VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
February 10, 2017 [Approved at 5/12/17 Meeting]

The Criminal Rules Committee meeting commenced at approximately 1:32 p.m. at the Supreme Court in Montpelier. Present were Chair Judge Tom Zonay; Judges Marty Maley and Alison Arms; Anna Saxman, David Fenster, Dan Maguire, Dan Sedon, Devin McLaughlin, Laurie Canty and Mimi Brill. Absent were Supreme Court liaison Justice Skoglund; John Treadwell; and Susan Carr. Also present was committee Reporter Judge Walt Morris, and guest Emily Wetherell, Supreme Court Staff Attorney.

The meeting opened with the Chair's congratulations to David Fenster on his appointment to the bench and announcement that appointment of a successor State's Attorney member would be sought from the Court.

1. The Minutes of the October 7, 2016 meeting were reviewed, and with two minor corrections on pages 4 and 6, were unanimously approved on Motion of Dan Maguire, seconded by Mimi Brill.

2. Committee Reporter Morris presented a report of Rules promulgated since the October 7, 2016 meeting. Promulgations included amendments to Rules 3(c)(16) (eff. 12/5/16); 17 (subpoenas)(eff. 2/20/17); 28 (interpreters)(eff. 3/13/17); and 30 (preserving jury charge objections)(eff. 4/10/17). The amendment of 30 was accompanied by contemporaneous amendment of the civil rule (51(b)); and 28, by contemporaneous amendment of the interpreter rules for the civil and probate divisions. As to 28, the Judiciary's Website will be updated to provide more prominent and effective access to information about Interpreter Services, and how to secure them in connection with judicial proceedings. V.R.C.P. 5 (service and filing) was also amended (eff. 2/20/17) to authorize electronic service and filing. Pursuant to V.R.Cr.P. 49(b)(which "defaults" to the civil rules), service by reliable electronic means will now be authorized in the criminal division.

3. **2013-04—General Revisions of Rule 11 (General Reformatting and Restyling)**

Proposed general reformatting and restyling of the Rule, with some substantive changes, had been previously approved by the Committee, based upon drafts by Mr. Treadwell, but submission of a final promulgation proposal delayed by intervening needs to amend both Rules 5 and 11 to comply with the UCCCA. Reporter Morris presented a reformatted draft of the proposed amendments that had previously been approved by the Committee. Extensive discussion ensued as to one provision of the proposal--Rule 11(e)--focusing upon the court's "acceptance", "rejection" or "deferral" of its decision as to acceptance or rejection of a plea

agreement "until there has been an opportunity to consider the presentence report."[1] The subsection in issue provides in pertinent part that "Thereupon the court, before entry of the plea, may accept or reject the agreement, or defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report. A plea agreement is not binding upon the court and does not limit the court in the judgment and sentence to be imposed unless the court accepts the plea agreement under subdivision (e)(4) of this rule." This exact language is contained in the existing Rule 11(e)(2). Notwithstanding the existence of this provision, concerns were raised by committee members as to the timing of the Court's decision to accept, reject, or defer decision on a plea agreement proposal; on the meaning of the term "accept" and whether "acceptance" is equivalent to binding approval of a plea agreement on the part of the judge. As an example, Judge Arms noted the issue presented where one judge has presided at plea colloquy, entry and findings, thereby "accepting" the plea of guilty or nolo. Is a successor judge responsible for sentencing thereby "bound" to accept the agreement and impose sentence accordingly, even if they would not have initially "accepted" the agreement? Devin McLaughlin agreed that interpretation of the term "acceptance" in determining whether a plea agreement is binding or not could be ambiguous. In the ensuing discussion, committee consensus was that a judge's acceptance of a *plea* under the terms of a plea agreement was not binding upon the Court unless the judge provided affirmative record indication that at time of receipt of the plea, that she or he would categorically apply sentence at a later sentencing hearing in a manner fully consistent with the agreement. Reporter Morris noted that in most cases, an experienced judge would refrain from providing such categorical indication at time of entry of the plea, in effect "deferring" decision on whether to accept the plea agreement's proposed sentence until time of the sentencing hearing, and in a serious case, review of the PSI. Both existing and proposed restyled Rule 11 provide that if a judge having received a plea with plea agreement, and having found the plea to be knowing and voluntary, subsequently decides that she or he will not agree to be bound by the agreement, a defendant has a right to withdraw his or her plea. This is the apparent basis for the provision of existing and proposed Rule 11(e)(4), requiring advisement to the defendant that in event of either rejection of the plea agreement (or deferral of decision at time of entry of the plea), if the court ultimately rejects the agreement, the defendant has the opportunity (meaning, the right) to "then" withdraw his or her plea.

