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January 6, 2010

Honorable Paul L. Reiber
Vermont Supreme Court
109 State Street
Montpelier, VT 05609-0801

RE: 2009 Annual Report of the Advisory Committee on the Rules of Criminal Procedure

Dear Chief Justice Reiber:

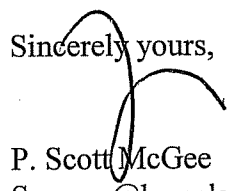
On behalf of the Advisory Committee on the Rules of Criminal Procedure, I am herewith transmitting the 2009 Annual Report of the Committee. Appended to the Annual Report is a proposed promulgation order containing proposed amendments and Reporters Notes that the Committee is recommending for circulation to the Bar for comment.

I am sending you under separate transmittal letter two proposed promulgation orders containing amendments to the Rules that have been circulated to the Bar for comment and that the Committee is now recommending to the court for promulgation.

Please let me know if you have any questions regarding the Annual Report or the status of any matters pending before the committee.

Our next meeting will be held on January 15, 2009.

Sincerely yours,


P. Scott McGee
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PSM/bd
enclosure

cc: Robert Greemore, Court Administrator
Professor L. Kinvin Wroth, Reporter
All Members, Criminal Rules Advisory Committee

VERMONT SUPREME COURT
Advisory Committee on Rules of Criminal Procedure

2009 Annual Report

The Committee submits this report to the Supreme Court pursuant to Administrative Order No. 20, § 5. This report covers the Committee's activities since the submission of its last annual report on October 27, 2009. Since that report, the Committee has met three times on April 10, June 26, and September 18, 2009, to consider amendments or other matters pertaining to the Vermont Rules of Criminal Procedure and relevant provisions of the Vermont Rule of Appellate Procedure. During the year, Thomas J. Donovan, Jr., Chittenden County State's Attorney was appointed to the Committee to replace John T. Quinn, and Daniel H. Maguire was designated as Vermont Bar Association representative.

On November 12, 2008, effective January 2, 2009 the Supreme Court promulgated an amendment to V.R.Cr.P. 24(f) that had been recommended with revisions to reflect comments received from the Joint Legislative Committee on Judicial Rules on October 30, 2007. and an amendment to V.R.Cr.P. 43(c) addressing the request of the Court in *State v. Brown*, No. 2003-384, 2005VT 104, at ¶ 15 (8/26/05), that the Committee consider the potential inconsistency between the language of Rule 43(c)(3) and the language in the District Court's computer-generated notice form for hearings that had been recommended as circulated, there having been no comments from the bar. *See* [http://www.vermontjudiciary.org/rules/Promulgated/vrcrp24\(f\)and43\(c\)\(3\)amended.pdf](http://www.vermontjudiciary.org/rules/Promulgated/vrcrp24(f)and43(c)(3)amended.pdf)). These amendments were reviewed by the Legislative Committee on Judicial Rules on December 8, 2008, and January 14, 2009, without suggested changes.

On December 17, 2008, effective January 1, 2009, the Court promulgated an emergency amendment to V.R.Cr.P. 56(d), allowing the Supreme Court to provide for methods of notice by the clerk that would reduce the cost of service, with a direction that the Advisory Committee report on any comments received by September 30, 2009. *See* [http://www.vermontjudiciary.org/rules/Promulgated/vrcrp77\(d\)_vrcrp56\(d\)_vrpp77\(d\)_vrap45\(c\)noticebyclerk.PROMULGATED.pdf](http://www.vermontjudiciary.org/rules/Promulgated/vrcrp77(d)_vrcrp56(d)_vrpp77(d)_vrap45(c)noticebyclerk.PROMULGATED.pdf). This amendment was reviewed by the Legislative Committee on Judicial Rules on January 14, 2009, without comment. Comments received from the District Court Oversight Committee, the state's attorneys, and attorneys in the office of the Defender General will be reported to the Court by separate letter.

On December 17, 2008, effective January 1, 2009, the Court promulgated emergency amendments to A.O. 38, allowing video conferencing on a case-by-case basis as well as a county-by-county basis, in order to reduce the cost of transporting lodged defendants in the face of economic exigencies, with a direction that the Advisory Committee report on any comments received by September 30, 2009. *See* http://www.vermontjudiciary.org/rules/Promulgated/A.O.38amendment_PROMULGATED.pdf. These amendments were reviewed by the Legislative Committee on Judicial Rules on January 14, 2009, without suggested changes. Comments received from the District Court Oversight

Committee, the state's attorneys, and attorneys in the office of the Defender General will be reported to the Court by separate letter.

