

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
Friday, January 20, 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. January 20, 2017 agenda
- B. Proposed new criminal rule – Closure of Proceedings or Sealing of Judicial Records
- C. Crim. P. 41
- D. E-Filing Privacy Concerns
- E. Question re Form 4
- F. Transmittal letter re Crim. P. 35 & Form 4 – March 8, 2001
- G. October 21, 2016 minutes

II. Approval of Minutes

The October 21, 2016 minutes were adopted as submitted.

III. Announcements from the Chair

- Judge Dailey will not be at the April 21 meeting, so he will need someone to substitute as chair;

- No rules have been adopted since the October 21, 2016 meeting, but Judge Dailey has updates on two prior proposals. First, Crim. P. 24(g) is outstanding and was submitted to the court in November 2013. Judge Dailey will follow-up with Justice Coats on its status. Second, the E-Discovery Sharing rule submitted to the court in October 2015 hasn't been adopted, because only some districts are participating in electronic discovery. Judge Dailey will keep the committee updated on the status of the proposal; and
- Judge Dailey recognized that Terri Morrison, Legal Counsel for the State Court Administrator's Office, will no longer attend the Criminal Rules Committee meetings. He noted that Ms. Morrison had been involved in the committee for nearly 20 years; that she had done a tremendous amount of work for the committee over the years; and that her service to the committee has been invaluable. He also noted that first assistant legal counsel, Karen Yacuzzo, will continue attending the meetings on behalf of the State Court Administrator's Office.

IV. Old Business

A. Crim. P. 4 and 9— Amendments to Warrant or Summons Procedures – HB 1104 [SB 13-250 & HB 09-1262]

Judge Hoffman couldn't be here today, but Judge Dailey reported that the subcommittee is still working. Most things have been worked out, but one final issue remains. The subcommittee will either reach a consensus or they will submit majority and minority reports. This item will appear on a future agenda.

B. Crim. P. 15

Judge Fisch couldn't attend today, but she sent Judge Dailey an email update. The subcommittee surveyed the judicial districts across the state and a number of districts don't have the equipment necessary to do video depositions. A member asked how many districts don't have the capabilities, and the subcommittee reported that most judicial districts don't have the capabilities, but they didn't have an exact number.

A member asked if the rule were to require video depositions, what do you do if practitioners or self-represented parties don't have the equipment. Will the court provide the equipment? But, another member offered that it is easy to record on a smartphone or tablet. Another member stated that the current rule allows video recording, it is preferred, and if it's possible it should be done, so he doesn't think a change to the rule is necessary.

Another alternative is the subcommittee could propose language in subsection (d) of Rule 15 that says there is nothing prohibiting the court from ordering a video deposition. The rule doesn't prohibit video depositions and it might be good practice to make it explicit. Another member added that if video depositions are going to become more frequent, because of certain parties, like at-risk elders, perhaps the subcommittee should look into

adding new language. The subcommittee could consider something like, “Nothing shall prohibit the deposition from being video recorded”, language that wouldn’t require video recording, but would allow a court to order it, in its discretion. The subcommittee will look at this issue and report back on it at the next meeting.

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

Mr. Whitley reported that subcommittee is still working on a proposal and will report back to the committee at the next meeting.

V. New Business

A. New criminal rule – access to court files, documents, and hearings– letter and attachments from Steven D. Zansberg.

Most members agreed that this is a complicated issue with many constitutional (and possibly statutory) components. The committee agreed that a subcommittee needed to study the issue. A subcommittee was appointed, comprised of Judge Grohs (chair), Matt Holman, Karen Taylor, Dave Vandenberg, and Megan Ring.

Judge Dailey asked Jenny Moore to provide research assistance for the subcommittee. He was interested in knowing whether, and if so, how other states address the subject in their rules. He was interested not only in determining whether other states had rules in the form proposed by Mr. Zansberg, but also whether other states had adopted variations thereof.

(At a subsequent point in the meeting, Judge Dailey remembered that the supreme court also had a Public Access Committee. He’d like the chair of the Public Access Committee, Court of Appeals Judge Jerry Jones, notified that a subcommittee is looking at the issue of public access to criminal files and documents. He instructed Ms. Moore to forward Mr. Zansberg’s materials to Judge Jones.)

B. Crim. P. 41 – Procedure for Obtaining Orders for Production of Records

Judge Dailey received an email from Judge Hartman discussing the differences in procedure between search warrants and requests for production of records. Under section 16-3-303(3), C.R.S. 2016, search warrant procedures may be established by supreme court rule, and under Crim. P. 41(c)(3), search warrants can be applied for and issued electronically, with oaths given over the phone. However, a request for production of records is governed by section 16-3-301.1(3)(a), C.R.S. 2016, which appears to require oaths by officers personally appearing before a judge. The issue raised by Judge Hartman’s email is whether, by rule or statute, the same procedure for obtaining a search warrant could be extended to obtaining an order for production of records. A subcommittee comprised of Judge Nichols (chair), Kevin McGreevy, and Robin Whitley will look into it and report back to the committee.

C. Victims' Privacy Concerns

Ms. Reed discussed a child sex assault case in which the victims' names were not redacted from case materials. Ms. Yacuzzo stated that CJD 05-01 automatically restricts information in a child sex assault case, and that the instance mentioned by Ms. Reed was "user error" by a court clerk; the error was corrected, and it isn't a system issue. Ms. Reed agreed but noted that the incident had prompted her to look into another issue, i.e., the presence of child sex assault victims' names on the juror questionnaires, which were open to the public to see. She understood that the information is public in the courtroom, but how and why is it being handed out to the public later? Regarding this issue, Ms. Yacuzzo reported that SCAO has been unable to find authority to redact the information in question. Ms. Reed stated she'd like to look at this issue closer and report back to the chair if she was it taken up again at a future meeting.

D. Form 4 – Petition for Postconviction Relief Pursuant to Crim. P. 35(c)

Judge Dailey received an email from another court of appeals judge, asking whether Form 4, Petition for Postconviction Relief Pursuant to Crim. P. 35(c), could be improved by amending it in one or two respects. Under #4, "Direct Appeal," it might be helpful if language similar to the following was adopted:

Date completed (i.e., date mandate issued): _____

Most members were generally in favor of this change.

There was, however, less consensus as to whether #9 needed to reflect that the time limit on pursuing a Crim. P. 35(c) motion commences to run on the date the direct appeal is completed. The committee was unsure if adding more information to #9 would be helpful and acknowledged that it would be difficult to craft appropriate language on the spot. Consequently, a subcommittee consisting of Judge Gilman (chair) Kevin McGreevy, and Matt Holman, was appointed to consider, evaluate, and recommend what, if any, changes should be made to the form.

With no other new business, the committee adjourned.

VI. Future Meetings

April 21, 2017
July 21, 2017
October 20, 2017

The committee adjourned at 2:00 pm.

Respectfully submitted,
Jenny Moore