

Right to Know Advisory Committee  
Public Records Exceptions Subcommittee  
October 21, 2009  
(Draft) Meeting Summary

Present:  
Shenna Bellows, Chair  
Bob Devlin  
Suzanne Goucher  
Mal Leary  
Linda Pistner  
Harry Pringle  
Chris Spruce

Also in attendance:  
Ted Glessner  
Justice Andrew Mead

Staff:  
Peggy Reinsch  
Colleen McCarthy Reid

Subcommittee Chair Shenna Bellows convened the meeting at 10:35 a.m., and welcomed the participation of Advisory Committee members that serve on other RTK AC subcommittees, and Supreme Judicial Court Associate Justice Andrew Mead.

### **Juror confidentiality statutes**

Justice Mead was invited to participate with the Subcommittee in discussing, at the request of Mal Leary, the existing confidentiality protection of information pertaining to jurors. Ted Glessner accompanied Justice Mead.

Justice Mead currently chairs the Judicial Branch's committee that has jurisdiction over issues concerning court records. Justice Mead also explained his experience with juries, including 16 years as a Superior Court Justice, overseeing many jury trials. He encouraged jurors to share their concerns, and the top three reported back to him were parking costs, the per diem paid for jury service and a profound concern about whether parties will be able to find the jurors after the case is concluded. Criminal cases are often overwhelming. Maine jurors are great, Justice Mead said; 99.9% take their role seriously. Some are lost along the way because of their concerns about making decisions on serious injuries, large monetary values and horrific crimes.

Justice Mead stated that the current law is elegant in the way it balances the need for government openness with personal privacy. Justice Mead clarified that he can offer comments on the administration of justice, but he cannot make further comments about the law.

Mr. Leary explained why he asked the Subcommittee to review the juror statutes - the juror confidentiality statutes are the total reverse of all the other laws: where most statutes presume records are open and provide exceptions, Title 14, sections 1254-A and 1254-B presume confidentiality and allow release only as exceptions. Mr. Leary also mentioned the history of criminal trials being open. In addition, Mr. Leary noted that there is nothing you can do to prevent someone from identifying a juror who is serving on a jury just by attending court, or watching who enters or leaves the court house. Judges can take steps to protect jurors in federal

courts and in some states. Mr. Leary mentioned the notorious prosecution of an alleged mobster in which the jury was kept anonymous and sequestered during the trial, and only after the acquittal was it discovered that a juror was a cousin of the defendant on trial. Mr. Leary has spoken to Chief Justice Saufley and agrees with her that many areas of the juror questionnaire should be kept confidential. When he served on a criminal jury presided over by Justice Skolnick, Mr. Leary said that the question of names becoming public was inconsequential.

Justice Mead agreed that government needs to be open, and information about how the government does business needs to be public. But Justice Mead asserted that juror names and addresses are not really “court records;” they are very different from the usual type of record that must be public. Although it is true that you cannot avoid being identified, just the fact that the defendant knows who the juror is can affect how the juror behaves. The court used to give out the entire juror list - names, addresses, juror questionnaire when requested - and never heard of a problem. But what if the defendant is a sociopath? The fact that the name and address are not released serves as some protection. If a juror asks if the defendant can get to him or her, the judge can say generally no.

Chris Spruce asked whether we need to have a blanket approach; what if we develop a set of criteria for certain cases, but have a presumption that the information is open? Justice Mead was concerned about the practical application of such an approach; you can’t tell the juror whether the information will or won’t be public. One judge may apply the law inconsistently from another judge. From a philosophical point of view, if this isn’t really court data, then releasing it is inconsistent. The current practice is to presume the information is confidential unless a requester can prove a “need to know.” If the requester makes a responsible inquiry, then it can be released.

Ms. Bellows reiterated the subcommittee’s focus on the right to know how the government operates. Does juror information fall into that category? The government is collecting more and more personal, sensitive data. Justice Mead agreed that the courts have a lot of personal data, and he explained that the courts have carefully defined “court records.” There has to be some ability to look at evidence in a case, and many records contain certain bits of personal information, such as Social Security numbers, drivers’ license numbers and date of birth. Justice Mead identified media requests as generally being responsible inquiries. Illegitimate requests could include pedophiles looking for juror questionnaire information relating to child victims of sexual abuse. The law recognizes an overriding interest in keeping personal juror information confidential; there should be some assurances that the sociopathic defendant won’t end up with a juror’s name and address.

