eCharging enables automated routing, temporary retention for review, filing, and printing on demand for criminal complaints. An electronic signature is used to verify the documents.

Committee Charge. Judge Wernick explained that the committee’s charge is generally limited to determining what amendments to the criminal rules are necessary in light of the transition to mandatory e-filing. He noted, however, that the committee may also consider the following ancillary issues: (1) whether to amend Rule 11.07, as the Committee continues to receive requests from judges to reconsider the 7-day time limit for deciding omnibus issues; and (2) whether to recommend expansion of the prohibited bases in the exercise of peremptory challenges under Rule 26.02, an issue submitted by the MSBA. Judge Wernick and staff briefly introduced both ancillary issues to the committee.

Rule 11.07: Judge Wernick proposed that a subcommittee consider the issue and draft proposed language for the committee’s consideration. Committee members Judge Williamson, Michael Spindler-Krage, and Daniel Lew agreed to undertake the task and will report back to the committee. It was suggested that perhaps the committee should consider amending Rule 11.07 to require that the moving party provide advance notice of all contested issues and authority to the judge and prosecutor prior to the omnibus hearing to prevent surprise and the need for a submissions period. Ultimately it was agreed that this requirement would be an unreasonable burden, especially on public defenders, and would be a difficult rule to enforce. The committee agreed to focus only on expansion of the 7-day time limit.

Rule 26.02: Judge Wernick requested volunteers to conduct additional research on the issues presented. Committee members Richard Kyle and Martin Costello will conduct further research and report back to the committee on their findings. David Brown will speak with Judge Daniel Mabley for insight regarding whether and how the MSBA’s proposed amendment will affect voir dire and prying into sensitive areas. The committee will also review the 2000 Jury Task Force report.

Review of proposed rule amendments. Next, the committee reviewed and considered proposed amendments to the Rules of Criminal Procedure sequentially. Among the points made were:

Rule 1.04: There was extensive discussion over the continued use and viability of tab charges. Major points included:

- There have been reported incidents of abuse of tab charging in Hennepin County where law enforcement officers have purportedly issued “tab charges” in certain cases (e.g. DARs) to avoid the payables list and require defendants to appear in court.
- Tab charging is rarely, if ever, used outside of Hennepin County. In other counties, the defendant is issued a citation even if the defendant is to be held in custody.
- The tab charge is a charging method that preceded the Rules of Criminal Procedure and its use is inconsistent with Rule 6.01.
- All counties should abide by the same charging procedures once electronic charging is mandated statewide.
- This is primarily a Hennepin County issue, which can be solved by simply including a data field on the standard citation wherein the charging party may identify a case as in custody and note the exception permitting continued detention under Rule 6.01, subd. 1(a). Another member commented that Rule 6.01, subd. 1(d) requires the officer to report to the court the reasons why a defendant was not released, and that a simple check box data field may be inadequate to satisfy this requirement.
- If Hennepin County has a continued need for tab charging, the rules could be amended to maintain tab charging as long as it can be done electronically.

The Committee initially reached consensus to maintain tab charging in the rules and require electronic filing of all charging documents. However, upon further discussion of Rule 6.01, the Committee decided to reconsider the matter at the next meeting after staff have had an opportunity to redraft Rule 6.01 and remove all ambiguity from the cite and release language of that rule.

The Committee approved the addition of a “Charging Document” definition and the elimination of the “Electronic Citation” definition in Rule 1.04.

Rule 1.06: The Committee approved the proposed amendments to Rule 1.06 with the following exception: The words, “citations and complaints,” in the last sentence of Rule 1.06, subd. 2 should be replaced with “charging documents.”

A member commented that some charging documents simply cannot be electronically filed at this time, noting the need for exceptions for parking enforcement, housing enforcement, indictments and the like. There was general acknowledgement that the system may never be entirely paperless – only substantially less paper.

The Committee noted that the Pilot Counties referenced in Rule 1.06, subd. 2 should be listed in the comments to the rule. The Committee further noted that the proposed language in the comment regarding paper filing of certain complaints (i.e. amended complaints and conflict cases filed by prosecutors from different venues) should be clarified.

Rule 2: The Committee had no objection to the proposed inclusion of language permitting probable cause statements to be signed under penalty of perjury pursuant to Minn. Stat. § 358.116 in lieu of an oath, and approved the inclusion of this alternative throughout the rules where an oath or sworn signature is otherwise required.

