

**VERMONT SUPREME COURT**  
**Advisory Committee on Rules of Criminal Procedure**  
**2015 - 2017 Annual Report**  
December 6, 2017

The Advisory Committee on the Rules of Criminal Procedure submits this report to the Vermont Supreme Court pursuant to Administrative Order No. 20, § 5. This report covers the committee's activities for the period since the submission of the committee's 2013-2014 annual report in April 2015. Since that report, the committee has met on April 10, 2015, May 20, 2016, October 7, 2016, February 10, 2017, May 12, 2017 and September 22, 2017 to consider amendments and other matters pertaining to the Vermont Rules of Criminal Procedure and relevant provisions of the Vermont Rules of Appellate Procedure.

During 2015-2016, former Chair P. Scott McGee retired from the committee, having completed his latest of several terms; Justice Marilyn S. Skoglund was designated to serve as committee liaison to the Court; and the terms of Superior Judge James R. Crucitti, Bonnie Barnes, Esq., Joanne Charbonneau and Karen Rush Shingler, Esq. expired. Superior Judge Martin A. Maley was appointed to replace Judge Crucitti. John Pacht, Esq. was appointed to replace Bonnie Barnes. Laurie Canty was appointed to replace Ms. Charbonneau and Daniel Sedon was appointed to replace Ms. Shingler.

During 2016-2017, Superior Judge Thomas Zonay, already serving as a Committee member, was appointed to replace Mr. McGee as Committee Chair. Mimi Brill, Esq. was appointed to replace Mr. McGee as a member of the Committee. John Pacht, Esq. and David Fenster, Esq. were appointed to serve as Superior Court Judges. Devin McLaughlin, Esq. was appointed to replace John Pacht, and Rosemary Kennedy, Esq. was appointed to replace David Fenster. Kelly Woodward, Victims Advocate in the Franklin Unit, was appointed to replace Susan Carr, who had served on the committee for many years in the capacity of non-voting Victims Advocate representative. On March 23, 2017, Superior Judge Karen Carroll was appointed to serve as Associate Justice of the Court, and she replaced Justice Marilyn Skoglund as committee liaison to the Court. On October 6, 2017, John Treadwell, Esq. was appointed to serve as a Superior Court Judge. His replacement, designated by the Attorney General, and approved by the Court on November 14, 2017 per A.O. No. 20, § 2, is Evan Meenan, Esq.

This report summarizes the status of proposed rule amendments and the committee's activities under the following headings: I. Amendments promulgated by the court; II. Amendments promulgated by Legislative enactment; III. Promulgated amendments of civil rules of import to criminal proceedings; IV. Proposed Amendments that have been through the comment period and are being recommended to the court for promulgation; V. Proposed amendments being recommended for circulation to the Bar and public for comment; VI. Amendment requests considered by the committee but not recommended for further action at this time; and VII. Matters remaining on the committee's agenda.

## **I. AMENDMENTS PROMULGATED BY THE COURT**

Since the date of the last Criminal Rules Committee Annual Report, the court promulgated the following amendments to the criminal rules:

**1. Amendment to V.R.A.P. 3(b)(2)** to eliminate automatic appeal in cases where a sentence of life imprisonment is imposed upon either express waiver of appeal, or entry of a plea of guilty or nolo contendere. In such cases, a sentenced defendant is still entitled to initiate a timely appeal in compliance with the appellate rules, but an appeal would not be automatically entered by the clerk. *Committee Agenda Item 2011-02*. (Promulgated on August 5, 2015 to become effective on October 5, 2015).

**2. Amendment to V.R.A.P. 4(f)** (the “Prison Mailbox” rule). The Court promulgated this rule on January 9, 2017, effective March 13, 2017. The Committee provided advisement to the Court as to whether any following amendments to the Rules of Criminal Procedure would be warranted (none were perceived). *Committee Agenda Item 2017-01*.