On January 14, 2009, effective February 1, 2009, the Court promulgated emergency amendments to V.R.Cr.P. 5(f) and 18, enabling a court to reduce the costs of transporting defendants by ordering a defendant to appear for first appearance and arraignment in the court nearest the correctional center in which the defendant is detained, were promulgated, with a direction that the Advisory Committee report on any comments received by September 30, 2009. See

http://www.vermontjudiciary.org/rules/Promulgated/PROMULGATEDamendingVRCRP5_f_and_18.Signed.pdf. These amendments have not been reviewed by the Legislative Committee on Judicial Rules. Comments received from the District Court Oversight Committee, the state's attorneys, and attorneys in the office of the Defender General will be reported to the Court by separate letter.

On November 21, 2008, the following amendments were circulated for comment, with comments due on January 26, 2009: V.R.Cr.P. 16.1(c) (exempt law enforcement officers who have participated in the investigation from rule limiting prosecution access to witnesses first included on a defense witness list); V.R.Cr.P. 18(b) (added to require prosecution of pre-trial release violations in the county or circuit of the court that issued order unless defendant charged with new offense); V.R.Cr.P. 24(d) (add language permitting court to retain alternate jurors after jury retires in order to ensure availability of sufficient number of jurors if a sitting juror is unable to complete deliberations); V.R.Cr.P. 32(a) and (b) (correct gender references and permit clerk to sign a judgment reflecting court's ruling from the bench); V.R.Cr.P. 32(c) (provide defense attorneys notice and opportunity to attend PSI interviews of defendant). See [http://www.vermontjudiciary.org/rules/proposed/VRCrP16.1\(c\)_18\(b\)_24\(d\)_32\(b\)PROPOSED.pdf](http://www.vermontjudiciary.org/rules/proposed/VRCrP16.1(c)_18(b)_24(d)_32(b)PROPOSED.pdf). These amendments were reviewed by the Legislative Committee on Judicial Rules on December 8, 2008, and January 14, 2009, without suggested changes. No other comments were received. The amendments will be recommended by separate letter for promulgation as circulated.

On March 4, 2009, the Legislature, by § 26 of Act No. 1 of 2009, An Act Relating to Improving Vermont's Sexual Abuse Response System, effective July 1, 2009, added V.R.Cr.P. 15(e)(5) and amended V.R.Cr.P. 15(f) to make provision for depositions of victims under the age of 16 in prosecutions for lewd and lascivious conduct and sexual assault. The Committee will recommend by separate letter an emergency amendment making style amendments to the amendments as enacted.

The remainder of this report summarizes the Committee's activities under three headings: I. Proposed amendments recommended for circulation to the bar for comment. II. A proposed amendment considered by the Committee and not recommended for circulation or promulgation at this time. III. Matters remaining on the Committee's agenda.

I. PROPOSED AMENDMENTS RECOMMENDED FOR CIRCULATION TO THE BAR

The Committee recommends the circulation to the bar for comment of the following proposed amendments (A proposed promulgation order is appended to this report.):

1. An amendment of V.R.Cr.P. 3(c)(9) to conform the rule to provisions regarding abuse of vulnerable adults for conformity with the language of legislative changes recodified in Title 13, Chapter 28, adopted in Acts of 2005, No. 79.

2. Amendments adding V.R.Cr.P. 26(e) and V.R.A.P. 10 (b)(8) to provide a procedure that will ensure accurate identification of portions of audio and video recordings actually presented to the fact-finder at trial, as asked by the Supreme Court in *State v. Lee*, 2008 VT 128, paragraph 9.

3. An amendment to bring V.R.Cr.P. 32(c)(4) into conformance with a 1999 legislative change to 13 V.S.A. § 5231.

4. An amendment of V.R.Cr.P. 41 to reorganize the present rule, extend its present provisions concerning issuance of warrants by fax to include other electronic means, and add provisions for warrants to monitor conversations.

5. Amendments of V.R.Cr.P. 44.2(b) and A.O. 41 that were recommended for circulation in the Committee's 2008 annual report but not circulated pending further comment from the Court Administrator and Board of Bar Examiners. The amendments would permit nonresident attorneys clerking or employed as government attorneys to appear in all actions assigned by the supervising attorney on the basis of a single motion.

II. PROPOSED AMENDMENT NOT RECOMMENDED

The District Court Oversight Committee proposed that V.R.Cr.P. 32(d) be amended to impose a one-year limit on withdrawing pleas in "fine only" cases in order to limit collateral attack long after conviction. The Oversight Committee has withdrawn its proposal on the ground that the practice was no longer a problem in the trial courts. Accordingly, the Advisory Committee will take no action on the proposal.

