[As approved at meeting on August 3, 2018]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
February 2, 2018

The Criminal Rules Committee meeting commenced at approximately 10:02 a.m. at the Supreme Court in Montpelier. Present were Chair Judge Tom Zonay, Mark Kaplan, Devin McLaughlin, Dan Sedon, Dan Maguire, Rosemary Kennedy, Judges Marty Maley and Alison Arms, Mimi Brill, Evan Meenan, Laurie Canty, Kelly Woodward, John Treadwell, Supreme Court liaison Justice Karen Carroll, and Committee Reporter Judge Walt Morris. Committee member Anna Saxman was absent, but Rebecca Turner of the Defender General's Office attended in her stead.

Justice John Dooley (Ret.) later joined the meeting to speak to Agenda Item No. 13 (Amendments to V.R.C.P. 79.2 and V.R.Cr.P. 53-Possession and Use of Recording and Transmitting Devices in Court)

The meeting opened with the Chair's welcome to newly-appointed Attorney General designee Evan Meenan.

1. The Minutes of the September 22, 2017 meeting were reviewed, and were unanimously approved with one addition (completion of case citation of *State v. Thomas*, NM 2016, p. 5), on Motion of Mark Kaplan, seconded by Dan Sedon.

2. Committee Reporter Morris provided an account of the Legislative Committee on Judicial Rules review of a number of proposed criminal rules at its meeting on October 23, 2017. At that meeting, the LCJR considered the legislative amendment of Rule 43(a) in the Budget Act (H. 542, Act. No. 85, § E. 204.1; 2017 Adj.Sess.) which sought to prohibit the conduct of arraignments under Rule 10 by video transmission without the consent of the defendant, and the Judiciary's conduct of preliminary appearances under Rule 5 via video in the Chittenden Unit. LCJR had been asked to review the status of the legislative enactment, and whether any further legislative response was warranted. Reporter Morris indicated that after consideration of the long established distinctions between preliminary appearance under Rule 5 for defendants in custody, and formal arraignment under Rule 10 (even though preliminary appearance and arraignment have been with rare exceptions been considered to be the same process in practice), LCJR appeared to be of the view that the amendment in the Budget Act did not serve to reach and preclude conduct of Rule 5 preliminary appearance by video, and that referral back to appropriate committees for further legislative enactment was warranted. LCJR members indicated that the primary concern, shared by the judiciary, was that any video arraignment process would assure that attorney-client communications are entirely confidential, and permit spontaneous confidential attorney client interaction as the need arises in the course of the proceeding.

In response to the report of the LCJR considerations, some Criminal Rules Committee members noted their continuing concerns as to absence of privacy in attorney-client communications in the course of video appearances, citing the physical setting of the spaces provided at the Chittenden facility, and the difficulties of engaging in spontaneous yet confidential communications as the need arises in the course of such proceedings. Committee consensus was to the effect that whatever procedures are implemented by the judiciary for video appearances, measures to assure confidential and effective attorney-client communications are essential.

Apart from the Rule 43(a) issues, LCJR considered the proposed amendments of Rules 5(e) (Screening and assessment advisements at arraignment); 11.1 (modified advisement of collateral consequences in certain marijuana cases) and 44.2 (appearance and withdrawal of attorneys; deletion of reference to the law office study requirement of attorneys not admitted in Vermont completing law office study in certain governmental law offices pending admission) and offered no comments with respect to promulgation of any of the three proposed amendments.[1] A promulgated amendment to add Rule 32(g), establishing procedures for restitution hearings, was also subject to LCJR discussion.[2] Reporter Morris indicated that he apprised LCJR of the addition of a clarifying reference in the Reporter's Note, responding to concerns previously raised by Rep. LaLonde as to the relationship between the "ability to pay" determination and establishment of the restitution sum (i.e, that inability to pay does not preclude establishment of a restitution sum and entry of a restitution judgment). There were no comments or objections to the promulgated amendment.