Rule 3: The Committee had no objection to the proposed amendments to Rule 3 and approved the following additional amendment to Rule 3.03, subd. 4: The words, “or clerk of court,” in the second paragraph should be stricken from the rule.

Rule 4: The Committee had no objection to the proposed amendments to Rule 4 and approved the following additional amendment to Rule 4.02, subd. 5(3): “, and no record will be made of the proceedings” should be stricken from the rule, as a record of the proceedings is necessary when the complaint is dismissed.

Rule 5: The Committee had no objection to the proposed amendments to Rule 5.

Rule 6: Staff will redraft Rule 6.01, removing all ambiguity from the cite and release language, and the Committee will revisit whether or not the tab charging option should be eliminated from the rules at the next meeting. Judge Wernick asked members to speak with other interested individuals regarding the tab charge matter and to be prepared to discuss at the next meeting.

Rule 7: The Committee had no objection to the proposed amendments to Rule 7.

Rule 9: The Committee had no objection to the proposed amendments to Rule 9 and approved the following additional amendment to Rule 9.03, subd. 10: “email, facsimile” should be replaced with “any electronic means” to reflect evolving electronic methods of exchanging discovery.

Rules 10 & 11: The Committee had no objection to the proposed amendments to Rules 10 & 11.

Rule 15: The Committee had no objection to the proposed amendments to Rule 15 and approved the following additional amendment to Rule 15.07: “in writing or” should be stricken from the last sentence of the rule, as there is no reason for a reduction to a lesser included offense to be in writing if the charging document is not amended.

Rule 17: The Committee will review and consider the proposed amendments to Rule 17 at the next meeting after reconsidering the tab charge issue.

Rules 18-20: The Committee had no objection to the proposed amendments to Rules 18-20. Staff inquired whether it is necessary to include reference in Rule 20.04 to the statutory requirement for appointment of commitment counsel prior to ordering a simultaneous examination under chapter 253B and Rule 20. The Committee determined that it would need advance permission from the supreme court to review and consider this issue.

Rule 21: The Committee had no objection to the proposed amendments to Rule 21 and approved the following additional amendment to Rule 21.05. The last sentence of the first paragraph should provide: “The person must promptly file it with the court under seal without need for prior court order, or send it by registered or certified mail to the court administrator for filing.”

Rules 23-25: The Committee had no objection to the proposed amendments to Rules 23-25.

Next Meeting. Judge Wernick thanked the members for their time and efforts. He summarized that at the next meeting the Committee will: (i) review and consider the proposed amendments to the remaining rules; (ii) revisit the prospect of eliminating the tab charge; (iii) review and consider proposed language offered by the subcommittee on Rule 11.07; and (iv) consider whether to adopt an amendment to Rule 26.02, expanding the prohibited bases for peremptory strikes.

There being no further business, the meeting was adjourned.

Meeting Summary

MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

Friday, October 10, 2014
Minnesota Judicial Center Room 225

Members present:

Hon. Mark Wernick, Chair
Andrew Birrell
Helen R. Brosnahan
David Brown
Scott Christenson
Martin J. Costello
Julie A. Munkelwitz
Timothy Richards
Prof. Ted Sampsell-Jones
Michael Spindler-Krage
Greg Widseth
Hon. Jodi Williamson
Karen Kampa Jaszewski, Staff Attorney
Aaron Zurek, Staff Attorney

Members absent:

Hon. David Lillehaug, Liaison Justice
Frederic Bruno
Richard Kyle
Hon. Michelle Larkin
Daniel K. Lew
Jessica Merz-Godes
Robert Plesha
Hon. Robert Tiffany

Guests present: Carla Heyl, Patrick Busch, and Patty Leither.

Welcome and Call to Order. Committee Chair, Judge Mark Wernick, welcomed all members and guests, and called the meeting to order.

Committee Reports Update. Staff Attorney, Karen Jaszewski, provided a brief update on the status of committee matters since last meeting. The Committee's recommended amendments to the criminal rules (identifying procedures for complaints filed during pretrial proceedings, clarifying procedures related to payable ordinances violations, and addressing the admissibility of testimony at probation revocation hearings involving allegations of new criminal conducted) were promulgated (effective November 1, 2014) by the supreme court on October 2, 2014. The Committee's recommended rule amendments were adopted as is, and the court received no public comments.

