

VERMONT SUPREME COURT
Advisory Committee on Rules of Criminal Procedure
2010 -2011Annual Report

November 14, 2011

The Committee submits this report to the Supreme Court pursuant to Administrative Order No. 20, § 5. This report covers the Committee's activities for the two-year period since the submission of the Committee's 2009 annual report on January 6, 2010. Since that report, the Committee has met on April 30, July 23, and October 8, 2010 and on April 29, 2011 to consider amendments or other matters pertaining to the Vermont Rules of Criminal Procedure and relevant provisions of the Vermont Rules of Appellate Procedure.

During 2010, Professor L. Kinvin Wroth resigned as the Committee's Reporter, and Professor Michele Martinez Campbell, Vermont Law School, was appointed to succeed Professor Wroth as Reporter, effective after the October 8, 2010 meeting. Professor Campbell resigned after the April 29, 2011 Committee meeting, and the Court appointed retired Superior Judge Walter M. Morris, Jr. to succeed her as the Reporter to the Committee. In addition, Superior Judge Mark J. Keller and Chittenden County State's Attorney T.J. Donovan resigned from the Committee during this past year. The Supreme Court appointed Superior Judge Thomas A. Zonay to replace Judge Keller and Addison County State's Attorney David R. Fenster to replace Mr. Donovan.

Amendments Promulgated by the Court during the period covered by this report:

The following amendments were promulgated by the Supreme Court on February 24, 2010 effective on April 26, 2010: **V.R.Cr.P. 16.1(c)** (exempts law enforcement officers who have participated in the investigation from the restriction limiting prosecution access to witnesses first included on a defense witness list); **V.R.Cr.P. 18(b)** (requires prosecution of pre-trial release violations in the county or circuit of the court that issued the bail order unless defendant is charged with a new offense); **V.R.Cr.P. 24(d)** (permits 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)** (eliminates gender references and permits clerk to sign a judgment reflecting court's ruling from the bench); **V.R.Cr.P. 32(c)** (provides defense attorneys notice and opportunity to attend PSI interviews of defendant).

Style amendments to **V.R.Cr.P. 15(e)(5)** as added, and **(f)** as amended, by § 26 of Act No. 1 of 2009, An Act Relating to Improving Vermont's Sexual Abuse Response System, effective July 1, 2009, recommended by the Committee to the Supreme Court, were promulgated on January 14, 2010, effective on that date.

On January 14, 2010, effective on that date, the Supreme Court promulgated a second emergency amendment to **A.O. 38** adding Section IV providing for video testimony pursuant to V.R.E. 807 in the Bennington District and Family courts because Bennington had received a

grant to purchase equipment for one-way transmissions. The Committee is soliciting comments on the implementation of the new system.

The Court Administrator's memorandum of June 24, 2010, contained new standard headings for forms in the Civil, Criminal, Environmental, and Family Divisions of the Superior Court as approved by the Court Administrator and Administrative Judge for Trial Courts to accommodate Act 154 of 2009 (Adj. Sess.), § 7, enacting 4 V.S.A. § 30 to establish a single statewide Superior Court with those divisions, effective on July 1, 2010.

The Supreme Court promulgated emergency amendments to the Civil, Criminal, Appellate, Small Claims, Environmental Court, and Family rules to accommodate Act 154 of 2009 (Adj. Sess.), § 7, enacting 4 V.S.A. § 30 to establish a single statewide Superior Court, on July 1, 2010, effective on that date.

The Court on September 22, 2010, promulgated the following amendments effective on November 22, 2010, with certain revisions based on comments received by the Committee: **V.R.Cr.P. 3(c)(9)** (amendment to conform the rule to provisions regarding abuse of vulnerable adults that have been recodified in Title 13, Chapter 28); **V.R.Cr.P. 32(c)(4)** (amendment to bring Rule 32(c)(4) into conformance with a 1999 legislative change to 13 V.S.A. § 5231); **V.R.Cr.P. 41** (amendment that reorganizes the present rule, extends its present provisions concerning issuance of warrants by fax to include other electronic means, and adds provisions for warrants to monitor conversations); **V.R.Cr.P. 44.2(b)** and **A.O. 41** (amendments to V.R.Cr.P. 44.2(b) and A.O. 41 permitting 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); **V.R.Cr.P. 26(e)** and **V.R.A.P. 10 (b)(8)** (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).

The Court on September 22, 2010, effective on November 22, 2010, promulgated an amendment to **A.O. 20** providing that if the Attorney General or the Defender General is present at a meeting of the Committee, he or she may vote in the meeting in place of the designee of the office who is seated on the Committee.

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; and III. Matters remaining on the Committee's agenda.

