

AGENDA
COLORADO SUPREME COURT
ADVISORY COMMITTEE ON
RULES OF CRIMINAL PROCEDURE

Friday, January 20, 2023, 12:45 p.m.
Ralph L. Carr Colorado Judicial Center
2 E. 14th Ave., Denver, CO 80203
Fourth Floor, Supreme Court Conference Room

- I. Call to Order
- II. Approval of Minutes from the October 21, 2022 Email Meeting
- III. Announcements from the Chair
- IV. Old Business
 - A. Crim. P. 16—(Judge Gerdes, Kevin McGreevy, and Christian Champagne)
- V. New Business
- VI. Future Meetings
 - A. April 21; July 21; October 20
- VII. Adjourn

NOTICE
ANYONE WISHING TO INQUIRE ABOUT AN AGENDA ITEM
MAY CONTACT THE CHAIRPERSON OF THE COMMITTEE,
JUDGE JOHN DANIEL DAILEY, AT 720-625-5342.

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
Scheduled for Friday, October 21, 2022

Because of the extremely limited amount of business on the agenda for the Colorado Supreme Court’s Advisory Committee on the Rules of Criminal Procedure, the committee met via email throughout the week of October 17, 2022. Members participating in that form of the meeting were:

Name	Present	Excused
Judge John Dailey, Chair	X	
Sheryl Berry	X	
Christian Champagne	X	
Judge Kandace Gerdes	X	
Judge Shelley Gilman	X	
Matt Holman	X	
Abe Hutt	X	
Judge Chelsea Malone	X	
Kevin McGreevy	X	
Judge Dana Nichols	X	
Robert Russel	X	
Karen Taylor	X	
Sheryl Uhlmann	X	
Judge Vincente Vigil	X	
Non-Voting Participant		
Karen Yacuzzo	X	

I. Attachments & Handouts

- A. October 21, 2022 agenda
- B. July 15, 2022 minutes
- C. Email from Jessica Yates and the Attorney Regulation Counsel—Crim. P. 16
- D. Report on the Impact of HB 22-1229 on Form A of the Rules for Civil Infractions and Rules on Traffic Infraction

II. Approval of Minutes

- A. The July 15, 2022 minutes were approved by acclamation with the following changes: changed the language at the bottom of page 2 from *discrimination of those other bases* to *discrimination on the basis of those other categories* for improved clarity; corrected the numbering under *Determining the Validity of a Challenge* to all numbers rather than letters and numbers; and removed (d)(5)(V) from 9) in the middle of page 4, as it was included in error.

III. Announcements from the Chair

Chair Judge Dailey reported that the proposed amendments to Rule 24, accompanied by majority and minority reports, have been submitted to the supreme court, and will be put out for public comment and a public hearing scheduled for February 7, 2023.

IV. Old/New Business

A. Civil Infraction Rules—HB 22-1229’s Possible Impact on Form A—(Sheryl Berry/Christian Champagne/Sheryl Uhlmann)

The subcommittee that reviewed recent legislation did not recommend making any changes to either Form A of the Rule for Traffic Infractions or the Rules for Civil Infractions. The committee agreed.

V. New Business

A. Email from Jessica Yates and the Attorney Regulation Counsel—Crim. P. 16 (Judge Dailey)

The Office of Attorney Regulation Counsel (OARC) had, through an email received from Jessica Yates, asked that the committee consider amending Crim. P. 16 to permit the disclosure to OARC of information in criminal cases against attorneys charged with a crime. Ms. Yates suggested this could be done by including, at an appropriate spot in Crim. P. 16, the “phrase, “unless allowed by court rule or a court order,” or a specific sentence (i.e., “This restriction on disclosure and use does not prevent a prosecutor from disclosing the discovery to the Office of Attorney Regulation Counsel.”). Judge Gerdes, Mr. McGreevy, and Mr. Champagne volunteered to serve on a subcommittee to address this issue.

VI. Future Meetings

2023 Meetings: January 20; April 21; July 21; October 20

To: Judge Dailey and the Criminal Rules Committee
From: Judge Gerdes, Mr. Champagne, Mr. McGreevy
Date: January 11, 2023
RE: Office of Attorney Regulation Counsel [OARC]'s request to address Crim. P. 16 discovery limited dissemination

Introduction: Our subcommittee was asked to investigate and consider the request from Jessica Yates, Attorney Regulation Counsel, whether Crim. P. 16 could be amended to allow prosecutors to provide discovery materials to OARC. In some matters, OARC requests these materials directly from the District Attorney's Office. However, some District Attorney's offices have been declining to provide the requested materials, citing to Crim.P. Rule 16, Part III (c), which states in relevant part:

Materials furnished in discovery pursuant to this rule may only be provided to others and used by them for purposes of preparation and trial of the case, and shall be subject to such other terms, conditions or restrictions as the court, statutes or rules may provide.

