

Approved

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

May 21, 2013

ATTENDEES

Laura Dupaix - Chair
Judge Michele Christiansen
Judge Vernice Trease
Professor Jensie Anderson
Diane Abbeglen
Craig Barlow
Patrick Corum
Craig Ludwig
Steven Major
Vincent Meister
Todd Utzinger

EXCUSED

Judge Brendan McCullagh

STAFF

Brent Johnson

GUESTS

Nate Carlisle
James Schoppman
Scott Swapp

I. WELCOME / APPROVAL OF MINUTES

Laura Dupaix welcomed the committee members to the meeting. Ms. Dupaix introduced Professor Jensie Anderson as a new member of the committee, replacing Professor Amos Guiora. Patrick Corum moved to approve the minutes from the previous meeting. Todd Utzinger seconded the motion. The motion carried unanimously.

II. RULE 7 - TIME LIMIT FOR PROBABLE CAUSE DETERMINATIONS

Ms. Dupaix welcomed James Schoppman and Scott Swapp to the meeting. Mr. Schoppman presented a proposal to change from 48 hours to 24 hours the time limit within which probable cause determinations must be made after a warrantless arrest. Mr. Schoppman stated that the request arose from a situation in which Mr. Swapp's brother was arrested on a Thursday evening and a probable cause determination was not made until Saturday afternoon. Mr. Schoppman stated that the family attempted to discover information on how to obtain his

release, but they had difficulties with the jail. Mr. Schoppman stated that the mother ultimately called the judge's wife to see what could be done. Mr. Schoppman stated that the judge had not even heard about the arrest. The judge made the probable cause review as soon as possible after that.

Mr. Schoppman stated that the problem in some areas is that jailers, and perhaps judges, do not have a sense of urgency with probable cause determinations. Mr. Schoppman stated that case law requires urgency, with reviews being done as soon as possible. Mr. Schoppman stated that the jailers in this situation were under the impression that the 48 hours does not include weekends. Mr. Schoppman noted that the McLaughlin and Pugh cases held that probable cause determinations must be the same no matter where they are conducted. There are no special circumstances for rural areas.

Mr. Schoppman stated that the brother in this case committed suicide the following Monday morning. The family believes that the extra time in jail contributed to the brother formulating the suicide plans.

Mr. Schoppman stated that, in Arizona where is a prosecutor, they have a 24-hour requirement. Mr. Schoppman stated that at the very least video arraignments are done and there doesn't seem to be a reason why Utah cannot adopt a 24-hour requirement. Craig Barlow stated that the rule does not contain any sanction for failing to meet the 48-hour requirement and posed the question to Mr. Schoppman as to whether he is proposing any type of sanction for failing to meet the deadline. Mr. Schoppman stated that the consequence would be § 1983 litigation. Mr. Schoppman also stated that Title 77 of the Utah Code contains a requirement that these reviews be done "without unnecessary delay," and failure to do so is a class B misdemeanor.

Scott Swapp stated that the family is not interested in filing a lawsuit against the jail or others, they just want things to change for the future. Mr. Swapp stated that his brother was a happy and well-adjusted individual and the suicide was a complete shock to the family. Mr. Swapp stated that those extra 24 hours in jail may have been critical. Judge Vernice Trease stated that in the Third District they conduct reviews within 24 hours. Judge Trease stated that every morning the signing judge receives a stack of P.C. statements to review. Judge Trease stated that on the weekends the signing judge will receive a call at 2:00 in the afternoon and the officer will read the P.C. statements. Steven Major stated that in Davis County, the officers cannot book someone unless they have a P.C. statement. Mr. Major stated that the reviews are therefore occurring within 24 hours. Mr. Schoppman stated that 24 hours should be feasible everywhere.

Judge Trease noted that this will perhaps affect the jails more than the courts and wondered whether the courts could do this by rule. Todd Utzinger stated that if the rule is changed to 24 hours it will at the very least send the message to officers that there is urgency involved. Mr. Utzinger stated that county attorneys will also press their officers for urgency. Vincent Meister stated that there may also be a need to clarify that the 48 hours does not exclude weekends. Mr. Barlow stated that there did not appear to be opposition to the change, but it will be a matter of logistics. Mr. Barlow noted that in some areas there might be only two judges