3. **2016-02: V.R.Cr.P. 42--Contempt**

The Committee then considered a final draft of proposed amendments to V.R.Cr.P. 42, which serve to update procedures for criminal contempt. The Committee had considered these amendments at length at its September 22nd meeting. These amendments would address procedure where contempt is not summary, and thus requires full judicial process, including the right to trial by jury. The proposed amendments serve to reorganize the existing rule and provide three substantive changes: addition of a requirement of notice to the defendant of the maximum penalty that may imposed upon conviction, to facilitate appearance of counsel, and assignment of counsel to represent the indigent defendant, and addition of a specific provision for the mode of appointment of a prosecuting attorney, to avoid any appearance of influence on the part of the judge as to the conduct of the contempt and to assure that counsel without interest in the proceeding is prosecuting the contempt. The Committee focused upon assurances that a defendant would be provided with specific notice of the right to be represented by counsel, and to make application for assignment of counsel. A subsection (b)(1)(E) was to be added to the proposal to this effect. The Committee also discussed at length the judicial appointment of a prosecutor, and what would occur is the appointed prosecutor upon investigation declined to

[1] As Reporter Morris indicated, the amendments to Rules 5(e) and 11.1 were promulgated as final on October 17, effective December 18, 2017. While submitted to the Court for final promulgation, the amendments to Rule 44.2 were withheld at the request of the Committee to permit further examination of the impact of major revisions of A.O. 41 (Attorney licensure and admission) by the Court. Amendment of Rule 44.2 remains on the docket of Committee business.

[2] This amendment was promulgated as final on July 14, 2017, effective September 18, 2017.

prosecute the contempt. The concern articulated was whether after such declination, a judge could persist in seeking appointment of a prosecuting attorney who would then determine to prosecute the contempt, even if a predecessor had declined. Ultimately the Committee concluded that declination to prosecute by the initially appointed public prosecutor (Attorney General or State's Attorney) would be unlikely to result in a judge's appointment of yet another prosecutor, and that the provisions of proposed subsection (b)(2) should be read as addressing the need for appointment of a successor prosecutor, when the initially appointed public prosecutor declines the representation on specific ethical grounds, such as conflict of interest, rather than declination to prosecute on the merits. In addition, the Committee determined to substitute "may" for "must" in describing the authority and obligation of the judge with respect to appointing a successor when the initially appointed prosecutor declines the representation. With these two changes, the Committee unanimously approved of a final draft of the proposed amendments, to be submitted for publication and comment.

4. Other short matters addressed:

a. **2017-07: V.R.Cr.P. 17: Subpoenas-- Officials Authorized to Issue**

The proposed amendment would expand the categories of persons authorized to issue subpoenas in criminal cases, to include the court clerk, a judge, or a member of the Vermont bar. It is anticipated that the amendment would serve to facilitate issuance of subpoenas consistent with a defendant's Compulsory Process guarantees, subject to existing provisions of the rule establishing protections for persons and records that are the subject of a subpoena. The amendment would also serve to establish greater conformity with the equivalent civil rule, V.R.C.P. 45(a)(3), which has long provided for subpoena issuance by clerk, judge, or attorney. On motion of Devin McLaughlin, seconded by Dan Sedon, the Committee unanimously approved of transmittal of these amendments to the Court for publication and comment.

b. **2015-03: V.R.Cr.P. 23(d): Jury Sequestration/Separation Colloquy Issues; Procedures for Waiver in Event of Jury Separation of More than 48 hrs (life cases) or 30 days (other cases) from Voir Dire to Trial; Judge Admonitions to Jurors; Supplemental Voir Dire**

The proposed amendments address issues as to sufficiency of waiver in event of jury separation for greater than the prescribed dates between selection and trial, admonitions required to be provided by the presiding judge, and procedures for supplemental voir dire prior to commencement of trial in event of jury separation.

The proposal has three key components: (1) in order to consent to delay from jury selection to a trial date longer than the periods prescribed, a waiver, either in writing or on the record in open court, would be required; (2) If commencement of trial is delayed more than 48 hours, the court must provide general admonition to the jurors on the prohibition against engaging in any investigation or research about the case or the people involved, including accessing media and communicating with others about the case in any manner; and (3) provision of a right to supplemental voir dire prior to commencement of trial about any information gained

by jurors about the case in the interim. The proposal, initially brought forward by Anna Saxman, has been considered at a number of meetings of the Committee.

