

August 22, 2018

Justice Carlos Samour  
Colorado Supreme Court  
Liason to Advisory Committee on Rules of Criminal Procedure  
2 E. 14<sup>th</sup> Avenue  
Denver, Colorado 80203

Re: Proposed changes to Crim. P. 15

Dear Justice Samour:

On behalf of the Criminal Rules Committee, I am writing to inform you that on July 20, 2018, the Committee voted to recommend that the court adopt the following described changes to Crim. P. 15.

#### **BACKGROUND**

In July of 2016, the Colorado legislature amended C.R.S. § 18-6.5-103.5- Video tape depositions-at risk victim and witnesses. The legislative changes now require that a deposition taken pursuant to this statute has to be preserved on video imaging format (3)(a)(III)(b) and the prosecution must transmit the recording to the clerk of the court in which the action is pending. Since the statute requires that the deposition be conducted pursuant to Crim. P. 15(d), the advisory committee began a discussion on the need to address the impact of the statutory change on the rule.

A subcommittee was formed and quickly discovered that two other statutes were relevant to the discussion. C.R.S. § 18-6-401.3- Video tape depositions-children-victim of child abuse requires depositions to be recorded and preserved on video tape and that the video tape be transmitted to the clerk of the court in which the action is pending. Similarly, C.R.S. § 18-3-413- Video tape depositions-children-victims of sexual offenses requires videotaped depositions and transmittal to the clerk of the court. Both statutes require depositions to be taken pursuant to Crim. P. 15(d).

Notably, the current version of Crim. P. 15(d) does not require depositions to be preserved on video tape or video imaging formats and as a result, does not require a video tape to be transmitted to the Court. Because this rule has not been updated, it does not contemplate or address the issues that have arisen with e-filing. Additionally, Crim. P. 15(f) relates to transcripts and does not contemplate furnishing a video tape to opposing counsel.

The committee's early discussion focused on whether to amend Crim. P. 15(d) and (f) at all. The committee discussed the fact that the rule mandates that the Court "direct" how the deposition is to be taken and transcribed. Some of the committee members believed that the Court can direct the manner of taking and transcribing the deposition and in the instance of a deposition to be taken pursuant to one of the three statutes, would order the parties to comply with the requirements of the statute. Other members believed that all depositions should be preserved

and transmitted in the same manner as the three statutes for consistency purposes. These members believed that the rule should be consistent with current technology. Ultimately, the entire committee agreed with the latter approach and the sub-committee undertook the task of making the Rule consistent with the three statutes. Once this determination was made, the committee agreed that (f) also needed to be amended.

One of the biggest concerns that the committee had in discussing the possible mandate for videotaping and transmission of the tapes/CD's to the Court was the impact this change would have on clerk's offices around the state. With the change to e-filing, the committee was aware that the clerk's offices do not have storage space for the tapes and have no way of uploading them to J-Pod. The committee wanted to get the input of the clerks before amending the rule.

In February of 2018, I met with the Clerks Advisory Committee to get their input and feedback. They were very appreciative to be included in the discussion. The members of this committee stressed the fact that clerk's offices all over the state do not have anywhere to store the large amount of CD's that are currently being admitted as video evidence. This includes body cams, dash cams, confessions, surveillance and many other types of evidence. They also are unable to reproduce this type of evidence when a request is made. On the other hand, they are able to upload transcripts. Although transcripts create other issues such as whether it is an "official" transcript simply because it is filed, who gets access to it and how is redacted if disclosed.

While the committee considered the input of the clerks and the issues with storage, the entire committee agreed that Rule 15(d) and (f) should be amended (1) to mirror the three statutes and (2) to address the advancement in technology. While the committee went back and forth on the precise wording of the amendments, we ultimately unanimously agreed to propose the following amendments.

#### **LIST OF PROPOSED REVISIONS**

1. Rule 15(d) should be amended to require the preservation of depositions by video recording at the expense of the requesting party.
2. Rule 15(d) should require that a copy of the video recording be filed with the clerk of the court.
3. Rule 15 (f) should be amended to require that the requesting party (not just the prosecution) file a transcript of the deposition with the clerk of the court.
4. Rule 15(f) should also require the requesting party to provide a copy of the transcript to the opposing party without cost.

#### **DISCUSSION**

The committee unanimously agreed to recommend the changes listed in item 1-4. There were no dissents to any of the proposed changes.

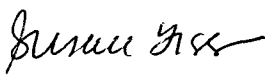
The committee believes that the rule should be consistent with the three statutes requiring video preservation and transmission to the court. Since all three statutes reference the rule, the committee took the next step and decided that all depositions taken pursuant to the rule should be preserved in the same manner. Because of the differences in technology and uncertainty about availability of certain technology across the state, we decided to use the reference to "video tape". Video tape is used in two of the three statutes. We also agreed that this should remain a cost borne by the requesting party. One of the subcommittee members surveyed the Chief Judges who reminded us that there are still many jurisdictions without video equipment and they felt that the cost should not and could not be borne by the Court. After much discussion, we all agreed that a copy of the recording should be transmitted to the clerk of the court. While we understand the physical storage issues, we believe that the rule should be consistent with the three statutes and that the court has a role in the preservation of the deposition. We know that the storage issues will need to be addressed by some other rule or Chief Justice Directive.

The committee also believed that it was important to require that a transcript be transmitted to the court. The committee thought that this would ensure preservation of the deposition in case the video tape was lost or destroyed. This change would ensure that the deposition was part of the court file.

Finally, we agreed that the requesting party should be required to provide a copy of the transcript to the opposing party without cost. We believed in all likelihood that the prosecution would be requesting most of the depositions. In fact, C.R.S. § 18-6.5-103.5 only allows the prosecution to request a deposition. As such, we believed that if a copy of the transcript had to be filed with the court, it should also be furnished to opposing counsel free of charge.

Thank you for reviewing our suggested amendments. Please feel free to contact me if you have any questions.

Sincerely,



Susan Fisch

Chair, Subcommittee on Rule 15