III. MATTERS REMAINING ON THE COMMITTEE'S AGENDA

The following matters remain on the Committee's agenda for further consideration:

1. V.R.Cr.P. 30. The Committee will consider whether Rule 30 should be amended to permit the court, at its election to instruct the jury before or after argument, or both, as requested by the District Court Oversight Committee.

2. V.R.Cr.P. 43. The Committee will continue to consider whether Rule 43 should be clarified to address the question whether the defendant could choose not to be present at sentencing.

In closing, the Committee and the Reporter wishes to express its appreciation to John T. Quinn, Addison County State's Attorney, and Assistant Attorney John Treadwell for their years of service on the Committee. The Committee also wishes to thank Hon. Brian Burgess for his guidance as Supreme Court liaison, and all the members of the Vermont bench and bar, the members of the Legislative Committee on Judicial Rules, former Court Administrator Lee Suskin, Deb Laferriere, and others who have participated in the rule-making process through their thoughtful suggestions, comments, and assistance.

Submitted under date of January 6, 2010

A handwritten signature in black ink, appearing to read 'P. Scott McGee', with a stylized, flowing script.

P. Scott McGee, Chair

For the Committee:

Hon. William H. Sorrell (Cindy J. Maguire,
designee)
Hon. Matthew Valerio (Anna Saxman, designee)
Bonnie Barnes
Susan Carr
Joanne Charbonneau
Hon. James R. Crucitti
Thomas J. Donovan, Jr.
Mark A. Kaplan
Hon. Mark Keller
Daniel H. Maguire
Karen Shingler
Hon. David Suntag

Hon. Brian L. Burgess, Supreme Court Liaison
Professor L. Kinvin Wroth, Reporter

ATTACHMENT

PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2010

**Order Promulgating Amendments to the Vermont Rules of Criminal and Appellate
Procedure and Administrative Order No. 41**

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 3(c)(9) of the Vermont Rules of Criminal Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 3. ARREST WITHOUT A WARRANT; CITATION TO APPEAR

(c) **Nonwitnessed Misdemeanor Offenses.** If an officer has probable cause to believe a person has committed or is committing a misdemeanor outside the presence of the officer, the officer may issue a citation to appear before a judicial officer in lieu of arrest. The officer may arrest the person without a warrant if the officer has probable cause to believe:

(9) The person has abused, as defined in 33 V.S.A. § 6902(1), committed a misdemeanor offense prohibited by 13 V.S.A. §§ 1376-1379 against a vulnerable adult; as defined in 33 V.S.A. § 6902(14) 13 V.S.A. § 1375(8); ~~or a minor child of a vulnerable adult.~~

Reporter's Notes—2010 Amendment

Rule 3(c)(9) is amended to conform to legislative changes that moved provisions establishing criminal offenses against vulnerable adults from Title 33, Chapter 69, Subchapter 1, to a new Chapter 28 in Title 13. See Act No. 79 of 2005. Though the definitions deleted in this amendment remain in Title 33, those provisions now define conduct for purposes of mandatory reporting. The new language, as appropriate for rules relating to criminal proceedings, embraces the provisions of 13 V.S.A. §§ 1376-1378 that establish various specific offenses against vulnerable adults. The definition of that term is that found in 13 V.S.A. § 1375(8), a more recent version of the language of 33 V.S.A. § 6902 (14) previously incorporated in the rule. The reference to "a minor child of a vulnerable adult" is deleted from the rule, because neither Title 33 nor Title 13 creates a separate

offense of abuse of such a minor child. To the extent that abuse of a minor child causes "unnecessary harm, ...pain, or ...suffering to a vulnerable adult, the conduct is covered by 13 V.S.A. § 1376.

2. That Rule 26(e) of the Vermont Rules of Criminal Procedure be added to read as follows:

RULE 26. EVIDENCE

(e) Record of Audio and Video Recordings Submitted as Evidence. Whenever an audio or video recording of any statement or other evidence is presented as evidence to the trier of fact in the course of a trial, the party offering the evidence shall clearly identify on the record the starting and stopping points of the portions actually presented to the trier by reference to frame or other indicators on the recording medium or to specific words in the recording.

Reporter's Notes—2010 Amendment

Rule 26(e) is added to provide a procedure that will ensure accurate identification of portions of audio and video recordings actually presented to the fact-finder at trial, as asked by the Supreme Court in *State v. Lee*, 2008 VT 128, paragraph 9, a case in which a videotape offered in evidence did not indicate which portions of the recording were played to the jury. The effect of the rule is that the party offering the evidence is responsible for making sure that the record will clearly state which portions of the recording were presented at trial. A simultaneous amendment adding V.R.A.P. 10(b)(8) requires the party or clerk ordering a transcript or other statement of the evidence at trial to make sure that the transcript or statement contains the information required by Rule 26(e).

3. That Rule 32(c)(4) of the Vermont Rules of Criminal Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 32. SENTENCE AND JUDGMENT

(c) Sentencing Information.

(4) *Right to Comment and Offer Evidence.* Prior to imposing sentence, the court shall afford the state, the defendant and his attorney an opportunity to comment upon any and all information submitted to the court for sentencing. Any objection to facts contained in the presentence investigation report shall be submitted, in writing, to the court at least three days prior to the sentencing hearing, unless good cause is shown for later objection. Either party may offer evidence, including hearsay, specifically on any disputed factual

issues in open court with full rights of cross-examination, confrontation, and representation. When a defendant objects to factual information submitted to the court or otherwise taken into account by the court in connection with sentencing, the court shall not consider such information unless, after hearing, the court makes a specific finding as to each fact objected to that the fact has been shown to be reliable by a preponderance of the evidence, including reliable hearsay. If the court does not find the alleged fact to be reliable, the court shall either make a finding that the allegation is unreliable or make a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report or other controverted document thereafter made available by the court to the Department of Corrections. ~~On request of the victim of a felony, or the next of kin of such a victim who has died or become incapacitated, who appears at sentencing, the state shall offer as evidence the statement of such a victim or next of kin relative to the crime, the defendant and the need for restitution. At sentencing, the court shall ask if the victim is present and, if so, whether the victim would like to be heard concerning the crime, the person convicted, and the need for restitution. In imposing sentence, the court shall consider any views offered at the hearing by the victim or next of kin of such victim who has died or become incapacitated. If the victim is not present, the court shall ask whether the victim has expressed, either orally or in writing, views regarding sentencing. If so, the state may present such views through a competent witness having first-hand knowledge of the views attributed to the victim, and the court shall take those views into consideration in imposing sentence along with other evidence whether supportive or contradictory that has been introduced at sentencing.~~ The statement shall be given under oath, subject to cross-examination, and the defendant, the defendant's attorney and the state may comment on the information provided by the victim or the next of kin of the victim.

Reporter's Notes—2010 Amendment

The provisions relating to statements by victims and their next of kin are amended in light of the 1999 amendments to the statutory rights of victims. *See* 13 V.S.A. § 5231. The prior rule only provided for comment by victims of felonies. The 1999 amendments provide for statements by victims of any offense.

While victim is not defined in the rule, 13 V.S.A. § 5301(4) provides that “‘victim’ means a person who sustains physical, emotional or financial injury or death as a direct result of the commission or attempted commission of a crime or act of delinquency and shall also include the family members of a minor, incompetent or a homicide victim.”

The prior rule required that all statements by victims at sentencing be made under oath and subject to cross-examination. This is not the general practice in the Vermont District Court. Victim statements address both facts and evidence to be considered by the sentencing judge and opinions and comments regarding the particular resolution. If a defendant is contesting the victim's factual assertions the

victim's statement should be made under oath and subject to cross-examination unless the court indicates on the record that it will not rely on the contested factual assertions in determining the sentence. Additionally, Rule 32(c)(3) provides that

Any other information submitted to the court for consideration at sentencing shall be disclosed sufficiently prior to the imposition of sentence as to afford reasonable opportunity for the parties to decide what information, if any, the parties intend to controvert by the production of evidence.

This language provides the opportunity for a defendant to seek a continuance if the victim presents previously undisclosed facts and the court indicates that it will consider those facts in determining the sentence.

4. That Rule 41 of the Vermont Rules of Criminal Procedure be abrogated and replaced to read as follow:

RULE 41. SEARCH AND SEIZURE

(a) Authority To Issue a Warrant. A search warrant authorized by this rule may be issued only by a judicial officer upon request of a law enforcement officer, an attorney for the state, or any other person authorized by law.

(b) Grounds for Issuance. A warrant may be issued under this rule to

(1) search for and seize any

(A) evidence of the commission of a criminal offense, or

(B) contraband, the fruits of crime, or things otherwise criminally possessed, or

(C) weapons or other things by which a crime has been committed or is about to be committed, or

(D) person who has been kidnapped or unlawfully imprisoned or restrained in violation of the laws of this state, or who has been kidnapped in another jurisdiction and is now concealed within this state, or any human fetus or human corpse, or

(2) search for a person whose arrest is authorized by law; or

(3) monitor conversations for which one party has consented in order to obtain evidence of the commission of a crime.

