

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
Friday, April 20, 2018

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 12:47 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	
Robert Russel		X
Megan Ring	X	
Karen Taylor	X	
David Vandenberg	X	
Non-Voting Participant		
Karen Yacuzzo	X	

I. Attachments & Handouts

- A. April 20, 2018 agenda
- B. October 20, 2017 minutes
- C. Crim. P. 15 memo & draft
- D. Updated Report Re Proposed Changes to Crim. P. 5 and 7
- E. SB 18-223

II. Approval of Minutes

The October 20, 2017 minutes were adopted by acclamation with three amendments to correct typographical errors: (1) in section III, second bullet point, delete *for* before *Robin Whitley*; (2) in section IV(A), second paragraph, delete *even* after *should*; and (3) in section IV(A), third bullet point, delete *the proposal* before *a proposal*.

III. Announcements from the Chair

- Judge Dailey recognized the superior work of Jenny Moore, who has left her position as the staff person for this committee. He hopes to have her back as a guest so that he and all the committee members can thank her for her excellent work over the years. J.J. Wallace will be filling in temporarily until a new staff person is hired.
- The chair reported rule Change 2018(05) Form 4; adopted April 12, 2018, effective immediately, which adds a line for “date of mandate from appellate court” to Form 4 used in connection with motions for postconviction relief.

IV. Old Business

A. Crim. P. 15: Depositions

To begin, it was noted that at the last meeting, the committee voted to use the term “video recording” instead of the phrase “video imaging format” in subsection (d).

Judge Fisch recounted that, at the last committee meeting, she had agreed to meet with the clerks’ advisory committee to get feedback about the mechanics of lodging a video recording of a deposition with the court. She met with them in February. Judge Fisch summarized their feedback as to storing recordings on CDs as follows:

- They don’t want CDs because retention rules require that they keep the CDs for 50 years and storage space is a problem for many of their offices.
- They cannot presently upload CDs to JPOD for storage (the clerks described present difficulties that they are having with dash cam and body cam footage that they are receiving).
- The clerks hold the CDs, but they are unable to reproduce them.

Judge Fisch also asked the clerks about transcripts:

- The clerks indicated that they can upload transcripts into JPOD, which makes transcripts easy to store.
- But, they noted, the storing of transcripts raise other issues, such as: What is the controlling date: Of lodging? When uploaded? When used in the court?; Is the transcript official?; Should transcripts be suppressed?; Would a court order be needed to release the transcript?; Does the clerk’s office have to redact (per existing rules) confidential information from transcripts or will another party be responsible for redacting?

The committee considered using civil practices whereby a deposition is not part of the record until used in court and is kept by each side. But that idea was rejected when the committee examined the language of three statutes, all of which require that the recording be transmitted to the clerk of the court. *See* §§ 18-3-413(3), 18-6-401.3(3), 18-6.5-103.5(3)(b).

A motion was made, seconded, and approved by a vote of 9-0, that the rule require that the CD/recording be given to the clerk.

Next the committee discussed whether to keep Crim. P. 15(f) (requiring the prosecution to provide a transcribed copy of the deposition if the deposition is taken at the prosecution's request).

One committee member felt it was best to keep (f) as-is because it is unaffected by the new statutes. He also noted that it's helpful to defense to have transcripts and transcripts can be uploaded into JPOD.

Some committee members worried that there was an ambiguity about paragraph (f)'s requirement that a transcribed copy be provided: who does the transcript and how is it done? The rule states that the deposition can only be taken by court order and must be "before the court," see Rule 15(a), and the taking and transcription of the deposition must be "as the court may direct," see Rule 15(d). Because of these requirements, members believed that the deposition would be in a courtroom (or presided over by the court in another location such as a hospital room), so there should be an FTR recording or a court reporter present making obtaining a transcript clear.

A motion was made to keep (f) as-is, and it was seconded.

The chair opened the motion for discussion. One committee member sees a lot of effort being made to track down exhibits that have been given back to the parties. The exhibits are getting lost or are hard to find and she believes that a lot of unnecessary time and resources are being devoted to trying to locate missing parts of the record. She favors keeping (f) because a transcript is easily included in JPOD and can serve as a failsafe part of the record.

A friendly amendment to the motion was made and accepted to change (f) to make it the duty of the requesting party to provide a transcript to the other side (no matter if the requesting party is the prosecution or defense).

Another friendly amendment to the motion was made and accepted to require that the transcript of the deposition be lodged with the clerk of the court.

The committee voted 6-3 on the motion to keep (f) with amendments requiring:

- that the requesting party (whether prosecution or defense) provide a transcript to the other side; and
- that the requesting party lodge the transcript with the clerk of the court.

