COLORADO SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

Minutes of Meeting
Friday, July 19, 2013

A quorum being present, the Colorado Supreme Court's Advisory Committee on Rules of Criminal Procedure was called to order by Judge Susan Fisch (acting as chair in Judge Dailey's absence) at 12:52 p.m., Supreme Court Conference Room, Ralph L. Carr Colorado Judicial Complex. Members present, or excused from the meeting were:

Name	Present	Excused
Judge Ed Casias	X	
Judge John Dailey, Chair		X
Judge Susan Fisch	X	
Judge Shelley Gilman	X	
Judge Morris Hoffman		X
Matt Holman	X	
Abe Hutt	X	
Steve Jacobson	X	
Judge Gilbert Martinez	X	
Kevin McGreevy	X	
Donna Skinner Reed	X	
Karen Taylor	X	
David Vandenberg	X	
Robin Whitley	X	

I. Attachments & Handouts

A. Agenda
B. Minutes of the April 19th, 2013 Meeting
C. Crim. P. 17 and Crim. P. 24, rules approved by the supreme court since the last meeting
D. Email Crim. P. 24(g), juror questions
E. Email HB 13-1210 and HB 13-1086, materials sent to the new legislation subcommittee
F. Email Crim. P. 17(e), materials sent to electronic subpoenas subcommittee

II. Approval of Minutes

With three amendments, the proposed minutes for the April 19, 2013 meeting were approved. The three amendments were:

A. On page 2, second paragraph of C., there is an extra "that".

B. On page 4, "New Business" section B, the statutory reference to 24-30-2104(4), C.R.S. 2012 should read 24.30-2104(3), C.R.S. 2012.

C. On page 4, "New Business" section C needs to be removed.

III. Announcements from the Chair

A. Judge Susan Fisch welcomed new committee member, David ("Dave") Vandenberg, a deputy district attorney in Larimer County.

B. Judge Fisch announced that Jenny Moore, from the Colorado Supreme Court Library, will be staffing the meeting, along with Cecily Harms. They will take the minutes at this meeting and future meetings.

C. Judge Fisch reported that Crim. P. 17 (e) and Crim. P. 24(e) were approved by the Supreme Court on May 15, 2013.

IV. Old Business

A. "Failure to Pay" Warrants —Judge Fisch reported that the ACLU submitted a proposed change to the criminal rules that incorporates a contempt of court procedure for failure to pay situations as an alternative to the bench warrant procedure. There were concerns about the ACLU's proposed change. The committee was likely to oppose the lengthy rule-change proposal when there are so many statutes on restitution and failure to pay that can be deferred to. Also, collections practices vary from jurisdiction to jurisdiction. The ACLU will get back to the committee about a potential rule redraft. A committee member asked if a chief justice directive could be used. Another member stated that there is such a wide disparity between districts in how they handle failure to pay situations, that the issue would be brought up at a chief judges meeting before a chief justice directive is drafted, because the chief judges may be able to reach a consensus on how they would like to handle failure to pay warrants. A committee member added that the different statutes create a problem of determining when to issue warrants and whether a case goes to collections instead of requiring a failure to pay warrant. There have been failure to pay warrants that put people in jail for several months.

B. Crim. P. 35: "Actual Innocence" Exception —Steve Jacobson noted that his name was spelled incorrectly on the meeting agenda (it was spelled Jacobs*e*n). He stated that the subcommittee has met and that they have another meeting scheduled. The subcommittee is having a philosophical and practical discussion about what changes are feasible. They are drafting a memo on where the federal courts are on the "actual innocence" exception, and the memo will be on the October 18th meeting's agenda.

