

Administrative Office of the Courts

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

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

AGENDA

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

November 14, 2006 - 5:15 p.m.

1. **WELCOME AND APPROVAL OF MINUTES** **Michael Wims**
2. **RULE 40** **Paul Boyden**
Michael Wims
3. **RULE 15.5** **Michael Wims**
4. **OTHER BUSINESS**
5. **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.

Administrative Office of the Courts

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

November 7, 2006

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

**To: Supreme Court's Advisory Committee
on the Rules of Criminal Procedure**

Dear Committee Member:

This letter is to remind you of the next meeting of the Supreme Court's Advisory Committee on the Rules of Criminal Procedure, which will be Tuesday, November 14, 2006, at 5:15 p.m. Enclosed you will find materials that will be discussed at the meeting. Included on the agenda will be discussions of Rule 8, Rule 15.5 and Rule 40. Aric Cramer will be at the meeting to discuss his proposed change to Rule 8.

On Rule 40, I am including some comments directed to the search warrant process. Some of the comments go directly to the rule, while some of the comments are more general. In addition to the comments enclosed, a few other judges have seen previous versions of the rule and have offered some suggestions. The suggestions or questions are as follows:

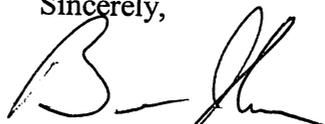
- Although the language beginning on line 27 comes from the existing statute, some judges question the constitutionality of the provision.
- The rule should perhaps address unsigned warrants and unserved warrants. Some judges suggested that there be a requirement to keep documentation on unissued warrants, with a notation that the documents were not signed. There is also an issue about public access to unsigned warrants and public access to unserved warrants.
- There was also a suggestion that the search warrant return may go to any magistrate of the issuing court, and not necessarily the issuing magistrate. The magistrate could endorse on the warrant where the warrant should be returned. One judge has raised the issue of whether it is truly necessary for the magistrate to sign the return.
- There was also a question about whether motions to seal or unseal should go to the magistrate that issued the warrant and/or sealed the warrant.

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efficient, and independent system for the advancement of justice under the law.**

- It was also suggested that the good-cause language in Section (1) either contain a catchall provision which would not limit good cause to the specific findings in subparagraph (2), or to specifically state that subparagraph (2) contains the only criteria upon which good cause may be based.
- The judges also raised the question of whether the committee should address access to PC statements in Rule 7.

If you have any questions about the meeting, or will be unable to attend, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Brent Johnson", written over a horizontal line.

Brent Johnson
General Counsel

enc.

From: Peggy Gentles
To: Scott Hennessy
Date: 10/27/06 12:26PM
Subject: Fwd: Search warrants

I'm not sure why this came straight to me. Happy to help resolve but wanted you to see. I believe the failure to file returns may not be the court's issue; the "penalty" for failure to file a return within may tie to the ability to use any evidence gathered. In addition, I don't believe the statute requires what Debbie is saying. 77-23-207 talks about "promptly" filing the return - again an issue to be decided by the court if raised. We will take and properly track whatever law enforcement brings us.

>>> Deborah Wright 10/27/06 11:23AM >>>
Peggy,

We have had a lot of problems with search warrants since everything has changed. The Detectives are NOT bringing them originals back.

Its all the police departments that are doing this. The ones that do bring them back are bringing in copies and keeping the originals. Lani is trying to tell them but a lot of them are just dropping them off in the basket.

We assign the number, the officer takes the original search warrant , copy of affidavit (we keep the original affidavit and give them copies) and return. When they come back to have the return signed they must have the original search warrant and original return and leave those with the courts. This is happening with all the police departments so they all need the reminder.

Is there a letter that can be sent out to all of the police departments to let them know that the **Original** search warrants need to brought back to the court within 10 days of service and after they get the return sign they must bring it down and leave the original with the courts not copies?

If you have any questions, please call me 87356

Thanks,

Debbie

From: Deborah Wright
To: Brent Johnson; Heidi Van Tress; Lani Vehikite; Scott Hennessy; Tim Shea
Date: 10/27/06 3:22PM
Subject: Fwd: Search warrants

I understand the rule regarding search warrant process is being changed. There are two issues we as clerks and law enforcement need clarified to hopefully prevent further law suits and misinterpretations.

