[As Approved at Committee Meeting on November 19, 2021]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

MINUTES OF MEETING
August 13, 2021

The Criminal Rules Committee meeting commenced at approximately 9:30 a.m. via Teams video conference. Present were Committee Chair Judge Thomas Zonay, Judges Marty Maley and Alison Arms, Dan Sedon, Mimi Brill, Devin McLaughlin, Rebecca Turner, Mary Kay Lanthier, and Kelly Woodward. Supreme Court Liaison Justice Karen Carroll and Committee Reporter Judge Walt Morris were also present. Laurie Canty, Frank Twarog and Domenica Padula were absent; Evan Meenan, Esq. participated in the meeting, at the request and on behalf of Rose Kennedy.

Chair Zonay opened the meeting, after presence of a quorum was noted.

1. **Approval of June 4, 2021 Meeting Minutes.**

On motion of Mr. Sedon, seconded by Ms. Turner, the minutes of the June 4, 2021meeting were unanimously approved.

2. **2020-07: V.R.Cr.P. 11(a)(4)** (post-*Benoit* procedure for preservation of post-conviction challenge to predicate conviction while pleading guilty to the enhanced offense, where there is *no plea agreement*). At the June 4th meeting, the Committee decided to transmit this proposed amendment to the Court, with request for publication for comment, *without* any added criteria that would apply to either the State's or Court's consideration of whether to agree to, or approve of, a Defendant's assertion of intent to pursue a PCR challenge to a predicate in the absence of a plea agreement. The proposal was published on August 3rd, with comment period ending on October 4, 2021. Chair Zonay (who had originally advanced the proposal), again stated that the added 11(a)(4) would only apply where a Defendant pleads "straight up"—that is, without any plea agreement. Rebecca Turner concurred in this assessment of the application of the amendment, and there was no articulation of contrary view by other Committee members. An edit will be made to the Reporters Note clarifying the issue and intended scope of the amendment. Beyond the brief discussion, and the note edit, no action was taken pending closure of the comment period in October.

3. **2015—02: Video Testimony; Promulgated V.R.C.P. 43.1; Proposed Criminal Rule 26.2 for Video Testimony by Consent of Parties** (Subcommittee—Sedon, Brill, Kennedy)—Issues for final draft: (1) content of judge's colloquy for a defendant's waiver of that aspect of Confrontation addressed to physical presence of witness; (2) procedures/standards for withdrawal of agreement/waivers for video testimony by either defendant or state. The Committee has worked on a proposed rule authorizing limited provision of video testimony in criminal proceedings by agreement of the parties for several years now, and through a number of changes in Committee membership. In the course of the present meeting, it was acknowledged that during the judicial declarations of emergency, Administrative Order 49 and its periodic amendments have provided authorization of use of video participation, and provision of testimony, superseding to a degree, but not abrogating existing rules completely, including V.R.Cr.P 43. In the meantime, V.R.C.P. 43.1 has been promulgated, providing general criteria (and limitations) as to employment of video proceedings in civil (and by reference, family) cases.

Justice Carroll reported that the Court has comprised a ***Task Force on Remote Hearings*** expressly charged with responsibility to recommend guidelines for hearing types to routinely schedule for remote hearings, and parameters for scheduling other proceedings for remote hearings. She also indicated that some further amendments of A.O. 49 were in the offing. Reporter Morris stated that historically, the Chairs and Reporters of the Advisory Rules Committees have been consulted by the Court before promulgation of A.O. 49 amendments relevant to practice in any of the divisions. Justice Carroll inquired of the Committee's working relationship with the Criminal Division Oversight Committee, since the Remote Hearings Committee is directed to confer with Oversight Committees in the course of its work.[1] As with other periodic consideration of the Committee's proposed V.R.Cr.P. 26.2, and the state of the draft amendment, Committee consensus was yet again to defer any action, pending further amendments of A.O. 49, or abrogation of A.O. 49. In the meantime, the Committee Reporter will inquire of the intervening activities of the Remote Hearings Committee and provide a report at the next Criminal Rules Committee meeting.

