

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
Friday, October 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 at or excused from the meeting were:

Name	Present	Excused
Judge John Dailey, Chair	X	
Sheryl Berry	X	
Judge Shelley Gilman	X	
Judge Deborah Grohs	X (phone)	
Judge Morris Hoffman		X
Matt Holman	X	
Abe Hutt	X	
Judge Chelsea Malone	X	
Kevin McGreevy	X	
Judge Dana Nichols	X (phone)	
Robert Russel		X
Karen Taylor	X	
Sheryl Uhlmann	X (phone)	
David Vandenberg	X	
Non-Voting Participant		
Karen Yacuzzo	X	

I. Attachments & Handouts

- A. October 18, 2019 agenda
- B. July 19, 2019 minutes
- C. Rule 41 documents: proposed revisions and email explanation; *Cardman v. People*, 2019 CO 73 and *Phillips v. People*, 2019 CO 72
- D. Rule 44 documents: transmittal letter and email
- E. Access to Criminal Court Records in Criminal Cases rule draft and discussion items

II. Approval of Minutes

- A. The July 19, 2019 minutes were approved as submitted.

III. Announcements from the Chair

- A. Judge Dailey introduced new committee member Denver County Court Judge Chelsea Malone. Judge Malone came highly recommended by Karen Taylor and Kevin McGreevy.

IV. Old Business

A. New Criminal Rule—Public Access to Court Records

Subcommittee Chair Judge Grohs presented the committee with a draft of a rule, broken down into sections, with questions pertaining to each section needing to be addressed. Those questions were discussed; various recommendations were made as to how the questions should be addressed in the rule; and, in some instances, the committee asked the subcommittee to consider alternative ways of covering a subject.

Examples of the first (i.e., committee recommendations) were: adding a provision specifying a time within which a party could respond to a motion to limit access; not defining the word “public” but in certain instances specifying when only *court staff, parties, attorneys of record should have access to the document or parts of a document*; adding back into the rule the concept that documents are “presumed open to the public unless. . . .”; removing or replacing a “compelling interest” standard for restricting access to documents; removing redundant parts of the proposal; removing a portion of the proposed rule dealing with preservation of records; not including provisions setting forth a specific time for completing review of motions or expressly stating that requests for access to items should go to the judge presiding over the case; and moving the content of a separate sua sponte orders section (section h) into section (a).

(Most of these recommendations were arrived at by a consensus of the committee; several others were approved by a vote, the closest split of which was 7-3.)

An example of where the committee asked the subcommittee to consider drafting alternative ways of covering a subject concerned the issue of whether a hearing on a motion should be closed. The committee suggested that the subcommittee draft two versions of the rule, one using the language the hearing would be “closed unless” and another stating that “a party may request that a hearing be closed.”

The committee discussed whether to include an effective date with the proposed rule. The group mentioned that an effective date would need to be coordinated with the State Court Administrator’s Office (SCAO) to ensure proper training for clerks of court and time for IT to implement changes. The committee decided that a suggested effective date should be included in the transmittal letter to the supreme court.

Judge Dailey mentioned that David Migoya of the Denver Post wrote to the Public Information Office at SCAO to query whether a judge’s order sealing a case will be public. Judge Dailey assumes that these orders will be open to the public. Justice

Samour commented that the rule will have to address this. Judge Dailey asked that the issue of providing notice to the media be addressed in the transmittal letter.

Kevin McGreevy asked if the subcommittee could look at whether a party can ask for a temporary restriction of access to items. He shared an example: if the opposing party files something that should have been restricted, can the opposing counsel file something to request immediate restriction until the court goes through its process? Judge Dailey asked Mr. McGreevy to work with Judge Grohs on adding some language like this to the rule.

Judge Dailey commended the committee – but especially the subcommittee -- for all its hard work on this project. Justice Samour echoed this sentiment.

B. Crim P. 44(e) (taken first)

The supreme court considered 44(e) but found an inconsistency in the proposed draft. They suggested fixing the inconsistency by adding, “, if applicable” in the last sentence of Crim. P. 44(e)(1). Justice Samour told the committee to please not feel bound by this suggestion. The committee voted 11-0 to approve the additional change to the proposed rule.

The proposed rule now reads:

Rule 44. Appearance of Counsel

(a) - (d) [NO CHANGES]

(e) Termination of Representation.

(1) Unless otherwise directed by the trial court or extended by an agreement between counsel and a defendant, counsel's representation of a defendant, whether retained or appointed, shall terminate ~~when at the conclusion of trial court proceedings have concluded. and after a final determination of restitution.~~ Trial court proceedings ~~shall conclude~~ “have concluded” when restitution, if applicable, is finally determined and at the point in time:

(I) When dismissal is granted by the court and no timely appeal has been filed;

(II) When the parties have entered into an agreement for pretrial diversion or when an order enters granting a ~~deferred prosecution~~, deferred sentence, or probation if no sentence to incarceration is imposed;

(III) After a sentence to incarceration is imposed upon conviction when no motion has been timely filed pursuant to Crim P. 35(b) or such motion so filed is ruled on; or

(IV) When a timely notice of appeal is filed by the defendant.

(2) At the time a [pretrial diversion order is entered](#) ~~deferred prosecution~~ or deferred sentence is granted or at the time sentence is imposed upon conviction, the court shall inform the defendants when representation shall terminate.

V. New Business

A. Crim. P. 41— Search, Seizure, and Confession

A judge contacted Judge Dailey to inquire whether the rules committee would be interested in amending Rule 41 in response to the supreme court's decisions in *Cardman v. People* and *Phillips v. People*. In those cases, the supreme court held that matters not raised in pretrial motions to suppress are not waived but only forfeited, and thus, are subject to plain error review. The committee voted 7-3 in favor of not forming a subcommittee to address this issue.

VI. Future Meetings

January 17, 2020
April 17, 2020
July 17, 2020

The committee adjourned at 2:37 PM.