(c) Issuance and Contents.

(1) *Probable Cause.* A judicial officer shall issue the warrant if the judicial officer is satisfied that there is probable cause to believe that grounds for the application exist based upon an affidavit or affidavits or sworn testimony or both. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is factual basis for the information furnished.

(2) *Particularity.* The warrant shall identify:

(A) the property or other object of the search and name or describe the person or place to be searched, or

(B) the conversations to be monitored.

(3) *Requesting a Warrant in the Presence of a Judicial Officer.*

(A) *Warrant on an Affidavit.* When a law enforcement officer, an attorney for the state, or other person authorized by law presents an affidavit in support of a warrant, the judicial officer may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) *Warrant on Sworn Testimony.* The judicial officer may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) *Recording Testimony.* Testimony taken in support of a warrant shall be recorded by a court reporter or by a suitable recording device, and the transcript or recording shall be filed with the clerk, along with any affidavit.

(4) *Requesting a Warrant by Reliable Electronic Means.*

(A) *In General.* When a law enforcement officer, an attorney for the state, or other person authorized by law so requests, a judicial officer may issue a warrant based on information communicated by reliable electronic means.

(B) *Transmitting and Affirming Affidavits.* Upon learning that an applicant is requesting a warrant under Rule 41(c)(4), a judicial officer shall inform the applicant that a signed or unsigned affidavit shall be transmitted electronically to the judicial officer. The warrant affidavit shall be sworn to or affirmed by administration of the oath over the telephone by the judicial officer. The administration of the oath need not be made part of the affidavit or recorded, but the judicial officer shall note on the affidavit that the oath was administered. The determination of probable cause for issuance of the warrant shall be made solely on the contents of the affidavit or affidavits provided.

(C) Warrant by Reliable Electronic Means. If the judicial officer proceeds under this subsection, the following additional procedures apply:

(i) Transmission to a Judicial Officer. The applicant shall prepare an original warrant and shall transmit it to the judicial officer by reliable electronic means.

(ii) Modification. The judicial officer may modify the original warrant. The judge shall transmit a copy of the modified warrant to the applicant by reliable electronic means.

(iii) Signing the Warrant. Upon determining to issue the warrant, the judicial officer shall immediately sign the original warrant with any modifications, enter on its face the exact date and time it is issued, and transmit a copy by reliable electronic means to the applicant.

(iv) Filing of the Warrant. The judicial officer shall file with the clerk by an appropriate means the signed original or modified warrant and the affidavit. The clerk shall enter the signed original or modified warrant on the docket when filed. At the time of making the return, a copy of the warrant as served shall be filed with the clerk.

(5) *Contents of the Warrant.*

(A) In General. The warrant shall be directed to a law enforcement officer of the state of Vermont authorized to enforce or assist in enforcing any law thereof. The warrant shall command the officer to search the person or place named for the property or other object specified and seize the property or object and, if appropriate, the person specified. The warrant shall also command the officer to:

(i) serve the warrant within a specified period of time not to exceed 10 days from issuance;

(ii) serve the warrant between the hours of 6:00 A.M. and 10:00 P.M. unless the judicial officer for reasonable cause shown authorizes execution at other times; and

(iii) return the warrant to the court designated in the warrant.

(B) Warrant for Monitoring a Conversation. The warrant shall be directed to a law enforcement officer of the state of Vermont authorized to enforce or assist in enforcing any law thereof. The warrant shall command the officer to monitor conversations for which one party has consented. The warrant shall identify the non-consenting parties to the conversation, if known. The warrant may indicate that multiple conversations may be monitored and that it may be executed on

multiple occasions. The warrant shall command the officer to:

(i) execute the warrant within a specified period of time not to exceed 10 days from issuance;

(ii) execute the warrant between the hours of 6:00 A.M. and 10:00 P.M. unless the judicial officer for reasonable cause shown authorizes execution at other times; and

(iii) return the warrant to the court designated in the warrant.

(d) Execution and Return of the Warrant.

(1) *Execution.* The officer taking property under the warrant shall:

(A) give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken; or

(B) shall leave the copy and receipt at the place from which the property was taken.

(2) *Inventory.* A written inventory of any property taken shall be made in the presence of the applicant for the warrant, or the officer serving the warrant, and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant, officer serving the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer.

(3) *Return.* The return shall be made promptly and shall be accompanied by the inventory. The clerk of the court to which the warrant was returned shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(4) Execution and Return of a Warrant for Monitoring A Conversation.

(A) *Noting the Time.* A law enforcement officer executing a warrant for monitoring a conversation shall enter on the warrant the exact date and time that the warrant was executed and the period of time that any monitoring occurred.

(B) *Return.* If the warrant is executed a return shall be made within 90 days. Upon certification by a law enforcement officer, an attorney for the state, or any other person authorized by law that an investigation related to the warrant is ongoing, a judicial officer may authorize an extension of the time for making the return for such period as the judicial officer deems reasonable. The return shall identify:

(i) the identity of any non-consenting parties to the conversation, if known;

(ii) the date and time of any monitored conversations; and

(iii) the approximate length of any monitored conversations.

(C) **Service.** At the time the return is made, the law enforcement officer executing a warrant for monitoring a conversation shall serve a copy of the warrant on any known non-consenting parties to the conversation. Service may be accomplished by delivering a copy to the known non-consenting parties; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location; or by mailing a copy to the person's last known address. Upon certification by a law enforcement officer, an attorney for the state, or any other person authorized by law that an investigation related to the warrant is on-going, a judicial officer may authorize an extension of the time for serving the return for such period as the judicial officer deems reasonable. Service need not be made upon any person against whom criminal charges have been filed related to the execution of the warrant.

(e) **Motion for Return of Property.** A person aggrieved by an unlawful search and seizure may move the court to which the warrant was returned or the court in the county or territorial unit where property has been seized without warrant for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judicial officer shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. After an indictment or information is filed, a motion for return of property shall be made or heard only in the county or territorial unit of trial and shall be treated as a motion to suppress under Rule 12(b)(3).

(f) **Motion To Suppress.** A defendant aggrieved by an unlawful search and seizure may make a motion to suppress evidence in the county or territorial unit of trial as provided in Rule 12(b)(3). If the motion is granted, the evidence shall not be admissible at the trial or at any future hearing or trial.

(g) **Definitions:** The following words wherever used in this rule shall have the following meanings:

(1) The term "property" is used in this rule to include documents, books, papers, and any other tangible objects except those listed in Rule 41.1(m)(3); and

(2) The term "reliable electronic means" shall include facsimile transmission, electronic mail, or other method of transmitting a duplicate of an original document.

Reporter's Notes—2010 Amendment

Rule 41 is abrogated and replaced with a significantly revised new rule. The changes are intended to make detailed provisions for the electronic issuance and transmission of search warrants and the use of “wire warrants” or other means of monitoring conversations. A number of changes are also intended to conform the rule to provisions of the Federal Rules of Criminal Procedure as “restyled” in 2002, but provisions not found in the Federal Rules are retained or revised as appropriate.

Rule 41(a) is unchanged from the former rule.

Rule 41(b)(1) and (2) are amended to make clear that a party subject to arrest cannot be “seized” merely by virtue of a search warrant. The authority to “seize” such a person comes either from the circumstances giving an officer authority to arrest without warrant under V.R.Cr.P. 3(a)-(c) or from an independently issued arrest warrant. *Cf.* Reporter's Notes to 1982 amendment of former Rule 41(b)(5). New Rule 41(b)(3) and related provisions of Rule 41(c)(2)(B), (5)(B), and (d)(4), governing monitoring of conversations, are new to Vermont. Under Vermont law, a warrant must be obtained to conduct electronic monitoring of conversations in a location where an individual has an expectation of privacy, but the former rule contained no express provisions for such a warrant, because “property” as defined in former Rule 41(g) and carried forward in new Rule 41(g)(1), only includes tangible objects. New Rule 41(b)(3) makes clear that one party to the conversation must have consented to the monitoring. The use of “may” in the first sentence of (b) means that other uses of monitoring are not barred.

Rule 41(c)(1)-(3), making general provisions and covering requests for a warrant made before a judicial officer, elaborate upon and clarify provisions of former Rule 41(c). See F.R.Cr.P. 41(d)(2). New Rule 41(c)(1) and (3) make clear what is implicit in the former rule that the judicial officer may find probable cause and issue the warrant on the basis of the affidavits or sworn testimony of the person seeking the warrant or another witness transcribed by a court reporter or recorded and may proceed on the basis of testimony alone if reasonable in the circumstances. Subparagraph (c)(3)(C) specifically requires the judicial officer to file with the clerk the transcript or recording of any testimony taken, as well as any affidavit.

