

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 18, 2014

ATTENDEES

Patrick Corum – Chair
Judge Michele Christiansen
Judge Brendah McCullagh
Judge Vernice Trease
Professor Jensie Anderson
Jeffrey Gray
Steven Major
Vincent Meister
Cara Tangaro
Douglas Thompson
Tessa Hansen – Recording Secretary

EXCUSED

Craig Barlow
Craig Ludwig
Brent Johnson

STAFF

GUESTS

Steve Burton
Nate Carlisle
Sheryl Worsley
Connor Boyack

I. WELCOME/APPROVAL OF MINUTES

Patrick Corum welcomed the committee members to the meeting and introduced Tessa Hansen, who joins the committee as Recording Secretary. In that (nonvoting) position, she will take minutes and assist with research as needed. Vincent Meister moved to approve the minutes from the previous meeting. Cara Tangaro seconded the motion. The motion carried unanimously.

II. RULE 40 – GPS WARRANTS

Mr. Corum welcomed Nate Carlisle and Sheryl Worsley, from the Society of Professional Journalists (SPJ), to the Meeting. The SPJ supported the proposed changes to the Rule regarding the time in which documents related to search warrants may be sealed, and come before the committee to discuss procedures for possible public notification when warrants are sealed, and the sealing of documents hits the three-year mark (at which time the records may be sealed indefinitely). The SPJ would like the court websites to allow access to this information. The society also asked for the committee's support in this request. Mr. Corum noted that the unsealing of warrants is a function of the Administrative Office of the Courts (the AOC). The rules of Criminal Procedure would not encompass a notification system. Mr. Corum suggested that the mechanism for public notification, and any accompanying rule, be drafted by the AOC. Mr. Carlisle and Ms. Worsley asked whether the committee would be willing to take a position in favor of a mechanism, and whether the AOC would implement a notification system without a formal rule or order from the Court.

Judge Trease noted that while there is not a system of public notification of sealing of warrants in place, the sealing is a matter of public record. Both Mr. Corum and Judge Trease reiterated that the Committee cannot make a rule to govern this issue, but the AOC and the Judicial Committee are tasked with administrative mechanisms affecting the public in this way.

The SPJ direct additional questions about current procedure, and ways it may be made more transparent to Brent Johnston. SPJ express some concern that without written rule or mandates, courts may not provide information and access requested.

Mr. Corum noted that regarding the status of the proposed changes to Rule 40, the public comment period has expired, the committee now can review the comments, edit the proposed rule if necessary, and send to the Court for approval. No committee members recommended changes based on the comments received. Mr. Corum moved to send the Rule to the Court without additional amendment. The motion was seconded and unanimously approved.

II. H. B. 70

Mr. Corum welcomed Connor Boyack, president of Libertas institute, and Steve Burton with the Utah Society of Criminal Defense Lawyers. Mr. Boyack and Mr. Burton stated that their organizations are concerned about the militarization of police tactics. During this most recent legislative session, both organizations worked to clarify the standards under which no-knock search warrants may be issued. To that end, H.B. 70 has been passed, but not signed.

Mr. Burton and Mr. Boyack noted that in amending the statute, the legislature has made two substantive changes to forcible entry procedures. First, officers are not required to have probable cause, rather than "reasonable grounds" before making a forcible entry, should not use more force than is necessary to effectuate the entry, and should identify themselves as officers and state the purpose of entry as soon as practicable after entering. The second substantive change would require either a) a magistrate to make a finding of probable cause, based on the

warrant affidavit, that evidence may be destroyed; or) a magistrate to have "reason to believe" that physical harm may result if law enforcement is required to announce their presence before entering.

Members of the committee expressed concern regarding the wording of the amendments. Subsection 3(b)(ii) requires a finding of probable cause regarding the likelihood of evidence destruction, where Subsection 3(b)(iii) requires only the magistrate's finding of "reason to believe" that physical harm was likely to occur. Committee members discussed whether the differing standards would result in confusion. Judge McCullagh also noted that the disjunctive "or" in subsection 3 could also result in unclear direction to magistrates tasked with issuing no-knock warrants.

In addition, Judge Trease suggested that the statute, as written, could prompt separation-of-powers concerns, and place magistrates in a position of assuming executive police power functions. Mr. Burton and Mr. Boyak conceded that the language in the amendment was the result of extensive negotiation and in some instances the express directives of legislators and other advisors.

The committee agreed that further examination of the proposed statute and the effect of the new language is needed. Mr. Corum requested that Mr. Thompson, Mr. Gray, Mr. Meister, Ms. Tangaro, and Steven Major form a subcommittee to address this issue. Mr. Thompson and Mr. Gray will lead the subcommittee.

Mr. Burton noted that soon all warrants will be issued through an electronic warrants system, which may ameliorate some of the committee's concerns.

III. RULE 7 – PROBABLE CAUSE REVIEWS

The amendments to Rule 7 remove language providing for the recording of testimony in the event that a witness will not appear and testify, and alter language regarding detaining potential witnesses. The committee asked whether the proposed rule change has been out for comment for the required amount of time. Mr. Corum stated that he would speak to Mr. Johnson and determine whether that was the case. Mr. Meister proposed that the committee not take action on the issue at this meeting and instead wait until it has information about whether the comment period has in fact expired. Steven Major seconded the motion. The committee voted unanimously in favor.

V. RULE 2 – TIME COMPUTATION

Mr. Corum stated that he did not have additional information for the committee on this agenda item. He will confer with Mr. Johnson and address Rule 2 at the next meeting.

VI. RULE 14 – SUBPOENAS

Mr. Corum has asked for input from the Utah Crime Victims group regarding the impact that proposed changes to Rule 14 might have on crime victims. The proposed amendments remove the option to depose subpoenaed witness and instead require the presence of subpoenaed witnesses at a hearing. Mr. Corum informed the committee that he will continue to seek comment from the crime victims group and will share any additional information with the committee at the next meeting.

VII. REORGANIZATION OF RULES

Judge McCullagh stated that he has an outline of the proposed reorganization of the rules and he will distribute to the Committee before the next meeting. The Rules would be organized into four categories: (1) Pretrial; (2) Magistrate; (3) Trial; (4) Post-trial. Judge McCullagh noted that the intent of the reorganization would be to eliminate reliance on a catch-all rule, eliminate duplications, streamline, and clarify. At the May meeting, he anticipates that subcommittees could be assigned.

VIII. FAULKNER V. LINDBERG

The committee still has questions regarding the extent of authority the District Court retains with regard to cases remanded to justice court.