

**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

September 29, 2009 - 5:15 p.m.

**ATTENDEES**

Craig Barlow  
Judge Michele Christiansen  
Patrick Corum  
Laura Dupaix  
Professor Amos Guiora  
Craig Ludwig  
Steven Major  
Vincent Meister  
Judge Vernice Trease

**EXCUSED**

Samuel Harkness  
Judge Brendan McCullagh

**GUEST**

Randy Richards

**STAFF**

Brent Johnson

**I. WELCOME AND APPROVAL OF MINUTES**

Laura Dupaix welcomed the committee members to the meeting. Ms. Dupaix welcomed Professor Amos Guiora and Judge Vernice Trease as new members. Ms. Dupaix also noted that Todd Utzinger had recently been appointed.

Steven Major moved to approve the minutes from the last meeting. Craig Barlow seconded the motion. The motion carried unanimously.

**II. WITNESS CONFIDENTIALITY**

Laura Dupaix welcomed Randy Richards to the meeting. Mr. Richards had proposed a rule amendment providing for witness confidentiality in certain circumstances. Mr. Richards stated that his proposal came about because of a gang case in which witnesses are afraid to testify because of potential retaliation. Mr. Richards stated that there has already been violence in the case, with one murder, and a beating that incurred in a courthouse elevator. Mr. Richards stated that the proposal is that the judge can close the courtroom if the judge determines that it is necessary to protect witness confidentiality. Mr. Richards stated the individuals in the courtroom would include only court personnel, the judge, the jury, and attorneys. Also, the witness *could* testify under a pseudonym. Mr. Richards noted that the federal government has a witness

protection program but there isn't such a program in the state. Mr. Richards stated the proposed rule would be more economical than a witness protection program.

Mr. Barlow stated that he had reviewed the proposal and the research and that the other states' statutes and rules seemed to apply only to victims who are young. Mr. Richards stated that the California statute is similar to the proposal and there are cases in which confidential informants' identities are protected. Ms. Dupaix stated that when a witness testifies the defendant will know who it is. Mr. Meister asked what the remedy would be for protecting witnesses after a trial. Professor Guiora asked whether there would be a way to bring federal protections into play. Mr. Meister stated that those probably don't apply to the state. Mr. Meister noted that even if the court closes the proceeding and promises confidentiality, there will be nothing to prevent the defendant from contacting others to notify them that certain individuals testified against the defendant. Mr. Barlow stated that the media will have a problem with this proposal because it closes proceedings.

Mr. Corum stated that the problem with the proposal is that it is overbroad and in the majority of cases it will be used by the prosecution. Mr. Meister stated that he wasn't sure that the committee could do anything procedurally. Mr. Meister stated that the remedy might be with the Legislature, which could impose greater penalties for threatening a witness. Judge Trease stated that greater deterrence won't work because they don't care about what the statute says before going after an individual. Judge Trease noted that even a life sentence doesn't deter such action. Patrick Corum volunteered to look at other states' laws and see what is out there to determine whether the committee should do anything. Professor Guiora noted that various states have enacted terrorism legislation and there might be something in those statutes.

### **III. RULES 17, 18, and 19 SUBCOMMITTEE**

Craig Barlow reported that the subcommittee has not done anything yet.

### **IV. RULE 8 SUBCOMMITTEE**

Laura Dupaix stated that the subcommittee has not met but she had a law clerk do a 50 state survey on what other states are doing. Ms. Dupaix stated that after reviewing the survey she would like to revisit Rule 8 in its entirety. Judge Trease asked whether the problem was mostly in rural counties. Steven Major stated that the problem is that attorneys are not getting paid enough. Ms. Dupaix stated that money is a different issue and is being reviewed by an independent committee. Ms. Dupaix stated that California has a minimum qualifications rule but the court then makes a determination as to whether the attorney is competent above and beyond those minimum qualifications. Mr. Meister asked whether there were also clauses that allow the court to look at other factors if the attorney does not meet the minimum qualifications. Ms. Dupaix stated that there are such clauses and the common theme is that a judge must determine that the attorney is competent.

Judge Trease stated that it would be fine to add discretionary language, but the committee should not eliminate the minimum qualifications. Ms. Trease stated that a judge should not have discretion to go completely outside the rule. Mr. Barlow stated that the problem in some areas is that a judge becomes so familiar with counsel that the judge will appoint that person even if the person is not competent. Judge Trease stated that the goal is to make sure those who appear are qualified. Judge Trease stated that if it leaves some people out so long as those who are appointed are qualified. Ms. Dupaix stated that the big problem is on habeas cases. She stated that there are some very good attorneys who don't qualify but perhaps should because they would do an excellent job. Ms. Dupaix stated that there is a different skill set for habeas cases and that some Rule 8 attorneys have a problem shifting from a trial to a habeas case, which are essentially civil. Mr. Corum suggested that the rule grant authority to the supreme court to appoint counsel at all levels. Steven Major suggested having a committee of judges appoint counsel. Ms. Dupaix stated that she will draft something, pass it by the subcommittee, and then have it ready for the full committee to review at the next meeting.

## **V. RULE 40**

Vincent Meister stated that there have been some changes to the e-warrant system that might address the problems with Rule 40. Mr. Meister stated that he is not yet certain whether anything should be done to the rule based on those changes. Mr. Meister stated that he will report back at the next meeting if things need to change.

## **VI. OTHER BUSINESS**

Mr. Meister stated that the committee should look at the subpoena rules and to put everything on subpoenas in one rule; for example the service requirements. Mr. Corum also suggested that the committee look at Rule 36 on withdrawal of counsel because attorneys are often withdrawing for no apparent reason and judges rarely get into the reasons. This can create problems when attorneys withdraw close to the time of trial.

The committee scheduled its next meeting for November 19, 2009. The meeting will be begin at 5:30 p.m. because Professor Guiora teaches until 5:15 p.m. The meeting adjourned at 6:45 p.m.