Linda Pistner questioned whether there are statutes or court orders that limit a juror from speaking to the Press once a case is complete. Justice Mead said that judges make clear that there is no duty to speak, but there is also no restriction on a juror speaking with the Press, or anyone else, once the case is over. When asked what standard judges apply when deciding whether to release juror information, Justice Mead said that as justices of the court, the concern is really about a person who wants to track down a juror, harass the juror or injure the juror. Research inquiries and media inquiries are responsible uses. The court wants the ability to say no to less than legitimate requests, the ability to say no to people who want the information for mischievous reasons.

Ms. Pistner asked Justice Mead about the juror questionnaire. Justice Mead described the questions as fairly intrusive.

Harry Pringle asked the Subcommittee members if there is a serious problem with the current law that needs to be addressed? Mr. Leary responded that these statutes turn the usual public records-confidentiality presumption on its head. Mr. Pringle understands the jurors' concerns about being tracked down; he said he is less guided by a general philosophical standard than the facts presented here.

Suzanne Goucher asked about the release of the names of potential jurors as well as the questionnaire forms, to the parties and attorneys for voir dire. Justice Mead explained that while the defense attorney is given copies, the attorney is not permitted to release that information to the defendant. The attorney takes notes, and acts as a buffer between the juror and the defendant. On the day of the trial, the defendant gets a list of the names of the potential jurors to see if the defendant knows any, but the defendant does not see the questionnaires. Ms. Goucher asked whether the release of the list of the potential jurors to the defendant is turning the protections of the law on its head. Justice Mead replied that if the defendant does not know the person on the potential list of jurors, the defendant will not know when the person is chosen as a juror, as the jurors are identified in voir dire by number only.

Mr. Leary said that his concern is about both the pool of potential jurors and the panel of jurors sitting in judgment, although he agreed that some information on the questionnaires should be kept confidential. But it is necessary to release some personal information to identify whether there is bias, discrimination, overreaching. Why would a person's occupation be deserving of protection? The fundamental problem in this country, Mr. Leary said, is that people distrust government. Sometimes getting the information after the trial is too late. The records are designated confidential, and there is not a right to obtain the information. What if the court does not consider a reporter "responsible?" Ms. Bellows expressed her doubts that a juror's occupation is a "governmental function." Although the Judicial Branch is a separate branch of government, a juror is different than a public employee. She asked whether there is a practice in Maine of not providing the information when requested. Ms. Goucher noted that there are judges who say they will never have cameras in the courtroom, so it would be easy to predict that a judge may refuse to release the information. Ms. Goucher asked what happened – from the time Maine became a state in 1820 to 2005, the information was open. Justice Mead explained that Society changed – we live in an increasingly hostile, violent society with heightened concerns. He believes television contributes to the unease. He thinks that people are more concerned now about others having their information; he likes being able to tell jurors that we have done what we can to protect them. Ms. Goucher described the jury room as a "black box" – just about the only place we allow complete secrecy. But when the trial is complete, the interests of justice are served by knowing who was there and what transpired.

Ms. Bellows agreed there are competing interests. She brought the focus back to the Subcommittee's charge: to review the statutes, after having already voted as a Subcommittee to leave as is. Mr. Pringle saw no need to make a change – nothing was presented that had persuaded him otherwise. He moved that the Subcommittee recommend no change to the juror confidentiality statutes. Mr. Spruce moved to table; Ms. Goucher seconded the motion. The subcommittee voted 4-1 to table (Ms. Bellows, Ms. Goucher, Ms. Pistner, Mr. Spruce voting in favor; Mr. Pringle voting against).

The Subcommittee agreed to meet on Tuesday, November 10<sup>th</sup> at 12:30 p.m., following the meeting of the Legislative Subcommittee. [Note that both meetings have been rescheduled for November 17<sup>th</sup>.]

The meeting adjourned at 12:40 p.m.

Respectfully submitted by Peggy Reinsch and Colleen McCarthy Reid, Right to Know Advisory Committee staff