Ultimately, the Committee tentatively agreed to the proposed amendments, including the provisions of subsection 11(e) that were the subject of discussion, with the following changes: In subsection 11(e)(2), the phrase "before entry of the plea" would be deleted, leaving the sentence to read, "Thereupon the court, ~~before entry of the plea~~ may accept or reject the agreement, or defer decision…". Subsection 11(e)(4)(B) would be amended as follows: "(B) advise the defendant personally in open court that in the event that it rejects the plea agreement, the court is not required to follow the plea agreement;" The Reporter's Note will address the issue of "acceptance" and provide a definition of the term for clarification, drawing upon the numerous decisions of the court on point. Apart from the issues with subsection 11(e), there were no comments or objections to the draft, as previously approved. A revised draft will be presented for Committee consideration at the next scheduled meeting.

4. **2014-06: Proposed new Civil Rule 80.7a (Civil Animal Forfeiture procedures) per Act 201 (2014 Adj.Sess.), S. 237, effective July 1, 2014.**

[1] See draft, 2/7/17, p. 3, Subsection 11(e)(2).

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. In that the proceedings are civil, not criminal in nature, and the rules would be vested in the Civil Rules, as is the case for civil license suspension and civil (drug case) forfeiture, after brief discussion, the Committee directed the Reporter to forward the proposal of amendment to the Civil Rules Committee for its review and comment, prior to our transmittal of the proposal to the Court for publication and comment.

5. **2014-08: Proposal to amend Rule 32 (Adding Section 32(g))to specify procedures for restitution hearings (*State v. Morse,* 2014 VT 84, 197 Vt. 495; *State v. Vezina,* 2015 VT 56, 199 Vt. 175).**

After brief final review of the proposed amendments, with minor revisions to text and Reporter's Note, the Committee unanimously approved of transmittal of the proposal to the Court for renewed publication and comment.[2]

6. **2014-09: Proposal to amend Rule 32 to specify procedures for objection to sentencing information including PSI sentencing recommendations, and general and special conditions of probation, if recommended in PSI (*State v. Cornell,* 197 Vt. 294 (2014); *State v. Bostwick,* 197 Vt. 345 (2014); *State v. Campbell,* 2015 VT 50; *State v. Anderson,* 2016 VT 40 (4/22/16) and *State v. Cornell,* 2016 VT 47 (4/22/16)).**

The Committee has unanimously determined to table this item and take no further action in favor of any amendment of Rule 32 as to PSI objections at this time. Reference to the Committee's recommendation against approval of the proposed amendment shall be included in the draft of the Committee's next Annual Report to the Court.

7. **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).**

Committee Reporter Morris reported that this proposal will be forwarded to the Court for publication and comment, as directed by the Committee at its last meeting.

8. **2015-02: Video Arraignment and Other Court Appearances; Administrative Order No. 38; Proposed V.R.C.P. 43.1 (Participation or Testimony by Video Conference or Telephone); Adoption of Provisions of Civil Rule for Criminal Proceedings.**

[2] The proposed amendment had previously been published for comment, with no comments received. Upon its own review, the Court suggested further Committee consideration of the proposal, addressed to issues of burden of proof and a requirement of advance disclosure of a defense of inability to pay restitution, resulting in the present version of the proposal. The revised proposal has since been published for comment, with comment period closing on May 19, 2017.

A.O. 38 presently authorizes video appearance at arraignments, status conferences and like proceedings. Proposed Civil Rule 43.1 would authorize video or telephone participation in proceedings by parties, attorneys, witnesses and other necessary persons, extending to provision of testimony as well, under specified conditions and criteria and under court supervision. Anna Saxman and David Fenster were originally appointed to serve on a Special Ad Hoc Committee on Video Appearance and Courtroom Technology, to consider and propose procedural rules for the use of video appearance and video testimony in each of the court dockets. A subcommittee of Criminal Rules (Saxman; Fenster; Sedon; Treadwell) was appointed at the October 2016 meeting to consider and propose amendments to the Criminal Rules that might be considered, authorizing video or telephone appearance and participation in criminal cases, to the extent that such might be appropriate given constitutional Fair Trial guarantees. The subcommittee prepared a proposal under date of November 29, 2016 that was the subject of extensive Committee discussion. The proposal was outlined by Mr. Fenster and Ms. Saxman, with additional comments by Mr. Sedon.

