

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

**Minutes of Meeting  
Friday, July 22, 2011**

A quorum being present, the Colorado Supreme Court's Advisory Committee on Rules of Criminal Procedure was called to order by Judge Morris Hoffman at 12:50 p.m., Court of Appeals Conference Room at the Denver News Agency Building. Members either present at or excused from the meeting were:

<b>Name</b>	<b>Present</b>	<b>Excused</b>
Judge Ed Casias	X	
Judge John Dailey, Chair		X
Dana Easter	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	
Justice Martinez (Supreme Court Liaison)		X
Kevin McGreevy	X	
Cliff Riedel	X	
Karen Taylor	X	
Robin Whitley	X	

**I. Attachments**

- A. Agenda
- B. Minutes of the April 15, 2011 Meeting
- C. Appendix A, Time Computation Changes
- D. Minutes of the May 5, 2011 Meeting

**II. Approval of Minutes**

Judge Hoffman chaired the meeting for Judge John Dailey. One day prior to the meeting Robin Whitley pointed out an inconsistency between the approved Crim. P. 41 changes and the version printed in the April 15, 2011 minutes. The correct version was submitted and approved by the supreme court. Only the minutes need correction. The April 15, 2011 minutes were approved as revised. The May 5, 2011 meeting minutes were approved as submitted.

### **III. Chair report**

April Bernard reported that the court approved changes to Crim. P. 41 on June 16, 2011, effective immediately.

### **IV. Old Business**

#### **A. Crim. P. 17**

During the April meeting the committee agreed on changes to Crim. P. 17(h). After reviewing the transmittal letter, Judge Dailey wished to have the committee consider whether language should be added to clarify that contempt and a bench warrant are not mutually exclusive options.

Judge Hoffman asked if the language should clarify that after a witness appears on a bench warrant a contempt citation may be issued. There is no language suggesting that a citation can't be issued. The words "may be deemed a contempt of the court" appear to make proceeding with contempt always be an option. Even so, several members felt that there needed to be clarification that contempt is an available remedy whether or not the court issues a bench warrant.

There was discussion about the bond when bringing in a witness. The practical workings of the bond should be a non-issue. The witness is brought in just to testify. After he/she testifies the warrant is vacated.

The committee discussed the notion that contempt isn't discharged merely because a witness is brought in on a warrant. The court should be able to serve the person with a contempt citation and proceed.

In reviewing other states' provisions, Mr. Whitley found that in many, whether rule or statute, there is language indicating that contempt and issuing a bench warrant for appearance aren't mutually exclusive, one doesn't preclude the other. The court may issue a warrant and find someone in contempt.

Judge Hoffman suggested adding a third section to Crim. P. 17(h), indicating that these remedies aren't mutually exclusive. Judge Shelley Gilman suggested language for the third section, "The court may proceed under paragraphs 1 or 2 or both." Kevin McGreevy suggested removing the bench warrant provisions.

A motion was made and seconded to clarify this issue and indicate that contempt and issuance of the bench warrant aren't mutually exclusive.

Mr. Whitley proposed a comment to the rule. Several members felt that the issue should be addressed in the body of the rule. A member proposed

additional language for Crim. P. 17(h)(2)(I), “Whether or not a contempt citation issues...” Judge Hoffman preferred that the committee decide conceptually whether or not to add express clarification, and let Judge Dailey and him work out the language. This would expedite submission of the rule.

Mr. McGreevy didn’t think that a fix was necessary. The court has inherent contempt power. Judge Ed Casias suggested that the intent should be in the rule to clarify the inherent power.

The motion carried 9:0 with 2 abstentions. Judge Hoffman will distribute the final rule to the committee before submission to the court.

The subcommittee is also working on a proposal to restrict the issuance of subpoenas for medical records. Judge Hoffman recommended waiting to see what the Civil Rules Committee does and what the supreme court approves before making any changes related to subpoenas for medical records. The Civil Rules Committee is proposing changes to C.R.C.P. 45. They are also working on C.R.C.P. 345 and the forms.

## **B. Time Computation**

A joint meeting on time computation was held with representatives from the Appellate, Civil, and Criminal Rules Committees. Mr. Whitley was in attendance. As a result of the meeting there were further changes to the time computation proposal for the Criminal Rules, included in the agenda packet.

Rule changes from all committees will be submitted to the court together. Rules with no corresponding statute will be effective January 1, 2012. Those with a corresponding statute will be effective July 1, 2012, to allow for the legislative process and amendments should the legislature choose not to act. These dates will also allow for publication of the new rules.

It was decided at the joint meeting that the changes to the Criminal Rules should be effective July 1, 2012, as there are a number of time periods tied to the statutes.

Mr. Whitley changed the threshold for placing the number of weeks in parenthesis in the rules from 35 days to 49 days to be consistent with the Civil Rules. The package should be submitted to the supreme court soon. The committee thanked Mr. Whitley for his work on time computation.

Work will begin soon on early introduction of legislation to deal with time computation. This item will be placed on the October agenda for an update. Mr. Whitley will report on the submission to the court and legislation.

## **C. Crim. P. 35(c)**

This item was tabled until the next meeting.

#### **D. Crim. P. 16 Costs**

At the April meeting the committee decided not to adopt a proposal related to discovery funding issues, submitted by Sherry Stwalley after mediation between the District Attorneys' Council and the Public Defender's Office. However, several members felt that the issue should be discussed again at the next meeting, as all members were not in attendance.