C. **Crim. P. 24(g) – Juror questions —**Abe Hutt presented the subcommittee's two versions of a proposed change to Crim. P. 24(g). Committee members disagreed on whether the addition of the language "and announced to the parties prior to trial" in one of the versions of the proposed rule change went beyond the scope of what the subcommittee had been asked to do. A committee member voiced concern about the language of both versions. He stated that the new language in both versions "after notice to the parties and an opportunity to be heard" could be read as a general announcement to the parties, and neither version addresses the problem of a judge allowing questions for a witness without allowing parties to be heard. Therefore, a committee member proposed adding "on whether each juror question is permissible" after the new language "and an opportunity to be heard." One member responded that the subcommittee had not discussed adding language about if each juror question was permissible, but that he does not object to the addition of the language if it helps make the rule clearer. Another committee member stated that the procedure should be made clear in new judge orientation. A member replied that the subcommittee was striving for brevity. Another committee member voiced concern, stating that the new "opportunity to be heard" language is not specific enough regarding what the opportunity to be heard is on. A member was also concerned that the proposed rule's first sentence would mean that jurors could not submit questions until there had been notice to parties and an opportunity to be heard, but that opportunity to be heard could be about if jurors could submit questions. The committee member opined that the problem stemmed from putting the new language in the first sentence, which is not about the particular submitted questions but about whether to allow jurors to submit questions. The committee arrived at reworked language to go in a separate, new, second sentence.

A committee member asked why "in compliance with other procedures established by the trial court" was in the proposed rule. A member replied that that language, except for the "other," was already in the rule. The member asked what this language was referring to. The committee member replied that it is important to have language in the rule saying at the beginning of trial that procedures will be followed, and that is what his proposed language is doing ("and announced to the parties prior to trial"). The committee member further stated that the less trial judges are told how to do things the better, and that there are many procedural ways to do jury questions (place them on the counter, waive at the clerk, etc.). One member asked another member if he was disagreeing that attorneys should be able to review questions first. The committee member replied that he believes attorneys should be able to review questions first, and that the only disagreement of the subcommittee was about whether requiring judges to tell lawyers what the procedures are before trial is beyond the scope of what they were asked to draft.

A committee member asked what a judge is supposed to announce before trial under the new proposed rule. A committee member replied that the judge

would have to announce how the procedure for asking jury questions would work. A committee member replied that the rules already require that and that it is already her practice, but that she does not go through it for attorneys who regularly appear before her. A committee member replied that the jury needs to know what the procedures are. A committee member replied that it is part of her trial script. One member stated that she took "announced to the parties before trial" to mean counsel is before her and she is laying out the procedure, but she is concerned it could be construed that the procedure is being announced when the jury is already there, so it is not actually "before trial." A committee member stated that they were trying to avoid a situation where in the middle of trial the judge states "now we're doing jury questions," and there was not any previous discussion of how such questions would be handled. A committee member then questioned whether the timing issues the committee was discussing could produce a reversible error situation.

The proposed language could be violated in a scenario where the judge explains to the jury the procedure for asking jury questions because the explanation was not done "before trial." A committee member recommended taking out "prior to trial" from the proposed language. He said this would eliminate the required window of time. Another committee member agreed, but stated the proposed rule minus "prior to trial" would still create a formal requirement that the explanation be done on the record. A committee member stated that it is hard to believe judges are not already doing this in some form. A committee member said she does explain the procedure to jurors, but not to attorneys who are always before her. A member asked what would happen if she had two experienced attorneys before her and off the record she says they will do jury questions, and then she does not tell the jury they can ask questions until the end of the first witnesses' testimony. A committee member replied that that would not be reversible error. A committee member responded that he does not want to write a rule that imposes strict formal requirements when they are not needed.

A committee member asked whether most judges give instructions to jurors. Another committee member replied that they do not in county court. It was stated that some judges have a jury question instruction that they read with the opening jury instructions, and that a timing requirement should not be in the rule because it takes away flexibility for a judge. A committee member stated that the committee is discussing the issue because jury question procedures haven't been proceeding as the committee thinks they should, so the more guidance they can give is good. She further stated she thought the goal of the rule change was to get more of the bench on the same page for best practices. Another member stated that at the last meeting they had agreed they would put in the rule just what was to be mandated, not best practices, because those would go in the comments.