Rule 41(c)(4), covering procedure for requesting a warrant by “reliable electronic means” (defined in Rule 41(g)(2)), is new, though similar in some respects to former Rule 41(h), which it would replace. The preference for face-to-face requests expressed in former Rule 41(h)(1) is not carried forward in the new rule. Subparagraph (c)(4)(A) makes explicit that the officers who may apply for a warrant personally as listed in subparagraph (c)(3)(A) may also apply electronically. It is the responsibility of the judicial officer to verify the identity

and authority of the officer in case of doubt. Subparagraphs (B) and (C) provide detailed procedures for assuring that the basic requirements of the oath and establishing the identity of the documents transmitted are satisfied. The applicant initially must electronically transmit the affidavit, which need not be signed, to the judicial officer, who administers the oath to the applicant by telephone. The judicial officer's notation of the oath on the affidavit serves as a record of the oath when the affidavit is transmitted to the clerk under (C)(iv). In contrast to an application in the judicial officer's presence, probable cause on an electronic application must be determined only on the basis of the affidavit or affidavits.

Under subparagraph (c)(4)(C), the original warrant prepared by the applicant, any modification of it by the judicial officer, and the signed and dated warrant when issued are electronically transmitted back and forth between the applicant and the judicial officer. Subparagraph (C)(iv) requires the judicial officer to file the signed warrant and the affidavit with the clerk "by an appropriate means," which can include hand delivery of a paper original warrant or electronic transmission by fax or by e-mail of a scanned signed warrant. The clerk's entry of the filed warrant on the docket when received assures positive identification of the document filed. The requirement that the warrant as served also be filed allows comparison of that document with the warrant filed by the judicial officer.

Paragraph 5 applies to all warrants whether applied for in the judicial officer's presence or electronically. Subparagraph (c)(5)(A) is a clarification of provisions of former Rule 41(c). Subparagraph (B) adapts the provisions of (A) to warrants for monitoring conversations. The requirement that nonconsenting parties be identified provides the basis for service on those parties at the time of the return pursuant to Rule 41(d)(4)(C).

Rule 41(d)(1)-(3) are adapted from former Rule 41(d) and are divided into subparagraphs similar to the style of F.R.Cr.P. 41(f). Paragraph (d)(4) makes specific provisions for the execution and return of a warrant for monitoring a conversation. Subparagraph (C) specifically requires service of the return upon nonconsenting parties. Both (B) and (C) allow the time for making and serving the return to be extended by a judicial officer upon certification that a related investigation is ongoing.

Former Rules 41(e) and (f) are carried forward unchanged. Rule 41(g) is amended by changing the title to "Definitions" and adding a definition of "reliable electronic means" to include fax, e-mail, or other electronic means of transmitting a duplicate original. Former Rule 41(h) concerning granting search warrants by fax is not carried forward because its content is embraced in other provisions of the new rule.

5. That Rule 44.2 of the Vermont Rules of Criminal Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 44.2 APPEARANCE AND WITHDRAWAL OF ATTORNEYS

(b) Attorneys Not Admitted in Vermont.

(1) *In General.* Any member in good standing of the bar of any other state or of the District of Columbia who has filed a pro hac vice licensing statement form with the Court Administrator and who has paid the required fee, in accordance with Administrative Order No. 41, § 13, may in the discretion of the court, on motion by a member of the bar of this state who is actively associated with him in a particular action, be permitted to practice in that action. The motion shall designate which attorney will serve as lead counsel. The court may at any time for good cause revoke such admission. An attorney so admitted to practice in a particular action shall at all times have associated with him or her in such action a member of the bar of this state, upon whom all process, notices and other papers shall be served and who shall sign all papers filed with the court and whose attendance may be required by the court.

(2) *Attorneys Completing Study in Government Attorneys' Offices.* Any member in good standing of the bar of any other state or of the District of Columbia who is completing study pursuant to Rule 7(d) of the Rules of Admission to the Bar, or who has completed such study and is awaiting admission to the Vermont bar, and who is working under the supervision of a member of a bar of this state practicing in the Office of the Defender General, an office that contracts with the Defender General to provide legal services, the Office of the Attorney General, or any State's Attorney's Office may, on motion by the supervising attorney in the superior court, or a district court, in the county where the nonresident attorney is supervised, be permitted to appear in all actions assigned by the supervising attorney for a specific designated time period. A government study licensing card issued pursuant to A.O. 41 §13A(c), which shall suffice for all actions the nonresident attorney shall be assigned to for the designated time period, shall be attached to the motion. No licensing fee shall be required for attorneys practicing under this paragraph.

