VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
February 3, 2012

The Criminal Rules Committee meeting commenced at 1:37 p.m. at the Vermont Environmental Court in Barre. Present were Judges Crucitti and Zonay; and Mark Kaplan, Joanne Charbonneau; Susan Carr; Cindy Maguire, David Fenster and Committee Chair Scott McGee. Committee members Anna Saxman, Dan Maguire, Bonnie Barnes, Karen Shingler and David Suntag were absent. Justice Brian Burgess was present as the liaison to the Committee from the Supreme Court, as was committee Reporter Judge Walt Morris. Former member, Assistant Attorney General John Treadwell, was present at the Committee's request to assist the committee's review of pending rule amendment proposals. One member of the public, Mike Donahue, was present.

1. Minutes of the December 2, 2011 meeting were reviewed, and unanimously approved upon motion of Judge Zonay seconded by Judge Crucitti.

2. 2011-04--Administrative Order No. 43: Amendments to Rule 41 to Establish Protocols for Preserving and Storing Records of All Search Warrant Applications, Returns, and Related Documents

Walt Morris and Joanne Charbonneau provided a report on recent protocols implemented by the Court Administrator and Court Clerks to identify, track and store search warrant applications and related documents. Ms. Charbonneau explained the procedures that are being established in her court in implementation of the protocols. A search warrant log and database is now established in each court. Periodic entries will be made by the Clerks as to search warrant applications, issuance or denial of warrants, and actions taken by law enforcement officers thereon, including filing of returns and inventories. All warrant documents are to be maintained in a segregated location by the Clerks, to assure confidentiality until the records are considered public documents, and then to assure accessibility to the public.

General discussion ensued about different mechanics of maintaining the records, cross referencing them, and keeping adequate data for accessibility. Walt Morris provided a review, with documents, of the computer screens, their format and entries that will be used to set up the system and maintain it. David Fenster noted that requirement of a police incident report number could prove problematic, and should not be a mandatory field. The reasons for this are that the agency may not have assigned an incident number, or not have been able to given time constraints; that warrant applications and searches may be pertinent not just to one incident or suspect, but to several cases; and that some applications are initiated by "non-traditional" law enforcement officers (ex., animal control or humane society officers, or a municipal inspector), or a prosecutor. Walt Morris indicated that the Court would likely wish to still have use of

incident numbers to the extent practicable, even if that was later on in a case, to provide additional warrant tracking data.

The general discussion included a review and reference to a proposal for a search warrant filing protocol that had been earlier circulated by Judge Crucitti.

Issues of public accessibility and sealing of records, and distinguishing between the two with reference to the Court's administrative orders and decisions were discussed. The committee was encouraged to make any additional suggestions to Walt Morris who will pass them on to those in the Court Administrator's Office who will work on the operations manual.

A draft of proposed amendments to Rule 41 to address the issues identified in A.O. 43 was presented by Walt Morris, and was the subject of extensive discussion by Committee members present. Committee members suggested various issues and modifications to the draft in the context of their working knowledge of the search warrant process.

John Treadwell suggested the consideration of a new sub rule 41.2 to collect all of the administrative guidance for handling of warrants and warrant applications, both for Rule 41 and for non-testimonial identification orders under Rule 41.1. John pointed out that the Rules do not normally extend into the administrative detail that is now contemplated, and suggested that these provisions might be more appropriately placed in a separate subrule pertinent to Rules 41 and 41.1. The committee consensus on this point was to continue with the Rule 41 revisions called for in A.O. 43, in view of the Court's desire for prompt action, and in consideration of the concerns raised by some committee members about combining provisions of Rules 41 and 41.1 as part of the A.O. 43 work. The proposal for amendments to Rule 41.1 and a new Subrule 41.2 will be taken up by the committee at a later time.

