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

*The meeting is scheduled
in the Council Room.

September 16, 2014
12:00 p.m. - 2:00 p.m.

Agenda

1. Welcome and approval of minutes	-	Patrick Corum
2. Rule 14 - subpoenas	-	Patrick Corum Heidi Nestel Brent Johnson Tim Shea
3. Remote services report	-	Tim Shea
4. Rule 7(h)(2)	-	Douglas Thompson
5. Rule 40 - GPS warrants	-	Judge Brendan McCullagh
6. Rule 40 - motions to seal	-	Brent Johnson
7. Rule 7 and Rule 14 - material witnesses	-	Judge Brendan McCullagh
8. Rule 26 - preparing orders	-	Brent Johnson
9. Reorganization of rules - update	-	Judge Brendan McCullagh
10. Other business		
11. Adjourn		

Utah State Courts

Brent Johnson <brentj@utcourts.gov>

Fwd: Rule 14(b)

Tim Shea <tims@utcourts.gov> Wed, Sep 3, 2014 at 10:14 AM
To: Brent Johnson <brentj@utcourts.gov>

Brent,
The supreme court would like the criminal rules committee to consider amendments to Rule 14(b) that would add to the existing requirements, requirements that have been established by caselaw. Justice Lee mentions one from Worthen, but suggests that there may be others. Can your committee take this on?
Thanks,
Tim

——— Forwarded message ———
From: **Thomas Lee** <tlee@utcourts.gov>
Date: Thu, Aug 28, 2014 at 1:13 PM
Subject: Re: Rule 14(b)
To: Tim Shea <tims@utcourts.gov>

Thanks Tim. The issue we would like the committee to address is whether to incorporate into criminal rule 14(b) the terms of standards set forth in our case law that are not prescribed in (or even suggested by) the terms of the rule. The rule says that a movant must show that he is "entitled to production of the records sought under applicable state and federal law." UTAH R. CRIM. P. 14(b)(1). To that standard our cases add the requirement that a defendant must show, to a "reasonable certainty," that "the records will contain exculpatory evidence favorable to the defense." State v. Worthen, 2009 UT 79, ¶ 38, 222 P.3d 1144. There may be other considerations set forth in other cases under this rule, but this is the one I came across recently. And it seemed to me that we ought to consider including these terms in the rule itself, so as not to catch a party or counsel unawares.

On Thu, Aug 28, 2014 at 11:45 AM, Tim Shea <tims@utcourts.gov> wrote:
Tom,
You asked me to remind you of this topic, and you would cite me to previously published opinions. If you will do that, I'll contact Brent Johnson, who staffs the criminal rules committee. If he has questions can I refer him to you?
Thanks,
Tim

Rule 40. Search Warrants

(a) Definitions.

As used in this rule:

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

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

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

(b) Grounds for issuance.

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

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

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

(b)(3) is evidence of illegal conduct.

(c) Conditions precedent to issuance.

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

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

(c)(2)(A) protection against unreasonable interference with normal business;

(c)(2)(B) protection against the loss or disclosure of protected confidential sources of information; or

(c)(2)(C) protection against prior or direct restraints on constitutionally protected rights.

(d) Search warrant served in readable form.

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

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

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

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

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

(f) Receipt for property taken.

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

(g) Return -- Inventory of property taken.

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

(h) Safekeeping of property.

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

(I) Magistrate to retain and file copies - Documents sealed for twenty days -Forwarding of record to court with jurisdiction.

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

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

(i)(2)(A) placing paper documents or storage media in a sealed envelope and filing the sealed envelope in a court file not available to the public;

(i)(2)(B) storing the documents by electronic or other means under the control of the court in a manner reasonably designed to preserve the integrity of the documents and protect them against disclosure to the public during the period in which they are sealed; or

(i)(2)(C) filing through the use of an electronic filing system operated by the State of Utah which system is designed to transmit accurate copies of the documents to the court file without allowing alteration to the documents after issuance of the warrant by the magistrate.

(j) Findings required for service without notice. If the magistrate finds upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given, the magistrate may direct that the officer need not give notice of authority and purpose before entering the premises to be searched.

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

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

(l) Remotely communicated search warrants.

(l)(1) Means of communication. When reasonable under the circumstances, a search warrant may be issued upon sworn or affirmed testimony of a person who is not in the physical presence of the

magistrate, provided the magistrate is satisfied that probable cause exists for the issuance of the warrant. All communication between the magistrate and the peace officer or prosecuting attorney requesting the warrant may be remotely transmitted by voice, image, text, or any combination of those, or by other means.