A draft report has been prepared on the Committee's proposed rule amendments regarding electronic filing of appeals and third-party document subpoenas. Committee members should review the report for errors or omissions.

Review of proposed rule amendments. The committee reviewed and considered proposed amendments to the Rules of Criminal Procedure. Among the points made were:

Rule 4.02: Judge Wernick summarized the Committee's discussion on the proposed elimination of the tab charge from last meeting. He noted that, outside of Hennepin County, tab charging is nearly obsolete and that Hennepin County primarily uses the tab charge in two ways: (1) officers issue tab charges on the street to avoid the payables list and (2) rather than cite and release, defendants are detained and issued a tab charge. Other counties issue citations and detain. Hennepin County judges would prefer that the rules expressly prohibit police officers from issuing a tab charge on the street. A member commented that there is still a need for tab charging among the State Patrol and other law enforcement agencies. There was consensus to retain tab charging as an option under the rules but to clarify the option to cite and detain in Rule 4.02 and Rule 6.01.

Rule 4.02, subd. 2: The committee approved the proposed amendment to the rule with the following additional amendments: (1) that the words, "or tab charge," be added to the title of subdivision 2; and (2) that the rule be amended as follows:

"The arresting officer or the officer's superior may issue a citation and release the arrested person, and must ~~do so~~ release the arrested person if ordered by the prosecutor or by a judge of the district court where the alleged offense occurred. The arresting officer or the officer's superior may issue a citation or tab charge and continue to detain the arrested person if any of the circumstances in Rule 6.01, subd. 1(a)(1)-(3) exist."

Rule 6.01: Staff introduced proposed amendments to the rule, which clarify the procedure for citation and detention. A member commented that the proposed rule omits reference to tab charging, and that the omission could be interpreted to eliminate tab charging as an option. The Committee agreed that Rule 6.01 has always dealt exclusively with citations and never referenced tab charging. Moreover, the inclusion of a reference to tab charging in Rule 4.01 resolves any concern that the proposed amendments to Rule 6.01 could be interpreted to eliminate the tab charge as a charging option. The Committee approved the proposed amendments to Rule 6.01.

Rule 17.01: Because the Committee preserved tab charging as option in the rules, all proposed strikethroughs of "tab charge" must be removed and the tab charge language maintained throughout. However, the Committee approved reference to "charging documents" in lieu of listing each document separately (e.g. "indictment, complaint, or tab charge."). This change may be made, where appropriate, throughout the rules. A member suggested, as an alternative to the term "charging document," the term, "charging instrument" or "charge." The member noted that complaints are no longer documents in an electronic world but a collection of data and that the court should move away from outdated terminology. The member made a motion for use of the alternative language; the motion failed for lack of a second.

Rules 18 – 26.04: The Committee approved the proposed amendments to Rules 18 – 26.04 without objection or comment.

Rule 27.03: The proposed amendment to Rule 27.03 is to clarify how the court handles PSIs in practice. PSIs are treated as confidential (nonpublic) by the court, but the rule references a “confidential” and “nonconfidential portion” of the PSI. The Chair explained that the rule pre-dates the Data Practices Act, and that under the Act PSIs are private and viewable by the subject of the data (or the defendant). However, the Act does not apply to the Judicial Branch and because the document is confidential under the Rules of Public Access, the court treats the entire document as confidential.

A member noted that PSIs in some counties continue to have a confidential and nonconfidential section. Another member noted that in her county, the court does not serve the PSI on the parties as required by Rule 27.03, subd. 1(B)(5); rather, probation does. Another member commented that agencies may believe they are prohibited under the Data Practices Act from serving PSIs on the parties.

A subcommittee will discuss the issues presented and draft clarifying language addressing precisely what the rule and statute are attempting to cure. The subcommittee members include: Judge Wernick, Julie Munkelwitz; and David Brown.

Rule 27.04: The Committee discussed whether, in a probation revocation proceeding, written statements of probable cause on a request for a warrant must be under oath or signed under penalty of perjury. It was the consensus of the Committee that a statement be added to the rules requiring that the written statements of probable cause supporting a warrant request be signed under penalty of perjury.