I. PROPOSED AMENDMENTS RECOMMENDED FOR CIRCULATION TO THE BAR

The Committee recommends that the Court circulate to the bar for comment the following proposed amendments (a proposed promulgation order will be forwarded to the Court separately):

1. Proposed revised V.R.Cr.P 16.2 which eliminates the existing requirement that discovery materials remain in the attorney's exclusive custody while maintaining the restriction of the existing rule that discovery materials may only be used for purposes relating to the preparation and trial of the case.

2. Proposed revised V.R.Cr.P. 18 which revises the nomenclature used to refer to the place of prosecution and trial in order to conform to changes made by the Judicial Restructuring Act, Act 154 of 2009 (Adj. Sess.). Additionally, this amendment provides for broadened venue for initial appearance and arraignment under Rules 5 and 10 and for a preliminary hearing under Rule 32.1(a)(1).

3. Proposed revised V.R.Cr.P 26 which requires a party seeking to introduce evidence of a criminal offense to provide at least thirty days notice to the other party rather than the seven day notice specified in the existing rule.

4. Proposed revised V.R.Cr.P. 30, which gives the court discretion to give preliminary instructions prior to the taking of evidence and to give some instructions after the close of evidence but prior to argument, while continuing the practice of the court instructing the jury on the elements of the charged crime and all other major and contested issues of the case after argument.

5. Proposed revised V.R.Cr.P 41 which adds a provision for a tracking device warrant. The proposed amendment does not specify when such a warrant is required, but sets out the procedure for obtaining such a warrant when one is requested.

II. PROPOSED AMENDMENT NOT RECOMMENDED

A proposal to amend V.R.Cr.P.43 to address the question whether the defendant could choose not to be present at sentencing was removed from the agenda because the Committee concluded that the benefits of allowing the court to require the defendant's presence meant that no amendment was necessary or appropriate.

III. MATTERS REMAINING ON THE COMMITTEE'S AGENDA

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

1. The Committee will continue to review experience under the emergency amendments to V.R.Cr.P. 5(f) and 18, which enable 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. The emergency amendments were promulgated on January 14, 2009, effective on February 1, 2009, with a direction that the Advisory Committee report on any comments received by September 30, 2009. The Committee issued a report to the court in January 2010 providing anecdotal reports of experience under the

amended rules provided by attorneys, court clerks and judges. The committee will provide supplemental reports as additional information is reported to the committee. (Committee Agenda Items 2008-10 and 2008-11)

2. The Committee will continue to review experience under the emergency amendment of 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. The emergency amendment was promulgated by the Court on December 17, 2008, effective January 1, 2009. These amendments were reviewed by the Legislative Committee on Judicial Rules on January 14, 2009, without comment. (Committee Agenda Item 2008-09)

3. The Committee will continue to review experience under the emergency amendment of 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. The emergency amendment was promulgated by the Court on December 17, 2008, effective on January 1, 2009. These amendments were reviewed by the Legislative Committee on Judicial Rules on January 14, 2009, without suggested changes. (Committee Agenda Item 2008-08)

4. The Committee will continue to review experience under a second emergency amendment of A.O. 38, promulgated on January 14, 2010, effective on that date, adding Section IV providing for video testimony pursuant to V.R.E. 807 in the Bennington District and Family courts because Bennington had received as grant to purchase equipment for one-way transmissions. (Committee Agenda Item 2008-08)

5. The Committee will review the emergency amendments to the Criminal Rules adopted on July 1, 2010, effective on that date, to accommodate Act 154 of 2009 (Adj. Sess.), § 7, enacting 4 V.S.A. § 30 to establish a single statewide Superior Court. (Committee Agenda Item 2010-05)

6. The Committee will review the Vermont Rules for Electronic Filing, adopted as emergency amendments together with related emergency amendments to the Rules for Dissemination of Electronic Case Records on August 17, effective on October 1, 2010, to determine what amendments to those rules and the Criminal Rules will be necessary to provide for the use of the Judiciary's e-Cabinet electronic filing system in the Superior Court, Criminal Division in Spring 2011. (Committee Agenda Item 2010-04)

7. The Committee is reviewing a possible amendment to V.R.Cr.P 44.2(c) addressing the timing of the automatic withdrawal of an attorney's appearance at the conclusion of a criminal case. (Committee Agenda Item 2010-07)

8. The Committee is reviewing a possible amendment to Appellate Rule 3(b)(C) as requested by former Justice Johnson in her concurring opinion in *State v. Sheperd*, 2011-14. (Committee Agenda Item 2011-02)

In closing, the Committee wishes to thank former members Hon T.J. Donovan and Hon. Mark J. Keller for their service and former Committee reporters L. Kinvin Wroth and Michele Martinez Campbell for their support 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 Joint Legislative Committee on Judicial Rules, Court Administrator Robert Greemore, Deb Laferriere, Larry Abbott, and others who have participated in the rule-making process through their thoughtful suggestions, comments, and assistance.

Respectfully submitted,



P. Scott McGee, Chair

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