**3. Amendment to V.R.Cr.P. 3(c)(16)**. Rule 3(c) prescribes those non-witnessed misdemeanor offenses for which a law enforcement officer, having probable cause, is authorized to arrest a person. The amendment to Rule 3(c)(16) conforms the nomenclature describing the offense of cruelty to a child to legislative enactment amending 13 V.S.A. § 1304. Per Act No. 60 of 2015, § 25, the Legislature amended the statute to create a felony offense of cruelty to a child, but retained codification of a misdemeanor offense in § 1304(a), which is the subject of V.R.Cr.P. 3(c)(16), recaptioning the section title as “Cruelty to a Child” and deleting former reference in the section title to age of either the child or the defendant. The amendment makes a non-substantive change to the title of the offense specified. *Committee Agenda Item 2016-01*. (Promulgated on October 5, 2016, to become effective on December 5, 2016.)

**4. Amendments to V.R.Cr.P. 5 (Pretrial Screening and Assessment Advisements)**. Rule 5 was amended in 2016 to add a new subdivision 5(e) and former subdivisions (e)-(h) were re-designated as (f)-(i). New subdivision 5(e) was added in response to the passage of Act No. 195 of 2013 (Adj. Sess.), establishing a system of pretrial risk assessments and needs screenings that may be voluntarily engaged in by defendants in: (a) felony cases excepting listed crimes; (b) felony or misdemeanor drug offenses; (c) cases in which showing is made that a defendant has a substantial substance abuse or mental health issue; (d) all other cases, with limited exceptions, where a defendant has been held, unable to make bail, for over 24 hours after lodging, or (e) in more limited circumstances ordered by the Court (and not voluntarily) as a condition of release under 13 V.S.A. § 7554. See 2013, No. 195 (Adj. Sess.), § 2, codified at 13 V.S.A. § 7554c. These amendments were promulgated on May 10, 2016, effective July 11, 2016. *Committee Agenda Item 2014-04*.

In 2017, Rule 5 was again amended to reflect 2016 and 2017 legislative enactments making changes in the structure of the pretrial screening and assessments program. Under the amendments, the results of the pretrial risk assessment and needs screenings are provided directly to defendants and their attorneys, the prosecutors, and the court. Formerly, these were provided to the prosecutor, who then distributed them to other parties. The amendment also clarifies that while the court may order a defendant to meet with a pretrial services coordinator and participate in a needs screening, to participate in a clinical assessment by a substance abuse or mental health treatment provider and follow the recommendations of the provider, and to otherwise participate in pretrial services, such orders are deemed to be in addition to conditions of release authorized by law, and do not serve to limit the discretion of the court to impose conditions of release authorized under 13 V.S.A. § 7554. The text of the statute and rule as amended also recasts and clarifies the scope of the statutory use and derivative use immunity for information disclosed in screening or assessment provided at § 7554c(e), and thus the advisement to be provided to the defendant as to immunity. The amended statute (but not the rule) also imposes specific limitations upon the information provided by a defendant that a pretrial services coordinator is permitted to disclose. See 2016, No. 140 (Adj. Sess.), § 1, and 2017, No. 61, § 3. These amendments were promulgated on October 17, 2017, effective December 18, 2017. *Committee Agenda Item 2016-03*.

**5. Amendments to V.R.Cr.P. 5 and 11 (Collateral Consequences of Conviction Advisements)**. These amendments address advisements of collateral consequences of criminal convictions to be provided to defendants at time of arraignment, and colloquy as to understanding of these advisements at time of entry of a plea of guilty or nolo contendere pursuant to Rule 11. The advisements are mandated by the Uniform Collateral Consequences of Conviction Act (UCCCA), 2013 (Adj.Sess.) No. 181, which is in

pertinent part codified at 13 V.S.A. §§ 8002-8005. These amendments were promulgated as emergency amendments on December 21, 2015, effective January 1, 2016; and promulgated as permanent amendments on June 15, 2016, effective on August 15, 2016. *Committee Agenda Item 2015-04*.

**6. Amendments to V.R.Cr.P. 11.1 (Collateral Consequences Advisement; Certain Marijuana Cases).** Rule 11.1, and the statute upon which it is based, predated enactment of the UCCCA. These amendments to Rule 11.1 reflect changes necessitated by enactment of Act 133 of 2015 (Adj. Sess.), which expressly prescribes the consequences resulting from the court's failure to provide the defendant with notice of collateral consequences. The former listing of specific advisements is also now streamlined simply by reference to the UCCCA. The amendment to the rule also clarifies that it is of application only to convictions for violation of 18 V.S.A. § 4230(a) (certain misdemeanor marijuana/hashish offenses) and not for all offenses prescribed by § 4230. These amendments were promulgated on October 17, 2017, effective on December 18, 2017. *Committee Agenda Item 2016-04*. The Committee will be reexamining the viability of Rule 11.1 post-UCCCA in context of its overall review of the general provisions of V.R.Cr.P. 11. See, *Committee Agenda Item 2013-04, infra*.