The paramount purpose for a rule change and need for criminal discovery is when an attorney is accused of a crime, and OARC needs to evaluate whether an interim suspension is necessary to protect clients, the public, or others. Ms. Yates estimated the situations in which OARC requests materials for a pending case occurs no more than 5-6 times per year, with an interim suspension occurring 1 or 2 times per year. We spoke with Ms. Yates concerning her proposal, as well as alternatives to amending Crim. P. 16.

Recommendation: Our subcommittee was unanimous in recommending Crim. P. 16 **not** be amended as requested by OARC. We concluded that the benefit to OARC does not outweigh some concerns that amending the rule may manifest, particularly given the infrequency of OARC's need.

Discussion: The following are the discussion points of our subcommittee. We agreed that the need for OARC to, on rare occasion, access a prosecutor's criminal case discovery is not trivial. Nevertheless, in balancing the underlying purpose of Rule 16, Part III (c), the possibility of other avenues for OARC to achieve its goal, and the frequency of when this issue arises, we collectively weighed those concerns against modifying the rule. Among other items, we discussed:

- The history behind this subsection, noting that it was designed to ensure these records are not public in order to support witness safety, protect the integrity of the prosecution, avoid "weaponizing" discovery in the media, avoid tainting the jury pool via improper publicity, and avoid the general improper use of these materials.
- Concern that carving out an exception in Crim. P. Rule 16 for OARC could lead to similar requests from other agencies, which all saw as problematic.
- We discussed that the Criminal Justice Records Act (CJRA) (C.R.S. §24-72-301 *et seq.*) seems to provide the most direct avenue to access the records in question. However, Ms.

Yates pointed out that § 24-72-305 (1)(b) prohibits the inspection of criminal justice records if “such inspection is prohibited by rules promulgated by the supreme court or by the order of any court.” She opined that the CJRA is subordinate to Crim.P. Rule 16, which prevents the disclosure of the records.

- We discussed with Ms. Yates that OARC had administrative subpoena power and whether it was feasible to use such a power to obtain the records they sought. Ms. Yates indicated that OARC does have administrative subpoena power, but only after their investigation advanced to the “trial division” within OARC, a process that can be cumbersome, time consuming, and has some negative implications for the attorney under investigation. While she agreed that such a tool could work, it was not preferred as it would take too long and require some potentially unnecessary litigation. Ms. Yates also discussed that it may involve the AGs office providing representation and it is unclear how OARC is perceived as or intended to be a litigant.
- We discussed OARC’s initial analysis of those with serious crimes involved actual investigative work such as interviews, gathering evidence, and/or generating and following new leads; such a process could result in a parallel investigation that could affect the criminal proceedings. Ms. Yates responded that such investigation could take place if necessary, but it is rare, and that any such investigation would be freely shared with the District Attorneys handling the prosecution upon request.
- Ms. Yates noted that Colo. RPC. Rules 8.1 and 1.6 may actually *require* a District Attorney to share information requested by OARC. Rule 8.1 reads, in relevant part:

... [A] lawyer... in connection with a disciplinary matter, shall not:

(b) ...knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 1.6 states generally that a lawyer may not reveal information relating to representation of a client without informed consent or subject to an exception listed in the rule, one of which is that such information may be shared in order to comply with other law or court order.¹ It was discussed that the best solution to the challenge faced by OARC may be a comment added to Colo. R.P.C. 8.1 that addresses the obligation of a District Attorney to share information with OARC in regard to a disciplinary investigation.

¹ Rule 1.6 prohibits a lawyer from revealing information relating to representation of a client unless the client gives informed consent, the disclosure is necessary to represent the client, or the disclosure is authorized in paragraph (b) to prevent death or harm, to reveal the client’s intent to commit a crime, to prevent a substantial fraud or mitigate/rectify an injury caused therefrom, to secure advice regarding compliance with ethical rules, laws, or court orders, to establish a claim or defense on behalf of the lawyer in a criminal or civil suit or other proceedings, or to comply with a court order or law.