On motion of Alison Arms, seconded by Rosemary Kennedy, the Committee unanimously approved of transmittal of the final draft of proposed amendments to the Court for publication and comment.

c. **2017-04 (Amendments to Rule 44.2—Appearance and Withdrawal of Attorneys; Technical Amendment Due to Deletion of clerkship requirement for bar admission)**

This proposal, which has already passed through publication and comment, had been tabled at the last meeting; Anna Saxman, who had expressed concerns about aspects of the amendments in context of the recent A.O. 41 revisions, was absent; the item was passed to the next meeting agenda.

d. **2017-03—Amendment to Rule 54(a)(2)—Applicability of Rules; Proceedings; 1qssssDeletion of Reference to the "Traffic Act"**

This housekeeping amendment deletes reference to the "Traffic Act", now rescinded in view of legislation affecting the jurisdiction of the Judicial Bureau. See, V.R.C.P. 80.6 (Judicial Bureau rules) and 2015, Act No. 47, § 38. Reporter Morris indicated that the comment period after publication closed on December 18, 2017, without any comments received, and the proposed amendment is now before the Court for final promulgation.[3]

5. **2016-06--Amendment to Rule 43(c) to Expressly Permit Waiver of Appearance at Arraignment (Impact of decision in *In re: Bridger*, 2017 VT 79)**

A subcommittee (McLaughlin; Sedon; Treadwell; Morris) was appointed to consider and present a redraft of proposed amendments that would expressly permit a defendant charged with a misdemeanor to waive appearance and enter a plea of not guilty at arraignment in a signed writing, accompanied by signed conditions of release agreed to by the prosecuting attorney, filed contemporaneously with the waiver or within such other time ordered by the Court. A redraft was presented by Devin McLaughlin, who explained that the proposal would reorganize Rule 43(c) into three parts: (1) pleas of not guilty by waiver at arraignment; (2) pleas of guilty or nolo contendere by waiver where case disposition/sentence would be a fine only; and (3) pleas of guilty or nolo contendere by waiver where more serious offenses, and penalties, including probation or incarceration would be in issue. The subcommittee's draft was to consider the impact of the decisions in *State v. Manosh*, 2014 VT 95, 197 Vt. 420, and *In re: Bridger*, 2-17 VT 79. As committee discussion of the proposal proceeded, Chair Zonay noted that the Court had scheduled arguments in the March Term in a number of post-*Bridger* cases involving Rule 43 and Rule 11 issues, and that it would be prudent to defer consideration of Rule 43(c) amendments until further guidance might be provided by the Court as to the reach of *Bridger*, and its impact upon viability of pleas by waiver, and necessary components of plea colloquy and required court findings, including as to factual basis under V.R.Cr.P. 11(f). Reporter Morris indicated that those pending appeals would likely have implications as to the committee's

[3] The amendment to 54(a)(2) was promulgated by the Court as final on February 5, 2018, effective April 9, 2018.

Agenda Item No. 2013-04 (General Revisions of Rule 11) as well.[4] The committee unanimously decided to defer action on all three Rule 11 Agenda Items (2016-06; 2013-04; 2017-08) to its next meeting, and pending issuance of anticipated decisions by the Court.

6. **2018-01: V.R.Cr.P. 53; V.R.C.P. 79.2 (Possession and Use of Recording and Transmitting Devices in Court)**

Justice Dooley provided an overview of the provisions of the proposed rules, and the committee process of their development. As Justice Dooley indicated, these rules were the product of an ad hoc committee comprised of representatives of each of the Advisory Rules Committees, including Anna Saxman and David Fenster from the Criminal Rules Committee. The special committee met on a number of occasions, and produced proposals of amendment which were the subject of a public hearing convened on August 3, 2017. The proposed rules were published for comment, with the comment period closing on September 18, 2017. Following receipt of public comment (approximately 12-15 written comments were received, in additions to comments provided at the public hearing), and further review, the special committee forwarded its proposals, recommending promulgation, to the Court. Reporter Morris indicated that by reason of the nature of the publication (publication captioned as proposed amendments to Civil Rule 79.2), and transitions affecting Criminal Rules committee representation to the special committee, as practical matter, the Advisory Committee on Criminal Rules had not engaged in any substantive review of the proposals.

