

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

November 19, 2013

ATTENDEES

Patrick Corum- Chair
Judge Michele Christiansen
Judge Brendan McCullagh
Judge Vernice Trease
Craig Barlow
Jeffrey Gray
Craig Ludwig
Steven Major
Vincent Meister
Douglas Thompson

EXCUSED

Professor Jensie Anderson
Cara Tangaro

STAFF

Brent Johnson

I. WELCOME / APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting. The minutes from the previous meeting were approved without change.

II. RULE 7 - UPDATE

Staff provided an update on the Supreme Court's actions regarding the change to rule 7 reducing the time for probable cause reviews from 48 hours to 24 hours. Staff stated that the Supreme Court considered the Board of District Court Judges' comments and wants to make certain that technology and plans are in place to help facilitate the reduction in time. The e-warrant system model will be used for probable cause reviews. The courts' IT department has targeted an April 1, 2014 implementation date. However, it may take as long as July 1, 2014 depending on changes requested by judges. Staff stated that he will report this information to the Supreme Court at their next meeting and they will consider an effective date at that time.

III. RULE 40 - SEALING SEARCH WARRANTS

Staff distributed proposed changes to rule 40 that will create a process for allowing prosecutors or officers to request indefinite sealing of search warrant documents if the search warrant documents have remained sealed for at least three years. Craig Barlow asked whether media representatives have been apprised of the change and, if so, what was their reaction. Staff explained that they are generally fine with the changes, but would like to see a process by which they can receive notice of any motions for indefinite sealings. Staff stated that he told the media representatives to present a specific proposal on how this could be accomplished.

Steven Major asked whether the rule change would be retroactive, affecting currently sealed warrants such that they would have to ask for six-month sealing periods. Mr. Barlow stated that the rule would be retroactive because it is procedural. Vincent Meister suggested that the rule be made prospective only so that the rule will not affect current warrants. The committee agreed with the suggestion. Staff stated that the Supreme Court could put this language in its order approving the rule.

Mr. Major asked about situations in which the officer or prosecutor might know from the beginning that an indefinite sealing will be necessary because of issues such as privacy for individuals who are not the target of the investigation. Mr. Meister stated that it makes sense to have a process that will allow for indefinite or permanent sealings when, for example, the search reveals that the allegations are completely baseless and therefore the person that was subject to the search should continue to have an expectation of privacy. Mr. Barlow provided the example of a search for child pornography on a computer. Child pornography is not found, but other pornography is found, such as gay pornography. It is not illegal to possess such materials and the individual subject to the search may not want that information disclosed to the public. Douglas Thompson stated that such a process could be abused. Judge Brendan McCullagh agreed, stating that people will not know the basis for the sealing and will wonder if officers are trying to protect themselves. Mr. Barlow stated that if officers are allowed to use the government process to obtain information that is sensitive and embarrassing, the person subject to the search should similarly be able to use a government process to have documents sealed. Judge McCullagh stated that an individual could seek expungement of those records. Judge Vernice Trease stated that the committee should not attempt to resolve everyone's issues and some of the parties will simply have to deal with the six-month requirement.

Jeffrey Gray noted that the prosecutors' interests don't always coincide with the target's interests and it may be the target who wants the sealing when the prosecutor does not. Mr. Corum suggested that the rule could be changed to allow the target to seek sealing. Mr. Thompson questioned how the target of the search warrant will know that the warrant is due to be unsealed. Mr. Major stated that the target will not know but will at least know about the warrant and would therefore at least know enough to research potential remedies. Judge Trease suggested that this shouldn't necessarily be in the search warrant rule but could be found in other provisions. Mr. Barlow asked whether it would be appropriate to ask the Supreme Court if they want the rule to go further than proposed. Mr. Corum suggested simply adding "a person with standing" to those who may ask for documents to be sealed. Mr. Major then moved to approve

the proposal adding "a person with standing." Judge McCullagh seconded the motion. The motion carried unanimously.