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

(l)(3) Issuance. If the magistrate finds that probable cause is shown, the magistrate shall issue a search warrant.

(l)(4) Signing warrant. Upon approval, the magistrate may direct the peace officer or the prosecuting attorney requesting a warrant from a remote location to sign the magistrate's name on a warrant at a remote location.

(l)(5) Filing of warrant and testimony. The warrant and recorded testimony shall be retained by and filed with the court pursuant to Section (i). Filing may be by writing or by mechanical, magnetic, electronic, photographic storage or by other means.

(l)(6) Usable copies made available. Except as provided in Sections (i) and (m) of this rule, any person having standing may request and shall be provided with a copy of the warrant and a copy of the recorded testimony submitted in support of the application for the warrant. The copies shall be provided in a reasonably usable form.

(m) Sealing and Unsealing of Search Warrant Documents

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

(m)(1)(A) applications for search warrants;

(m)(1)(B) search warrants;

(m)(1)(C) affidavits or other recorded testimony upon which the search warrant is based;

(m)(1)(D) the application, affidavits or other recorded testimony and order for sealing the documents.

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

(m)(2)(A) cause a substantial risk of harm to a person's safety;

(m)(2)(B) pose a clearly unwarranted invasion of or harm to a person's reputation or privacy; or

(m)(2)(C) pose a serious impediment to the investigation.

Sealed documents shall be maintained in a file not available to the public. If a document is not sealed in its entirety, the court may order a copy of the document with the sealed portions redacted to be placed in the public file and an un-redacted copy to be placed in the sealed file. Except as required by Section (i), no document may be designated as "Filed under Seal" or "Confidential" unless it is accompanied by a court order sealing the document.

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

(m)(4) Length of time documents may remain sealed.

(m)(4)(A) The documents may remain sealed ~~until the court finds, for good cause, that the records should be unsealed.~~ for a period of up to six months. Prior to the end of the six month period, the prosecutor, peace officer, or a person with a direct interest in the records may apply to the court to seal the documents for an additional period of up to six months. Upon a finding that conditions for sealing remain, the court may order the documents to be sealed for up to six additional months. The prosecutor, peace officer, or a person with standing may seek, and the court may grant, additional six month extensions provided conditions for sealing remain.

(m)(4)(B) If search warrant documents have remained sealed for at least three years, the prosecutor, peace officer, or a person with standing may apply to the court to seal the documents indefinitely. Upon a finding that the conditions for sealing remain, the court may order that the documents be sealed indefinitely, pending further order from the court.

Rule 7

Current language

(h)(1) If a defendant is charged with a felony or a class A misdemeanor, the defendant shall be advised of the right to a preliminary examination. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the magistrate shall order the defendant bound over to answer in the district court.

(h)(2) If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. The examination shall be held within a reasonable time, but not later than ten days if the defendant is in custody for the offense charged and not later than 30 days if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. A preliminary examination may not be held if the defendant is indicted.

Judge McCullagh's proposed changes

(h)(2) If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. The examination shall be held within a reasonable time, but not later than ~~ten~~ **14** days if the defendant is in custody for the offense charged and not later than ~~30~~ **28** days if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. A preliminary examination may not be held if the defendant is indicted.

My proposed changes

(h)(1) If a defendant is charged with a felony or a class A misdemeanor, the defendant shall be advised of the right to a preliminary examination **at the defendant's first appearance**. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the magistrate shall order the defendant bound over to answer in the district court.

(h)(2) If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. The examination shall be held within a reasonable time, but not later than ~~ten~~ **14** days **from the date of request** if the defendant is in custody for the offense charged and not later than ~~30~~ **28** days **from the date of request** if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. A preliminary examination may not be held if the defendant is indicted.

Rule 26. Written orders, judgments and decrees.

(a) In all pretrial and postconviction rulings by a court, counsel for the party or parties obtaining the ruling shall within ~~fifteen~~ 14 days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(b) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within ~~five~~ seven days after service.

(c) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered based on a ruling after a hearing or argument, the stipulation of counsel, the motion of counsel or upon the court's own initiative, and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made. If the order, judgment, or decree is the result of a hearing, the order shall include the date of the hearing, the nature of the hearing, and the names of the attorneys and parties present at the hearing.

(d) The trial court shall prepare the final judgment and sentence, and any commitment order. The trial court shall serve the final judgment and sentence on the parties and immediately transmit any commitment order to the county sheriff.