4. **Appellate EFiling and Case Management; Proposed Amendments of 2020 V.R.E.F., and V.R.A.P. for Commencement of Efiling in the Supreme Court. Implications for criminal appellate practice.** A brief report was provided by Ms. Turner and Reporter Morris. These amendments were promulgated by the Court on July 13, effective July 15 (VREF) and August 17th. While there were some pertinent updates as to interlocutory appeals, and minor edits throughout the appellate rules, there were no substantial amendments related to Criminal Division practice.

5. **2020-02: V.R.Cr.P. 7** (**Amendment of Indictment/Information**) Rule 7 amendment to provide for Standards and/or Limitations upon *Pre-Trial* Amendment of the Information(s) by a Prosecuting Attorney, akin to V.R.C.P. 15(a).[2] (Adding multiple counts, or amending misdemeanor to felony charges late in the case—Request of Judge Bent). A final promulgation draft was presented and discussed. The draft incorporated the discussion and recommendations of the Committee at the August meeting, following closure of the comment period. The Committee determination was to transmit the final draft to the Court with promulgation recommendation.

6. **2020-03: Collateral Consequence advisement in Fish and Game matters (and other violations prosecuted as criminal offenses** (Twarog).

This issue was originally brought forward by Frank Twarog in the context of pleas resulting in conviction of those fish and game violations that are considered criminal in nature. Frank's experience was that no collateral consequence advisement was given, and he suggested a review to determine whether a rules amendment was warranted. There was brief further discussion, beyond that which had transpired at the Committee's June 4th meeting. Dan Sedon questioned why, as considered criminal proceedings, the collateral consequences advisements required by 13 V.S.A. § 8005 and Criminal Rules (5(d)(6) and 11(h)) are not given. Related to the issue, Rebecca Turner indicated that at the Sentencing Commission, there has been a review of a number of criminal offenses that might be considered for civil violation status, the review also focusing upon minor offenses that are infrequently charged in any event. Beyond the discussion, no action was taken. The issue (of a rules amendment to clarify that minor offenses such as Fish and Wildlife violations classified as criminal offenses are subject to collateral

[1] Judges Zonay, Arms and Treadwell, and Laurie Canty of the Court Administrator's Office are members of Criminal Division Oversight. The charge and designation of the Advisory Committee on Remote Hearings was issued on June 7, 2021.

[2] Rule 7(d) addresses conditions of amendment of an information *during* trial, not prior to trial, at whatever juncture.

consequence advisements/all criminal procedures reflected in the rules) will be placed on the next meeting agenda for determination of whether any further Committee action will be taken.

7. **2021-01: V.R.Cr.P. 45(e) (Computation of Time); Abrogation of the "Three Day" Rule in Criminal, Civil and Appellate Rules**

Is the "Three Day Rule" of V.R.Cr.P. 45(e) still necessary, with Odyssey eFiling and Service in place in all units?[3] The Committee continued its June 4th discussion of the proposal to eliminate the "three day rule" in computation of time, which essentially adds three days to the calculation of a due date for purposes of service mandatory responsive pleadings. The conclusion was that while a small group of people could theoretically be adversely affected, the benefits of consistency among the rules, and broader recourse to electronic filing, outweighed any disadvantages. The unanimous conclusion of the Committee was to advise the Court that a similar abrogation of V.R.Cr.P. 45(e) is warranted, and recommended.

8. **Request for Establishment of an Advisory Committee on Rules of Appellate Procedure.**

After service on a special subcommittee with other appellate practitioners to propose revisions to the VREF and VRAP associated with Odyssey electronic filing and case management at the Supreme Court, Ms. Turner and Bridget Asay have written to the Court to request the establishment of an Advisory Committee on Rules of Appellate Procedure, to provide focus upon review and development of the procedural rules of the Appellate Division. Historically, appellate rules amendments have been the province of the Civil Rules Committee.

After brief discussion, the Committee unanimously concluded to support this request, and the Court will be advised to this effect.

9. **2021-02: V.R.Cr.P. 53 and V.R.C.P. 79.2 (Recording Court Proceedings); and V.R.Cr.P. 53.1 (Use of Video Recording Equipment Where the Official Record is Made by Video Recording); Issues Associated with Defense Request to Video Record Jury Trial.**

Rules 53/79.2 authorize *audio* recording by participants, but prohibit video recording absent good cause shown. Ms. Turner requested that the Committee review the existing rules, in context of the resumption of jury trials and trial court opinions in *Alvarez; Colehamer* denying defense requests for video recording of proceedings. An additional consideration is that the existing rules on recording predate the Covid experience and practice in the Criminal Division under the terms of A.O. 49 and its various amendments.