IV. RULE 40 - GPS WARRANTS

Mr. Meister presented an update on efforts to address GPS warrants. A committee has been established to create a form and to modify the UCJIS system to separately identify those warrants. Mr. Corum asked whether the main concern is serving the subject of the warrant. Mr. Meister stated that there are also issues about placement of the GPS device, and the period of time for sealing the warrant. Mr. Meister stated that January is the target for having the system in place. Mr. Meister stated that the judges on the committee have agreed with the concept. Mr. Meister stated that there will be a need to create a separate rule to address these warrants. The process will be in place by January but any proposed rule will not be effective by then. The committee should expect a rule proposal at its next meeting.

V. RULE 14 - SUBPOENAS

Mr. Corum stated that this issue will be postponed until a future meeting.

VI. REORGANIZATION OF THE RULES UPDATE

Judge McCullagh stated that the process is moving forward. Judge McCullagh wants to coordinate with Tim Shea on what the civil procedure committee is doing because he will be cutting and pasting civil rules into the criminal procedure rules and wants to make certain that those are consistent. Judge McCullagh hopes to have a big part of this effort done by the next meeting. Judge McCullagh will also incorporate provisions that reflect the move to electronic filing.

VII. RULE 29 AND VENUE

Judge McCullagh stated that changes are not necessary and this agenda item should be dropped.

VII. FALKNER V. LINDBERG

Judge McCullagh stated that the committee had discussed this issue before and decided that Falkner was an isolated case and the problems would not be repeated. Staff stated, however, that he had seen three more petitions for extraordinary relief on this issue and perhaps a rule change is necessary. Judge McCullagh stated that he will propose language at the next meeting.

IX. MATERIAL WITNESS WARRANTS

Staff presented a proposal on the process for material witness warrants. Staff reminded the committee members that the Supreme Court had rejected the previous proposal and asked the committee to revisit the issue to determine whether material witnesses could receive greater

protections. Staff stated that he had researched rules from other jurisdictions and many other jurisdictions use the language being proposed. This language simply clarifies that if a material witness cannot post bail the witness's testimony should be preserved as soon as possible unless the interests of justice justify continued custody of the witness. Mr. Meister stated that his office already follows this process and takes the witness before a judge as soon as possible to take testimony. Mr. Thompson asked whether the rule should have a time limit on how long a material witness may be detained. Staff explained that most states do not have a time limit although one has a 30-day time limit and one has a 7-day time limit. Staff stated that it was his understanding from the last meeting that the committee did not want a time limit.

Judge Trease stated that section (1)(4) is now inconsistent with section (1)(3). Judge McCullagh suggested that the section simply be removed. Mr. Meister stated that perhaps the language "when ordered to do so" is still important because the judge might order a witness to appear at a subsequent hearing even if testimony has already been preserved. Mr. Corum stated that the issue of admissibility of preserved testimony will ultimately be an evidentiary issue and therefore (1)(4) is not necessary.

Staff explained that he also presented proposed changes in the first section to clarify that a judge must make two findings: that the person is in fact a material witness and that the person will not appear. Mr. Grey stated that it is implicit in the existing language that the judge must determine that the witness is material. Craig Barlow then moved to approve the proposal, rejecting the alternative language on findings. Judge McCullagh seconded the motion. The motion carried unanimously.

X. MOTIONS TO QUASH BINDOVERS

Staff explained that he had researched what other states are doing and, given that the practices are different in each state, there is not a model for Utah. Staff stated that after researching other states he recommends that the rule not be amended because the practices are entrenched in Utah and there is no immediately apparent way that the practice can be improved. Mr. Corum agreed, stating that case law will resolve any issues. The committee agreed that changes are not necessary.

XI. OTHER BUSINESS

Judge McCullagh stated that the issue of admissibility of unrecorded confessions had recently arisen again. Judge McCullagh reminded committee members that the committee had discussed this issue several years ago and decided that the issue should be handled as a rule of evidence. The Rules of Evidence Committee thereafter chose not to do anything. Staff stated that he and Rick Schwermer, staff to the Evidence Advisory Committee, had been invited to a meeting of the Supreme Court earlier this year and the conclusion of the meeting was that the Evidence Advisory Committee should be the one to address the issue. Mr. Corum stated that an employee of his office is a member of the Evidence Advisory Committee and he knows that the committee is working on the issue.

XII. ADJOURN

There being no further business, the meeting adjourned at 1:30 p.m. The next meeting is scheduled for January 21, 2014 at noon.