

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

**Minutes of Meeting
Friday, October 17, 2014**

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. Minutes of the July 18, 2014 Meeting
- C. Colorado Rules of Juvenile Procedure
- D. E-Discovery Sharing System
- E. Crim. P. 32(a), SB 13-229

II. Approval of Minutes

The committee approved the Minutes of the July 18, 2014 Meeting with one addition: Roman numeral IV, "New Business" section was added to include the announcement and future consideration of SB 14-190, the E-Discovery Sharing System.

III. Announcements from the Chair

Judge Dailey announced that Crim. P. 49.5 was adopted by the supreme court on September 24, 2014, effective immediately, however, two typos had been discovered: an incorrect website address in section (1) and an incorrect cross-reference to another part of the rule in section (4). Terri Morrison said she would make the appropriate revisions, and check the rule for other typos and inconsistencies. If possible, the committee will vote via email on the proposed revision of the e-filing rule, and then send the rule, with a transmittal letter explaining the changes, to the supreme court.

Judge Dailey introduced the newest member of the committee, Weld County county court judge Dana Nichols. Terri Morrison introduced SCAO's new First Assistant Legal Counsel, Karen Yacuzzo, who will attend the meeting with, or in lieu of, Ms. Morrison.

Finally, Judge Dailey noted that the proposed revisions to Crim. P. 24(g) were still pending before the supreme court.

IV. New Business (Addressed Out of Order)

Colorado Rules of Juvenile Procedure

The supreme court created the Advisory Committee on Rules of Juvenile Procedure (Juvenile Rules Committee) on May 1, 2014 to suggest revisions to existing rules and forms and to propose new rules and forms to implement H.B. 14-1032. At the request of the supreme court, the members of the criminal rules committee were asked to review and comment upon the Juvenile rules committee's proposals. Fourteenth judicial district chief judge Mick O'Hara appeared, via telephone, on behalf of the Juvenile Rules Committee. He described his committee's work over the summer, and presented its proposals for comment. The members of the criminal rules committee: (1) provided input about filing deadlines, capitalization, and statutory citations in the rules; (2) noted that proposed rule 3.7 did not state whether documents needed to be shared with private counsel if the child had retained private counsel; (3) asked for clarification whether the hearing referenced in 3.9 (c)(2)(D) would be held automatically or must be requested; and (4) with respect to certain forms, asked if the notarization requirements were necessary, recommended adding a signature line, and suggested typing in the Public Defender's website.

Chief Judge O'Hara said he would take the comments back to the Juvenile Rules Committee for further consideration, and Judge Dailey thanked C.J. O'Hara for his presentation.

V. Old Business

A. E-Discovery Sharing System

The E-Discovery Sharing System Subcommittee members Steve Jacobson and Dave Vandenberg prepared a memo for the committee on the status of an E-Discovery system that is scheduled to be in place by Nov. 1, 2016. Although noting that a change to Crim. P. 16 will be necessary, the subcommittee thought it would be

premature to amend it now. The subcommittee will keep the committee updated on the project.

B. Crim. P. 32, SB 13-229

Robin Whitley presented a revised proposal to Crim. P. 32, which included the changes discussed at the April 2014 meeting, as well as modified waiver and restitution language.

The committee had many questions about restitution and where it should be addressed in the rule. After going through the rule section by section the committee agreed on the proposed changes, but amended sections (b)(1) and (b)(3)(I). The proposal, which was passed by a vote of 9 to 0, reads

Rule 32. Sentence and Judgment

(a) Presentence or Probation Investigation.

(1) When Investigation and Report Required and How Made.

(I) In General. ~~In any felony case where the court has discretion as to the punishment and on court order in any misdemeanor case, T~~the probation officer ~~must~~shall make an presentence investigation and written report to the court before the imposition of sentence or granting of probation:-

(a) in any case in which the defendant is to be sentenced for a felony and the court has discretion as to the punishment, or

(b) when the court so orders in any case in which the defendant is to be sentenced for a misdemeanor.

(II) Waiver. The court, with the concurrence of the defendant and the prosecuting attorney, may dispense with the presentence investigation and report unless a presentence report is required by statute, including but not limited to the requirements of section 16-11-102(1)(b), C.R.S.

~~An application for probation shall be in writing upon forms furnished by the court, but when the defendant has been convicted of a misdemeanor or class 1 petty offense, the court, in its discretion, may waive the written application for probation.~~

(2) Court May Order Examination. The court, upon its own motion or upon the petition of the probation officer, may order any defendant who is subject to presentence investigation or who has made application for probation to submit to a mental and physical examination.

