

VERMONT SUPREME COURT
Advisory Committee on Rules of Criminal Procedure

2007 Annual Report
November 26, 2007

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 11, 2006. Since that report, the Committee has met once on September 7, 2007, to consider amendments or other matters pertaining to the Vermont Rules of Criminal Procedure. During the year, Anna Saxman was appointed to the Committee, replacing the late Henry Hinton as Defender General's designee.

The Committee reviewed emergency amendments adding V.R.Cr.P. 3(c)(17), promulgated and effective on July 6, 2006, as added by Act No. 192 of 2005 (Adj. Sess.), §20, and amending V.R.Cr.P. 11(c), promulgated July 6, 2006, effective September 1, 2006, as added by Act No. 121 of 2005 (Adj. Sess.), §2. The Committee was asked to report on any comments received on both rules by January 1, 2007. No comments were received.

The Committee reviewed an emergency amendment of V.R.Cr.P. 3(c)(6), promulgated September 29, effective October 1, 2006. The Committee was asked to report by April 2, 2007, on any comments received on the emergency amendment. The Chairman in a letter of April 4, 2007, reported that no comments had been received and that the Committee recommended no changes in the emergency amendment.

The Committee reviewed Rule 41(h). The rule had been scheduled to sunset on April 15, 2007, pursuant to Acts of 2001, No. 131 (Adj. Sess.), § 3, but the sunset was repealed by Acts of 2007, No.6, § 1. By letter of April 4, 2007, the Chairman McGee reported to the Supreme Court the sense of the Committee that the cumbersomeness of the procedure had led to its being seldom used, but that the Committee recommended an extension of the rule to permit consideration of revisions that might incorporate an e-mail component and would streamline the process while maintaining substantive safeguards. By order of April 19, 2007, effective that date, the Court promulgated an emergency amendment repealing the sunset and directing the Committee to report by September 14, 2007, on any amendments, including other electronic means of communication. See further discussion in Section III of this report.

On October 31, 2006, the Court Administrator circulated to the bar for comment amendments to Rules 12(d), 23(d), 24(e), and 24(f), which had been proposed in the Committee's 2006 Annual report dated October 11, 2006. Comments on these proposals were due by December 29, 2006. The Committee has reviewed all comments received and, in a separate letter, will recommend to the Court that the proposed amendments be promulgated as circulated, except for the proposed amendment to Rule 24(f) which the committee will further review at its next meeting to discuss comments received from the Joint Legislative Committee on Judicial Rules.

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

I. PROPOSED AMENDMENT RECOMMENDED FOR CIRCULATION TO THE BAR

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

II. PROPOSED AMENDMENTS NOT RECOMMENDED

1. Rule 16(a)(2)(E). It was proposed to amend Rule 16(a)(2)(E) by deleting the requirement that the prosecution provide the defense with records of prior criminal convictions of the prosecution's intended trial witnesses. The Committee declines to recommend this proposal. The Office of Defender General only obtains Vermont record checks; extending its present authority to private counsel would be unlikely to be funded (Agenda # 05-7).

2. Administrative Order No. 38. The committee will give no further consideration to Administrative Order 38 concerning video conferencing to avoid transportation of incarcerated defendants unless requested to do so by the Court (Agenda # 03-1)..

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. 3(c)(9). The Committee will consider a proposal to amend Rule 3(c)(9), providing for arrest without warrant in the case of abuse of a vulnerable adult or the child of a vulnerable adult, for conformity with the language of legislative changes adopted in Acts of 2005, No. 79 (Agenda #07-3).

2. V.R.Cr.P. 24(d)—Proposed amendment to add language permitting the court to retain alternate jurors after the jury retires in order to ensure that a sufficient number of jurors will be available in case a sitting juror were unable to complete deliberations. The Committee will review the use of the practice in federal court under Fed.R.Cr.P. 24(c)(3), as well as comparable experience in Vermont courts (Agenda # 06-3).