First, the rule states that the search warrant needs to be returned "promptly". What does "Promptly" mean? It does not have a specific time frame. We have Detectives who will get it signed and drop it off at the court when they feel like sometimes a couple of months down the road. We have told officers that they need to be returned within 10 business days. The rule is too general we really need to have a specific time frame that clearly states how many days they have to return it. Most things are 10 days on return with civil cases. The rule is broad and too open for interpretation. We would like to see it say "10 business days" that gives them ample time to get it to the court and everyone knows they have to return by that time.

The second issue we have is the original copies. Some law enforcement will drop off copies of everything and they keep the originals. We have told them they need to bring us the original. The rule does not clarify if the court gets the original or if we could have copies. In civil cases, the court is required to have the original documents, search warrants does not state either way its just says it needs to be returned promptly.

Since the ruling that came down from Federal court regarding the warrants, we assign a search warrant number before they go up to the Judge to be signed. We give the officer the original search warrant, return and copy of the affidavit, we keep the original. When it comes back on return we are getting a lot of copies and not the originals. We need to get the law enforcement and the courts all on the same page and have it spelled out clearly in the rules. We would like the rule to say that the "originals" must be filed with the courts and within 10 business days".

Could you look into this and let me know what can be done. If you have any further questions please call me at 87356.

Thanks,

Debbie Wright

>>> Scott Hennessy 10/27/06 01:09PM >>>

I agree with Peggy on this. I don't see the code addressing the "original" issue and using the term "promptly" when referring to the time to make a return. And I think it is not an issue that we should "push." I think it is great if Lani is asking them to do it, but not our bad if they don't. It may be an issue somewhere down the line that they have to deal with.

Scott

I understand the rule regarding search warrant process is being changed. There are two issues we as clerks and law enforcement need clarified to hopefully prevent further law suits and misinterpretations.

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Scott

From: Judge Kirk Heaton
To: tims@email.utcourts.gov
Date: 10/5/06 11:25AM
Subject: Proposed Rule on Search Warrants

Tim:

This request may be premature but if I wait until the comment period I will have forgotten it.

In drafting a proposed rule pertaining to the issuance of search warrants I would ask you to consider the following:

Since at least 1977 we have been filing the original of the affidavit for search warrant with the clerk of the court for the magistrate issuing the warrant. A copy of the signed warrant is retained by the magistrate. A copy of the affidavit and the original of the warrant is then given to the officer for service, with instructions to return the original to the court with the return. We have assigned a number to this file. I have also used this same procedure with administrative traffic checkpoints.

For the most part this system has worked pretty well. However, on one district court case when the Information was filed the clerk did not assign the same number to the criminal case and we were in the district court with the prosecutor and defense attorney arguing about a search warrant that the district judge did not know existed nor did he have it in front of him. That district judge instructed his clerk to use the same number for the criminal case as was used for the search warrant so this wouldn't happen again.

I have mixed feelings whether the criminal case should have the same number that was issued for the search warrant or whether all search warrant should be filed with a prefix like SW. I can see advantages and disadvantages both ways.

One of the important items that I think needs to be addressed with the proposed rule is the application of Section 77-23-209, UCA, and perhaps this section will need to be amended or clarified by the rule.

Subsection 2 of Section 77-23-209 states that "if the magistrate does not have authority to proceed further with respect to the offense regarding which the warrant was issued, the magistrate shall forward the warrant and the depositions, affidavits, or recorded testimony to the appropriate court of the county having jurisdiction over the offense." The language "offense regarding which the warrant was issued" creates a problem. For example, I issue a warrant for the search of a residence for methamphetamine. The warrant is executed and no methamphetamine is found but marijuana is found and the prosecutor files a possession of marijuana charge in the justice court as a class B misdemeanor. However, the "offense regarding which the warrant was issued" is possession of methamphetamine is a third degree felony and under Section 77-23-209 I then need to forward the search warrant file to the district court even though the case from the execution of the search warrant ended up in the justice court. That doesn't make a lot of sense to me. I would think the court that handles the criminal case ought to have the search warrant unless it is decided to file all search warrants in the district court so they are in one location in the county.

A similar situation arises when, as in the Supreme Court case, no charges are filed as a result of the execution of the search warrant. It looks like it should remain in the court that issued it rather than be transferred to the district court because the offense that was the subject matter of the warrant was a felony.

I do think that if a justice court judge issues a search warrant for a felony offense and a felony is filed that the warrant ought to be transferred to the district court so all of the documents pertaining to that case are in one location.

Thank you for your consideration of these items.

Judge Heaton

From: Judge David L. Mower
To: Brent Johnson
Date: 10/25/06 1:58PM
Subject: Proposed Rule 40 URCrP

I have attached a copy of the PDF file that was distributed to the members of the Board of District Court Judges. It includes my commentary.