Rule 27.05, subd. 4 (3): The Committee approved inclusion of language recognizing the alternative of a statement signed under penalty of perjury to the sworn affidavit.

Rule 28: The Committee approved reference to “charging documents” in lieu of listing each document separately (e.g. “indictment, complaint, or tab charge.”).

Rule 32: The Committee approved the proposed amendments to Rule 32 without objection or comment.

Rule 33.02: Staff asked the Committee whether service on a represented party should include service on the party in addition to the party’s attorney. The Committee determined that service should be on the attorney only, and that the rule should not be amended to require service on the party. The Committee approved the proposed amendments with the following additional amendment: the phrase, “under these rules,” be added to the first sentence of the rule immediately after the word, “party.” Staff will incorporate the language approved by the General Rules and Civil Rules committees with respect to the completion of service by electronic transmission. That language is substantially as follows: “Service is complete upon completion of the electronic transmission of the document to the E-Filing System.”

Rule 33.03: Staff introduced the proposed amendments to Rule 33.03. There was extensive discussion over whether and under what circumstances a notice of filing should accompany service of the written order upon the parties by the court administrator. A member commented that under Rule 28.04, subd. 2(8) service of the notice of filing commences the running of the state's time for appeal. The member noted that the language of Rules 33.03 and 28.04 should be consistent. The Chair appointed a subcommittee to consider whether the rule should be amended to require the court administrator to serve a notice of filing and to propose amendment language if necessary; the subcommittee will report back to the Committee at the next meeting.

MSBA Request regarding Rule 26.02. The Committee next considered the MSBA's proposal to expand the prohibited bases for peremptory challenges under Rule 26.02. The Chair asked whether, under current law, an attorney or party violates Rule 1.02 by exercising a peremptory challenge on a basis prohibited by that rule. The ensuing Committee discussion was extensive. Among the points made were:

- Expanding the prohibited bases for peremptory challenges will make jury selection more cumbersome.
- Rule 1.02 prohibits discrimination based on "disability." Prohibiting a peremptory strike on this basis may be problematic if juror is physically incapable of serving as a juror in a particular case (e.g. a blind juror in a case with voluminous photographic exhibits). Another member noted that a challenge for cause would still be available in such a case.
- If Rule 26.02 is expanded to include all of the bases listed in Rule 1.02, it may be more effective to eliminate discrimination by eliminating the peremptory strike altogether.
- Rule 1.02 prohibits discrimination based on "creed." This term is broad and not defined. Because creed includes a belief system, it may be difficult to deny a peremptory on this basis.
- Rule 1.02 also prohibits discrimination based on "marital status" and "age." Such factors can be relevant when selecting a fair and impartial jury in particular cases (e.g. marijuana or domestic assault cases).
- Many peremptory strikes are made on a "gut feeling" that cannot be articulated. The *Batson* method of eliminating illegal discrimination is inexact and difficult to apply.
- Discrimination based on any reason listed in Rule 1.02 is wrong; perhaps Minnesota should lead on this issue and broadly prohibit discrimination in the exercise of peremptory strikes.
- Rule 1.02 prohibits discrimination based on "religion." If Rule 26.02 is expanded, it should prohibit discrimination based on "religious affiliation" because religious beliefs (e.g., only God can judge other people) may properly support a peremptory challenge.
- California has broadened the prohibited bases for peremptory challenges by statute. It would be helpful to see how the change has been addressed by courts in California.
- *Batson* challenges are a creation of caselaw; this issue should evolve on a case-by-case basis where there is a claim of unlawful discrimination supported by a proper record.

The Committee deferred a decision on the MSBA proposal until a future meeting. Martin Costello will research how the expansion of the prohibited bases in California has been addressed in practice and report back to the committee.

Next Meeting. Judge Wernick thanked the members for their time and efforts. The next meeting is November 14, 2014. Any documents members would like the Committee to review and consider at the November meeting should be submitted to Karen Jaszewski no later than November 7th. There being no further business, the meeting was adjourned.

