

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

March 20, 2012

ATTENDEES

Judge Brendan McCullagh
Judge Vernice Trease
Patrick Corum
Laura Dupaix
Craig Ludwig
Steven Major
Vincent Meister
Todd Utzinger

EXCUSED

Judge Michele Christiansen
Craig Barlow
Jeremy Delicino

STAFF

Diane Abegglen
Brent Johnson

GUESTS

Nate Carlisle
Sheryl Worsley

I. WELCOME / APPROVAL OF MINUTES

Laura Dupaix welcomed the committee members to the meeting. Craig Ludwig moved to approved the minutes from the previous meeting. Vincent Meister seconded the motion. The motion carried unanimously.

II. SEARCH WARRANT ISSUES

Ms. Dupaix welcomed Nate Carlisle and Sheryl Worsley, who are representatives of the Society of Professional Journalists, to discuss sealed search warrant issues from the perspective of the media. Mr. Carlisle stated that the media is not opposed to sealed search warrants, but they are proposing criteria for better access to search warrants. Ms. Worsley stated that the media recognizes the need to seal some search warrants. Ms. Worsley stated that there is a balance between the public's right to know and the privacy interests of individuals and the protection of investigations. Ms. Worsley suggested that at some point in time, all search warrants should be available to the public. Ms. Worsley provided an example of a Utah County

case in which search warrants are still sealed after four years. Ms. Dupaix asked whether a motion to unseal the warrants had been filed in the case. Mr. Carlisle stated that a motion has not been filed but they have submitted several requests to obtain the information. Ms. Worsley stated that one of their objectives is to learn something about search warrant cases and to report if there are abuses. Ms. Worsley stated that the media has a responsibility to monitor public activities.

Ms. Dupaix expressed her opinion that the rule contains sufficient guidance for judges and attorneys to decide when warrants should be sealed. Ms. Dupaix stated that she agreed with the suggestion that at some point all search warrants should be presumptively public. Judge Trease asked whether there is something specific in rule 40(m) that the media suggests changing. Mr. Carlisle stated that the sealing standard should be more objective and a balancing test should be used. Mr. Carlisle suggested that the committee consider standards in GRAMA and the sealing standards used by other states. Mr. Meister noted that, even under GRAMA, records are protected while an investigation is pending. Mr. Meister noted that even if a person is no longer a suspect in a case, the case could be compromised because the search warrant might lead to other information that should remain private for a period of time to avoid compromising the investigation.

Ms. Worsley noted that when a motion to seal is filed there is no counter-argument. Ms. Worsley stated that is why they favor a balancing test, which would essentially give a voice to others who have an interest in the documents. Todd Utzinger asked whether the media has ever filed motions to have these unsealed. Ms. Worsley stated that they have filed some motions. Ms. Worsley stated that in one case the court allowed the media attorney to review in camera search warrant documents and after reviewing the documents the attorney agreed that the documents should remain sealed.

Ms. Dupaix summarized the media's request as: the media does not object to the 20 day waiting period, the media does not object to those warrants that are properly sealed, but the media would like an opportunity to challenge the sealing decisions. Ms. Dupaix stated that the real issue seems to be the ability to challenge. Mr. Carlisle stated that they do not know how many search warrants are sealed because that information is not publically available. Mr. Carlisle stated that it can also be expensive and time consuming to have an attorney file a motion to unseal a search warrant. Judge Brendan McCullagh stated that motions to unseal should not be considered burdensome because much work was put into requesting the sealing of the documents and it is therefore only appropriate that much work be done to provide argument on why the documents should be unsealed. Mr. Carlisle noted that these requirements are not just for journalists, but the public also has a right of access and the requirements should not be burdensome for members of the public.

Judge McCullagh noted that the individual who is the subject of the warrant is not always the person under investigation and the person may have a legitimate continuing right to privacy. Mr. Carlisle suggested that documents could be redacted to protect privacy. Ms. Dupaix asked whether search warrant documents would be available once the case is filed. Mr. Carlisle stated that search warrant documents might be available but the filing of a case does not necessarily

provide the media with notice that a search warrant was previously issued. Mr. Carlisle noted that sometimes the person who is the subject of the warrant wants the information to become public.

Mr. Meister stated that in approximately 98% of all cases, the prosecutors do not ask for the search warrant to be sealed. Mr. Meister stated that the 20 day time period is sufficient to protect the investigation. Mr. Meister stated that prosecutors should have the burden of justifying to the court why information should be sealed. Mr. Meister also agreed that search warrants should generally be public once a case has been filed. Judge Vernice Trease suggested that perhaps there should be some type of periodic review by the court and prosecutors to determine whether sealing is still justified. Staff explained that the Administrative Office of the Courts is currently working on projects that might resolve some of the media's concerns. Staff stated that they are working on making search warrants available through Xchange, which would allow the media to research search warrant cases and this would better allow the media to file motions. Staff stated that there are some logistical issues to resolve.

The committee members agreed that the issues warranted further discussion and that some rule changes may be justified. Ms. Dupaix asked whether there were any volunteers to research the issues and present a proposal. Patrick Corum and Mr. Johnson agreed to research the issues.

III. SB 214

Judge McCullagh stated that the Legislature had passed a bill that changes the requirements for stays on justice court appeals. Judge McCullagh stated that, based on the statutory changes, there is a need to amend court rules. Judge McCullagh stated that the statutory changes apply only to trials de novo and not hearings de novo. Judge McCullagh stated that the statute also does not apply to DUI cases. Judge McCullagh stated that, in cases in which the statute applies, the judge must address criteria governing a stay at the time of sentencing. Judge McCullagh stated that this negates the requirement for defendants to file a motion seeking a stay. Mr. Corum asked whether justice court decisions on stays could still be reviewed by the district court. Judge McCullagh stated that the district court could still review those.

Judge McCullagh distributed a proposed new rule 27B which includes provisions currently in rule 27A, with some changes. Judge McCullagh also distributed a proposed Rule 27A. Judge McCullagh stated that the bill allows judges to set conditions for the stay and that those conditions are found in § 77-20-10. Judge McCullagh stated that there is a need to have a rule in place by the time the bill becomes effective on May 7.

Judge McCullagh proposed that the rule be distributed by email to committee members and the members could respond with comments. Judge McCullagh will then compile the comments and propose new amendments. The committee members agreed with this proposal.

IV. OTHER BUSINESS / ADJOURN

Mr. Meister stated that there is a need to consider changes to rule 40 to address the recent case law on the requirements for law enforcement to place a GPS tracker on a vehicle. The issue will be discussed at the next meeting. The meeting adjourned at 1:30 p.m.