Some comments need further explanation.

Lines 34-37. My comment contains only the word "catheter." Here is the explanation.

In the 6th District we frequently see applications for body fluid search warrants. There was a horror story associated with one such warrant.

The person to be searched, a female, would not give a urine sample. The male officers took her to a room in the jail where a female nurse inserted a catheter and extracted urine. This was done while the officers watched.

Since then, we have been inserting into the warrant a requirement that a urine sample be obtained by voluntary urination. If that can't be done, the officer must make a further application.

Line 73. My comment is the word "superfluous." This is the explanation.

There are other places in the rules of procedure where it will be necessary to define the phrase "to file" and to define the specifications of an electronic filing system.

the better practice would be to define those terms only once, and then refer to the definition when necessary. Otherwise there is a risk of multiply non-uniform definitions.

Line 81. The small blue caret should refer to inserted text "there is."

Line 84. The small blue caret should refer to inserted text "before searching."

Line 136. The small blue caret should refer to inserted text "any."

There were several good comments made at last Friday's meeting about the rule subsection that begins at line 76. Since then I've thought that a form would probably be a good idea. the form could contain directions to the serving officer about where to make and file the return.

David L. Mower
<http://users.mstar2.net/dmower>

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PROPOSED RULE 40
UTAH RULES OF CRIMINAL PROCEDURE
SUBCOMMITTEE DRAFT 9/28/06 4:18 p.m.

4 (a) Definitions.

5 As used in this rule:

6 (1) "Daytime" means the hours beginning at 6 a.m. and ending at 10 p.m. local time.

7 (2) "Recorded" or "recording" includes the original recording of testimony, a return or other
8 communication or any copy, printout, facsimile, or other replication that is intended by the
9 person making the recording to have the same effect as the original.

10 (3) "Search warrant" is an order issued by a magistrate in the name of the state and directed to a
11 peace officer, describing with particularity the thing, place, or person to be searched and the
12 property or evidence to be seized and includes an original written or recorded warrant or any
13 copy, printout, facsimile or other replica intended by the magistrate issuing the warrant to have
14 the same effect as the original.

15 (b) Grounds for issuance.

16 Property or evidence may be seized pursuant to a search warrant if there is probable cause to
17 believe it:

18 (1) was unlawfully acquired or is unlawfully possessed;

19 (2) has been used or is possessed for the purpose of being used to commit or conceal the
20 commission of an offense; or

21 (3) is evidence of illegal conduct.

22 (c) Conditions precedent to issuance.

23 (1) A search warrant shall not issue except upon probable cause, supported by oath or
24 affirmation, and shall particularly describe the person or place to be searched and the person,
25 property, or evidence to be seized.

26 (2) If the item sought to be seized is evidence of illegal conduct, and is in the possession of a
27 person or entity for which there is insufficient probable cause shown to the magistrate to believe
28 that such person or entity is a party to the alleged illegal conduct, no search warrant shall issue
29 except upon a finding by the magistrate that the evidence sought to be seized cannot be obtained
30 by subpoena, or that such evidence would be concealed, destroyed, damaged, or altered if sought
31 by subpoena. If such a finding is made and a search warrant issued, the magistrate shall direct
32 upon the warrant such conditions that reasonably afford protection of the following interests of
33 the person or entity in possession of such evidence:

34 [(a)] (A) protection against unreasonable interference with normal business;

35 [(b)] (B) protection against the loss or disclosure of protected confidential sources of
36 information; or

37 [(c)] (C) protection against prior or direct restraints on constitutionally protected rights.

38 (d) Search warrant served in readable form.

39 A copy of a search warrant shall be served in a readable form upon the person or place to be
40 searched.

41 (e) Time for service -- Officer may request assistance.

42 (1) The magistrate shall insert a direction in the warrant that it be served in the daytime, unless
43 the affidavit or recorded testimony states a reason to believe a search is necessary in the night to
44 seize the property prior to its being concealed, destroyed, damaged, altered, or for other good
45 reason; in which case the magistrate may insert a direction that it be served any time of the day or
46 night.

47 (2) The search warrant shall be served within ten days from the date of issuance. Any search
48 warrant not executed within this time shall be void and shall be returned to the court or
49 magistrate as not executed.

50 (3) An officer may request other persons to assist in conducting the search.

51 (f) Receipt for property taken.