By consensus, the proposal to require an incident number was placed in a new section of the proposed rule, and it was placed at the end of the text of the Rule. The concern was that if the incident number requirement were included as a necessary element of the warrant, motions to suppress for technical non-compliance not affecting the validity of the warrant itself would be invited. Further to this point, Cindy Maguire suggested that the proposed amendments contain a comment indicating that technical non-compliance with any of the provisions of the rules as to warrant issuance and returns would not serve as a basis for suppression of the fruits of any search pursuant to warrant. The committee consensus was that this issue was not one best addressed in comments, but by the Supreme Court itself in response to case-specific challenges to claims of non-compliance with warrant requirements.

There was considerable discussion of the consequences and process upon denial of a warrant application. Concern was expressed about instances where a judge says the officer does not have enough information to issue the warrant, but the court allows the officer to supplement the application. Scott McGee suggested that the rule might indicate that, when a warrant has been denied after the court has reviewed the warrant and any supplemental information, then the procedures outlined would be followed. The committee agreed with this proposal.

Committee discussion and action with respect to the Rule 41 changes consumed the bulk of the scheduled meeting, ending at approximately 3:20 PM.

After discussion, and modifications of the draft document, the following proposed amendments to Rule 41 were unanimously approved by the committee, upon motion of Judge Zonay, and second by Mark Kaplan:

Denial of Warrant Application: If upon review of the application and affidavit, and consideration of any supplemental information provided under oath, the judge denies the application for lack of probable cause, the judge shall so indicate in writing on the proposed warrant, and immediately file the proposed warrant, application and affidavit with the Clerk of Court. If denial occurs after hours, the judge shall deliver the documents to the Clerk on the next business day (noting that delivery may include transmission by electronic means). (Proposed Rule 41 (c)).

Filing of the Warrant: Upon issuance of the warrant, the judge shall immediately file a copy of the signed warrant, as well as the original application and affidavit with the clerk of the court designated in the warrant. If the warrant is issued after court hours, the judge shall ensure that the documents are delivered to the court on the next business day for filing. At the time of making the return, a copy of the warrant as served shall be filed with the clerk. (Proposed Rule 41(d)(3)(D)).

The clerk shall enter the signed original or modified warrant into the established warrant log and database when filed. (Proposed Rule 41(d)(4)(C)(iv)).

Filing of the Warrant when Issued or Denied; Warrant Log and Database:
Upon issuance of the warrant, the judge shall immediately file a copy of the signed warrant, as well as the original application and affidavit with the clerk of the court designated in the warrant. If the warrant is issued after court hours, the judge shall ensure that the documents are delivered to the court on the next business day for filing. Upon filing of a warrant, and/or application and affidavit(s), the clerk of court shall: (1) assign a standardized warrant identification number to the warrant; (2) enter the warrant, its identifying details and subsequent activity into a warrant log and standardized database maintained for each unit; and (3) file the warrant documents in a secure location with all other warrant documents of the unit, pending lawful disclosure, court order, or other disposition. (Proposed Rule 41(d)(6)(A)).

A warrant log and database are established to permit monitoring of timely execution of warrants issued, and timely filing of return and inventory following search. The clerk shall affix the same warrant identification number to all subsequent papaers related to the issuance, execution and return of the warrant. The warrant log and database shall bear docket entries as to each stage of the issuance, execution and return of the warrant. The Court Administrator shall prescribe policies and protocols for maintenance of the warrant log and database in each unit. (Proposed Rule 41(d)(6)(B)).

Execution and return of the warrant:

The return shall be made within ten days and shall be accompanied by the inventory. Upon certification of the applicant that good cause exists for extension of the return date, the judge may extend the time for the return and inventory for such period of time that the judge deems reasonable. (Proposed Rule 41(e)(3)).

Warrants not Executed; Filing Requirements:

If a warrant is not executed within its prescribed term, the applicant shall within ten days of the expiration of its term, file the original warrant as issued, the application and affidavit with the clerk of the court designated in the warrant, with a return noting "warrant not executed", the applicant's signature, and date of the applicant's signature. (Proposed Rule 41(e)(6)).