After extensive discussion of the issues at the June 4th meeting, Committee consensus was to ask that Ms. Turner provide a draft of proposed amendments, or more specific identification of sections and issues for review, for the August meeting.[4] Ms. Turner had not been able to focus on completion of a draft for consideration. The Committee did have a brief, continued discussion of the issue of

[3] The Civil and Criminal Rules for computation of time are identical. The Civil Rules Committee unanimously voted on May 21st to recommend abrogation of the "Three Day" Rule, as unnecessary. V.R.Cr.P. 45(e): ***"Additional Time After Certain Kinds of Service.*** *Whenever a party must or may act within a specified time after being served and service is made under V.R.C.P. 5(b)(mailing), (3) (leaving with the clerk), or (4) (sending by electronic means), 3 days are added after the period would otherwise expire under Rule 6(a)(V.R.Cr.P. 45(a)).*" The Civil Rules proposal (and its proposal to also abrogate V.R.A.P. 26(c)) was published for comment on September 16th, with comment period closing on November 15th.

[4] See 6/4/21 Meeting Minutes, pp. 4-6.

party/participant recording. Judge Arms emphasized that any provision expanding party/participant recording must be accompanied by strong potential sanctions for any misuse of video recording, noting that the potential for abuse to the detriment of fair process is significant. To take Committee consideration of potential amendments further, a subcommittee was appointed, consisting of Ms. Turner, Ms. Kennedy, Mr. Sedon, Ms. Lanthier, and Judge Arms, to meet and provide a report and recommendations to the Committee at its next meeting.

10. **2020-04: V.R.Cr.P. 35 (Sentence Reconsideration; Stipulations to Modify at Any Time) (**Status Report**)**.

The Committee previously deferred to the Sentencing Commission for recommendation as to adoption by statute of an amendment to 13 V.S.A. § 7041 that would provide for sentence reconsideration by agreement of state and defendant at any time upon stipulation. While the Commission had included such a recommendation in its November 2020 supplemental report to the legislature, no action on the proposal occurred in the last session. At the August 13th meeting, Judge Zonay reported that Representative LaLonde would apparently be following up with proposed legislation during the next session. As was the case at time of the June 4th meeting, no further Committee action is warranted, other than monitoring introduction and progress of any bill.

11. **2021-03: Centralized Clerk Review of Criminal Filings in Odyssey; V.R.Cr.P. 8(b); Joinder of Defendants in the Same Information or Indictment.**

This Agenda item was brought forward from discussion at the June 4th meeting. The original request for review came from Laurie Canty, following the efiling of informations joining two codefendants with a variety of counts (some joined; some as to each individual only), which was incompatible with the Odyssey case record. Apparently, Odyssey does not have the capability of maintaining an accessible record for each of joined codefendants where there is a single information and case filing, and this was a problem noted in the process of centralized review of criminal division filings. The interim solution in the presenting case was to require the prosecuting attorney to file two separate cases, even though the "joined" counts are identical, and name each in the same document. With separate filings, a case filing entry for one named defendant can be accessed, with notation of "related case" providing information from which case entries in the other defendant's file can be accessed. One additional presenting problem is that when defendants are joined in an Odyssey case filing, and expungement or sealing of the disposition record of one co-defendant is warranted, there is apparently no effective way to address expungement or redaction in the other co-defendant's case, in which there may be no expungement, and a "permanent" record of conviction and sentence. Ms. Canty's inquiry was whether amendment of Rule 8(b) Joinder of Defendants as to filing requirements would provide any solution in reconciling with the Odyssey Case Management for purposes of access to electronic case record pertinent to each Defendant.[5]

In its discussions, the Committee was reluctant to consider any amendment of Rule 8 if an effective technological or administrative remedy would suffice. Ms. Canty and Reporter Morris were to explore in further detail this option, in lieu of a rule amendment, and provide a report at the next meeting. In consequence of the renewed discussion of this issue on August 13th, the Committee unanimously concluded that an administrative solution should be sought, and that given the complexities of joinder of

[5] From initial promulgation of the Criminal Rules, Rule 8(b) has authorized joinder of two or more defendants in the same information or indictment. The issue presented is as to case captioning, and retrieval, public access, and expungement of case records as to individual defendants who have been joined.

defendants generally, a rules amendment should not be recommended as an accommodation to any limitations of the Odyssey efiling and case management system.