Proposed Civil Rule 43.1 would authorize participation and testimony by contemporaneous videoconference or telephone conference (1) by agreement of the parties, unless the court finds good cause for presence; (2) on motion of a party; or (3) on the court's own motion. The civil rule provides separate standards for video and telephone proceedings, distinguishes non-evidentiary and evidentiary proceedings and establishes criteria for the court to employ in determining whether such proceedings will be permitted, and addresses as well the use admissibility of depositions of witnesses who are available for video or telephone testimony, or unavailable, consistent with V.R.E. 804(a).

The subcommittee proposal under discussion was more limited in scope than that of proposed V.R.C.P. 43.1. The subcommittee proposal would (1) require a written or record waiver of appearance by a defendant for any proceedings, in contrast to existing provision of A.O. 38; and (2) would permit presentation of witness testimony by live video, either upon agreement of the parties, or in absence of agreement, upon order by the court, after consideration and findings addressed to the following factors: Constitutional rights of the Defendant; Fairness to the parties; Significance of the witness; Complexity of the testimony; and Practical difficulties of requiring the witness to appear in court or by video. In contrast to proposed V.R.C.P. 43.1, the subcommittee proposal has no provision for video testimony on the Court's own motion.

While acknowledging that both parties in a criminal case would occasionally want, and perhaps need, to secure witness' testimony via live video testimony, various concerns were articulated about the subcommittee proposal. One concern was as to whether a judge, having ultimate authority would be permitted to veto both parties' request and insistence that testimony via video was reasonably warranted. It was noted that the proposal establishes specific criteria by which a judge's discretion in permitting, or not allowing, video testimony, would be guided. Dan Maguire noted that in his assessment, the more complex/complicated the testimony of a witness, the less likely it would be that a request for video testimony would be granted. And that clearly, it would neither be at all likely, nor appropriate, that a complaining witness would be permitted to provide video testimony. In response to the latter point, although very limited in scope the long-standing existence of V.R.E. 807 (authorizing live or recorded video testimony of minors and certain others in sexual offense cases based upon specific court findings) was noted.

Mimi Brill suggested that consensus might be reached on a proposal which limits authorization of live video testimony to expert witnesses. Members again acknowledged that some provision for this would from case to case be seen as beneficial for both the State and the Defendant. Dan Maguire commented that waiver issues could be presented as to confrontation and cross examination interests and if so, the issue of written or record waiver should be addressed. Judge Arms expressed the view that it would be helpful to the process if a criterion akin to V.R.E. 403 "relevancy balancing" were added to the 5 listed in the proposal, requiring the judge to balance potential for unfair prejudice against relevancy/probative value, necessity or other compelling interests. Members agreed that it would be helpful to see if additional criteria would address concerns, while permitting some authorization for live video testimony and not impeding Fair Trial rights.

Mark Kaplan noted that the introduction of video testimony would make the dynamic of a criminal trial entirely different than has been the tradition and imperative. He indicated his strong opposition to any movement to dilute the requirement of personal appearance and live testimony generally in criminal proceedings, noting the specific guarantees of Fifth and Sixth Amendments and Article 10 in criminal cases, and cautioning against erosion of these guarantees out of concerns for expediency and cost saving.

The Committee ultimately decided that a redraft of the November 29, 2016 proposal would be provided by the subcommittee for further consideration at the next meeting, addressing the various concerns that had been presented in the course of the discussion.[3]

9. **2014-02: Proposed Amendment to Rule 24(a)(2) (Disclosure/Distribution of Completed Juror Questionnaires to Counsel; Report of Judge Zonay for Committee on Public Access to Court Records.**

Due to lack of time, this proposal was passed to the Agenda of the next Committee meeting.

10. **2016-04—Proposed Amendment of Rule 11.1 (Additional Colloquy in Certain Marijuana Cases)**

The Committee considered a final redraft of proposed amendments to Rule 11.1, which required a specific collateral consequences colloquy in cases of violation of certain provisions of 18 V.S.A. § 4230 (marijuana/hashish possession/cultivation). The changes are necessitated by passage of Act. No. 133 (2016 Adj. Sess.), the Uniform Collateral Consequences of Conviction Act, which expressly prescribes and modifies the advisements formerly required under Rule 11.1. The amendments also clarify that the additional advisements are only required with respect to convictions for violations of § 4230(a), and not for all violations that may be proscribed under the section. There being no comments or objections, the Reporter was authorized to send the final draft with Reporter's Notes to the Court for publication and comment.

[3] The "multi-division" Special Ad Hoc Committee is scheduled to meet again on May 18, 2017.

