

**COLORADO SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE**

**Minutes of Meeting
Friday, January 16, 2015**

A quorum being present, the Colorado Supreme Court's Advisory Committee on 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	
Steve Jacobson	X	
Kevin McGreevy	X	
Judge Dana Nichols	X	
Donna Skinner Reed	X	
Karen Taylor	X	
David Vandenberg	X	
Robin Whitley	X	
Non-Voting Participant		
Terri Morrison	X	
Karen Yacuzzo	X	

I. Attachments & Handouts

- A. Agenda
- B. October 17, 2014 Meeting Minutes
- C. Crim. P. 32(g) email from Judge Fisch

II. Approval of Minutes

The committee approved the July 18, 2014 Meeting Minutes with no corrections.

III. Announcements from the Chair

At the October 17, 2014 Meeting, Judge Dailey reported that Crim. P. 49.5 had been adopted by the court on September 24, 2014, effective immediately; however, two typos had been discovered. Terri Morrison agreed to fix the two typos and check the rule for other inconsistencies and make further revisions. Between the October and January Criminal Rule Committee Meetings, the revised rule, with a number of other proposed

changes, was distributed via email to, and unanimously approved by, the committee. As submitted to the supreme court, the rule, as amended, would state:

Rule 49.5. ELECTRONIC FILING and SERVICE SYSTEM

(a)1. Types of Cases Applicable. E-Filing and E-Service may be used for certain cases filed in the courts of Colorado as the service becomes available. The availability of the E- System for criminal cases will be determined by the Colorado Supreme Court and announced through its web-site www.courts.state.co.us/icces <http://www.courts.state.co.us/supet/supet.htm> and through published directives to the clerks of the affected court systems.

(b)2. E-Filing May be Mandated. With the permission of the Chief Justice, a chief judge may mandate E-Filing within a county or judicial district for specific case classes or types of cases. A judicial officer may mandate E-Filing and E-Service in that judicial officer's division for specific cases, for submitting documents to the court, and for serving documents on case parties. Where E-Filing is mandatory, the court may thereafter accept a document in paper form and the court shall scan the document and upload it to the E-System Service Provider. After notice to an attorney that all future documents are to be E- Filed, the court may charge a fee of \$50 per document for the service of scanning and uploading a document filed in paper form. Where E-Filing and E-Service are mandatory, the Chief Judge or appropriate judicial officer may exclude pro se parties from mandatory E-Filing requirements.

(c)3. Definitions.

(1a) Document. A pleading, motion, writing, or other paper filed or served under the E-System.

(2b) E-Filing/Service System. The E-Filing/Service System ("E-System") approved by the Colorado Supreme Court for filing and service of documents via the Internet through the Court-authorized E-System Provider.

(3e) Electronic Filing. Electronic filing ("E-Filing") is the transmission of documents to the clerk of the court, and from the court, via the E-System.

(4d) Electronic Service. Electronic service ("E-Service") is the transmission of documents to any party in a case via the E-System. Parties who have subscribed to the E-System have agreed to receive service of filings via the E-System, except when personal service is required.

(5e) E-System Provider. The E-Filing/Service/E-Service Filing System Provider authorized by the Colorado Supreme Court.

(6f) Signatures.:

(I) Electronic Signature. An electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by the person with the intent to sign the E-Filed or E-Served document.

(II) Scanned Signature. A graphic image of a handwritten signature.

(d)4. To Whom Applicable.:

(1a) Attorneys licensed or certified to practice law in Colorado, or admitted pro hac vice under C.R.C.P. 205.3 or 205.5 may register to use the E-System. The E-System Provider will provide an attorney permitted to appear pursuant to C.R.C.P. 205.3 or 205.5 with a special user account for purposes of **Ee-F**iling and **Ee-S**servicing only in the case identified by a court order approving pro hac vice admission. In districts where E-Filing is mandated pursuant to Subsection (b)13 of this Rule 49.5, attorneys must register and use the E-System.

(2b) Where the system and necessary equipment are in place to permit it, pro se parties and government entities and agencies may register to use the E-System.

(e)5. E-Filing — Date and Time of Filing.: Documents filed in cases on the E-System may be filed under Crim. P. 49 through **E-F**iling. A document transmitted to the E-System Provider by 11:59 p.m. Colorado time shall be deemed to have been filed with the clerk of the court on that date.

(f)6. E-Service — When Required — Date and Time of Service.: Documents submitted to the court through E-Filing shall be served in accordance with Crim. P. 49 by E-Service to parties who have subscribed to the E-System. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

(g)7. Filing Party to Maintain the Signed Copy — Paper Document Not to Be Filed — Duration of Maintaining of Document.: A printed or printable copy of an E- Filed or E-Served document with original, electronic, or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. Documents shall be maintained in accordance with the Rules of Professional Conduct.

(h)8. Documents Requiring E-Filed Signatures.: For E-Filed and E-Served documents, signatures of attorneys, parties, witnesses, notaries and notary stamps may be affixed electronically or hand-written and scanned.

(i)9. Documents Under Seal.: A motion for leave to file documents under seal may be E-Filed. Documents to be filed under seal pursuant to an order of the

court, if filed electronically, must be submitted separately from the Motion to Seal.

(j)10. Transmitting of Orders, Notices, and Other Court Entries. Courts shall distribute orders, notices, and other court entries using the E-System in cases where E-Filings were received from any party.

(k)11. Form of E-Filed Documents. C.R.C.P. 10 shall apply to E-Filed documents.

(l)12. Relief in the Event of Technical Difficulties.

(1a) ~~The court may enter an order permitting a document to be filed nunc pro tunc to the date it was first attempted to be sent electronically.~~ Upon satisfactory proof that E-Filing or E-Service of ~~the~~ a document was not completed because of:

(I) an error in the transmission of the document to the E-System Provider which was unknown to the sending party;

(II) a failure of the E-System Provider to process the E-Filed ~~ed~~ ing document(s) when received; or

(III) other technical problems experienced by the filer or E-System Provider, ~~the court may enter an order permitting the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically.~~

(2b) Upon satisfactory proof that an E-Served document was not received by or unavailable to a party served, the court may enter an order extending the time for responding to that document.

(m)13. Form of Electronic Documents.

(1a) **Electronic Document Format, Size, and Density.** Electronic document format, size, and density shall be as specified by Chief Justice Directive # 11-01.

(2b) Multiple Documents. Multiple documents (including proposed orders) may be filed in a single electronic filing transaction. Each document (including proposed orders) in that filing must bear a separate document title.

(3e) Proposed Orders. Proposed orders shall be E-Filed in editable format. Proposed orders that are E-Filed in a non-editable format shall be rejected by the ~~Court~~ Clerk's office and must be resubmitted.

(n)14. Document Security Level. Documents filed in a criminal case will not be electronically available to persons other than the parties until reviewed and provided by the clerk of court or his or her designee.

(o)15. Protective Orders. Nothing in these rules shall prohibit a court from ordering the limitation or prohibition of a nonparty's remote electronic access to a document filed with the court.

Judge Dailey submitted a transmittal letter on the committee's behalf, and the supreme court approved the proposed amendments on December 29, 2014, effective immediately. Judge Dailey thanked the committee as well as Terri Morrison, Karen Yacuzzo, and Jenny Moore for working on and submitting the proposed amendments

On another subject, Judge Dailey reported that a transmittal letter was being prepared by Robin Whitley and Karen Taylor with respect to the amendments to Crim. P. 32 passed at the October 17, 2014 Meeting. The transmittal letter was expected to inform the supreme court of both majority and minority positions regarding the amendment to subsection (b)(3)(I). Judge Dailey will update the committee when the proposed rule change and transmittal letter are submitted to the supreme court.

IV. Old Business

A. Crim. P. 32, Failure to Pay Warrants

On behalf of subcommittee members Terri Morrison, Judge Dana Nichols, and Dave Vandenberg, subcommittee Chair Judge Susan Fisch submitted a proposal adding a new section (g) to the rule. As proposed, the new section would state:

(g) Proceedings In The Event of Failure To Pay. When the Court imposes a sentence that includes a fine, costs, restitution or other form of monetary payment, the Court shall follow the procedures set forth in C.R.S. § 18-1.3-702.

In discussing the proposal, the committee decided the rule ought to address two issues: 1) the advisement that needs to occur at sentencing; and 2) what happens later from a defendant's failure to pay. In regard the advisement, the committee decided Crim. P. 32(c) needs additional language telling a judge what advisement he or she needs to make to comply with section 18-1.3-702, C.R.S.

As for new section (g), the committee proposed an alternate amendment to read:

When a defendant fails to pay a monetary amount imposed by the court, the court shall follow the procedures set forth in section 18-1.3-702, C.R.S.