The rising cost of purchasing copies seems to be driving this issue. A member thought that the amount the defendant pays for discovery is a matter to be addressed in an individual case through a ruling from the judge. The issue is difficult, as there are differences between judicial districts and there are fiscal issues across several budgets. A member suggested adding a discovery surcharge on court costs to help cover the expense.

Cliff Riedel said that the proposed change previously submitted to the committee was presented as an agreement between the Public Defender and District Attorney's Council. However, upon checking with the council Mr. Riedel found that no agreement was reached. The council wants the legislature to deal with the issue.

A member motioned that the committee not act on the amendment to Crim. P. 16. The costs of criminal discovery are better addressed via legislation. The motion was seconded and passed 6:4.

#### **E. Crim. P. 32.2(c)(1) Time for Filing Appeal in Death Penalty Cases Where No Motion for Post-conviction Relief Was Made**

An anomaly in Crim. P. 32.2 was identified at the special meeting on May 5, 2011. Judge Dailey referred the issue to the death penalty subcommittee, Matt Holman and Karen Taylor. Mr. Whitley joined the subcommittee after the meeting. The May 5, 2011 minutes should be amended to show that Mr. Whitley joined the subcommittee. Mr. Whitley and Ms. Taylor worked on language to amend the rule.

Crim. P. 32.2(c)(1) sets the deadline for filing a notice of appeal in death penalty cases, within 5 days after the court rules on post-conviction motions. The committee had voted to change the deadline to 7 days during the time computation discussion at the April meeting.

There is no deadline outlined for submitting a notice of appeal when there are no post-conviction motions. The statute and the rule contemplate this contingency, but the rule doesn't adjust the notice-of-appeal deadline to accommodate it. The proposed additional language will cover this contingency and ties into the deadline for filing, rather than any ruling, if no

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motion was filed. Five (to become seven) days after the imposition of a death sentence the court advises the defendant of the deadline for post conviction motions. At that point the court could accept a waiver.

A member outlined the situation where the defendant waived the right to file post-conviction motions at first advisement. The defendant has 154 days to file post-conviction motions. The defendant could change his/her mind 1-2 months later. The idea is to make the deadline to file a notice of appeal come shortly after the deadline to file post-conviction motions if no motions are filed.

A motion was made to amend the language in Crim. P. 32.2(c)(1) to "...within 7 days after the trial court's order on post-conviction review motions, or within 7 days after the expiration of the deadline for filing post-conviction review motions if none have been filed."

Judge Susan Fisch suggested adding language for the waiver when the defendant waits until the last day to waive or isn't filing a waiver. Mr. Whitley pointed out that Crim. P. 32.2(b)(3)(V) indicates that post-conviction motions are filed within 154 days of advisement date.

The committee discussed the situation where the lawyer is fired by the defendant: the post-conviction attorney has 154 days to file a post-conviction motion, the defendant fires the post-conviction lawyer and doesn't want to file any motions, and the court accepts the defendant's actions. In this situation, the appellate lawyers would have most or all of the 154 days to work on the appeal before having to file the notice of appeal.

Mr. Whitley described a situation where the deadline passes and no motions are filed, but then the defendant wants to file a post-conviction motion outside of the deadline and says that he/she never waived the right to do so—but opined that the rule need not be adjusted to deal with this scenario. Judge Fisch proposed the language "or valid waiver after deadline."

The committee discussed the situation where the defendant fires all lawyers. Mr. Jacobson responded that this is a usual occurrence, typically 7 days into the timeline. On day 153 if the defendant fires the lawyer most judges will still want to hear from counsel. A member added that appellate lawyers and post-conviction lawyers are each on their own track. Time is usually extended, i.e. 6 months becomes 18 months. The moment the notice is submitted the appeal is ready.

The motion to amend language in Crim. P. 32.2(c)(1) was seconded.

On further discussion, Mr. Whitley pointed out that time computation rules are to take effect July 1. For time computation in Crim. P. 32.2 Mr. Whitley outlined 3 options. The first option involved fixing the gap in the rule

immediately and, in anticipation of all the other time changes, changing this deadline now to 7 days. The second option involved fixing the gap immediately and leaving the deadline at 5 days, leaving the from-5-to-7 change to its projected later effective date. The final option involved waiting to make this gap-fixing change until all of the time computation changes are made.

There was discussion about how the effective date of the rule will affect cases. Judge Hoffman pointed out that the gap currently exists and there are no cases related to this matter. Mr. McGreevy questioned the effective date of the change, i.e. the offense date or the date of the conviction.

Mr. Whitley recommended the first option—that the committee adopt the proposed language change and submit the proposed change to the court. The recommendation to the court will make the deadline for filing the notice of appeal 7 days. The motion passed 11:0.

### **Rule 32.2. Death Penalty Post-Trial Procedures**

**(a)through (b)** No change

**(c) Appellate Procedure.**

**(1)Unitary Notice of Appeal.** The notice of appeal for the direct appeal and the notice of appeal for all post-conviction review shall be filed by unitary notice in the supreme court ~~no later than within 57~~ days after the trial court's order on post-conviction review motions, or within 7 days after the expiration of the deadline for filing post-conviction review motions if none have been filed. The unitary notice of appeal need conform only to the requirements of sections (1), (2), (6) and (8) of C.A.R. 3(g).

There was a short discussion about the difference between “no later than” and “within.” The Criminal Rules use both terms. Perhaps only one term should be used. Mr. Holman will create a transmittal letter to send to Judge Dailey and Ms. Bernard.

## **V. Future Meetings Scheduled**

**A. Oct 21, 2011**

**B. Jan 20, 2012**

The committee adjourned at 2:15 p.m.  
*Respectfully submitted,*  
*April Bernard*

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