A committee member stated that the rule already says that procedure shall be established by the court and asked whether that language already

accomplishes what the committee is trying to achieve with the current proposed changes. He suggested the rule does not need the extra hurdle of the proposed language ("and announced to the parties prior to trial"). Another committee member advocated keeping the "in compliance with procedures established by the trial court" language already in the rule so that trial courts are not tied to a particular process. He stated that the rule is not about making every court follow the same procedure, but it is instead about making sure parties know how jury questions will be handled and that parties can see the questions before they are asked. A committee member read his version of the proposed rule. Mr. Hutt accepted all of the changes as friendly. A motion was made, seconded, and approved by a vote of 6-5 to submit the following proposed rule change to Crim. P. 24(g) to the Supreme Court:

Rule 24. Trial Jurors.

(a) through **(f)** [NO CHANGE]

(g) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court AND ANNOUNCED TO THE PARTIES. AFTER GIVING THE PARTIES NOTICE AND AN OPPORTUNITY TO BE HEARD ON EACH QUESTION, THE COURT SHALL DETERMINE WHETHER TO ASK THE SUBMITTED QUESTION. THE TRIAL COURT SHALL PERMIT APPROPRIATE FOLLOW-UP QUESTIONS FROM THE PARTIES WITHIN THE SCOPE OF THE JURORS' QUESTIONS. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for reasons related to the severity of the charges, the presence of significant suppressed evidence or for other good cause.

A committee member reminded the committee that the proposal didn't encompass the proposed rule comment. Another committee member stated that the she wanted the language in the comment to be in the rule itself. A committee member suggested replacing "Trial judges should" with something less forceful such as "trial judges are encouraged to" for fear that the "should" would become synonymous with "shall." The committee disagreed on whether questions should be encouraged after each witness. Several judges said they have had trials where they did not ask questions after each witness, and instead just made an announcement about jury questions at the beginning of the trial. A committee member asked whether the last sentence of the rule allows judges to have flexibility on when to announce that the jury can ask questions and when those questions can be asked. A committee member replied that the last sentence speaks more to having reasons to limit juror questions due to the nature of the case. Another member asked if some judges do not allow questions from every witness, and instead just allow them for particular witnesses. A committee member replied that he had been in a trial where a particular witness was so perfunctory that the judge did not ask if there were jury questions for the witness. Another member asked whether

some judges announce the procedure for jury questions once and then wait for the jury to be proactive about asking. She stated that perhaps the committee should not add the comment and let judges set their own procedure. A committee member suggested adding “when appropriate” to the comment’s language. A committee member said that he preferred the rule without the comment because the comment creates an appellate issue that otherwise would not arise. Another committee member stated that his notes from the previous meeting state the committee was using the word “suggest” regarding the comment.

Referencing the vote on the proposed rule change to Crim. P. 24(g), and not its comment, a committee member said that in a previous instance when a proposed rule was sent to the Supreme Court after a vote with a close margin, the Supreme Court was informed of the close vote.

There was discussion on whether the committee had to vote on removing the comment from the rule, because the rule they had just voted to submit to the Supreme Court did not include the comment. A motion to remove the comment from the proposed Crim. P. 24(g) was made, seconded, and approved by a vote of 7-0. Mr. Hutt will prepare the transmittal letter, including the minority’s view that the words “and announced to the parties” should not be included and its reasons.

D. **Crim. P. 17(e), electronic service of subpoenas —**Karen Taylor reported that the subcommittee has not met. The subcommittee needs to discuss how to proceed, and then they will report back to the committee. The issue is tabled until the October 18th meeting.

V. New Business

A. New Legislation

i. **HB 13-1210, Crim. P. 5 —**Robin Whitley reported that HB 13-1210 eliminates the statutory provision that set up a process where a district attorney would give advisement to misdemeanor and petty offense defendants. The statute, before HB 13-1210, called for a plea discussion and negotiation before appointment of court-appointed counsel. If a plea agreement was reached, it was entered, and there was no appointment of counsel. HB 13-1210 removed that provision. There is a parallel provision in Crim. P. 5 (c)(2), which is headed “Appearance Before the Court,” and in this subsection the following language needs to be removed: “except that the defendant shall be advised that an application for the appointment of counsel shall not be made until after the prosecuting attorney has spoken with the defendant as provided in C.R.S. 16-7- 301(4)(a).” This is the only rule change that needs to be made because of HB 13-1210.