Justice Dooley indicated that essentially, the current work intends to update the existing court rules for recording devices from the time of their promulgation back in 1988 (with minor amendment in 1992), to reflect the substantial advances in recording technology, notably the ubiquity of personal recording devices such as cell phones, and the unique challenges now presented in now regulating possession and use of recording devices in the court room. As a matter of context, Justice Dooley indicated that there is a general divide among jurisdictions as to recording of proceedings: (1) rules authorizing presumptive access, subject to established guidelines and procedures, and (2) rules which permit use of recording devices only with express permission and in the sole discretion of the court. Vermont has long observed the former system permitting access and recording. The media, who are the primary users of recording devices in court, have generally done a good job of compliance with the established rules over the years. One of the central questions posed in the amendment process is whether there should be separate standards for access by traditionally-recognized media, versus "non-traditional" media and private individuals, including non-parties who wish to record. He noted that given the prevalence of electronic devices, attorneys and even the judges have become accustomed to their use, to record, to receive data, and to communicate externally from the court room in the course of proceedings, and during recesses.

[4] See, e.g. ***In re: Cynthia Pinheiro,*** 2018 VT 50 (May 4, 2018)(PCR decision; holding that while "substantial compliance" remains the standard of review of purported errors a judge's plea colloquy per V.R.Cr.P. 11(c), a failure altogether to reference and explain to Defendant an explicit essential element of an offense—intentional or reckless conduct in an aggravated domestic assault case—dictates that the conviction must be vacated. "…the absence of any discussion on the record of the mental element of the …..charge was not merely a technical failing. It left the record devoid of sufficient basis to infer that petitioner's guilty plea to the charge was knowing and voluntary.; *Id.* at ¶ 16.)

The proposed amendments would establish definitions of "media"; "participant" and "non-participant" to sort categories of individuals authorized to possess and use recording devices, and the conditions of such use. The amendments retain provision for media "pooling" in the event of multiple media requests to record and/or transmit; as well as existing prohibitions on recording of juror activity and images. The amendments preserve and further articulate the authority of the judge to prohibit, terminate, limit or postpone recording or transmitting, and the use of any device, subject to procedures and criteria in connection with such orders. In terms of what may be recorded, the amendments distinguish between visual and oral/audio recording and transmission. For example, bench conferences, conferences between counsel and between counsel and client and activity during recesses may be recorded or transmitted visually, but not orally. Chambers conferences may not be recorded or transmitted unless permitted by the judge.

In terms of authorization to possess and use devices for recording and transmission, the proposal also distinguishes between "participants" and "non-participants" ("non-participant" being a member of the public who is neither a designated media representative nor participant). Subject to the referenced limitations, participants may create a concurrent recording of proceedings for their personal use. Non-participants are authorized to possess and use recording devices, subject to the general limitations, and the further restriction that they may not use a device to record proceedings "visually", nor communicate visual images recorded in a courtroom to any person inside or outside the courthouse.

The Committee had a number of comments and questions in response to Justice Dooley's presentation. Group consensus was to the effect that the present rule governing media pooling should be retained, rather than broadened (i.e., media are to themselves negotiate pooling of devices used and their recorded content, not involving the judge, with no use of a particular medium in the absence of agreement on the part of all media). The proposal of amendment appears to unnecessarily return greater responsibility (and work load) to the judge to sort out and decide media disputes as to how many and which devices, of which media may be used.

Dan Sedon stated that the distinctions recognized in the proposed rule between "media" and members of the public seeking to record and transmit seemed somewhat ambiguous and subject to arbitrary interpretation.[5] Question was raised as to whether a person identifying themselves as a "blogger" would be subject to treatment as a member of the media. Rose Kennedy asked what the process would be for appealing any decision barring or restricting claimed access. Justice Dooley referred the Committee to the definitions of the proposed rule, indicating that they were sufficiently broad, and could be extended to treat a "blogger" as media, if they are regularly engaged in that practice. He noted as well that the proposed rules have procedures for determination of status as related to access, and appeal from any decision denying access accorded to a particular status.