**7. Amendment to V.R.Cr.P. 16.** The amendment added a new subdivision (d)(3), which provides that the prosecuting attorney is not required to disclose to the defendant information as to the residential address or place of employment of the victim, unless the court finds, based upon a preponderance of the evidence, that nondisclosure of the information will prejudice the defendant. The amendment serves to implement the provisions of 13 V.S.A. § 5310, while expressly reserving the court's authority to order that the state disclose the information where necessary to preserve a defendant's due process and confrontation guarantees. This amendment was promulgated on May 10, 2016, effective July 11, 2016. *Committee Agenda Item 2013-06*.

**8. Amendments to V.R.Cr.P. 17 (Subpoenas).** The amendment to Rule 17(a) clarifies that a subpoena is provided by the clerk of court, but actually issued by a judicial officer, subject to certain notice of rights on the part of persons subject to subpoena to object or seek an order to quash or limit the scope of subpoena. The amendment also adopts a provision of Civil Rule 45 requiring the subpoenaing party to take reasonable steps to avoid imposing undue burden or expense on the other; and further addresses issues associated with subpoenas for electronically stored information. In addition, the amendments expressly recognize "non-proceedings" subpoenas duces tecum, that is, for production of documents or information in context of general discovery, and not just for court hearing or schedule deposition. Service of subpoenas for certain sensitive, privileged or confidential information must be preceded by written notice to the other party, either the state or the defendant. These amendments were promulgated on December 15, 2016, effective February 20, 2017. *Committee Agenda Item 2013-02*. Post-promulgation, the Committee is reexamining the issue of whether authority to issue subpoenas under Rule 17 should be broadened to again include clerks of court, and to add attorneys admitted to practice in Vermont. See, *Committee Agenda Item 2017-07, infra*.

**9. Amendments to V.R.Cr.P. 28 (Interpreters).** These amendments, made simultaneously with amendments to V.R.C.P. 43(f) and V.R.P.P. 43(e), substantially revise and update procedural rules governing provision of interpretation services in judicial proceedings, consistent with contemporary Access to Justice requirements of federal law. The rules amendments were accompanied by provision of revised and website-accessible public information and policy materials by the Office of the Court Administrator. The interpreter amendments were promulgated on January 9, 2017, effective March 13, 2017. *Committee Agenda Item 2013-10*.

**10. Amendments to V.R.Cr.P. 30/V.R.C.P. 51(b).** These contemporaneous amendments clarify those circumstances in both criminal and civil trials in which objections to proposed jury instructions fully

articulated at a charge conference may be preserved without the necessity for their reassertion after the court's reading of the instructions and prior to the jury's retirement for deliberations. Promulgated on February 6, 2017, effective April 10, 2017. *Committee Agenda Item 2013-03*.

**11. Amendment to V.R.Cr.P. 32 (Restitution Procedures).** This amendment adds subdivision (g) to Rule 32 (which otherwise addresses sentencing procedure), to provide specific procedures for conduct of restitution hearings convened pursuant to 13 V.S.A. § 7043. Added provisions require certain pre-hearing disclosures by both prosecution and defendant, such as the availability of insurance covering subject victim loss, as well as advance disclosure by the defendant in event of intended assertion of a defense of financial inability to pay any restitution that may be ordered by the court. Promulgated on July 14, 2017, effective September 18, 2017. *Committee Agenda Item 2014-08*.

**12. Amendments to V.R.Cr.P. 41(e)(4, 5 and 6).** These amendments to Rule 41 authorize the filing of search warrant returns and accompanying documents by reliable electronic means to facilitate prompt filing where great distances or particular circumstances of completion of the return would otherwise impede timely submission of returns contemplated by rule 41, consistent with the “warrant accountability” procedures adopted in 2013. The rule had previously authorized electronic application and issuance of search warrants, and the amendment serves to now authorize filing of returns as well via electronic means. In event of electronic filing, the amendment also requires that the original return and accompanying documents be filed with the court within 15 days of electronic submission to avert any disputes as to which are the original, and operative documents. Promulgated on October 20, 2015, effective immediately. *Committee Agenda Item 2013-11*.