12. <u>2020-07: V.R.Cr.P. 11(b); Nolo Plea; Clarifying Whether, and When a Defendant has a Right to Enter Nolo; Court Criteria for Rejection of Such Plea</u>. (Request of Senator Benning at LCJR meeting on Dec. 8, 2020)

At the June 4th meeting, the Committee discussed at considerable length Senator Benning's suggestion, mindful of preserving judicial discretion, that there should at least be criteria governing the exercise of discretion by the judge to reject a nolo plea and require a guilty plea.[6] The suggestion stems from the perception that many judges require a plea of guilty as a condition of acceptance of a plea agreement, when such is not reasonably necessary, and may necessitate a trial that would otherwise be avoidable. Presently the court has wide discretion to reject a plea of nolo contendere, which requires court consent under Rule 11(b). The renewed consideration on August 13th provided indication of continuing division of Committee member views as to any proposed amendment, and the absence of consensus as to further consideration.

At the June 4th meeting the Committee had asked Reporter Morris and Ms. Turner to engage in further research as to whether any jurisdiction, apart from Virginia, had adopted any variant from our Rule 11(b), to limit or guide judicial discretion in declining to accept a nolo plea. The Reporter's memorandum to the Committee in advance of the June meeting stated that it appeared to be the broadly-observed rule that a nolo plea requires the consent of the court, and that it is not a matter of right, and not recognized to date as a right of Constitutional dimension.[7] And that Virginia appeared to be the only jurisdiction establishing that a judge is required to accept a plea of nolo contendere. The Reporter also indicated that with respect to Federal Rule 11, a DOJ directive provides that "United States Attorneys may not consent to a plea of *nolo contendere* except in the most unusual of circumstances and only after a recommendation for doing so has been approved by (higher DOJ officials)" (parenthetical matter substituted). Ms. Turner indicated that in her research, she had found another jurisdiction—Alaska—which appears to authorize a Defendant's right to a no contest plea.[8]

While the nolo plea is generally recognized as a privilege, and not a Defendant's right, Ms. Turner urged consideration of the benefits provided to the justice system through availability of the plea, in terms of efficiencies in avoidance of unnecessary trials, and the often serious collateral consequences attendant upon a plea of guilty—not only with respect to potential civil liability, an historic primary

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[6] See minutes of meeting June 4th, p. 10.

[7] Virginia Rule of Criminal Procedure, § 19-254, provides in pertinent part that "in misdemeanor and felony cases, the court shall not refuse to accept a plea of nolo contendere", but the Reporter had found no other authority so limiting a court's discretion to decline consent to a nolo plea. *North Carolina v. Alford*, 400 U.S. 25, 27 L.Ed. 2d 162 (1970) held that it was not *error* of Constitutional dimension to permit a defendant facing the death penalty to enter a plea of guilty to a reduced charge—second degree murder—while protesting innocence, in order to avoid execution, where he "intelligently concluded that his interests required" entry of the guilty plea. However, the Court in that case did not conclude that a defendant has a right to require that a plea of nolo contendere/guilty while protesting innocence be accepted by a court.

[8] Alaska R. Crim. P. 11(a) provides that "A defendant may plead not guilty, guilty or nolo contendere. If a defendant refuses to plead, stands mute, or if a defendant corporation fails to appear, the court shall enter a plea of not guilty." The Alaska rule does not contain a provision equivalent to V.R.Cr.P. 11(b), which leaves the acceptance of a nolo plea to a judge's discretion and consent.

rationale for the plea, but also in terms of significant immigration/deportation consequences, which were featured in the *Padilla* case[9], leading to required Rule 11 colloquy as to immigration/deportation consequences of criminal conviction.

