

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
Friday, January 18, 2019

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 (phone)	
Judge Shelley Gilman		x
Judge Deborah Grohs	x (phone)	
Judge Morris Hoffman	x	
Matt Holman		x
Abe Hutt	x	
Kevin McGreevy	x	
Judge Dana Nichols	x (phone)	
Donna Skinner Reed	x (phone)	
Robert Russel	x	
Karen Taylor	x	
Sheryl Uhlmann	x (phone)	
David Vandenberg	x (phone)	
Non-Voting Participant		
Karen Yacuzzo	x	

I. Attachments & Handouts

- A. January 18, 2019 agenda
- B. October 19, 2018 minutes
- C. Crim. P. 32 subcommittee report
- D. Judge Espinosa’s email to the committee
- E. C.R.C.P. 80/380 proposed changes sent to the supreme court
- F. Crim. P. 55 draft 6/12/17
- G. Crim. P. 55(e) subcommittee memo
- H. Crim. P. 55(e) draft

II. Approval of Minutes

- The minutes were approved as submitted.

III. Announcements from the Chair

- Judge Dailey had no announcements and stated there had been no proposed criminal rules adopted by the supreme court since the last meeting.
- Justice Samour provided an update on the proposed changes to Crim. P. 5 and 11 that the committee recently submitted to the court. He provided an alternate version of rule 5 for the committee to consider and stated that he would ultimately defer to the committee's preference on the rule. Justice Samour suggested moving the proposed language to a different location within the rule and that given heavy dockets, judges could comply with the spirit of statute by simply adding the language to the written advisement everyone receives. In his view, this would be beneficial should a defendant not want to answer whether he or she is currently in the military or is a veteran in front of others. Justice Samour contended that his version is more efficient and creates less possibility for harm. Further, if Crim. P. 5 would change following Justice Samour's suggestion, Crim. P. 11 would no longer need revision. The committee voted 7 to 3 in favor of accepting Justice Samour's friendly amendment to the rule proposal. The members voting not to accept the changes did so because they wanted the rule to comply more closely with the statute by requiring an inquiry rather than providing a verbal advisement.

The re-formulated proposal to amend Rule 5 reads:

Rule 5. Preliminary Proceedings

(a) Felony Proceedings.

(1) [NO CHANGE]

(2) Appearance Before the Court. At the first appearance of the defendant in court, it is the duty of the court to inform the defendant and make certain that the defendant understands the following:

- (I) The defendant need make no statement and any statement made can and may be used against the defendant;
- (II) The right to counsel;
- (III) If indigent, the defendant has the right to request the appointment of counsel or consult with the public defender before any further proceedings are held;
- (IV) Any plea the defendant makes must be voluntary and not the result of undue influence or coercion;
- (V) The right to bail, if the offense is bailable, and the amount of bail that has been set by the court;
- (VI) The nature of the charges;
- (VII) The right to a jury trial;

(VIII) The right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged was committed by the defendant;

(IX) If currently serving in the United States armed forces or if a veteran of such forces, the defendant may be entitled to receive mental health treatment, substance use disorder treatment, or other services as a veteran.

(3) through (5) [NO CHANGE]

(b) [NO CHANGE]

(c) through (c)(1) [NO CHANGE]

(2) Appearance Before the Court. At the first appearance in the county court the defendant shall be advised in accordance with the provisions set forth in subparagraphs (a)(2)(I) through (VII) and (IX) of this Rule.

(3) Appearance in the County Court Not Issuing the Warrant. If the defendant is taken before a county court which did not issue the arrest warrant, the court shall inform the defendant of the matters set out in subsection (a)(2) (I through VII and IX) of this Rule and, allowing time for travel, set bail returnable not less than 14 days thereafter before the court which issued the arrest warrant, and shall transmit forthwith a transcript of the proceedings and all papers in the case to the court which issued the arrest warrant. In the event the defendant does not make bail within forty-eight hours, the sheriff of the county in which the arrest warrant was issued shall return the defendant to the court which issued the warrant.

IV. Old Business

A. Crim. P. 55(e)—Court reporter issue – Judge Fisch, Karen Taylor, and Matt Holman

Judge Fisch introduced State Court Administrator’s Office (SCAO) employee, Claire Walker, to answer questions regarding a new proposal to amend Crim. P. 55. The committee decided to table the discussion of changes to this rule until the committee could take a closer look at the draft with a track changes version of the new proposal. Ms. Walker agreed to return to discuss the draft.

Regarding Crim. P. 55(e), Judge Fisch explained Matt Holman’s memo and the various versions of proposed amendments to 55(e) presented therein. The committee also reviewed Kevin McGreevy’s proposal that incorporated parts of Chief Justice Directive 05-03. In discussing the intersection of rules and CJDs, members commented that if a CJD’s language is incorporated into a rule, the rule will need to be changed when the CJD changes. Some members asserted that CJDs are not always easy to access, so referring to a CJD in a rule leaves some people unable to access necessary materials.