52 The officer, when seizing property pursuant to a search warrant, shall give a receipt to the person
53 from whom it was seized or in whose possession it was found. If no person is present, the officer
54 shall leave the receipt in the place where the property was found.

55 (g) Return -- Inventory of property taken.

56 The officer, after execution of the warrant, shall promptly make a verified return of the warrant to
57 the magistrate and deliver a written or recorded inventory of anything seized, stating the place
58 where it is being held.

59 (h) Safekeeping of property.

60 The officer seizing the property shall be responsible for its safekeeping and maintenance until the
61 court otherwise orders.

62 (i) Magistrate to retain and file copies - Documents sealed for twenty days - Forwarding of
63 record to district court.

64 (1) At the time of issuance, the magistrate shall retain and seal a copy of the search warrant, the
65 application and all affidavits or other recorded testimony on which the warrant is based and shall,
66 within a reasonable time, file those sealed documents in court files which are secured from
67 access by the public. Those documents shall remain sealed until twenty days following the
68 issuance of the warrant unless that time is extended or reduced under Section (m). Unsealed
69 search warrant documents shall be filed in the court record available to the public.

70 (2) Sealing and retention of the file may be accomplished by:

71 (A) placing paper documents or storage media in a sealed envelope and filing the sealed
72 envelope in a court file not available to the public; or

73 (B) filing through the use of an electronic filing system operated by the State of Utah which
74 system is designed to transmit accurate copies of the documents to the court file without allowing
75 alteration to the documents after issuance of the warrant by the magistrate.

76 (3) If the magistrate does not have authority to proceed further with respect to the offense
77 regarding which the warrant was issued, the magistrate shall forward the warrant, return,
78 inventory and affidavits or recorded testimony upon which the warrant is based to the appropriate
79 court of the county having jurisdiction over the offense within 15 days after the return.

30 (j) Findings required for service without notice.

81 If the magistrate finds upon proof, under oath, that the object of the search may be quickly
82 destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were
83 given, the magistrate may direct that the officer need not give notice of authority and purpose
84 before entering the premises to be searched.

85 (k) Violation of health, safety, building, or animal cruelty laws or ordinances -- Warrant to
86 obtain evidence.

87 In addition to other warrants provided by this rule, a magistrate, upon a showing of probable
88 cause to believe a state, county, or city law or ordinance, has been violated in relation to health,
89 safety, building, or animal cruelty, may issue a warrant for the purpose of obtaining evidence of a
90 violation. A warrant may be obtained from a magistrate upon request of a peace officer or state,
91 county, or municipal health, fire, building, or animal control official only after approval by a
92 prosecuting attorney. A search warrant issued under this section shall be directed to any peace
93 officer within the county where the warrant is to be executed, who shall serve the warrant. Other
94 concerned personnel may accompany the officer.

95 (l) Remotely communicated search warrants.

96 ~~[(a)]~~ (1) Means of communication. When reasonable under the circumstances, a search warrant may
97 be issued upon sworn or affirmed testimony of a person who is not in the physical presence of the
98 magistrate, provided the magistrate is satisfied that probable cause exists for the issuance of the
99 warrant. All communication between the magistrate and the peace officer or prosecuting attorney
100 requesting the warrant may be remotely transmitted by voice, image, text, or any combination of
101 those, or by other means.

102 ~~[(b)]~~ (2) Communication to be recorded. All testimony upon which the magistrate relies for a finding
103 of probable cause shall be on oath or affirmation. The testimony and content of the warrant shall be
104 recorded. Recording shall be by writing or by mechanical, magnetic, electronic, photographic storage
105 or by other means.

106 ~~[(c)]~~ (3) Issuance. If the magistrate finds that probable cause is shown, the magistrate shall issue a
107 search warrant.

108 ~~[(d)]~~ (4) Signing warrant. Upon approval, the magistrate may direct the peace officer or the
109 prosecuting attorney requesting the warrant from a remote location to sign the magistrate's name on
110 the warrant.

111 ~~[(e)]~~ (5) Filing of warrant and testimony. The warrant and recorded testimony shall be filed with the
112 court. Filing may be by writing or by mechanical, magnetic, electronic, photographic storage or by
113 other means.