Judge Arms indicated that her primary concerns relating to proposed nolo pleas were presented in cases involving sexual offenses, and other serious injury to victims. In her assessment, if a judge does not have the ability to neglect a nolo plea, the Defendant is being deprived of success in therapeutic programming that is a necessary component of sentence. Dan Sedon articulated mixed feelings. While there are many charges that would reasonably require a Defendant to admit guilt, and good representation would prepare a Defendant to succeed in admission-based therapeutic programming that is a component of a more favorable plea agreement and sentence, there may be minor offenses for which a plea of guilty would not reasonably be required, and where a right to enter a nolo plea would not unreasonably limit a judge's discretion. Mimi Brill expressed her support to a rule amendment that would accord a Defendant the right to enter a nolo plea. Judge Zonay state his view that the practical import of such a rule would be illusory—a judge is still at liberty to reject a plea agreement, resulting in more cases going to a "straight up" plea, or trial without benefit of plea agreement. Evan Meenan expressed his agreement with the positions of Judges Arms and Zonay—that a right to enter a nolo plea could have unintended consequences, and serve to constrain the historic discretion given to judges with respect to acceptance of nolo pleas. To Dan Sedon's comment, Mr. Meehan suggested that classifications of offenses as major/minor often outlive their original justification, and requiring acceptance of a nolo plea in all cases would serve to undermine public confidence in the justice system, especially in cases of crimes committed by police or other public officials. In his view, judges should retain discretion of accept or reject proposed nolo pleas. Devin McLaughlin shared his view that it is actually difficult to discern the difference between a guilty and a nolo plea, if there needs to be a "factual basis" finding for the particular charges underlying either plea. However, it was noted that Justice Eaton's dissent in *In re: Bridger*, 2017 VT 79, 205 Vt. 380, fn. 16 provides authority in support of his position that a finding of factual basis is not necessary where the plea is nolo contendere.[10] The Committee has considered *Bridger* and its impact upon Rule 11(f)'s factual basis finding requirement for guilty pleas in past meetings.[11] There was no discussion of the broader implications of the majority opinion in *Bridger* in context of the present discussion of whether to pursue an amendment according a Defendant the right to enter a nolo plea without approval of the trial judge.[12]

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[9] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

[10] This footnote from the dissent states that "V.R.Cr.P. 11(f) does not require the establishment of a factual basis for a plea of nolo contendere. See generally C. Wright, et al., 1A Fed. Prac. & Proc. Crim. § 179 (4th ed.) (stating that "factual basis" requirement is only provision that applies to pleas of guilty but not to pleas of nolo contendere, and "[t]his is because a plea of nolo contendere may be accepted from a defendant who is wholly innocent but who does not wish to contest the charge"). 'Implicit in the nolo contendere cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence." Alford, 400 U.S. at 36. The majority does not address why its standard for establishing a factual basis through a colloquy with the defendant as part of ensuring voluntariness is required for guilty pleas but is not required for nolo pleas, where the end result of each is a conviction.'".

[11] See Minutes, 9/22/17, pp.6-7; 2/2/18, pp. 4-5; and 5/4/18, p. 8.

[12] The reasons for a judge's rejection of a Defendant's intent to plead nolo in a given case under current Rule 11(b) would perhaps relate to, but not at all coincide with the issue of alternative means for determination of factual basis for the charge, consistent with *Bridger*.

Ms. Turner stated that, even removing a focus from the consequences of a guilty plea and conviction for non-citizens, there is a fundamental imbalance in the plea bargaining process that would serve to support acceptance of a right to a nolo plea. And, regardless of whether the plea is nolo, leaving the State to its proof is not the same as not taking responsibility. If there is a contest as to sentence, a Defendant's acceptance of responsibility, for purposes of accountability and eligibility for therapeutic correctional programming or not, can be addressed there. Judge Arms posited that such a change in criminal procedure (as to establish a right to a nolo contendere plea) should be for the legislature to make, given the competing concerns presented, including as to public confidence in the workings of the judicial system. In Judge Zonay's view, the plea to be given and associated findings as to factual basis must be consistent—in line with--the Court's reasoning in the *Bridger* case (the requisite colloquy with the Defendant as to Defendant's own statement/admission of the facts, and whether any alternative source may be relied upon in factual basis finding for the charge that is the subject of the plea being a "first hurdle", regardless of whether the plea is guilty or nolo).[13] And, he questioned whether the Committee should suggest to the Court the adoption of a significant rule change that has apparently only been the practice in two other jurisdictions, without greater justification for doing so.

At the conclusion of the Committee discussion, given the division of views and the apparent lack of consensus as to a proposed amendment of Rule 11(b) to accord a Defendant's right to enter a no contest plea, Chair Zonay suggested that the matter be placed on the agenda of the next meeting, for a motion as to whether to proceed with consideration or not. There was no objection to this manner of proceeding, and the suggested Rule 11(b) amendment will be placed on the next Agenda.

13. *State v. Stearns*, 2021 VT 48 (6/18/21); V.R.Cr.P. 35; Computation of Time for Filing for Sentence Reconsideration (Case briefing and referral to Criminal Rules Committee in the opinion).

Reporter Morris and Ms. Turner lead a brief discussion of the recently issued opinion in the *Stearns* case. Ms. Turner indicated that while related to Rule 35 sentence reconsideration procedure, at its heart, the case does not present a Rule 35 issue, but what might appear to be an obscure, but significant issue as to the Court's "mandate". See, V.R.A.P. 41. Specifically, the opinion deals with how the appellate rule on issuance of a mandate, and the 90 day clock for requesting sentence reduction, interact and play out. In *Stearns*, the Court equitably construed the phrase "after entry of *any order or judgment* of the Supreme Court upholding a judgment of conviction" in 13 V.S.A. 7042, establishing the 90-day time frame within which sentence may be reconsidered, to authorize maintenance of such a motion under the unique circumstance of the case. In a footnote in the opinion, the Court requests that the Criminal Rules Committee examine a rule amendment that would address an argument not reached in the case: computation of time for Rule 35 purposes from the date of issuance of the *mandate* of an order of the Supreme Court in issue, versus the date of *issuance* of the order itself.[14]

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[13] The Defendant's pleas in *Bridger* were guilty, not nolo. Both the dissent (Eaton, J.) and concurring opinions (Dooley, J.) note that the majority opinion does not address the continued viability of (*Alford)* pleas of guilty while protesting innocence, with the concurrence positing that an *Alford* plea would likely be inconsistent with the majority holding. Two post-*Bridger* decisions construe the 11(f) colloquy and admission requirements of *Bridger* where the plea is guilty (not nolo): *In re: Gabree*, 2017 VT 84 and *State v Rillo*, 2020 VT 82.

[14] "Defendant also argues that the ninety-day period started when the mandate of the entry order issued, rather than when the order itself issued. Although it is undisputed that defendant filed the motion for reconsideration within ninety days of the issuance of the order itself, he urges us to consider his mandate argument for the sake of clarity. Because we do not have a concrete set of facts upon which to analyze the mandate question, or a litigant with an actual stake in the answer, we do not consider it. See Wood v. Wood, 135 Vt. 119, 121, 370 A.2d 191, 192 (1977) (observing that prohibition on advisory opinions requires that appellate question "must be a necessary part of the final disposition of the case to which it pertains" and that "the

At the conclusion of the brief discussion, Ms. Turner indicated that she would be providing for consideration a draft rule amendment to carry forward and clarify the issue presented in the footnote in *Stearns*.

Next Committee Meeting Date: The next meeting date was scheduled for Friday, November 19th at 1:30 p.m. via Teams videoconference. Chair Zonay will email an invitation and meeting link to all Committee members.

The meeting was adjourned at approximately 11:10 a.m.

Respectfully submitted,

Walter M. Morris, Jr.
Superior Court Judge (Ret.)
Committee Reporter

AGENDA ITEMS DEFERRED:

14. 2019-02: V.R.Cr.P. 18(b); Venue; Exceptions (Zonay proposal).

Committee has deferred action subject to further developments/A.O. 49 amendments pertaining to venue during pendency of Judicial Emergency.

15. 2014-06: Proposed Added Civil Rule 80.7a (Civil Animal Forfeiture procedures) per Act 201 (2014 Adj. Sess.), S. 237, effective 7/1/14. (Draft to be sent to Civil Rules Committee for comment.) (Note: recent opinion, *State v. Ferguson*, 2020 VT 39 (5/29/20) re: bounds of hearsay in affidavits admitted per statute in animal forfeiture proceedings).

[11/18/2021]

establishment of legal doctrine derives from the decision of actual disputes, not from the giving of solicited legal advice in anticipation of issues"). Mindful of the need for clarity, however, we refer the question to the Criminal Rules Advisory Committee."