Mr. McGreevy stated that the version he proposed places “a thumb on a scale” to encourage the use of court reporters. In support of his proposal, Mr. McGreevy said that the committee wants court reporters in courtrooms, especially for appellate purposes because they allow for better administration of justice and are much more reliable.

Some committee members responded that placing this preference for court reporters into the rule would not impact the ability to have reporters in a meaningful way. Committee members noted that the court reporter schools are closing, and people aren’t pursuing this as a career path because electronic reporting is taking over the market. The committee voted 3-5 not to approve Mr. McGreevy’s proposal.

The committee then considered the first proposal from Mr. Holman’s memo that refers to CJD 05-03. Some members mentioned that referring to a CJD provides flexibility, and that while having a court reporter is optimal, one will not always be available. One member noted that CJD 05-03 is of general applicability, and that there are due process issues with criminal defendants needing accurate records of their trials. This same member suggested that if there are two trials going on, a criminal case should be prioritized because greater rights of liberty are at stake.

The committee then considered adopting option 1 of Mr. Holman’s memo along with a friendly amendment to spell out the distinction in applicability between district court and county court. By a vote of 6 to 3, the proposal passed. The subcommittee will prepare a transmittal letter, noting in it that the committee will review the whole of Crim. P. 55 later. Mr. McGreevy and Karen Taylor will prepare a minority report that can either be incorporated into the transmittal letter or sent separately to the court.

The proposal to amend Crim. 55(e), adopted by a majority of the committee, reads:

Rule 55. Records

(a) – (d) [NO CHANGES]

~~((e) Reporter's Notes; Custody, Use, Ownership, Retention. 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. For proceedings in district court, the practice and procedure concerning court reporter notes and electronic or mechanical recordings shall be as prescribed in Chief Justice Directive 05-03, Management Plan for Court Reporting and Recording Services. For proceedings in county court, that practice and procedure shall be as prescribed in C.R.C.P. 380.~~

(f) [NO CHANGES]

V. New Business

A. Crim. P. 32(c)(3)—Monetary payments assessed against defendants—Judge Grohs, Sheryl Uhlmann, and David Vandenberg

Judge Grohs explained that House Bill 16-1311, passed on June 10, 2016, amended the language in C.R.S. 18-1.3-702 regarding monetary payments assessed against defendants. To resolve the conflict between the statute and the rule, the subcommittee proposed an amendment to Crim. P. 32, which was moved, seconded, and approved unanimously.

The committee voted unanimously in favor of the proposed changes to Crim. P. 32. Judge Grohs will prepare a short transmittal letter.

The proposal to amend Rule 32, adopted by the committee, reads:

Rule 32. Sentence and Judgment

(a) through (c)(2) [NO CHANGE]

(c)(3) When the court imposes a sentence, enters a judgment, or issues an order that obligates a defendant to pay ~~that includes payment of~~ any monetary amount, the court shall instruct the defendant ~~that~~ as follows:

(I) If at any time the defendant is unable to pay the monetary amount due, the defendant must contact the court's designated official or appear before the court to explain why he or she is unable to pay the monetary amount; ~~and~~

(II) If the defendant ~~has the ability to~~ lacks the present ability to pay the monetary amount due without undue hardship to the defendant or the defendant's dependents, the court shall not jail the defendant for failure to pay; and ~~as directed by the court or the court's designee but willfully fails to pay, the defendant may be imprisoned for failure to comply with the court's lawful order to pay pursuant to section 18-1.3-702, C.R.S.~~

(III) If the defendant has the ability to pay the monetary amount as directed by the court or the court's designee but willfully fails to pay, the defendant may be imprisoned for failure to comply with the court's lawful order to pay pursuant to the terms of this section

(d) through (g) [NO CHANGE]

Judge Grohs will prepare a transmittal letter in support of the proposal.

B. Crim. P. 44(e)—Termination of Representation

Judge Hoffman, Sheryl Uhlmann, and Donna Skinner Reed all volunteered to serve on a subcommittee exploring this issue. Judge Dailey appointed Judge Hoffman chair of the subcommittee.

C. Limited Representation/Unbundled Legal Services

Kevin McGreevy, Robert Russel, and Judge Grohs all volunteered to serve on a subcommittee exploring this issue. Immediately following the meeting, Judge Dailey assigned Mr. McGreevy chair of the subcommittee.

VI. Future Meetings

April 19, 2019

July 19, 2019

October 18, 2019

The committee adjourned at 2:04 PM.

*Respectfully submitted,
Kathryn Michaels*