**13. Amendments to V.R.Cr.P. 45(a), and V.R.Cr.P. 12.1; 29, 32, 33 and 47 (Time; “Day is a Day” computation rules).** These amendments, with contemporaneous amendments of the rules for computation of time in each of the divisions of the Superior Court, the Supreme Court, and various other judicial proceedings, adopt the “day is a day” rule, a simplified method of computing time periods adopted in 2009 with amendments to the federal rules. Under the former rules, a period of 11 days or more was computed differently than a period of 10 days or less. The shorter time periods did not count intervening Saturdays, Sundays or legal holidays. Under the amended rules, all deadlines are computed the same way no matter the length—all days are counted. If the period in issue ends on a Saturday, Sunday or legal holiday, the deadline falls on the next business day. Amendment of the principal rule—45—was accompanied by amendment of other criminal rules that were affected, as well as certain related statutory amendments made by the legislature. See, 2017, (Adj. Sess.), No. 11. Promulgated on September 20, 2017, effective on January 1, 2018. *Committee Agenda Item 2013-05*.

## II. AMENDMENT PROMULGATED BY LEGISLATIVE ENACTMENT

**Amendment to Rule 43(a) (Presence of Defendant).** Per Section E.204.1 of the Appropriations Act, 2017, (Adj. Sess.), No. 85, the Legislature amended Rule 43 to add subdivision (a)(2), providing in pertinent part that “Arraignments shall be in person and shall be on the record and shall not be performed by video conferencing or other electronic means unless the defendant consents.” V.R.Cr.P. 5(f), which has been in effect since adoption of the criminal rules in 1973, sets forth a procedural distinction between arraignment, and preliminary appearance before a judicial officer for persons in custody. Though the Rule sets forth this distinction, with the Reporter’s Notes explaining the significant underlying bases for it, the two proceedings have historically been held at the same time, with a very small percentage of defendants occasionally invoking the right to a separate arraignment proceeding, as provided for in V.R.Cr.P. 5(f). Notwithstanding the historical practice, Rules 5(f) and 10, and the recent legislative amendment of Rule 43(a) have been interpreted in practice in the Chittenden Unit as not prohibiting the conduct of preliminary appearance by video conferencing. At time of the recent legislative enactment, preliminary appearances were being conducted via video conferencing only in the Chittenden Unit. The enactment,

and the interpretation of it, were the subject of proceedings before the Joint Legislative Committee on Judicial Rules on October 23, 2017. The Advisory Committee on Rules of Criminal Procedure has been considering other proposed amendments of Rule 43, and will continue to examine the Rule in context of any pertinent developments in normal course. See *Committee Agenda Items 2016-06 and 2015-02, infra*.

### **III. PROMULGATED AMENDMENTS OF CIVIL RULES OF IMPORT TO CRIMINAL PROCEEDINGS**

**Amendments to V.R.C.P. 5** (Governing Service and Filing in Criminal Cases). V.R.Cr.P. 49(b) and (c) adopt by reference the rules governing service and filing in civil proceedings (V.R.C.P. 5). The Court has promulgated two amendments to Civil Rule 5 of pertinence to criminal practice. Per promulgation order dated December 15, 2016 and effective February 20, 2017, the Court established procedures for service and filing of documents by electronic means in all divisions and units of the Superior Court. The Committee Chair and Reporter worked with the Chair and Reporter of the Civil Rules Committee in review of the final proposals of amendment submitted to the Court. *Committee Agenda Item 2014-01*. Per promulgation order dated July 14, 2017 and effective September 18, 2017, the Court amended V.R.C.P. 5(h) to provide in pertinent part that certificates of service may be incorporated into documents actually filed with the court, no longer requiring that a separate certificate of service document be prepared and filed as well. *Committee Agenda Item 2017-02*.

### **IV. PROPOSED AMENDMENTS RECOMMENDED FOR PROMULGATION**

There are no proposed amendments awaiting a court promulgation order.