available to review P.C. statements. Mr. Meister asked Mr. Schoppman what is happening in other states. Mr. Meister noted that only a handful of states have adopted the 24-hour rule and therefore posed the question of why 24 hours is not happening everywhere. Mr. Schoppman stated that most states do not have a specific time-frame, instead using such phrases as "unnecessary delay" or "promptly." Mr. Schoppman noted that McLaughlin held that reviews must be held within 48 hours. Mr. Schoppman stated that much has changed since McLaughlin and technology now allows for quicker reviews. Judge Trease stated that if the committee adopts the proposal there will be a need to address § 77-7-23 in which the legislature has declared a different standard. Todd Utzinger then moved to adopt the proposal of 24 hours with language stating that the time includes weekends and holidays. Mr. Corum seconded the motion. The motion carried unanimously. Craig Barlow then moved to have someone contact SWAPLAC for them to look at the statute so that the rule and statute can be harmonized. Patrick Corum seconded the motion. The motion carried unanimously.

III. RULE 40 - SEALING SEARCH WARRANT DOCUMENTS

Ms. Dupaix welcomed Nate Carlisle to the meeting and noted that the Utah Society of Professional Journalists had submitted the only comment on rule 40. Mr. Carlisle stated that the Society supports the six-month time limit, but they don't want the discussion to end there. Mr. Carlisle stated that the Society believes that there is too much discretion on whether to seal and the Society hopes that there can be more specific standards. Ms. Dupaix asked Mr. Carlisle what language the Society would propose instead. Ms. Dupaix stated that the time limit should resolve any concerns because the documents will be unsealed by that time. Mr. Carlisle stated that they do not have any specific proposals but perhaps the committee could provide more explanation in the rule as to what, for example, "impeding an investigation" means. Ms. Dupaix stated that it is difficult to provide more specific definitions because each case will be different. Mr. Utzinger stated that even if more specific factors were put into place there would still be a catch-all provision to accommodate various situations and the results therefore would not be different from the current practice. Judge Trease stated that if the Society is concerned that there aren't sufficient facts to support the sealing, then they can still review cases at some point. Judge Trease stated that each request must be accompanied by an affidavit in which the officer articulates specific reasons on why sealing is requested. Mr. Meister stated that if there are problems, officers could be subject to criminal penalties for making false statements or there could be issues with evidence and the exclusionary rule. Mr. Carlisle stated that, without data on the number of sealings, it is difficult to state for certain if there is an issue, but the cases that he has seen often do not seem to fit the criteria. Mr. Meister stated that the judges and the officers are in the best position to evaluate the criteria, based on each unique circumstance. Mr. Carlisle stated that one of the issues is that there is no public voice in the process so tightening the standards will essentially give the public a voice. Mr. Corum stated that the standards in the rule probably come from case law.

Mr. Meister stated that prosecutors and law enforcement officials also have some concerns with repeated requests to extend the sealing period in cases that remain open beyond several years. Mr. Meister stated that there are many cold cases that sit until new evidence is discovered and the officers do not think it is reasonable to repeatedly request extensions in those

cold cases. Mr. Meister stated that they are suggesting that after a period of three years, the officers can request an indefinite time for the documents to be sealed. Mr. Meister stated that his office has had cases open for up to 35 years. Mr. Carlisle stated that he did not see why it would be burdensome to officers to have to request extensions every six months. Mr. Corum stated that the starting point on this issue is that all search warrants are presumed public and therefore there should be a requirement to regularly review the status of each case. Mr. Corum stated that an indefinite sealing period is a nonstarter. Mr. Major suggested that three years may be too short and five years might be a better time-frame. Judge Trease asked what other states are doing on this issue. Mr. Corum stated that in his previous research he found that practices throughout the states vary considerably and there is not much uniformity. Mr. Carlisle stated that victims' families also have a stake in this issue and they are often left in the dark and may wish to have access. Mr. Meister stated that releasing information to the victim might jeopardize a case or a victim might even be a suspect. Judge Trease stated that simply because a victim wants access does not necessarily mean that the victim would want the documents to become public.

Ms. Dupaix then moved to table this item until the next meeting and have Mr. Corum research what other states are doing. Craig Barlow seconded the motion. The motion carried unanimously.

IV. RULE 14

Patrick Corum stated there is a need to address a problem in rule 14 because the process was recently applied to a request for a victim's telephone records. Mr. Corum stated that he did not believe the rule was intended to cover such a situation. Mr. Corum stated that he will present a proposal at the next meeting.

V. OTHER BUSINESS / ADJOURN

The committee members noted that there are many other agenda items for which there was insufficient time to discuss at this meeting. The items will be discussed at the next meeting. The meeting adjourned at 1:35 p.m.