Particularity; Incident Number: The warrant application shall contain any incident number assigned by the law enforcement agency or other applicant requesting the warrant. The return and inventory shall also contain reference to this incident number. (Proposed Rule 41(h)).

[NOTE: In consequence of post-meeting comments of Committee members responding to a draft circulated by the Reporter, the following **additional changes** were made to the proposed amendments approved at the February 3, 2012 meeting:

Warrant Seeking Electronically Stored Information:

A new section was added to address issues with seizure and retention of lectronically stored information. A warrant under Rule 41(d)(5)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The warrant may authorize the retention by the property owner of an electronic copy of such information necessary to avoid or mitigate business interruption or other disruptive consequences. The time for executing the warrant in Rule 41(d)(5)(A)(ii) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review. (Proposed Rule 41(d)(5)(B)).

Filing of the Warrant:

The provision for the judge's filing of the warrant when issued was relocated from Section 41(d)(3)(D) to Proposed Rule 41(d)(6)(Section addressing clerk's filing and entries, and the search warrant log and database).

Execution and Return of the Warrant:

In describing the inventory in case of seizure of electronically stored information, the following provision was added to Proposed Rule 41(e)(2): In a case involving the seizure of electronic storage media or the seizure and copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied. (Proposed Rule 41(e)(2)).

Return:

The time period for the return in Proposed Rule 41(d)(3) was shortened from ten days to "five calendar days" in Proposed Rule 41(e)(3).

The provision, "If no property was seized in consequence of the authorized search, the return shall so indicate", was added to Proposed Rule 41(e)(3).

Warrants not Executed; Filing Requirements:

As with Proposed Rule 41(e)(3), the time for filing of the warrant and a return in case of a warrant not executed was also shortened from ten days to "within five days of the expiration of (the warrant's) term. (Proposed Rule 41(e)(6)).

Tracking Device:

A definition of the term, "tracking device" is added to the rule as Proposed Rule 41(i)(3).

The final draft of the Proposed Rule 41 amendments, with Reporter's Notes, was submitted to the Supreme Court for publication and comment.

3. 2010-07--Proposed Amendment to Rule 44.2 (withdrawal of counsel):

The committee next considered the proposed amendments to Rule 44.2 for automatic withdrawal of counsel. A modification clarifying that there would be no automatic withdrawal in case of a pending motion for reduction of sentence was unanimously approved upon motion of Judge Zonay, and second by Mark Kaplan, and the modification is included in the proposed amendments published by the Court.

4. 2011-05 & 2011-07: Rule 11 Amendments; Colloquy re: citizenship and recognition of certain pleas by waiver without colloquy in open court:

A draft amendment to Rule 11(c)(7) prescribing additional colloquy/warning to the Defendant to consequences of guilty or nolo plea of deportation, denial of citizenship, or denial of entry to U.S. if not a United States citizen, to conform to requirements of the federal rules, was unanimously approved by the committee.

The committee also unanimously approved amendments to Rule 11(c) explicitly recognizing that no record colloquy is required where the court authorizes a plea by waiver consistent with Rule 43.

5. 2010-05—Omnibus Rule Changes to Conform to Judicial Restructuring Legislation; Amendments to Rule 6 (Grand Jury Practice):

Walt Morris reported on the status of these conforming amendments. A memorandum had been circulated to the committee addressing Grand Jury practice, and the statutory revisions which require amendment to the existing Rule 6. The amendments update Grand Jury practice, to now provide reference to "unit" instead of county or territorial unit; deleting reference to the jury commission; and substituting gender neutral language. The committee discussed the general definitions sections of Rule 54, and approved amendments to the term "judge" as it appears in the rule, including acknowledgment that magistrates and hearing officers may be appointed to serve as acting judges. On motion of Judge Crucitti, seconded by Cindy Maguire, the committee unanimously approved of the omnibus amendments, which will be forwarded to the Court for publication upon completion of the Reporter's Notes.

