

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
Friday, April 15, 2022

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 Supreme Court Conference Room. Members present at or excused from the meeting were:

Name	Present	Excused
Judge John Dailey, Chair	X	
Sheryl Berry	X	
Christian Champagne	X	
Judge Kandace Gerdes		X
Judge Shelley Gilman	X	
Judge Deborah Grohs	X	
Matt Holman	X	
Abe Hutt	X	
Judge Chelsea Malone	X	
Kevin McGreevy	X	
Judge Dana Nichols	X	
Robert Russel	X	
Karen Taylor	X	
Sheryl Uhlmann	X	
Non-Voting Participant		
Karen Yacuzzo	X	

I. Attachments & Handouts

- A. April 15, 2022 agenda
- B. January 21, 2022 minutes
- C. Letter and email from Senator Pete Lee; SB 22-128 as introduced
- D. Crim. P. 43 email from Ms. Uhlmann and current rule

II. Approval of Minutes

- A. The January 21, 2022 minutes were approved by acclamation with the following edits: added the word “and” at the bottom of page between “issue” and “appointed” and deleted the repeated language “presented in time periods” at the top of the second page.

III. Announcements from the Chair

- A. Chair Judge Dailey introduced the newest member of the committee, Christian Champagne, the elected district attorney for the Sixth Judicial District. Mr. Champagne takes the place of former member David Vandenburg.

- B. Judge Dailey also noted that, because of her impending retirement, Judge Grohs will be leaving the committee. He congratulated her on her upcoming retirement and thanked her for her impactful service on the committee since 2014.

Judge Dailey asked for recommendations to fill the vacancy that'll be left by Judge Grohs' retirement. One member noted that she would like to see more diversity on the committee; and another commented that the use of video technology has made it easier for geographically dispersed members to participate more meaningfully. Judge Dailey encouraged members to submit recommendations.

IV. Old/New Business

A. Combatting Implicit Bias in Jury Selection (Judge Dailey)

Judge Dailey recounted receiving a letter from state senator Pete Lee (a copy of the letter has been provided to the committee members). In the letter, Senator Lee, joined by another senator and two members of the house of representatives, (1) asked the committee to revisit the subject of proposing a rule to the supreme court substantially similar to the one the supreme court sent back with questions and comments. (The earlier proposal had addressed efforts to combat implicit racial bias in jury selection; consistent with one of the questions asked by the supreme court, the legislators asked us to consider addressing gender bias as well in a new proposal.); Senator Lee's letter also asked the committee to collect data relevant to the subject at hand.

Judge Dailey noted that there had also been a few articles in the newspapers, suggesting that the supreme court had acted precipitously and had not taken the prior proposal seriously. A couple committee members had been quoted in the articles.

Judge Dailey told the committee that, from his perspective, the supreme court had taken the prior proposal seriously. He recounted how committee members had first discussed adopting a rule in October 2020; how a subcommittee was formed and did extensive research, drafted a proposal, and presented it for the committee's consideration in January 2021; how the proposal had been approved by a majority of the committee at that time; how the committee had submitted the proposal, along with majority and minority reports, to the supreme court; and how, after considering the proposal and the reports, the supreme court presented the committee with a three-page memorandum, asking about various parts of the proposal, expressing concern about some aspects of the proposal, and inquiring whether greater consensus could be reached on some of its provisions; and how, after discussing the supreme court's memo line by line, as well as various compromise proposals from the minority group, the majority of the committee voted to re-submit the proposal in its original form without a single modification; and how, only then, did the supreme court reject the proposal with a note saying, "If the committee comes up with a similar proposal in the future that has greater consensus, the court will, of course, consider it."

Judge Dailey noted that, as to the criticism of the court for not holding a public hearing, in his decades-long tenure as a member and chair of this committee, there have been very few public hearings on rule proposals (he could recall only two in the past twenty years). He also noted that, contrary to the assumption made by Senator Lee in his letter, the committee is not well-suited to assemble data on the subject; indeed, he said, the legislature itself might be in a better position to do that.

Judge Dailey expressed, again his view, that neither Senator Lee's letter nor the news reports depicted a whole or accurate history of what had occurred, and that those sources had portrayed the supreme court in an unduly negative light.

All that said, Judge Dailey then opened the floor for discussion. Many members supported the idea of continuing to work on the subject to submit another proposal to the supreme court. One judge noted that anecdotally, fewer people of color have been showing up to jury duty, and that perhaps a rule would encourage greater participation and buy-in of the judicial system. Another member noted that if this committee and court do not pursue a rule, the legislature might do so, with the issue becoming overly politicized and resulting in an unworkable, perhaps harmful, rule. Members mentioned that the supreme court is not expecting unanimity on the issues but would be hopeful of compromise on a few issues. One member noted that the supreme court has effectively twice now requested to see something closer to a consensus view and it's the committee's obligation to propose a rule that contains greater accord.

Based on the discussion, Judge Dailey reappointed the original subcommittee of Kevin McGreevy, Judge Gilman, Judge Nichols, Bob Russel, and Sheryl Uhlmann, to consider submitting another proposal, perhaps with greater consensus on parts of it. Because the committee is passionate about this project and because there are new voices on the committee, Judge Dailey also added three new members to the subcommittee: Judge Malone, Karen Taylor, and Christian Champagne.

Mr. McGreevy remains the subcommittee chairperson.

B. Crim. P. 43(e)(3)— Consent of the Defendant to Proceed by Interactive Audio or Audio-Visual Device at Trial (Sheryl Uhlmann)

Sheryl Uhlmann brought this item to the committee's attention when she discovered that the current rule does not require the consent of the defendant to proceed by interactive audio or audio-visual device at a court trial. It was perhaps an oversight when the committee drafted this previously. Ms. Uhlmann recommended adding something that would authorize the use of these devices for a court trial on the consent of the defendant. The committee discussed how to make the change, along with issues such as whether a jury trial in a criminal arena could occur remotely, and what complications that may create. A motion was made, seconded, and, after a friendly amendment was accepted, approved by a vote of 12-0. Ms. Uhlmann will draft the transmittal letter to the court.

Rule 43. Presence of the Defendant

(a) – (d) [NO CHANGE]

(e) **Presence of the Defendant by Interactive Audiovisual Device or Interactive Audio Device.**

(1) – (2) [NO CHANGE]

(3) The consent of the defendant shall be required prior to conducting any of the following types of proceedings by the use of an interactive audiovisual device or an interactive audio device pursuant to this subsection (e):

- (I) Entry of guilty plea;
- (II) [Trial to the court;](#)
- (~~III~~) Sentencing hearings;
- (~~IV~~) Probation and deferred sentence revocation hearings;
- (~~V~~) Preliminary hearings;
- (~~VI~~) Pre-trial motions hearings;
- (~~VII~~) Hearings to modify bail;
- (~~VIII~~) Restitution hearings; and
- (~~IX~~) Crim. P. 35(b) and (c) hearings.

(4) – (5) [NO CHANGE]

COMMENT [NO CHANGE]

V. New Business

None.

VI. Future Meetings

July 15th, 2022

October 21st, 2022

The committee adjourned at 1:42 PM.