### **V. PROPOSED AMENDMENTS RECOMMENDED FOR CIRCULATION TO THE BAR**

The Committee has recommended that the Court circulate to the public and the bar for comment the following proposed amendments:

**1. Proposed Amendment to V.R.Cr.P. 44.2** (Attorney Appearance and Withdrawal). The proposal revises the rule in response to general revisions of A.O. 41, governing Licensing of Attorneys, effective May 15, 2017. Rule 44.2(b)(2), which formerly governed admission and practice of non-resident attorneys pending completion of law office study, or after such completion pending admission, is deleted as no longer necessary in view of A.O. 41's abolition of the law office study requirement as a condition of admission. The comment period for this proposal after publication closed on August 7, 2017; however, the Committee has requested that the Court defer further action on this proposal to enable the Committee to consider whether other potential amendments are warranted to the criminal rules after comprehensive consideration of the impacts of the A.O. 41 revisions. *Committee Agenda Item 2017-04*.

**2. Proposed Amendment to V.R.Cr.P. 54(a)(2)**. This proposal of amendment makes technical changes to Rule 54 (which is addressed to the applicability of the criminal rules) to comport with legislative enactment pertaining to the Judicial Bureau. Per 2015, (Adj. Sess.), No 47, § 38, 23 V.S.A. §§ 2201-2207, referred to in the former rule as the "Traffic Act" were repealed. The offenses and tickets formerly covered under the repealed statutes were placed under the jurisdiction of the Judicial Bureau. These matters are now subject to enforcement under 4 V.S.A. Chapter 29, under procedural rules promulgated by the Court. See 4 V.S.A. § 1106(f); and V.R.C.P. 80.6. In consequence, references to the "Traffic Act" in Rule 54(a)(2) are deleted. The proposed amendment has been published for comment, with comment period closing on December 18, 2017. *Committee Agenda Item 2017-03*

## VI. PROPOSED AMENDMENTS NOT RECOMMENDED

**Amendment to V.R.Cr.P. 32(c)(4)** (Objections to Content of Presentence Investigation Reports). The Committee considered at length amendment of Rule 32(c)(4), as suggested in the concurring opinion of Justice Dooley in *State v. Morse*, 2014-84, to require that a party objecting to any matters referenced in a PSI file written objection and redaction request within the specified time, in addition to assertions of fact going to sentencing. The existing rule, addressing evidentiary standards at sentencing, requires advance written objection as to assertions of fact that may feature as evidence considered at sentencing.<sup>1</sup> The proposal would broaden PSI content that would be subject to mandatory advance written objection to include such matters as sentencing and programming recommendations, as well as general and special conditions of probation recommended, if any. While there was no controversy as to the existing requirements, which go to procedural fairness in sentencing, the Committee unanimously determined that it would not recommend broadening the categories of PSI content subject to mandatory advance written objection, as potentially limiting the broad discretion accorded to the sentencing court in consideration of sentencing alternatives, and conditions of supervision shown to have basis on the sentencing record. *Committee Agenda Item 2014-08*.

## VII. MATTERS REMAINING ON THE COMMITTEE'S AGENDA

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

**1. Proposed Amendments to Rules 11/ 11.1.** The committee continues to engage in comprehensive review of Rules 11, 11.1 and possibly Rules 5 and 32, to bring currency to the existing promulgations consistent with legislative enactments and decisions of the Court, especially those addressed to Rule 11, and entry and acceptance of pleas of guilty and nolo contendere. Proposed amendments to restyle Rule 11 consistent with amendments to the comparable Federal rule have been completed and are awaiting final Committee action. At its next meeting, the Committee will consider further the implications of the decision in *In re: Bridger*, 2017 VT 79 for the existing proposal of amendment, including especially the requirement of a factual basis finding. *Committee Agenda Items 2013-04 and 2017-79*.

**2. Proposed Amendment to Rule 17** (subpoenas). The Committee is reexamining the issue of whether issuing authority should be broadened to again include clerks of court, and to add attorneys admitted to practice in Vermont as issuing authorities. In view of the efforts of the Advisory Committee on Rules of Civil Procedure to reexamine comparable Civil Rule 45, the criminal rules committee anticipates that it will work in close coordination with that committee in an effort to achieve greater symmetry between the respective rules. *Committee Agenda Item 2017-07*.