~~(d)~~ (e) All orders, judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. ~~Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.~~

~~(e)~~ (f) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record .

UTAH CRIME VICTIMS LEGAL CLINIC

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TO: Utah State Rules Committee Members

FROM: Heidi Nestel, Executive Director, Utah Crime Victims Legal Clinic

DATE: September 16, 2014

SUBJECT: Proposed changes to Criminal Rules of Procedure 14b – opposition to eliminate protection for non-public records

Greetings. Thank you for the opportunity to address the Criminal Rules Committee regarding the proposed changes to Rule 14b which currently governs the subpoenaing process of crime victims privileged and non-public records. Working as a legal advocate for victims the past 17 years and after much contemplation of this issue, it is my ***fervent*** recommendation for the Rules Committee to reject the proposed changes—namely, to eliminate court oversight and protection for a victim's non-public records. These changes could and would most certainly in some cases, have catastrophic implications for victim privacy and negate the very reason for the protections deliberately given by the Rules Committee when the rule was amended in 2007. The current rule is consistent with Utah case law and merely provides the court oversight needed to ward against intrusive and unwarranted infringements of victim privacy which could lead to a violation of victims' State Constitution Rights to be treated fairly, with dignity, and to be free from harassment and abuse. Below are some thoughts and real life case anecdotes which support keeping the rule as it is currently enacted.

Background of the Utah Crime Victims Legal Clinic: The Utah Crime Victims Legal Clinic provides free legal representation to victims of crime; we assist victims in understanding and asserting their legal rights under the Utah State Constitution, the Utah State code and rules of evidence and procedure meant to protect victims and give them a meaningful voice in the criminal justice system. The Legal Clinic was established in 2005 as a non-profit supported by federal grants. Over the past 9 years, we have had the opportunity to assist approximately 250 crime victims, each year, assert their rights during the investigative, pre-trial, trial and post-conviction stages of the criminal justice process. In addition, we have trained over 5,000 criminal justice professionals about victims' rights and how to effectively work with crime victims. Crime victims have many enumerated rights including the right to speedy trial, to be present and heard and important criminal justice hearings, the right to be treated with dignity, respect, fairness and be free from abuse and harassment, the right to restitution and reparations, the right to notification of case developments, hearing and proposed plea bargains, *and* the right to privacy and security. Without hesitation, I can report the number one issue for which the Legal Clinic attorneys assist and fight for victims is their right to privacy and the protection of privileged and private records. This is a top concern for our victim clients and the number one tactic to invade, intimidate and deter a victim from willingly participating in the criminal justice process.

Concerns About Rule Change:

The risk isn't that all defense attorneys would abuse it (many wouldn't), but it would leave victims wide open to some defense attorneys and some pro se defendants. The proposed change also doesn't really make sense in the plain language of the rule - "... school or other privileged records..."? School records aren't privileged. Clearly the writers of the rule intended to include school records (see e.g. Elizabeth

Smart case) even though those aren't included in the case law.

There are also many, many non-public records pertaining to a victim that are non-privileged but are not appropriate for defendants to be able to subpoena without court oversight. For example:

- a victim's journal;
- the contents of a victim's computer;
- a victim's address book;
- an adult victim's childhood medical records;
- a victim's emails to her mother;
- a victim's employment records – e.g., disciplinary records, annual evaluations, etc.;
- bank records or investment portfolios;
- UVISA applications;
- DCFS reports.

UCVLC has had experience with several of these – e.g., a stalker seeking a woman's OB-GYN records that were irrelevant to the case; defendants seeking a victim's journal; a defendant seeking a victim's employment records, etc.

Currently there are two levels of protection: (1) privileged records must pass the Worthen-Blake-etc. standard; and (2) non-privileged records must past the materiality test (see the footnotes to the rule). It is entirely appropriate to have court oversight to determine whether the non-public records a defendant is seeking are material to the case. Changing the rule would mean that a defendant could issue subpoenas for all sorts of irrelevant things. Again, not that all defense attorneys would, but some certainly would ... and it's a terrible idea to let pro se defendants decide what is and isn't material to a case. As far as what non-public means - if something's not accessible by skilled Googling, or by GRAMA request, it's probably non-public. A victim's marriage certificate? Public. A victim's phone records? Non-public. A victim's criminal history? Public. A victim's protected contact info on a protective order application? Non-public.