A motion to submit the proposed rule change to the Supreme Court was made, seconded, and approved by a vote of 7-0. Mr. Whitley was asked to prepare a transmittal letter to the court.

Rule 5. Preliminary Proceedings

(a) through **(d)**. [NO CHANGE].

(c) Misdemeanor and Petty Offense Proceedings.

(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) of this Rule~~, except that the defendant shall be advised that an application for the appointment of counsel shall not be made until after the prosecuting attorney has spoken with the defendant as provided in C.R.S. 16-7-301 (4) (a)~~.

(3) [NO CHANGE].

ii. **HB 13-1086, County Court appeals —**Robin Whitley stated that HB 13-1086 (regarding the timing of preparing the record for appeal from county court) implements changes to the statutes that the committee drafted and sent to the State Court Administrator's Office. HB 13-1086 changes the trigger for the running of the clock from the time of judgment to filing of the notice of appeal. Crim. P. 37 has the same language as the statute before HB 13-1086 changed it. The needed change to Crim. P. 37 is the language already drafted in HB 13-1086. A committee member asked what the specific proposed language changes to Crim. P. 37 were. The changes are replacing the word "judgment" with "the filing of the notice of appeal" throughout the rule, "electrically" to "electronically" in Crim. P. 37(c), and replacing "judge" with "clerk" at the end of the sentence beginning "If none are received" in Crim. P. 37(c). A committee member asked what the committee was supposed to do when revising statutes that do not contain gender-inclusive language. Another committee member stated that the committee was told that if they were already revising a rule with gender-biased language to address it. A committee member suggested holding over a proposed change to Crim. P. 37 until the October 18th meeting. The issue was set over until the October 18th meeting and Mr. Whitley will draft the proposed rule changes.

iii. **SB 13-229, timing of providing presentence investigation reports —**Robin Whitley reported that Section 4 of SB 13-229, the criminal omnibus bill, raises potential issues. After SB 13-229,

C.R.S. 16-11-102 states that upon the request of either the defense or district attorney, the probation department must provide the presentence report at least seven days before the sentencing hearing. If the probation department cannot provide the report in time, they are granted additional time to finish the report and the sentencing hearing is rescheduled to be at least seven days after the probation department provides the report. SB 13-229 did not change the statute's requirement that the report be provided at least 72 hours before the sentencing hearing. The criminal procedure rule has never lined up with the statute, and instead requires the report to be provided "within a reasonable time." A committee member stated that the criminal procedure rule is compatible with the new statute because the rule does not have specific deadlines, but asked the question of whether the committee should leave the rule as it is or if SB 13-229 was the nudge the committee needed to make the rule at least as specific as the statute. Another committee member said that changing the rule will cause many unexpected problems, and that the committee should wait awhile and see what happens with the new C.R.S. 16-11-102 before changing the corresponding criminal rule. Another committee member suggested changing the rule to say something like "within the time required by statute" because what the rule says now is meaningless considering the statute's requirements. A committee member suggested setting over the issue until the October 18th meeting when the committee will have had more time to observe the effects of the new C.R.S. 16-11-102. A committee member said it is concerning for the rule to say "within a reasonable time," because a practitioner could read that and think they have a complete answer, not knowing there is a stricter statute. He is also concerned that the new statute does not say anything about when to submit the request for the report that has to be provided at least seven days before the sentencing hearing. This could create a situation where someone abuses the statute by requesting the report the day before the hearing, which then has to be moved or vacated. A subcommittee of Judge Martinez, Abe Hutt, and Robin Whitley will work on this issue for the October 18th meeting and that it is tabled until then.

VI. Future Meetings Scheduled

A. Oct. 18, 2013
B. Jan. 17, 2014
C. April 18, 2014

The committee adjourned at 2:23 p.m.

Respectfully submitted,

Jenny Moore