Numerous concerns were raised as to the dynamics of recording devices and Fair Trial rights, including unauthorized use to intimidate or dissuade witnesses in testifying. Mark Kaplan stated concern as to recordings of jurors, Justice Dooley indicating that the proposal continued a

[5] This concern featured in part in the objections to the proposed rule raised by Anna Saxman, a member of the special subcommittee, during the public comment period for proposed V.R.C.P. 79.2.

complete bar upon visual recording of jurors in court proceedings. Judge Arms indicated that in an animal cruelty case, a person associated with an animal rights group sought to record an arraignment. She articulated a judge's concern for how to even know when recording is occurring in the courtroom so that it may be reasonably controlled. Justice Dooley acknowledged that there will always, as now, be issues of discerning and regulating/prohibiting unauthorized recordings and their ruse, presenting specific enforcement needs from time to time. Mr. Kaplan indicated that members of the defense bar feel strongly that media should not be able to record, visually or by audio, conferences in the courtroom between client and counsel, and cited one case in which it was perceived that such a conference had been recorded and broadcast to the prejudice of the defendant. Justice Dooley's presentation was an overview of the content of the proposed rules, and the process to date; the Committee will engage in a detailed review of the proposed rules at its next scheduled meeting, and thereafter provide comments to the Court.

7. **2016-03: V.R.Cr.P. 41; Act No. 169, S.155; Electronic Communications Privacy Act; Implications for/Revisions of the Rule ("Treadwell" Revisions)**

At the Committee's request, John Treadwell prepared a comprehensive discussion draft of a revised Rule 41, to be comprised of five separate "subdivisions". Consideration of the revisions is prompted by the enactment of Act 169 (2016 ; No. 169, Adj Sess.), the Electronic Communications Privacy Act. The separate "subdivisions" include provisions for warrants of general application (41); to monitor conversations (41.2); for tracking devices (41.3); and for searches implicating the Electronic Communications Privacy Act, including use of drones (41.4). A new subdivision 41.5 addresses the maintenance and filing of, and access to, records of searches conducted pursuant to warrant.[6]

Mr. Treadwell began by providing the Committee with an overview of the various amendments to Rule 41 that have accompanied expansion of the types of searches and seizures occurring with advancement of technologies for search.[7] He then lead the Committee through a detailed review of each of the draft subdivisions. For general provisions, monitoring of conversations, use of tracking devices and regulation of warrant documents, there was little comment, as these subdivisions consisted largely of a reorganization of the existing Rule 41 into subparts. Dan Sedon raised an issue related to one amendment of 41, the deletion of subsection 41(b)(3), which referenced monitoring "of conversations for which one party has consented in order to obtain evidence of the commission of a crime." The rules for warrants for monitoring of conversations would be addressed in the new subdivision 41.2. Subsection (a) of the new subdivision provides that warrants for monitoring of conversations are also subject to the general provisions of Rules 41, and 41.5 (record keeping, filing and access requirements). Dan's point was that in breaking the types of searches out into discrete subdivisions, there might be cases in which the search, and its applicable rule(s), don't neatly fit into one or the other subdivision. As Dan put it, "neither fish nor fowl.". The response of others was that the validity of searches with or without warrant must ultimately addressed by the courts on a case by case basis under

[6] Rule 41.1 is excluded from the new captioning, since 41.1 has long been promulgated to address non-testimonial identification procedures.

[7] As the Reporter's Notes indicate, Rule 41 has been amended in 2007, 2010, 2011, 2013, 2015 and 2016. See Notes for explanation of the various amendments and their bases.

determinative Constitutional analysis, apart from stated rules, and that cross referencing generally applicable principles in the rules could serve to avert the concern that a particular search and warrant process doesn't "fit" within the structure of the rules. This issue is to be noted in further development of final recommendations for amendment.