114 ~~[(f) Original testimony and warrant. "Recorded testimony" includes the original recording of~~
115 ~~testimony or any copy, printout, facsimile, or other replication of testimony that is intended by the~~
116 ~~person making the recording to have the same effect as the original testimony. "Warrant" includes~~
117 ~~an original written or recorded warrant or any copy, printout, facsimile or other replica intended by~~
118 ~~the magistrate issuing the warrant to have the same effect as the original.]~~

119 ~~(g)~~ (6) Usable copies made available. Except as provided in Sections (i) and (m) of this rule, any
120 person having standing to challenge the lawfulness of [request suppression of evidence discovered
121 as a result of] the search warrant or its execution may request and shall be provided with a copy of
122 the warrant and a copy of the recorded testimony submitted in support of the application for the
123 warrant. The copies shall be provided in a reasonably usable form.

124 (m) Sealing and Unsealing of Search Warrant Documents

125 (1) Application for sealing of documents related to search warrants. A prosecutor or peace
126 officer may make a written or otherwise recorded application to the court to have documents or
127 records related to search warrants sealed for a time in addition to the sealing required by
128 Subsection (i)(1). Upon a showing of good cause, the court may order the following documents
129 to be sealed:

130 (A) applications for search warrants;

131 (B) search warrants;

132 (C) affidavits or other recorded testimony upon which the search warrant is based;

133 (D) the application, affidavits or other recorded testimony and order for sealing the
134 documents.

135 (2) Sealing of search warrant documents. Search warrant documents are public record that may
136 be sealed in entirety or in part and not placed in the public file if all or part of the information in
137 them would:

138 (A) cause a substantial risk of harm to a person's safety;

139 (B) pose a clearly unwarranted invasion of or harm to a person's reputation or privacy; or

140 (C) pose a serious impediment to the investigation.

141 Sealed documents shall be maintained in a file not available to the public. If a document is not
142 sealed in its entirety, the court may order a copy of the document with the sealed portions
143 redacted to be placed in the public file and an un-redacted copy to be placed in the sealed file.
144 No document may be designated as "Filed under Seal" or "Confidential" unless it is accompanied
145 by a court order sealing the document.

146 (3) Unsealing of documents. Any person having standing may file a motion to unseal search
147 warrant documents with notice to the prosecutor and law enforcement agency. If the prosecutor
148 or law enforcement agency files an appropriate and timely objection to the unsealing, the court
149 may hold a hearing on the motion and objection. Where no objection to unsealing the documents
150 is filed, the defendant may prepare an order for entry by the court. The court may order the
151 unsealing of the documents or order copies of the documents to be delivered to a designated
152 person without unsealing the documents and require the person receiving the documents not to
153 disclose the contents to any other person without the authorization of the court.

154 (4) Length of time documents may remain sealed. The documents may remain sealed until the
155 court finds, for good cause, that the records should be unsealed.

157 Advisory Committee Notes

158 (a) This section is adapted from former Sec. 77-23-201 Utah Code Ann.

159 (b) This section is adapted from former Sec. 77-23-202 Utah Code Ann.

160 (c) This section is adapted from former Sec. 77-23-203 Utah Code Ann.

161 (d) This section is adapted from former Sec. 77-23-204 Utah Code Ann.

162 (e) This section is adapted from former Sec. 77-23-205 Utah Code Ann.

163 (f) This section is adapted from former Sec. 77-23-206 Utah Code Ann. The statute contained the
164 words "Failure to give or leave a receipt does not render the evidence seized inadmissible at trial."
165 This rule is not a departure from that original legislative intent. While the committee did not
166 consider it necessary to address admissibility in a procedural rule, the elimination of that language
167 does not suggest that failure to comply with the receipt requirement should be a basis for exclusion
168 of the evidence seized.

169 (g) This section is adapted from former Sec. 77-23-207 Utah Code Ann.

170 (h) This section is adapted from former Sec. 77-23-208 Utah Code Ann.

171 (i) Subsection (1) is added in compliance with the order of the Utah Supreme Court in Anderson v.
172 Taylor 2006UT55 (filed September 22, 2006). Subsection (2) is added to allow for a planned
173 electronic search warrant system operated by the Utah Bureau Of Criminal Identification. This
174 provision supercedes the supervisory orders of the Court in Anderson v. Taylor for that purpose.
175 Subsection (3) is adapted from former Sec. 77-23-209 Utah Code Ann.

176 (j) This section is adapted from former Sec. 77-23-210(2) Utah Code Ann.

177 (k) This section is adapted from former Sec. 77-23-211 Utah Code Ann.

178 (l) This section was formerly Rule 40 Remotely Communicated Search Warrants. Terms used are
179 intended to be interpreted liberally in order to facilitate remote communications as a means of
180 applying for and issuing search warrants while at the same time preserving the integrity of the
181 probable cause application and the terms of warrants that are authorized.

182 (m) (New section)

183