11. **2015-03: Rule 23 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**

Anna Saxman presented a proposal for amendment of V.R.Cr.P. 23(d) to 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 Committee engaged in extensive discussion of the proposal. The proposal has three key components: (1) in order to consent to delay from jury selection to 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 instruct 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.

As to provision (3) (supplemental voir dire), after discussion, the Committee concluded that it would be appropriate to rephrase the first sentence of the second paragraph of the draft to this effect: "Before the jury is sworn, the court shall afford the parties an opportunity upon request to conduct a supplemental examination of the jurors as provided…".[4]

David Fenster questioned whether the provision (2) requiring the court to provide a specific instruction to jurors was appropriate for inclusion in a rule of criminal procedure. In his view, judges should be free, while remaining obligated to provide proper instructions, to provide such instructions as in their discretion fit case circumstances. Chair Zonay noted that in his view, the essential question is whether the content of a rule goes to a matter of procedure, or substantive law. Alison Arms mentioned two cases, *State v. Cameron*, 2016 VT 134 and *People v. Flockhart*, which she felt addressed this issue. The consensus was that if the proposed rule prescribed any admonition to jurors on the part of the judge, it should be more broadly stated in recognition of the judge's discretion with respect to instructions. Ms. Saxman commented that perhaps there could be a broader statement of the "admonition" component, with some examples of the types of admonitions that could be provided referred to in the Reporter's Notes. Ms. Saxman will provide a redraft for consideration at the next Committee meeting. She asked Reporter Morris if the separation "admonitions" issue would be appropriate for consideration by the Committee on Model Criminal Jury Instructions, and he replied that it was, and would be considered by that Committee.[5]

[4] The existing Rule provides that "If the commencement of trial is delayed more than 24 hours, the parties *shall be entitled* to conduct a supplemental examination of the jurors as provided…" (emphasis added).

[5] At its meeting on May 5, 2017, in response to the decision in *Cameron,* the Committee on Model Criminal Jury Instructions approved of a revised instruction to jurors, to be given at commencement of trial, admonishing against any research, investigation, or communication with others by any means, including electronic means, for the duration of the trial. The instruction also expressly prohibits discussions among jurors themselves about the case, until deliberations begin. **See, Model Instruction CR 01-031 (5/8/17)**, posted in the body of the Vermont Model Criminal Jury Instructions. The jury instructions committee will give further consideration to a juror admonition instruction in event of separation from voir dire to trial at its next scheduled meeting.

12. **2016-06: Rule 43(c); Amendment to permit waiver plea on court approval of waiver of appearance, without colloquy in open court (responds to decision in *In re: Manosh*, 197 Vt. 424 (2014)**

At the Committee's meeting on October 7, 2016 a subcommittee consisting of Anna Saxman, Devin McLaughlin and David Fenster was appointed to consider Ms. Saxman's proposed amendment of Rule 43 that would permit waiver of appearance and plea by waiver in misdemeanor cases, without the necessity to a Defendant's appearance in Court and personal colloquy with the Court. This has been the long-standing practice in resolution of significant numbers of minor offenses, but the practice was called into question in consequence of the decision in *In re: Manosh.* Mr. McLaughlin reported that he and Ms. Saxman had discussed a revised proposal that was specific to the issue of waiver of appearance for arraignment and establishment of conditions of release. The proposal was discussed at length by the Committee, and unanimously approved for publication and comment. While the proposed amendment provides new language specific to waiver of appearance at arraignment, the draft Reporter's Note also discusses the practice of waiver pleas of guilty or no contest, and serves to clarify that such a waiver plea requires both an explicit waiver of personal appearance in court as well as waiver of the specific "rights" advisements that are required per Rule 11 and the precedent decisions. The proposed amendments and Reporter's Notes will be transmitted to the Court for publication and receipt of comment.

13. 2016-03: Act No. 169, S.155; Privacy Legislation; Implications for V.R.Cr.P. 41

At its May 20, 2016 meeting, John Treadwell briefly noted that the legislature had passed, and the Governor has signed into law, a Privacy Protection Act which in pertinent part became effective on October 1, 2016. The new law encompasses a broad range of issues, including limitations and procedures for compelled production of electronically stored information and other information characterized as "protected user information" from service providers, with and without search warrants; prescribes procedures for law enforcement use of drones for surveillance, with and without search warrants; and prescribes disclosures and filings to be made with the court and to targets of surveillance in conjunction with use of drones and compelled production of protected user information. This enactment will necessarily require review of existing provisions of Rule 41. Mr. Treadwell, who had indicated at the October 7, 2016 meeting that he would provide a more detailed review for the Committee of the provisions of the law and potential amendments of Rule 41, was unable to attend the meeting, so the Privacy Act, and any implications for Rule 41, were passed to the Agenda item of the next Committee meeting.

14. 2016-02--Rule 42; Criminal Contempt Procedures

Prior to the October, 2016 meeting, John Treadwell had circulated federal materials, and a draft proposal to amend existing V.R.Cr.P 42 to update procedures for criminal ("non-summary") contempt. Existing Rule 42 was adopted in 1973, and has not been subject to amendment since. Mr. Treadwell's proposed amendments would track the provisions of the current federal Rule 42, and provide for the specific means of notice to the alleged contemnor of the time and place for trial and allow for reasonable time to prepare a defense, and state the

essential facts constituting the contempt charged (procedural rights under existing rule) and in addition, state whether any term of imprisonment, or any fine in excess of $1,000 would be imposed upon conviction (for purposes of assignment of defense counsel). A new subsection would specify the means of appointment of a prosecutor of the contempt, directing the court first to appoint the Attorney General or a state's attorney, unless they are disqualified or decline appointment in which case the court may appoint another attorney to prosecute. The proposed amendments would not serve to delete any current provisions of the Rule. This item was not reached due to Mr. Treadwell's absence from the February 10, 2017 meeting. It will be considered at the next scheduled committee

15. **2017-01: V.R.A.P. 4(f); "Prison Mailbox" Rule**

The Court has promulgated a new Rule, V.R.A.P. 4(f) (eff. 3/13/17), based upon an equivalent federal rule, to standardize and clarify treatment of timeliness of prisoner filings. The rule change was prompted by the decision in *State v. Bruyette,* 2016 VT 3 (per curiam). Essentially, under the terms of the new rule, a notice of appeal filed by an inmate confined in an institution is timely filed if it is put in the prison mailing system on or before the filing deadline. The rule provides that if an institution has a system designed for "legal mail", the inmate must use that system to receive the benefit of the rule. A presumption of timely filing is established by notarized statement accompanying a notice of appeal stating the date the notice was deposited in the institution's internal mailing system. The rule does not preclude other evidence of timely filing, such as a postmark or an official date stamp showing filing date. By letter dated January 10, 2017, Justice Skoglund on behalf of the Court requested that the Committee review the new rule and provide comment as to whether resulting changes to any *other* rules would be appropriate. In discussion, Committee members had questions as to whether the Vermont Department of Corrections would have an established "legal mail" system as described, and as to whether inmates would have ready access to notaries in jail (predominant view of the Committee was that they do have such access), but apart from those issues, no problems were perceived, nor any need to amend any of the Rules of Criminal Procedure in consequence. The Chair will provide a response to Justice Skoglund to this effect on behalf of the Committee.

16. 2013-05—Rule 45 (Time) and Related Amendments; Simultaneous Amendments of V.R.C.P. 6 Proposed; Companion Legislation.

These amendments to Rule 45 (Computation of Time), adopting the federal "Day is a Day" rules, have been under consideration by the Committee for over three years. The Advisory Rules committees (Criminal; Civil; Probate) have been working on identical versions of the rules (with some variations in the respective Reporters' Notes) for simultaneous promulgation, and the process is nearing completion. Companion legislation (H. 4, sponsored by Rep. Martin LaLonde) is progressing in the legislature. Due to lack of time, a full report on these amendments was passed to the Agenda of the next Committee meeting.

17. **Annual Report**

Committee Reporter Morris indicated that he was in the process of drafting the next Annual Report of the Committee to the Supreme Court, and that the draft would be circulated to Committee members for comment before its submission to the Court.

18. <u>Next Meeting Date(s)</u>

Friday, May 12, 2017 was established as the next meeting date. Time: 1:30pm. Location: Vermont Supreme Court Building.

19. **<u>Adjournment</u>**

Committee Chair Zonay closed the meeting with encouragement to all Committee members to examine the body of the Criminal Rules with a view to improvements that may be made. As he indicated, our work is predominantly "responsive", to requests or necessity, but it would also be very helpful if we could engage in a proactive approach to and vision of the rules.[6] The meeting was adjourned by the Chair at approximately 3:52 p.m.

Respectfully submitted,

_____
Walter M. Morris, Jr.
Committee Reporter

[Approved: 5/12/17]

[6] A.O. 20, § 4, the Criminal Rules Committee authorization, prescribes that "The Committee shall continually review the operation and effectiveness of the Rules of Criminal and Appellate Procedure…"