**3. Proposed Amendment to Rule 23** (Jury Separation and Admonition by Judge). This proposal would provide further specificity as to admonitions to be provided by the trial judge to jurors in event of separation, including separation from selection to trial and during trial, consistent with the decision in *State v. Breed*, 2015 VT 43. *Committee Agenda Item 2015-03*.

**4. Proposed Amendment to Rule 24(a)(2)** to authorize more flexible access to juror information by attorneys in criminal matters by allowing distribution of juror questionnaires to counsel. The committee has established a subcommittee to review this issue in collaboration with the Advisory Committee on Public Access to Court Records. Further consideration is presently deferred, pending progress in implementing the Judiciary's new case management system. *Committee Agenda Item 2014-02*

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<sup>1</sup> The comparable federal rule, F.R.Cr.P. 32(f)(1) does additionally require specific written objection not only to factual assertions pertinent to sentence, but to "all material information" in presentence investigation reports.

**5. Proposed Amendment of Rule 41** (Search Warrants) to address implementation of the Privacy Protection Act, 2015, (Adj. Sess.), No. 169. The act contains provisions of impact upon warrants for search of electronic data, warrants for use of drones, and “Protected User Information”. The Committee is reviewing Rule 41 for potential revisions. *Committee Agenda Item 2016-05.*

**6. Proposed Amendment to Rule 42** (Contempt) to revise and update current provisions for the conduct of contempt proceedings, consistent with amendment of the comparable federal rule. *Committee Agenda Item 2016-02.*

**7. Proposed amendment to Rule 43** (Presence of Defendant) to consider amendment of Rule 43 in consequence of legislative enactment modifying the rule, and the decision in *State v. Bridger*, 2017 VT 79. *Committee Agenda Item 2017-06.*

**8. Proposed Amendments Authorizing Video Appearance and Testimony in the Criminal Division.** The Committee is considering proposed amendments that would authorize, in limited circumstances, video appearance and testimony in the criminal division, subject to specified criteria, and the necessity for case-specific findings by the trial judge. Authorization of video appearance and testimony, especially in criminal trials, presents difficult issues implicating Sixth Amendment and Article 10 guarantees. The focus of Committee effort is upon proposals for witness testimony in carefully prescribed circumstances, with a view to proposals for promulgation of V.R.C.P. 43.1, a rule under consideration by the Advisory Committee on Rules of Civil Procedure. *Committee Agenda Item 2015-02.*

**9. Proposed new Civil Rule 80.7a** to adopt Animal Forfeiture procedures per Act 201 (2014 Adj. Sess.), S. 237, effective July 1, 2014. *Committee Agenda Item 2014-06.*

**10. Electronic Filing in the Criminal Division.** The Committee remains ready to 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 in consequence of movement to a new case management system. *Committee Agenda Item 2010-04.*

**11. Accommodations for Persons with Cognitive Disabilities in Judicial Proceedings.** This proposal was brought forward and considered by the Committee at the request of Rep. Martin LaLonde of the Legislative Committee on Judicial Rules. The Committee has concluded that the issues presented are policy matters which warrant further consideration by the Office of the Court Administrator, to address consistent with Access to Justice and ADA obligations. The Committee requests that the Court Administrator be asked to consider the matter.

The Committee wishes to thank all the members of the Vermont bench and bar, the members of the Joint Legislative Committee on Judicial Rules, Court Administrator Patricia Gabel, Deb Laferriere, Emily Wetherell, Esq., Larry Abbott, and others who have participated in the rule-making process through their thoughtful suggestions, comments, and assistance and to especially thank Scott McGee, for his long and valued service and guidance as a member, and Committee Chair. The committee also wishes to thank Hon. Marilyn Skoglund for her service as the Supreme Court liaison Justice, and to thank Hon. James

Crucitti, David Fenster, Esq., John Treadwell, Esq. and Susan Carr for their many years of service on the committee.

Respectfully submitted,

Thomas A. Zonay, Chair

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Hon. Justice Karen Carroll (Court Liaison Justice)

cc: Hon. Walter M. Morris, Jr., Reporter