Most of the Committee's discussion focused upon proposed 41.4, particularly the provisions governing searches employing drones. See draft subsection 41.4(b)(3). Mr. Treadwell indicated that in his drafting, given the detail of the ECPA statute, most of the proposed procedures in this draft subdivision were taken from the statute itself verbatim.[8] While there was little Committee comment as to applications for warrant to prospectively employ use of a drone to search, the particular concern focused upon 41.4(b)(3)'s provision for an after-the-fact application for a warrant *following* employment of a drone to search, without a warrant. The specific language of the draft states that a warrant may be issued:

> "Pursuant to 20 V.S.A. § 4622(d)(3)(A) where a law enforcement agency has, within the past 48 hours, commenced use of a drone in exigent circumstances pursuant to a judicially recognized exception to the warrant requirement to search for and seize (evidence specified further in the rule)" (parenthetical matter added)

Mr. Treadwell indicated that the generally applicable drone statutes require law enforcement to seek a warrant for prospective use of drones for search, excepting "judicially recognized exceptions" to the warrant requirement, and that drone searched would be presumptively covered by the general provisions of Rule 41 in the absence of a separate subdivision of Rule 41. However, in view of the referenced provision of the statute, he felt that the Committee might find it advisable to address in the rules the "after the fact" application for warrant for warrantless use of a drone in a search that had already been completed. As an example of such a scenario, Mr. Treadwell mentioned a serious multiple-fatality DUI that had occurred on Interstate 89, following which police had difficulty in accessing a judicial officer to secure a warrant. Serious accident/incident reconstruction would be one possible area in which exigent recourse to drone use would be employed.

Dan Sedon focused upon the difficulty of requiring a judicial officer to attempt to "retrospectively" endorse basis for issuance of a warrant, or to find exigent circumstances or other recognized exception to a warrant, based upon an ex parte, "documents" request, rather than the acknowledged mode of review of searches with or with warrant, in an adversary hearing on a motion to suppress. Further, difficulties with assuring a judicial officer's impartiality after having approved of an "after the fact" request for warrant, then later presiding at an adversary hearing on a motion to suppress that drone search and its fruits. Mark Kaplan noted that "judicially recognized exceptions" to the warrant requirement are properly and presently addressed in the case law, and that it would be difficult or inadvisable to try to spell these out in a rule. Alison Arms noted the purposes of recourse to warrant, and that judicial review of a search pursuant to warrant is "very narrow" (i.e., generally discernment of basis on the "four corners" of the documents originally submitted). Dan Sedon questioned whether the state could

[8] Codified at 13 V.S.A. Chapter 232, §§ 8101 et. seq. See also, 20 V.S.A. Chapter 205, §§ 4621 et. seq., Law Enforcement Use of Drones (which expressly references recourse of warrant pursuant to Rule 41, or "judicially recognized exception to the warrant requirement".

have failed to show probable cause for initial request for a warrant, yet rely on purported exigency to sustain a completed warrantless search. Or does a defendant lose the ability to challenge an initially warrantless search under established burdens of proof an standards, by reason of a judge's after the fact determination of probable cause? In his assessment, the rule should provide clarity as to these issues.

Devin McLaughlin inquired as to what the "Drone Statute" (20 V.S.A. Chapter 205) says about law enforcement use of drones. John Treadwell indicated that it expresses a clear preference for recourse to warrant to authorize a search by drone, subject to "judicially recognized" exceptions. Mr. Treadwell noted the apparent legislative purpose, to require law enforcement to "declare" their use of drones to search, even under purported exigent circumstances, or recognized exceptions, with the aim of subjecting all drone use to judicial scrutiny, whether a warrant would have initially been required or not, to protect important privacy interests. In this regard, 20 V.S.A. § 4622(d)(3) requires that if a law enforcement agency uses a drone in exigent circumstances, the agency must obtain a search warrant for its use within 48 hours after use commenced, and that if such an application for a warrant is denied, the use of the drone must "cease immediately" and information or evidence gathered through use of the drone must be destroyed. § 4622(e) provides that information or evidence gathered in violation "of this section" shall be inadmissible in any judicial or administrative proceeding.

After extensive discussion, the Committee reached no consensus on this particular subsection of draft 41.4. It was agreed that this subsection required further study and continuation of discussions at subsequent meetings.

John Treadwell pointed out that draft 41.4(b) also addresses warrants for production of data from "license plate readers" (Automatic License Plate Recognition systems-APLRS) for investigation of criminal offenses, provided that more than six months have passed since creation of the data, and no criminal charges are pending, consistent with privacy protections underlying the ECPA. There was little substantive discussion or concern as to this proposed subsection.