~~The court, with the concurrence of the defendant and the prosecuting attorney, may dispense with the presentence examination and report unless a presentence report is required by statute, including but not limited to the requirements of section 16-11-102(1)(b).~~

(3) Delivery of Report Copies. The probation officer must provide copies of the presentence report, including any recommendations as to probation, to the prosecuting attorney and to defense counsel or the defendant if unrepresented. The copies must be provided:

(I) at least 72 hours before the sentencing hearing, or

(II) at least 7 days before the sentencing hearing if either the prosecuting attorney, defense counsel, or the defendant if unrepresented, so requests of the court within 7 days of the time the court sets the date for the sentencing hearing. If the probation department informs the court it cannot provide the report copies at least 7 days before the sentencing hearing, the court must grant the probation department additional time to complete the report and must reset the sentencing hearing so that it is held at least 7 days after the probation department provides the report copies.

~~(2) Report.~~ The presentence report shall include, but not be limited to, information as to the defendant's family background, educational history, employment record, and past criminal record, an evaluation of the alternative dispositions available for the defendant, and such other information as the court may require. In addition, the court, as it deems appropriate, may require the presentence report to include the findings and results of a professionally conducted mental and physical examination of the defendant. Within a reasonable time prior to sentencing, copies of the presentence report, including any recommendations as to probation, shall be furnished to the prosecuting attorney and defense counsel or to the defendant if the defendant is unrepresented. The report shall also include a statement showing the amount of time during which the defendant was confined prior to the imposition of sentence for the offense for which the defendant is being sentenced.

(b) Sentence and judgment.

(1) Sentence shall be imposed without unreasonable delay. Before imposing sentence, the court shall afford the defendant an opportunity to make a statement in his or her own behalf, and to present any information in mitigation of punishment. The state also shall be given an opportunity to be heard on any matter material to the imposition of sentence. Alternatives in sentencing shall be as provided by law. When imposing sentence, the court shall consider restitution as required by section 18-1.3-603(1), C.R.S.

(2) Upon conviction of guilt of a defendant of a class 1 felony, and after the sentencing hearing provided by law, the trial court shall impose such sentence as is authorized by law. At the time of imposition of a sentence of death, the trial court shall enter an order staying execution of the judgment and sentence until further order of the Supreme Court.

(3) Judgment.

(I) A judgment of conviction shall consist of a recital of the plea, the verdict or findings, the sentence, the finding of the amount of presentence confinement, and costs, if any are assessed against the defendant, the finding of the amount of earned time credit if the defendant had previously been placed in a community corrections program, an order or finding regarding

restitution as required by section 18-1.3-603, C.R.S., and a statement that the defendant is required to register as a sex offender, if applicable.

(II) If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

(III) All judgments shall be signed by the trial judge and entered by the clerk in the register of actions.

(c) Advisement.

(1) Where judgment of conviction has been entered following a trial, the court shall, after passing sentence, inform the defendant of the right to seek review of the conviction and sentence, and the time limits for filing a notice of appeal. The court shall at that time make a determination whether the defendant is indigent, and if so, the court shall inform the defendant of the right to the assistance of appointed counsel upon review of the defendant's conviction and sentence, and of the defendant's right to obtain a record on appeal without payment of costs. In addition, the court shall, after passing sentence, inform the defendant of the right to seek postconviction reduction of sentence in the trial court under the provisions of Rule 35(b).

~~If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. All judgments shall be signed by the trial judge and entered by the clerk in the register of actions.~~

(2) Where judgment of conviction has been entered following a plea of guilty or nolo contendere, the court shall, after passing sentence, inform the defendant that the defendant may in certain circumstances have the right to appellate review of the sentence, of the time limits for filing a notice of appeal, and that the defendant may have a right to seek postconviction reduction of sentence in the trial court under the provisions of Rule 35(b).

(d) - (f) [NO CHANGE]

Mr. Whitley will draft the transmittal letter, and a minority report with respect to part of the rule, because while agreeing with the overall proposal, he voted "no" on the change in (b)(3)(I). Karen Taylor will draft the majority report on this part of the rule.

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

The subcommittee of Karen Taylor, Donna Skinner Reed, and Judge Grohs is still working on the issue. Judge Nichols was appointed to the subcommittee, and she was going to get in touch with Judge Hartmann to see if he would like to work with them. The subcommittee will update the committee at the January meeting.

D. Crim. P. 32, Failure to Pay

Judge Fisch spoke to the ACLU's representative, Rebecca Wallace, who suggested that a reference to newly enacted §18-1.3-702, C.R.S., be put in Crim. P. 32. The subcommittee will present a proposal at the January meeting.

E. New Legislation Subcommittee

The 2014 New Legislation will appear on the January meeting agenda. Members will be given a final opportunity to look over SCAO's legislation summary that was sent out in July 2014, and decide if any action should be taken.

VI. Future Meetings

January 16, 2015

April 17, 2015

July 17, 2015

The committee adjourned at 3:00pm.

Respectfully submitted,

Jenny A. Moore