Although the committee unanimously endorsed the concept, it did not vote on the precise language of the proposed, alternate amendment. Instead, the committee asked the subcommittee to propose new advisement language to be included in section (c). At the April 17 Meeting, proposed amendments to Crim. P. 32(c) and (g) will be considered.

B. Crim. P. 17(e), Electronic Service of Subpoenas

According to the subcommittee, chaired by Karen Taylor, and members Judge Deborah Grohs, Judge Dana Nichols, and Donna Skinner Reed, electronic service of subpoenas is accomplished differently in different judicial districts. Two types of electronic service were described: 1) the sender emails a subpoena to the recipient, and the recipient prints, signs, scans, and emails the subpoena back to the sender; or 2) the sender uses an e-program that allows the recipient to accept service by one-click.

The subcommittee plans to propose an amendment to Crim. P. 17 that will be broad enough to encompass both methods for achieving service. The subcommittee hopes to present its proposal at the April 17 Meeting.

C. SB 14-190, E-Discovery Sharing System

As of now there are no rule or statute recommendations, but subcommittee members Steve Jacobson and Dave Vandenberg will keep the committee updated.

D. 2014 New Legislation Subcommittee

Judge Dailey asked if there were any additional 2014 Bills members would like to discuss. Hearing none, the 2014 Bills will no longer appear on the agenda, and the new legislation subcommittee members Judge Deborah Grohs, Abe Hutt, and Robin Whitley will begin to consider the 2015 Bills.

V. New Business

A. Crim. P. 44(a)

Judge Carl S. McGuire III alerted the committee that the part of the rule referencing representation of defendants by law students cites CRCP 226, which was repealed in 2011 and replaced with CRCP 226.5, which was itself repealed on September 1, 2014 and replaced with CRCP 205.7. A motion was made, seconded, and passed by a vote of 8 to 1, to change the citation in Crim. P. 44(a) to CRCP 205.7. As amended the text of Crim. P. 44(a) would read:

Rule 44. Appearance of Counsel

(a) Appointment of Counsel. If the defendant appears in court without counsel, the court shall advise the defendant of the right to counsel. In an appropriate case, if, upon the defendant's affidavit or sworn testimony and other investigation, the court finds that the defendant is financially unable to obtain counsel, an attorney shall be assigned to represent the defendant at every stage of the trial court proceedings. In any misdemeanor case the court may appoint as counsel law students who shall act under the provisions of C.R.C.P. ~~205.7~~²²⁶. No lawyer need be appointed for a defendant who, after being advised, with full knowledge of his rights thereto, elects to proceed without counsel. Except in a case in which a law student has been appointed, unless good cause exists otherwise, the court shall appoint the state public defender.

(b) through (e) [NO CHANGE]

A transmittal letter will be prepared for Judge Dailey's signature, and it, along with the proposed amendment, will be submitted to the supreme court.

B. SB 15-030

Terri Morrison informed the committee that, if passed in its current form, this bill would provide an affirmative defense to prostitution on or after July 1, 2015, if the person committed the act as a result of being a victim of human trafficking. However, the bill also provides persons charged or convicted of prostitution before July 1, 2015, and for whom the new affirmative defense would have applied, if it then existed, may petition courts to vacate their record(s) under the Crim. P. 35. The bill covers, among other things, municipal code and ordinance offenses; however, pursuant to Crim. P. 54, the Rules of Criminal Procedure do not apply to municipal ordinance or charter violations.

The State Court Administrator's Office wanted to bring this bill to the committee's attention, because if it passes in its current form Crim. P. 35 may need to be amended. Judge Dailey asked if anyone had considered the separation of powers issue of whether, for persons convicted before the legislation went into effect, courts could effectively exercise the plenary power of the executive to pardon individuals. Ms. Morrison said she will mention this concern to the Office of Legislative Legal Services, and keep the committee updated.

C. CRCP 106

Donna Skinner Reed proposed studying issues related to CRCP 106. Ms. Reed sees CRCP 106 being used essentially as an appeal in county court criminal cases, a practice which is becoming more common. A subcommittee, comprised of Donna Skinner Reed, Steve Jacobson, and Judge Dana Nichols, was formed to consider what, if anything, should be done with respect to this subject.

VI. Future Meetings

April 17, 2015
July 17, 2015
October 16, 2015

The committee adjourned at 1:45pm.

Respectfully submitted,
Jenny A. Moore