Judge Fisch will work with the subcommittee to reword (d) and (f) per the committee's feedback and provide an updated version to the whole committee at the next meeting. The chair nominated Mr. McGreevy to assist the subcommittee.

B. Crim. P. 55: Court Reporter issue

Judge Fisch reported that the subcommittee is waiting to see what the civil rules committee is going to do with C.R.C.P. 80 (district courts) and C.R.C.P. 380 (county courts). The chair asked if there was any need for discussion. The committee said no and the issue will remain tabled. J.J. Wallace will keep the chair and Judge Fisch updated on the progress of the civil rules committee.

C. Crim. P. 5 & 7

Subcommittee chair, Dave Vandenberg, stated that they left off last meeting with two tasks: (1) retool the language of the draft rules to make them less clunky—especially Rule 7; and (2) examine any tension between the statute and rule (especially Rule 7(h)(1)'s language allowing the prosecution to ask for a PH when that is not expressly mentioned in the statute). He drafted new language for the committee to consider, and he concluded that there was no tension between the rule and the statute because the statute, § 16-5-301, specifically delegates authority to the criminal rules committee.

Since he sent around his memo, he heard back from one subcommittee member who had no objection to the new draft language and agreed that the statute and rule were not in conflict.

The chair asked how far back he traced the rule for inclusion of the language regarding the prosecutor's request for a PH. Mr. Vandenberg said he looked at the last two revisions of the rule (dating back to 2008) and the language has remained the same.

The committee then explored the reasons why a prosecutor may ask for a PH. It was suggested that a prosecutor might ask for a PH in the following circumstances:

- A person is eligible for a PH based on the charges, but the defense asks for several continuances, in which case, the prosecutor may ask for a PH to move the case forward.
- If there were disagreement about bringing charges between prosecutors in one office or between a prosecutor and a law enforcement officer, a prosecutor might ask to have a PH to let the judge decide.
- If a prosecutor is concerned about a victim's or witness's ability to testify or his or her credibility, a prosecutor might want to have a PH to test his or her testimony.
- It also might be a tactical decision to ask for a PH: For example, in a 2nd degree assault case, the defendant is sometimes entitled to a PH and sometimes not. If defense counsel has not asked for a PH to which a defendant is entitled, a prosecutor might ask for one to head-off an ineffective assistance of counsel claim.

A motion was made and seconded to determine whether the committee wanted to update the rules to include the drug felonies. The committee voted 9-0 to amend the rules to include references to the drug felonies.

The committee agreed that more information was needed on why the prosecutor is included in the rule. The subcommittee was asked to try to get to the bottom of why the prosecutor is allowed to ask for a PH.

The committee then discussed the proposed language. It was agreed that if the language about the prosecutor is removed, then the first sentence of Rule 7(h)(1) can be one sentence, but if the reference to the prosecutor is left in the rule, then the first sentence of Rule 7(h)(1) should be broken down into two sentences (as reflected in the draft included with the meeting materials). The chair clarified with the committee that, once more information on the reason for the prosecutor's inclusion is provided, then the committee will just need to decide whether to use the one-sentence approach (no prosecutor) or the two-sentence approach (prosecutor included): the rest of the rule is approved.

D. Crim. P. 35(c)

The chair read an email update from Bob Russel on the proposal to modify Crim. P. 35(c). The subcommittee considered the proposal, but felt that change would not have a widespread impact and should not be pursued at this time. The chair reminded the committee that there is a body of 1970s-era cases that say a postconviction motion cannot be used as a substitute for appeal and clarification may be helpful.

A motion was made, seconded, and passed by a vote of 8-1, to table further consideration of the matter until there is a greater need to address the issue.

V. New Business

A. SB 18-223

Karen Yacuzzo brought to the committee's attention SB 18-223 (concerning the circumstances under which an autopsy report prepared in connection with the death of a minor may be released to certain parties). The initial version of the bill referred to Crim. P. 16 and seemed to change discovery practices.

After bringing the bill to the committee's attention, the bill was amended. The bill has passed in the senate, but has not yet passed in the house. At this time, she does not believe there will be any issues for the committee to address, unless there are additional changes to the bill.

With the committee's approval, Ms. Yacuzzo will continue monitoring the bill's progress and will bring any issues arising from it to the committee's attention.

VI. Future Meetings

July 20, 2018

October 19, 2018

January 18, 2019

The chair thanked the committee members for making the extra effort today to be here in person or by phone. The committee adjourned at 2:02 PM.

Respectfully submitted,
J.J. Wallace