Meeting Summary

MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

Friday, November 14, 2014
Minnesota Judicial Center Room 225

Members present:

Hon. Mark Wernick, Chair
Hon. David Lillehaug, Liaison Justice
Helen R. Brosnahan
David Brown
Scott Christenson
Martin J. Costello
Richard Kyle
Hon. Michelle Larkin (*via telephone*)
Daniel K. Lew
Jessica Merz-Godes
Julie A. Munkelwitz
Robert Plesha
Timothy Richards
Michael Spindler-Krage
Hon. Robert Tiffany
Hon. Jodi Williamson
Karen Kampa Jaszewski, Staff Attorney
Patrick Busch, Staff Attorney

Members absent:

Andrew Birrell
Frederic Bruno
Prof. Ted Sampsell-Jones
Greg Widseth

The Committee continued its discussion of proposed amendments to Rule 27.03. The rule needs to be clarified in two ways: (1) whether the PSI is to be forwarded by the court or by the probation officer, and (2) how to classify “confidential” information in PSIs. In 2010, the rule was amended, and the amendment was intended to be stylistic only. However, the effect of the amendment is it now appears to require the court, rather than the probation officer, to forward the PSI. The committee agreed that it is appropriate to amend the rule to clarify that either court staff or the probation officer may forward the PSI.

There needs to be clarity for how court staff are to handle PSIs. There may be some confusion because court staff are not subject to the Data Practices Act; they are subject to the Rules of Public Access. There are differences in terminology between the Act and the Rules; also, withholding information in a PSI from a defendant can raise due process issues. The committee members will consider the options that were presented in the materials, and will vote on them by e-mail.

Proposed amendments to Rule 33.03. The rule has been amended to clarify that it is not necessary to transmit a separate notice of entry when an order is transmitted. The transmission of the order triggers the appeal period. This is consistent with existing law on appeal deadlines.

Definition of “tab charge.” The definition of “tab charge” has been changed in light of the committee’s previous discussions. The words “or tab charge” should be added to Rule 4.02 and to Rule 6.

Discussion of signature standards. The electronic signature standard in force in the criminal rules was enacted at a time when many people were uncomfortable with using electronic signatures. The rule requires compliance with judicial branch policy. The juvenile delinquency committee has approved the use of electronic signatures without requiring compliance with any particular policy or technology standard. The State Court Administrator has been consulted and approved the proposed change, which would eliminate the requirement that the signatures comply with branch policy. The committee approved the proposed language.

Other minor changes. The committee approved several minor changes to the rules suggested by staff attorney Karen Jaszewski.

Motion to approve. Committee member Judge Williamson moved to approve the proposed changes, subject to an e-mail vote on Rule 27.03 before the end of the year. The motion was seconded; the motion carried.

Discussion on Rule 11.07. In 2010, Rule 11.07 was amended to establish a 7-business-day deadline for ruling upon omnibus issues. The deadline has been largely ignored by judges, and is widely seen to be unreasonable. The deadline contains no good cause provision, and is not clearly

extended if the parties request time to make written submissions. However, the standard 90-day decision deadline is too long for ruling upon omnibus issues, especially if the defendant is in custody.

It was suggested the rule should state that the judge must rule upon the “issues” rather than ruling upon the “case.” The committee agreed this would be appropriate. The committee members discussed several possibilities, including altering the rule to require the trial court to make a determination but not to make findings. It was noted that an appeal requires findings of fact and conclusions of law. A committee member suggested changing the 7-day deadline to 30 days, and the proposed language was revised accordingly. A motion was made to adopt the revised language; the motion was seconded and the motion carried.

Discussion on Rule 11.09. The committee considered an ambiguity in Rule 11.09 that made it unclear when a speedy trial period begins to run. The committee agreed upon several alterations to clarify the rule. A motion was made to adopt the proposed language; the motion was seconded and the motion carried.

Discussion on *Batson* challenges. The committee continued its discussion of whether to expand the bases for *Batson* challenges to include strikes based upon Rule 1.02 classifications. The proposal was developed by a Minnesota State Bar Association working group. The State Bar Association takes no position on the issue.

Justice Lillehaug explained that at this time he would like the committee to consider only whether it wished to address the issue. When asked by Justice Lillehaug if committee members had ever seen a strike based on sexual orientation, no member said they had. Several committee members expressed reluctance to address the issue without a clear factual context. If a peremptory strike based on sexual orientation does occur, it might be appropriate to have it dealt with through the litigation process.

Hearing on cameras in the courtroom. Justice Lillehaug remarked that there was an upcoming hearing on the use of cameras in the courtroom. The committee members should expect to receive written communications in the near future.

The meeting adjourned.