Reporter's Notes—2010 Amendment

Present Rule 44.2 is designated Rule 44.2(b)(1), and Rule 44.2(b)(2) is added to permit attorneys in good standing from other states who are performing their three-month clerkship in Vermont government attorney offices, or who have performed the clerkship and are awaiting admission in such an office, to handle a regular volume of cases without having to file a separate motion and licensing statement for each case. It also waives the \$200 fee per case in view of the public

nature of the practice. The rule is implemented by the simultaneous addition of § 13A to Administrative Order No. 41. While the supervising attorney does not have to appear in each case with the clerking attorney, the supervising attorney has the oversight responsibilities provided by Rule 5.1 of the Vermont rules of Professional Conduct.

6. That Rule 10(b)(8) of the Vermont Rules of Appellate Procedure be added to read as follows:

RULE 10. THE RECORD ON APPEAL

(b) The Transcript of the Proceedings; Duty of the Appellant To Order; Stipulation or Order for Abbreviated Transcript.

(8) When any party, or the clerk, orders a portion of the transcript that contains words presented to the trier of fact by audio or video recording, it shall be the responsibility of that party or clerk to insure that the transcript contains the part of the record containing the identification of the starting and stopping of the portions of the recording actually presented as required by V.R.Cr.P. 26(e), or to include a clear statement identifying those portions in any statement of the evidence or agreed statement prepared in accordance with subdivision (c) or (d) of this rule.

Reporter's Notes—2010 Amendment

Rule 10(b)(8) is added to supplement V.R.Cr.P. 26(e), simultaneously added to provide a procedure that will ensure accurate identification of portions of audio and video recordings actually presented to the fact-finder at trial. See Reporter's Notes to V.R.Cr.P. 16(e). That rule makes the party offering the evidence responsible for making sure that the record will clearly state which portions of the recording were presented at trial. The present amendment requires the party or clerk ordering a transcript, a statement of the evidence under V.R.A.P. 10(c), or a statement of the case under V.R.A.P. 10(d) to make sure that the transcript or statement contains information identifying the portions of the recording played, as required by V.R.Cr.P. 26(e).

7. That Section 13A of Administrative Order No. 41 be added to read as follows:

Administrative Order No. 41

LICENSING OF ATTORNEYS

§ 13A. Attorneys Completing Study in Government Attorneys' Offices.

(a) A nonresident attorney who is not currently suspended or disbarred in any state or the District of Columbia and who is completing study pursuant to Rule 7(d) of the Rules of Admission to the Bar, or who has completed such study and is awaiting admission to the Vermont bar, and who is working under the supervision of a member of a bar of this state practicing in the Office of the Defender General, an office that contracts with the Defender General to provide legal services, the Office of the Attorney General, or any State's Attorney's Office may, on motion by the supervising attorney in the superior court, or a district court, in the county where the nonresident attorney is supervised, be permitted to appear in all actions assigned by the supervising attorney for a specific designated time period, provided that the supervising attorney has attached to the motion a government study licensing card issued to the nonresident attorney as provided in subsection (b) of this section.

(b) The nonresident attorney shall complete under oath and submit to the Court Administrator an application on a government study licensing statement form prescribed by the Court Administrator, to which shall be attached a Certificate of Good Standing from a state in which the applicant is admitted. No licensing fee shall be required for attorneys permitted to practice under this section.

(c) Upon the approval of the nonresident attorney's application, the Court Administrator shall issue to the nonresident attorney a government study licensing card indicating the specific designated time period for which the card is valid. The card shall be filed in the court granting the motion and in any other court in which the nonresident attorney appears during the designated time period.

(d) Section 13(d) of this Order applies to a nonresident attorney admitted under this section.

Reporter's Notes—2010 Amendment

Section 13A is added to Administrative Order No. 41 to provide a procedure under which nonresident attorneys (as defined in §13(a)) who are in good standing in other states and who are performing their three-month clerkship in Vermont government attorney offices, or who have performed the clerkship and are awaiting admission in such an office, may be permitted to handle a regular volume of cases without having to file a separate motion and licensing statement for each case. See simultaneous amendment of V.R.Cr.P. 44.2(b). New §13A(b) requires the filing of a "government study" licensing statement application with the Court Administrator and waives the \$200 fee per case charged for admission pro hac vice under § 13 in view of the public nature of the practice. Upon approval of the application and grant of the supervising attorney's motion in the court where

the nonresident attorney is supervised, a government study licensing card will be issued and filed in any court where the nonresident attorney appears for a specified period of time. The new section incorporates § 13(d), requiring the nonresident attorney to comply with all applicable Vermont statutes and rules.

8. That these rules and administrative order, as amended, are prescribed and promulgated to become effective on _____, 2010. The Reporter's Notes are advisory.

9. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this _____ day of _____, 2010.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice