

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

AGENDA

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

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 19, 2006 - 5:15 p.m.

1. WELCOME AND APPROVAL OF MINUTES Michael Wims
2. RULE 14 SUBCOMMITTEE Laura Dupaix
3. RULE 18 Michael Wims
Judge Brendan McCullagh
4. SEARCH WARRANT SUBCOMMITTEE Vincent Meister
Michael Wims
5. OTHER BUSINESS
6. ADJOURN

The mission of the Utah judiciary is to provide the people an open, fair,
efficient, and independent system for the advancement of justice under the law.

RULE 14. SUBPOENAS

(1) Subpoenas requiring the attendance of a witness or interpreter and production or inspection of records, papers, or other objects.

(a) A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the prosecuting attorney on his or her own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending shall issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

(b) A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects, other than those records pertaining to a victim covered by Subsection (2). The court may quash or modify the subpoena if compliance would be unreasonable.

(c) A subpoena may be served by any person over the age of 18 years who is not a party. Service shall be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying the witness or interpreter of the contents. A peace officer shall serve any subpoena delivered for service in the peace officer's county.

(d) Written return of service of a subpoena shall be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.

(e) A subpoena may compel the attendance of a witness from anywhere in the state.

(f) When a person required as a witness is in custody within the state, the court may order the officer having custody of the witness to bring the witness before the court.

(g) Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance.

(h) Whenever a material witness is about to leave the state, or is so ill or infirm as to afford reasonable grounds for believing that the witness will be unable to attend a trial or hearing, either party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. Attendance of the witness at the deposition may be compelled by subpoena. The defendant shall be present at the

deposition and the court shall make whatever order is necessary to effect such attendance.

(2) Subpoenas for the production of records of victim.

(a) No subpoena or court order compelling the production of medical, mental health, school, or other non-public records pertaining to a victim shall be issued by or at the request of the defendant unless the court finds after a hearing, upon notice as provided below, that the defendant is entitled to production of the records sought under applicable state and federal law and that the records are not sought for the purpose of harassing or intimidating the victim.

(b) The request for the subpoena or court order shall identify the records sought with particularity and be reasonably limited as to subject matter.

(c) The request for the subpoena or court order shall be filed with the court as soon as practicable, but no later than 60 days before trial, or by such other time as permitted by the court. The request and notice of any hearing shall be served on counsel for the victim or victim's representative and on the prosecutor. Service on an unrepresented victim shall be made on the prosecutor.

(d) If the court makes the required findings under subsection (a), it shall issue a subpoena or order requiring the production of the records to the court. The court shall then conduct an *in camera* review of the records and disclose to the defense and prosecution only those portions that the defendant has demonstrated a right to inspect.

(e) The court may, in its discretion or upon motion of either party or the victim or the victim's representative, issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records.

(f) For purposes of this rule, "victim" and "victim's representative" are used as defined in Utah Code Ann. § 77-38-2(2).

(3) Applicability of Rule 45, Utah Rules of Civil Procedure.

The provisions of Rule 45, Utah Rules of Civil Procedure, shall govern the content, issuance, and service of subpoenas to the extent that those provisions are consistent with the Utah Rules of Criminal Procedure.

Advisory Committee Note: The adoption of subsection (2) is not intended to change existing rules, privileges, statutes, or caselaw pertaining to the release or admissibility of an individual's medical, psychological, school, or other records. Subsection (2) is intended only to adopt a procedure consistent with current applicable law that balances a victim's state constitutional right "[t]o be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process," with a defendant's constitutional right to due process. Utah Const. art. I, § 28(1)(a). Requiring a defendant to apply to the court for the production of a victim's records ensures that a victim or his or her representative will have an opportunity to assert any privileges or reasons why the records should not be subject to either release or *in camera* review. It also avoids the problem presented in *State v. Gonzales*, 2005 UT 72, 125 P.3d 878, in which the victim's mental health records holder mistakenly released privileged records directly to the defense in response to a subpoena that had not been served on either the victim or the prosecution.

Subsection (c) provides that once the defendant has made the threshold showing under subsection (a), records must be sent directly to the court for an *in camera* review by the court, whereupon the court will release any information material to the defense. This is consistent with current caselaw, which requires a defendant to make a threshold showing that no privilege applies and of materiality before obtaining even an *in camera* review. See *State v. Blake*, 2002 UT 113, 63 P.3d 56; *State v. Gomez*, 2002 UT 120, 63 P.3d 72; *State v. Cardall*, 1999 UT 51, 982 P.2d 79; *Ritchie v. Pennsylvania*, 480 U.S. 39 (1987).

Subsection (d) permits the court, if it releases any records to the parties, to issue reasonable orders to further protect the victim's right to privacy.

The adoption of subsection (3) clarifies the applicability of Rule 45, Utah Rules of Civil Procedure, as addressed in *State v. Gonzales*, 2005 UT 72, 125 P.3d 878.