3. V.R.Cr.P. 32(c). The Committee will consider a proposal to amend Rule 32(c) to require a probation officer interviewing a defendant as part of a pre-sentence investigation to give defense counsel notice and a reasonable opportunity to attend the interview.

4. V.R.Cr.P. 32(d)—Proposed amendment to impose a one-year limit on withdrawing pleas in “fine only” cases in order to limit collateral attack long after conviction. The Committee

will consider whether the availability of relief other than plea withdrawal in “fine only” cases affects the need for this amendment (Agenda # 05-4).

5. V.R.Cr.P. 41(d)—The Committee will consider whether to developed a rule providing a procedure for the use of wire warrants (Agenda # 06-4).

6. V.R.Cr.P. 41(h). As requested by the Court (see above), the Committee will consider revisions to the rule as extended by emergency amendment that might incorporate an e-mail component and would streamline the process of obtaining warrants from a distance while maintaining substantive safeguards.

7. V.R.Cr.P. 44.2 (b)—The Committee will consider the application to out-of-state lawyers during their Vermont clerkship of the amendment to Rule 44.2(b) promulgated on March 15, 2006, effective June 30, 2006, implementing an amendment to A.O. 41 providing for the filing of a *pro hac vice* licensing statement and pay an appropriate fee.

8. Competency Determinations. The Committee will consider an addition to the Criminal Rules that would adapt provisions of Family Rule 1(i), providing a procedure for competency determinations in juvenile cases, promulgated on May 12, effective July 14, 2006, and amended on August 15, effective October 15, 2007.

In closing, the Committee and the Reporter wishes to express its condolences to the family, friends, and colleagues of the late Henry Hinton and to express its appreciation for his dedicated service as the Defender General’s designee to 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, Court Administrator Lee Suskin, Deb Laferriere, and others who have participated in the rule-making process through their thoughtful suggestions, comments, and assistance.

Respectfully submitted,

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
Hon. James R. Crucitti
Mary C. Frost
Mark A. Kaplan
Hon. Mark Keller
John T. Quinn

Karen Shingler
Hon. David Sontag
John R. Treadwell

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

APPENDIX

PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2008

Order Promulgating Amendment to the Vermont Rules of Criminal Procedure

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

1. That Rule 43(c) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 43. PRESENCE OF THE DEFENDANT

(a) **Presence Required.** The defendant shall be present at the arraignment, at any subsequent time at which a plea is offered, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(c) **Presence Not Required.** A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for misdemeanors, the defendant, with the consent of the court, may waive appearance under Rule 5 in writing and the court, with the written consent of the defendant and the state's attorney, may permit arraignment, pleas of guilty, nolo contendere or not guilty, trial, and imposition of sentence in the defendant's absence. Before a plea of not guilty may be filed and accepted by the court, the state's attorney and the defendant shall agree upon bail and conditions of release, which shall be signed by the defendant and his or her attorney, and filed with the court simultaneously with the plea of not guilty.

(3) The defendant's presence is not required at a conference or argument upon a question of law and is not required at any other proceeding except as provided in subdivision (a) of this rule or otherwise ordered by the court.

Reporter's Notes—2008 Amendment

Rule 43(c) is amended pursuant to the request of the Court in *State v. Brown*, No. 2003-384, 2005VT 104, at ¶ 15 (8/26/05), that the Committee address the potential inconsistency between the provision of Rule 43(c)(3) that “defendant’s presence is not required at a conference or argument on a question of law” and the language in the District Court’s computer-generated notice form, used for all hearings, that requires defendant’s personal presence. In *Brown*, the Supreme Court had overturned a District Court decision forfeiting defendant’s bail for non-appearance at a status conference held under Rule 12(e) to determine how to proceed in light of defendant’s incarceration on federal charges. Under the amended rule, the defendant’s presence is required only at those proceedings specified in subdivision (a). The defendant need not be present at a conference or argument on a question of law and need not be present at other proceedings except as provided in subdivision (a) unless the court otherwise orders.

2. That this rule, as amended, is prescribed and promulgated to become effective on _____, 2008. The Reporter's Notes are advisory.

5. 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 _____, 2008.

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