COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
Friday, April 21, 2017

A quorum being present, the Colorado Supreme Court's Advisory Committee on the Rules of Criminal Procedure was called to order by Judge John Dailey at 12:45 p.m., in the Colorado Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Judicial Center. Members present or excused from the meeting were:

Name	Present	Excused
Judge John Dailey, Chair	X	
Judge Susan Fisch	X	
Judge Shelley Gilman		X
Judge Deborah Grohs		X
Judge Morris Hoffman	X	
Matt Holman		X
Abe Hutt		X
Kevin McGreevy	X	
Judge Dana Nichols	X	
Donna Skinner Reed		X
Megan Ring	X	
Karen Taylor	X	
David Vandenberg	X	
Robin Whitley	X	
Non-Voting Participant		
Karen Yacuzzo	X	

I. Attachments & Handouts

A. April 21, 2017 agenda
B. January 21, 2017 minutes
C. Crim. P. 4 and 9 – Amendments to warrants or summons procedures
D. Crim. P. 16 – E-discovery Steering Committee's edits to the Criminal Rules Committee's Proposal
E. Crim. P. 55(e) – Court Reporter Issue
F. Court Reporter issue update (04-03-17)
G. Form 4 Subcommittee memo

II. Announcements from the Chair

- Judge Dailey announced that the supreme court had adopted the proposal to amend Crim. P. 49.5 to reflect a name change in the court's e-filing system;

- Judge Dailey had inquired about the status of Crim. P. 24(g), which had been submitted to the court in November 2013. There is no news to report, but Judge Dailey will keep the committee updated; and
- Robin Whitley is retiring from the Denver District Attorney's Office. Judge Dailey congratulated him for his many years of service to the district attorney's office and to the invaluable services he had provided to the legal community as a member of the committee. Judge Dailey said he looked forward to hearing Mr. Whitley's future plans regarding his involvement with the committee.

III. Approval of Minutes

The January 21, 2017 minutes were adopted as submitted.

IV. Old Business

A. New criminal rule – access to court files, documents, and hearings.

The discussion was tabled, in light of Judge Dailey's request that additional research involving a broader consideration of the issue be done and transmitted to the subcommittee.

B. Crim. P. 16

Judge Dailey explained that the General Assembly's E-Discovery Steering Committee had submitted a few revisions to the language the committee had proposed. The revisions were discussed and adopted by a unanimous vote of the committee. As revised, the proposed rule reads:

Rule 16. Discovery and Procedure Before Trial

Definitions. [NO CHANGE]

Part I. – Part IV [NO CHANGE]

Part V. Time Schedules and Discovery Procedures

(a) – (b) [NO CHANGE]

(c) Cost and Location of Discovery.

(1) The prosecution's costs of providing ~~duplicating~~ any ~~material~~ discoverable material electronically to the defense~~, electronically or otherwise, under this rule~~ shall be funded as set forth in section 16-9-702(2), C.R.S.~~paid from funds allocated by the general assembly~~borne by the party receiving the material, ~~based on the actual cost of copying the same to the party furnishing the material.~~ The prosecution ~~Copies of any discovery provided to a defendant by court appointed~~

~~counsel~~ shall not ~~otherwise~~ charge for discovery~~be paid for by the defendant~~. For any materials provided to the prosecution as part of the defense discovery obligation, the cost shall be borne by the prosecution based on the actual cost of duplication. Copies of any discovery provided to a defendant by court appointed counsel shall be paid for by the defendant.

(2) The place of discovery ~~and furnishing of~~ for materials not capable of being provided electronically shall be at the office of the party furnishing it, or at a mutually agreeable location.

(d) [NO CHANGE]

Judge Dailey said he'd submit the proposal to the supreme court today.

C. Crim. P. 4 & 9

Judge Hoffman reminded the committee that the subcommittee had recommended that the rules be made harmonious with prior statutory changes. In the subcommittee's attempt to do so, it had reached consensus on every issue except one, i.e., the court's or the prosecutor's authority to decide whether to issue a summons or warrant. After discussion, a motion was made and passed by a vote of 5-3 to adopt the subcommittee majority's position. As revised, the proposed rule reads:

Rule 4. Warrant or Summons Upon Felony Complaint

(a) Issuance.

(1) **Request by Prosecution.** Upon the filing of a felony complaint in the county court, the prosecuting attorney shall request that the court issue either ~~to order that~~ a warrant ~~shall issue~~ for the arrest of the defendant~~,~~ or ~~that~~ a summons ~~shall issue and~~to be served ~~up~~on the defendant.

(2) **Affidavits or Sworn Testimony.** If a warrant is requested, the felony complaint must contain or be accompanied by a sworn statement of facts establishing probable cause to believe that a criminal offense ~~has been committed, and that the offense was committed~~ has been committed, and that the offense was committed [no additional change.]

(3) **Summons in Lieu of Warrant.** Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and ~~in~~ unclassified felonies punishable by a maximum penalty of more than 10 years, whenever a felony complaint has been filed prior to the arrest of the person named as defendant therein, the court~~,~~ ~~with the consent of the prosecuting attorney,~~ shall have power to issue a summons commanding the appearance of the defendant in lieu of an arrest warrant ~~for his arrest~~, unless a law enforcement officer presents in writing a basis to believe there is a significant risk of flight or that the victim's or public's safety

may be compromised. If empowered to issue a summons under this subsection (a)(3), ~~T~~the court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests.

(4) **Standards Relating to Issuance of Summons.** Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and unclassified felonies punishable by a maximum penalty of more than 10 years the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant ~~except where there isreasonable ground to believe that, unless taken into custody, the defendant will flee to avoid prosecution or will fail to respond to a summons~~. When an application is made to a court for issuance of an arrest warrant or summons, the court may require the applicant to provide such information as reasonably is available concerning the following:

(I) – (V) [NO CHANGE]

(5) **Failure to Appear.** If any person properly summoned pursuant to this Rule fails to appear as commanded by the summons, the court shall forthwith issue a warrant for the ~~his~~ arrest of that person.

(6) **Corporations.** [NO CHANGE]

(b) Form.

(1) **Warrant.** The arrest warrant shall be issued by a judge of a court of record directed to any peace officer and shall:

(I) State the defendant's name or if that is unknown, any name or description by which ~~he~~the defendant can be identified with reasonable certainty;

(II) – (V) [NO CHANGE]

(2) **Summons.** If a summons is issued in lieu of a warrant pursuant to this Rule, the summons shall:

(I) [NO CHANGE]

(II) State the defendant's name ~~of the person~~ and ~~his~~ address;

(III) – (IV) [NO CHANGE]

(V) Be signed by the judge or the clerk with the title of ~~his~~the office; and

(VI) [NO CHANGE]

(c) Execution or Service and Return.

(1) **Warrant.**

(I) – (II) [NO CHANGE]

(III) Manner. The warrant shall be executed by arresting the defendant. The warrant ~~The officer~~ need not be in the officer's ~~have the warrant in his~~ possession at the time of the arrest, in which event the officers shall then inform the defendant of the offense and of the fact that a warrant has been issued, and upon request shall show the warrant to the defendant as soon as possible. If the warrant is in the officer's possession at the time of the arrest, then the officer ~~but if he has the warrant at that time he~~ shall show the warrant ~~it~~ to the defendant immediately upon request. ~~If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense and of the fact that a warrant has been issued, and upon request he shall show the warrant to the defendant as soon as possible.~~

(IV) Return. The peace officer executing a warrant shall make return thereof to the issuing court. At the request of the prosecuting attorney any unexecuted warrant shall be returned and cancelled.~~to the issuing county judge and be cancelled by him.~~ At the request of the prosecuting attorney, made while a complaint is pending, a warrant returned unexecuted and not cancelled, or a duplicate thereof, may be delivered by the county judge to any officer or other authorized person for execution.

(2) **Summons.** [NO CHANGE]

Rule 9. Warrant or Summons Upon Indictment or Information

(a) Issuance.

(1) **Request by Prosecution**~~**When Issued**~~**.** Upon the return of an indictment by a grand jury, or the filing of an information, the prosecuting attorney shall request that ~~the court to order that a warrant shall~~ issue either a warrant for the arrest of the defendant~~,~~ or ~~that~~ a summons to be ~~shall issue and be~~ served ~~up~~on the defendant.

(2) **Affidavits or Sworn Testimony.** [NO CHANGE]

(3) **Summons in Lieu of Warrant.** Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and ~~in~~ unclassified felonies punishable by a maximum penalty of more than 10 years, whenever an indictment is returned

or an information has been filed prior to the arrest of the person named as defendant therein, the court~~, with the consent of the prosecution,~~ shall have power to issue a summons commanding the appearance of the defendant in lieu of a warrant for his arrest, unless a law enforcement officer presents in writing a basis to believe there is a significant risk of flight or that the victim's or public's safety may be compromised. If empowered to issue a summons under this subsection (a)(3), the court shall issue a summons instead of an arrest warrant when the prosecuting attorney so recommends.

(4) **Standards Relating to Issuance of Summons.** ~~The court shall issue a summons instead of an arrest warrant when the prosecuting attorney so requests.~~ Except in class 1, class 2, and class 3 felonies, level 1 and level 2 drug felonies, and unclassified felonies punishable by a maximum penalty of more than 10 years, the general policy shall favor issuance of a summons instead of a warrant for the arrest of the defendant. When an application is made to a court for issuance of an arrest warrant or summons, the court may require the applicant to provide such information as reasonably is available concerning the following:

(I) – (V) [NO CHANGE]

(5) **Failure to Appear.** If any person properly summoned pursuant to this Rule fails to appear as commanded by the summons, the court shall forthwith issue a warrant for the arrest of that person.

(6) **Corporations.** When a corporation is charged with the commission of an offense, the court shall issue a summons setting forth the nature of the offense and commanding the corporation to appear before the court at a certain time and place.

(b) – (c) [NO CHANGE]

Judge Dailey asked Kevin McGreevy to submit a statement of the minority's position for inclusion in the committee's transmittal letter to the supreme court. Judge Hoffman will author the transmittal letter.

D. Crim. P. 15

Judge Fisch asked that this be tabled to the next meeting.

E. Crim. P. 41 – process regarding electronic media seized by means of search warrant

Mr. Whitley reported that he distributed proposed language and commentary to the subcommittee, and the subcommittee would report back to the committee at the next meeting.

F. Crim. P. 41 – Production of Records

Previously, Weld County District Court Chief Judge Hartmann had asked the committee to consider a rule change allowing applications for orders to produce records to be handled much like applications for warrants, i.e., electronically or over the phone. A change would be especially helpful for large counties whose law enforcement must commute large distances to make requests for production of records.

Judge Nichols explained, however, that the statute that governs production of records has different language than the search warrant statute. Unlike the search warrant statute, the production of records statute does not have language allowing the supreme court to promulgate rules. After some discussion, it was the committee's perception that legislation (like that found in the search warrant statute) was needed to authorize the supreme court to adopt by rule "modernized" procedures for obtaining orders for production of records. On the committee's behalf, Judge Dailey will send an email to Justice Coats urging the Court to consider recommending the adoption of such legislation next year.

G. Crim. P. 35 -- Form 4

The subcommittee recommended, and the committee approved by a vote of 6-0 (with one abstention), a proposal to amend Form 4 by including a line denoting the date mandate has issued from an appellate court.

The text of the new line would read: "Date of mandate from the appellate court: _____"

Mr. Holman will draft the transmittal letter.

V. New Business

A. Crim. P. 55: Court Reporters

Judge Dailey said that a question has been raised as to the need to revise the language of both the Civil and Criminal Rules in light of the unavailability of court reporters in some rural districts. Currently, Crim. P. 55(e) provides that the "The practice and procedure concerning reporter's notes and electronic or mechanical recordings shall be as prescribed in Rule 80, C.R.C.P., for district courts and Rule 380, C.R.C.P., for county courts." Judge Dailey reported that Civil Rules Committee plans on drafting its own rule, which would say something to the effect that court reporters are not available in civil cases and if a party wants a court reporter that party will have to pay for it. That approach would be problematic in criminal cases, though. Judge Fisch acknowledged that Crim. P. 55 is out of date and volunteered to chair a subcommittee with Karen Taylor and Matt Holman to consider changes to the rule.

B. Crim. P. 35(c)

Judge Dailey passed along a question from a colleague about Crim. P. 35(c)(3)(V), which states in part, " … the Public Defender shall identify whether any conflict exists, request any additional time needed to investigate, and *add any claims* the Public Defender finds to have arguable merit." (Emphasis added.) The colleague had noted that the right to counsel in postconviction proceedings is statutory in nature and, in the caselaw, extends only to potentially meritorious claims brought by defendants. How, then, can the right to counsel be extended to discover claims which the defendant had not identified or pursued?

Committee members were reluctant to change that part of the rule, some mentioning access to justice concerns, others noting that because even seasoned attorneys can miss things, newly appointed counsel should be allowed to raise new claims not brought by a defendant. Still others said if the above-emphasized phrase were deleted and counsel saw something but couldn't raise it, counsel might be considered ineffective. Another member pointed out that if a DA thinks added claims are barred, he or she would have their day in court. The consensus of the committee was that there was no interest in pursuing an amendment to the rule.

C. Crim. P. 7(h) and 5(a)(4)

David Vandenberg has compared section 16-5-301(1)(a) to Crim. P. 7(h) and there are discrepancies between the statute and the rule. Another member pointed out that there is a similar issue with Rule 5(a)(4) in county court. Mr. Vandenberg will chair the subcommittee with Megan Ring and Judge Nichols to look at these issues.

VI. Future Meetings

July 21, 2017
October 20, 2017
January 19, 2018

The committee adjourned at 1:50 pm.

Respectfully submitted,
Jenny Moore