Proponents of the Rule change may have a point that the rule should apply to prosecutors and defendants rather than just the latter. However, the rule shouldn't be changed to include prosecutors without further discussion - there is a definite difference between the two. Should a prosecutor be trusted to make more decisions about what to subpoena than a pro se alleged serial rapist? Certainly.

In sum, it was a hard fought battle, many years in the making, to obtain Rule 14b which developed a much needed procedure to establish court oversight of the disclosure of victims' records and when a victims' privacy is appropriately breached. Currently, defendants can subpoena victims' non-public and non-privileged records if they merely demonstrate their materiality to the court and meet the standards set out in governing case law. To remove the "non-public" records from the rule would remove much needed protection, expose victims' to assured harassment and lead to reservations in reporting crime and participating in the criminal justice system.

On behalf of the Utah Crime Victims Legal Clinic and the victims for whom we serve now, the victims we will serve in the future, and for all victims not fortunate to have their own attorney, we implore you to reject the proposed rule change and let the current Rule 14b stay in effect and allow court's to have continued supervision over this issue.

(8) Appendix A. Amendments to statutes and rules (Excerpts)

Although our motivation has been improving hearings and services in our smaller courthouses, these proposed rules are not limited by the size of an operation. They should be vetted by the committees responsible for the rules and by the judges and lawyers involved in the different types of cases.

(a) Remote hearings

(i) Rule of Criminal Procedure 17.5. Hearings with contemporaneous transmission from a different location.

(a) The court may conduct the following hearings with the defendant attending by contemporaneous transmission from a different location:

(a)(1) arraignment;

(a)(2) bail;

(a)(3) change of plea;

(a)(4) early case resolution;

(a)(5) initial appearance;

(a)(6) law and motion;

(a)(7) pretrial conference;

(a)(8) review;

(a)(9) roll call;

(a)(10) waiver of preliminary examination; and

(a)(11) any hearing from which the defendant has been excluded under Rule 17.

(b) The court may conduct the following hearings with the defendant attending by contemporaneous transmission from a different location if the defendant waives attendance in person:

(b)(1) preliminary examination;

(b)(2) probation violation;

(b)(3) restitution;

(b)(4) sentencing; and

(b)(5) trial.

(c) For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous

transmission from a different location if the party not calling the witness waives confrontation of the witness in person.

(ii) Rule of Juvenile Procedure 29B. Hearings with contemporaneous transmission from a different location.

(a) In any delinquency proceeding or proceeding under Section 78A-6-702 or Section 78A-6-703 the court may conduct the following hearings with the minor or the minor's parent, guardian or custodian attending by contemporaneous transmission from a different location:

(a)(1) arraignment;

(a)(2) contempt

(a)(3) detention;

(a)(4) law and motion;

(a)(5) pretrial conference;

(a)(6) review; and

(a)(7) warrant.

(b) The court may conduct the following hearings with the minor or the minor's parent, guardian or custodian attending by contemporaneous transmission from a different location if the minor or the minor's parent, guardian or custodian waives attendance in person:

(b)(1) adjudication

(b)(2) certification to district court;

(b)(3) disposition;

(b)(4) expungement;

(b)(5) permanency;

(b)(6) preliminary hearing;

(b)(7) restitution;

(b)(8) shelter; and

(b)(9) trial.

(c) For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives confrontation of the witness in person.

(iii) Rule of Juvenile Procedure 37B. Hearings with contemporaneous transmission from a different location.

(a) In any abuse, neglect, dependency, or substantiation proceeding and in any proceeding for the termination of parental rights, the court may conduct hearings with the minor or the minor's parent, guardian or custodian attending by contemporaneous transmission from a different location if the minor or the minor's parent, guardian or custodian waives attendance in person.

(b) For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives confrontation of the witness in person.

(iv) Rule of Civil Procedure 43. Evidence.

(a) Form. In all trials, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(v) Code of Judicial Administration Rule 4-106. Electronic conferencing.

Intent:

To authorize ~~the use of electronic conferencing~~ hearings with contemporaneous transmission from a different location in lieu of personal appearances in appropriate cases.

To establish the minimum requirements for contemporaneous transmission from a different location.

Applicability:

This rule shall apply to all courts of record and not of record.

Statement of the Rule:

~~(1) In the judge's discretion, any hearing may be conducted using telephone or video conferencing.~~

~~(2) Any proceeding in which a person appears by telephone or video conferencing shall proceed as required in any other hearing including keeping a verbatim record.~~

(1) If the courtroom satisfies paragraph (3), the judge may participate in a hearing by contemporaneous transmission from a different location.