

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

October 27, 2008 - 5:00 p.m.

ATTENDEES

Craig Barlow
Judge Michelle Christiansen
Laura Dupaix
Julie George
Judge Bruce Lubeck
Craig Ludwig
Steven Major
Judge Brendan McCullagh

STAFF

Brent Johnson

EXCUSED

Patrick Corum
Samuel Harkness
Professor Erik Luna
Vincent Meister

GUESTS

Wally Bugden
Professor Paul Cassell
Creighton Horton
Tara Isaacson
Ken Wallentine
Katie Monroe
Professor Dan Medwed
Debbie Thader

Laura Dupaix welcomed the committee members to the meeting. The minutes from the previous meeting were approved. Ms. Dupaix welcomed the guests who were invited to speak on the issue of recording interrogations. Creighton Horton was invited to speak first.

Mr. Horton stated that he had been involved in preparing a best practices document for law enforcement. He stated that he was working on this issue when Wally Bugden went to the Legislature for legislation on recording interrogations. Mr. Horton stated that he had also been working on innocence reforms, such as the recent legislation which allows an individual to establish factual innocence based on compelling evidence. Mr. Horton stated that the California model was used for creating a best practices statement. Mr. Horton stated that he worked with Ken Wallentine, and Mr. Wallentine presented the document to law enforcement agencies throughout the state. The best practices statement does not require recording in every situation, but Mr. Horton believes that it is a good step forward. Mr. Horton stated that most of the law enforcement agencies in the state have adopted the best practices statement.

Ken Wallentine stated that law enforcement officials accepted the concept of recording interrogations long before prosecutors picked up the idea. Mr. Wallentine stated that he does not know any situation in which recording has ever not served law enforcement. Mr. Wallentine

stated that law enforcement simply wants to make certain that it is feasible in various circumstances. Ms. Dupaix asked Mr. Wallentine about the status of the best practices statement. Mr. Wallentine stated that he believes that it has been accepted by all law enforcement entities in the state, but no entity has made the statement mandatory. He stated that there is, however, peer pressure from each of the entities to use the best practices statement.

Wally Bugden stated that recording interrogations benefits both the officer and the defendant and that experiences have been overwhelmingly positive. Mr. Bugden stated that when he went to the Legislature with his proposal, the Legislature's primary opposition was that devices are not available everywhere. Mr. Bugden stated that highway patrol officers are currently videotaping all DUI stops so that there is a record of roadside tests and there is no reason not to do the same for other interrogations. Mr. Bugden stated that video tapes and audio tapes can provide compelling or exculpatory evidence and therefore can be of great benefit. Mr. Bugden stated that recording should be mandatory and not simply a suggestion. Mr. Bugden stated that the *Miranda* warning is a part of the fabric of the criminal justice system and would never have worked if it were merely a suggestion. Mr. Bugden stated that a rule is necessary and that there must be a remedy if recordings are not made. Mr. Bugden stated that the rule should not leave open the possibility that law enforcement might only record when it suits them. Mr. Bugden stated that the rule should apply for all crimes, but at least felonies. Judge Brendan McCullagh asked whether the rule would co-extend with *Miranda*, such that all custodial interrogations must be recorded, even if custody occurs in the field. Mr. Bugden stated that he believes the rule should not co-extend, but would just be for recordings done at the station. Judge Lubeck asked why this should be a rule instead of legislation. Mr. Bugden stated that the Legislature will not do it because law enforcement officers have objected and the Chief Justice of the Supreme Court has stated that this might only be possible under court rule.

Ms. Dupaix asked what the appropriate remedy would be for failing to record. Tara Isaacson suggested that the result should be similar to *Miranda*. If statements are not recorded, the statements would be presumptively inadmissible. Ms. Dupaix asked whether a jury instruction would be sufficient. Mr. Bugden stated that an instruction isn't sufficient, because there needs to be more motivation for recording. Craig Barlow stated that he agrees that there should be a mandatory rule with a presumption of inadmissibility, as long as the rule also states that failing to record does not mean that the statement is inherently unreliable. Judge McCullagh suggested that it might make more sense to make the rule co-extensive with *Miranda*.

Katie Monroe stated that her organization does not have substantive differences with the comments already made. Ms. Monroe stated that her organization works on improving the criminal justice system and improving mechanisms that can prove innocence. Ms. Monroe stated that her organization recently had its 223rd exoneration in the country. Ms. Monroe stated that her organization's concern is ensuring that the jury gets the best evidence possible and a recording helps to ensure that this occurs. Judge McCullagh stated that everyone agrees that recording is a good idea, but there is disagreement as to the remedy. Professor Dan Medwed stated that the presumption of inadmissibility is the preferred remedy. The presumption could be

rebutted by good cause. Good cause would include such things as the electricity being out, recording equipment was not available, or a judge could just evaluate the statement and admit it at his or her discretion. Professor Medwed also provided three reasons why a rule should be adopted: 1) case law is reactive and a rule would be proactive to address potential problems; 2) the supreme court has authority to oversee the reliability of evidence; and 3) a supreme court rule will ensure consistency throughout the state. Professor Medwed stated that if the committee considers a rule, his organization would like to help.

Craig Barlow stated that a jury instruction might be an adequate step, with the instruction stating that a jury can give the statement what weight way they choose, including disregarding an unrecorded statement. Steven Major stated that he doesn't want to see a jury get hung-up on why a statement was or was not recorded. Ms. Monroe stated that her organization has jury instructions on this issue from around the country and she can send those to the committee. Julie George stated that there needs to be some teeth to this practice, other than a jury instruction, otherwise there will be excuses similar to that which she is seeing now: such as an excuse that recording equipment was not working at the time.

Professor Paul Cassell provided a proposal which he stated would be a win-win situation. Professor Cassell proposed what he suggested is a carrot approach. Professor Cassell stated that in 1994, 14% of interrogations were recorded. Professor Cassell suggested that figure has probably gone up, but not dramatically. Professor Cassell stated that there are various reasons that law enforcement does not record, such as costs, the intimidation factor of cameras, and the worry that some portions will not be recorded. Professor Cassell suggested that a rule could be a trade off for scaling back *Miranda*. If interrogations are videotaped, then courts and others can determine whether a defendant is being treated fairly and the need for *Miranda* is lessened. Professor Cassell stated that it is unlikely the supreme court will be able to mandate recording because the supreme court does not have that authority over law enforcement. Professor Cassell suggested that the Legislature might also override any such rule. Professor Cassell suggested that the criminal justice system should look forward ten years and if it wants a different landscape it should create an incentive for recording.

After Professor Cassell's statements, the committee briefly discussed when to further discuss this issue. The committee set a meeting for November 17, 2008 at 5:15 p.m. The committee members agreed that the primary discussion is the enforcement mechanism and how that should occur. The meeting adjourned at 7:00 p.m.