The Committee noted that draft subsections 41.4 (b)(1) and (e) also address warrants for production of protected user information from a service provider, but due to lack of time, there was no substantive discussion of these subsections. Further consideration passed to the next Committee meeting.

8. **Agenda Items Deferred:**

2015-02: Proposed V.R.C.P. 43.1 (Participation or Testimony by Video Conference or Telephone); Adoption of Provisions of Civil Rule for Criminal Proceedings.

Consideration deferred to next Committee meeting (for lack of time). Alternative drafts of proposals "A" and "B" have been prepared by subcommittee for full Committee consideration.

2013-04—General Revisions of Rule 11 (General Reformatting and Restyling)

Pending review of anticipated post-*Bridger* decisions that in cases that have been argued or are scheduled for argument. Report on intervening opinions to be given at next Committee meeting.

2016--06--Amendment to Rule 43(c) to Expressly Permit Waiver of Appearance at Arraignment (Impact of decision in *In re: Bridger*, 2017 VT 79). Pending review of anticipated post-*Bridger* decisions in cases that have been argued or are scheduled for argument. Update on any intervening opinions at next Committee meeting. See paragraph 5, above.

2017-08—Amendment to Rule 11(f); Procedure for Factual Basis Finding
Pending review of anticipated post-*Bridger* decisions. Update at next Committee meeting.

2014-02: Amendment of Rule 24(a)(2) (Disclosure/Distribution of Completed Juror Questionnaires to Counsel; Pending action of Committee on Public Access to Court Records(PACR).

2015-01: Amendments to Rules 4(a)(b), 5(c); Electronic Filing of Probable Cause Affidavits; Electronic Filing of Sworn Documents in lieu of "hard" copies; Conformity with V.R.E.F. 7(c). Pending action of PACR Committee and Advisory Committee on Rules for Electronic Filing, in conjunction with implementation of new case management system by judiciary ("Next Generation-Case Management System").

2014-06: Proposed new Civil Rule 80.7a (Civil Animal Forfeiture procedures) per Act 201 (2014 Adj.Sess.), S. 237, effective July 1, 2014.

The proposed amendments would add V.R.C.P. 80.7a, establishing specific procedures for conduct of civil animal forfeiture cases in matters of animal cruelty or neglect (which are conducted in the criminal division per 13 V.S.A. § 354(d)). The proposed amendments have been reviewed at a number of past Committee meetings and unanimously approved. The Reporter will transmit the proposal to the Advisory Committee on Rules of Civil Procedure for that committee's consideration and response.

9. **2018-02: H. 523 (2017 Adj. Session); Introduction of New Bill in 2018 Adj.Sess.**

Reporter Morris indicated that this bill is being considered for reintroduction in some form during the 2018 Adjourned Session. The bill's primary focus is expansion of VRE 807 (video testimony in cases with certain child or other victims with disabilities) to include cases involving bodily injury or serious bodily injury. Other sections of the bill alter the circumstances for taking depositions under V.R.Cr.P. 15, and would require a hearing before a court before a subpoena is issued for a victim's school or other confidential records, with implications for V.R.Cr.P. 17. At the request of the House Judiciary Committee Chair, legislative council had inquired as to whether the Advisory Committee would have a particular position about the legisltation. The Committee engaged in a discussion of existing measures reflected in the evidentiary and criminal rules responsive to a criminal defendant's constitutional Confrontation Guarantees at trial. The discussion extended to pertinent cases, such as *Maryland v. Craig* and

State v. Dunbar. The Committee was unable to reach any consensus on a response to the proposed legislation, except to await any further legislative developments pertinent to our existing rules of procedure, or any further requests.[9] (Morris)

10. Next Meeting Date(s)

Friday, May 4, 2018 was established as the next meeting date. Time: 10:00am. Location: Vermont Supreme Court Building.

11. **Adjournment**

The meeting was adjourned by the Chair at approximately 12:15 p.m.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter

[9] The language reflected in H. 523 was in fact included in S. 159, a bill introduced in the 2018 Adj. Session. The bill was referred to Senate Committee on Judiciary and apparently has not advanced from the time of referral there.