6. 2011-02 (Review of V.R.A.P. 3(b)(2) colloquy requirement); 2011-06 (Review of V.R.Cr.P. 12 to conform to current practice); 2012-01 (Review Rule 41 tracking device provisions in light of *U.S. v. Jones*:

Due to Anna Saxman's absence, committee consideration of these Agenda items was postponed to the next meeting date.

7. Emergency Amendment to Rule 18:

The comment period for the proposed rule amendments was still open, but discussion of the proposed amendments was brought forward to in consideration of comments that had been received to date. The issues are associated with the language of the Rule as to venue generally, and the components of the proposed rule that are intended to address the need for "out of unit" proceedings from time to time, such as arraignments, review of bail on arrest warrants issued upon failure to appear, and violation of probation proceedings. The statute enacted as part of judicial restructuring, 4 V.S.A. §37 (a) and (b) establish as a general rule that proceedings involving a case shall be heard in the unit in which the case is brought, subject to certain exceptions.

The proposed rule provides that "Except as otherwise permitted by statute, or by these rules, the prosecution shall be had in the unit in which the offense was committed, or in a contiguous unit." Proposed subsection (b) provides exceptions, "in order to assure access to justice and its fair and efficient administration" for initial appearances and arraignment; VOP preliminary hearings; or hearings to review bail/conditions of release after arrest on a warrant issued for failure to appear.

Justice Burgess clarified that from the Court's perspective, the amendments serve the objectives of savings on costs and manpower demands of having to transport prisoners across the state for very short appearances which can be handled far more effectively in the location of initial detention, and to assure that detainees are able to get into court and have these proceedings handled in a more efficient and timely manner, avoiding the need for prolonged detention and demands on the correctional system that could have been avoided. The proposed amendments thus advance the dual goals of cost savings, a priority for many in the criminal justice system, as well as fair and prompt proceedings convened upon detention without delay. To address concerns that had been articulated during the comment period, Justice Burgess suggested that limiting language derived from 4 V.S.A. § 37(b)(1)(C)--When "…necessary to ensure access to justice for the parties or required for the fair and efficient administration of justice"—be incorporated into the text of the proposed rule itself as an explicit recognition that exceptions to the general rule would be closely guarded, to assure primary jurisdiction of the initiating unit of the Court.

Those present from the Attorney General's office spoke to additional reasons for supporting the proposed amendments. The Attorney General's office often has cases in multiple counties which may be part of a continuing criminal enterprise, or closely related, such as identity theft, prescription fraud, public benefits fraud, and the like. Under the statutes and rules which predated judicial restructuring, which recognized three larger territorial units of the District Court, multiple cases could be brought or joined in one court that might pertain to two or three or four other counties, for far more effective treatment from both prosecution and defense perspective. With elimination of the territorial units, and establishment of venue as coterminous with the county, that flexibility was eliminated. The venue provisions of the proposed rule restore that flexibility; they really do not effect a change, but eliminate an unintended restriction that apparently resulted from the restructuring act's definition of "unit" of the court.

After further discussion the committee agreed that the concerns about the reach of the proposed amendments to Rule 18 would be addressed in an expanded Reporter's Note emphasizing that the proposed amendments simply seek to maintain what had been the prior practice when the prior unit of venue consisted of multiple counties within a territorial unit, and that no material change has occurred. In addition, that cost savings, access to justice, and timely treatment of cases to avoid unnecessary detention were clear objectives of the statutes that were directly addressed by the amendments.

[NOTE: Following the February 3, 2012 meeting, the Reporter circulated a memorandum addressing the status of the venue statutes before and after judicial restructuring, including alternative proposals for amendments. The amended Reporter's Notes were circulated and ultimately forwarded to the Court, to supplement the Committee's original submissions.**]**

The meeting was adjourned at approximately 4:15 p.m.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter