VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
May 20, 2016

The Criminal Rules Committee meeting commenced at approximately 1:30 p.m. at the Supreme Court in Montpelier. Present were Chair Scott McGee; Judges Tom Zonay and Allison Arms; Laurie Canty, Anna Saxman, Mark Kaplan, David Fenster, Dan Sedon; John Treadwell, Dan Maguire, newly-appointed Committee member Devin McLaughlin, and Supreme Court liaison Justice Skoglund. Judge Maley, was absent. Also present was committee Reporter Judge Walt Morris. Guests in attendance were Emily Wetherell, Supreme Court staff attorney, and Rachel Seelig, of the Vermont Legal Aid Disabilities Law Project.

The meeting opened with the presentation of a certificate of appreciation from the Vermont Supreme Court to out-going Committee Chair Scott McGee by Justices Skoglund and Dooley, in recognition of Scott's service of over 30 years as a member and chair of the Committee. Justice Robinson also attended to offer her thanks and congratulations.

1. The Minutes of the November 20, 2015 meeting were reviewed, and unanimously approved.

2. **2013-10—Proposed Amendment to Rule 28 (Interpreters)**

The comment period on the proposed amendment closed on March 11, 2016.[1] On March 10, 2016, comments were received from the Vermont Legal Aid Disabilities Law Project expressing concerns as to the proposed language extending a requirement of interpretation services only to those persons with limited English proficiency, or who are deaf or hard of hearing. The comments suggested that the categories of interpretation need be expanded to include not only those with limited English proficiency, or deaf or hard of hearing, but also those who experience other communication difficulties who have people who can interpret for them. Apart from the proposed text of the rule, the comments expressed concern that the Reporter's Notes appear to suggest that the mandate for provision of interpreter services extends only to events occurring in the courtroom, or a court-directed program, and do not clearly reference an obligation to provide interpreter services at locations such as the clerk's window, and for assistance in obtaining basic information as to the functions of, and access to, court filings and processes. Rachel Seelig, Esq. of the VLA Project presented her concerns and engaged in the following discussion among Committee members as to the two principal issues presented. Extensive discussion ensued. As to the latter concern (provision for interpreter services other than in the courtroom, yet within the processes and responsibility of the judiciary), Committee members were unanimous in their agreement that as an administrative matter, the judiciary is vested with obligation to provide interpreter services as needed at the clerks' windows, for provision of basic public information as to court processes, and the manner and requirements of

[1] Identical amendments to V.R.C.P. 43(f) had been previously published for notice and comment, with comment period ending on October 5, 2015. The Advisory Committee on Rules of Civil Procedure had submitted its transmittal and request for final promulgation of those amendments to the Court on November 9, 2015.

filing of pleadings necessary to initiate or respond to court process. The Committee requested that the Reporter amend the notes to clarify that the rule addresses only court process and court-directed programs, and to indicate that the judiciary has additional obligation as an administrative matter, to provide court "access" interpretation, such as at the clerks' windows, as needed.

However, the Committee had significant concerns as to the VLA comments addressed to the text of the amended rule, and listing of those disabilities that would serve to require provision of interpreter services. Ms. Seelig had suggested that the language be broadened to include "…or any other disability that presents the need for interpreter services." She gave as an example persons who have experienced strokes, or aphasia, and who have people familiar with their speech patterns and utterances who assist them in communication with others. Her proposal was actually consistent with that which had been recommended by the Advisory Committee on Rules of Civil Procedure, at their meeting held on April 29, 2016.[2] Her comments about communication assistance gave rise to concern on the part of committee members as to standards of reliability and accuracy in the acceptance of novel means of interpretation which go beyond accepted standards of sign language, or spoken foreign language interpretation, and whether communication assistance as described by Ms. Seelig was actually consistent with commonly accepted understanding of interpretation services in legal proceedings. Mark Kaplan expressed serious concern as to the validity of proceedings in which interpretation is used that has not been shown to be valid and reliable, or as to which the qualifications of the interpreter to work reliably and with accuracy are not subject to reasonable determination by the judge as a threshold matter. Dan Sedon concurred in this concern. Reporter Morris pointed out that there is substantial authority going to the discretion and responsibility of the presiding judge to determine whether an interpreter is reasonably qualified to provide accurate interpretation, and whether any ethical barriers, such as relationship to a party, exist which would reasonably serve to disqualify an individual from provision of interpretation services in a given case. Committee debate focused upon whether additional express references to those circumstances requiring interpreter services should be added to the proposed rule, or whether all express references should be deleted from the text of the rule, while retaining the general requirement of interpretation when "…necessary to assure meaningful access to all court proceedings and court-managed functions…" In the course of the discussion, Anna Saxman reminded Committee members that Justice Johnson had chaired an Access to Justice Committee that in 2010 issue a lengthy report and recommendations on interpreter services in the Vermont courts that should be referenced in responding to the issues that had been raised.

Ultimately, upon motion of Judge Zonay, seconded by Dan Maguire, the Committee unanimously decided to delete express references in the amended rule to circumstances such as "limited English proficiency or hearing impairment", but to include in the accompanying Reporter's Notes express references to these circumstances, as well as other circumstances in which the trial judge would have authority and responsibility to appoint an interpreter. Judge Morris pointed out that the U.S. Department of Justice has provided guidance to state judiciaries with respect to provision of interpreter services, and that these might dictate inclusion of express

[2] The Civil Rules proposal was that the draft language be amended to provide that interpreter services be provided to a person "with limited English proficiency or hearing impairment, other disabilities that present the need for interpreter's services."

reference in state rules to the terms "limited English proficiency or hearing impairment". He will examine current DOJ guidance on interpreter services and Access to Justice to determine whether this is the case, and advise the Committee accordingly. A redraft of the proposed amendments to Rule 28 reflecting the Committee action, with revised Reporter's Notes, is to be prepared and circulated to the Committee by the Reporter.

3. **2013-02—Proposed Amendment to Rule 17 (to expressly permit document subpoenas and procedures associated with them)**

Reporter Morris briefly reviewed with the Committee changes that had been approved by the Committee to proposed amendments of Rule 17 at its March 27 and November 21, 2015 meetings, and minor textual additions made to proposed Rule 17(c) to conform to the language of existing civil rule 45(c). Revised and completed Reporter's Notes were reviewed as well. The Committee unanimously agreed to forward the proposed amendments and Reporter's Notes to the Court for publication and comment.

4. **2015-04--Emergency Promulgation of Amendments to Rules 5 and 11 to Provide for Collateral Consequence Advisements and 2013-04—General Revisions of Rules 11, and 11.1 in Consequence of Passage of the Uniform Collateral Consequences of Conviction Act, Act. No. 181 (2014 Adj. Sess.) and recent court decisions.**

Reporter Morris reviewed with the Committee the Court's emergency promulgation of the referenced amendments, which provide for specific collateral consequence advisements to Defendants at Rule 5/Initial Appearance and in conjunction with Rule 11 entry of pleas of guilty or nolo contendere. The emergency amendments were effective January 1, 2016; comment period closed on March 19, 2016 with no comments received. The Court is prepared to promulgate the amendments as final, following a meeting of the Legislative Committee on Judicial Rules scheduled for June 14, 2016. Committee members expressed familiarity with the advisements and their use. There appear to be no significant issues presented in implementation of the emergency amendments and use of the written form advisements, which track the language of the UCCCA. John Treadwell reported that the issues associated with the need to amend Rule 11.1 (colloquy requirements in certain possession/cultivation of marijuana cases) to comport with UCCCA has been addressed in enactment of Act No. 133, Sec. 7 (2016) which incorporates the provisions of the UCCCA by reference in 18 V.S.A. § 4230(a)(5), and deletes the existing distinct colloquy requirements.[3] In the interests of time, the general revisions of Rule 11, and final drafts based upon John Treadwell's earlier drafts and Committee revisions, were passed to the next Committee meeting for final action.

5. **Report on Promulgation Status of Proposed Amendments of Rules 5 (Act 195 pre-trial substance abuse screening advisements); 16 (Non-disclosure of certain alleged victim information); 30 (preservation of objections to jury instructions) and 41 (electronic filing of search warrant returns) (Committee indices ## 2012-04, 2013-03, 2013-06 and 2013-11)**

[3] Amendment of Rule 11.1 is thus warranted to comport with the amended statute, a matter for the next Committee meeting agenda.

Reporter Morris indicated that on May 10, 2016, the Court had promulgated as final all of the proposed amendments *except* as to Rule 30. The amendments to Rules 5 and 16 are effective on July 11th; the amendments to Rule 41 are effective on August 15th. See reference to status of 2013-03 (Rule 30) *infra.* The Reporter provided Committee members with copies of comments that had been received as to the Rule 16 amendments after the Court's final promulgation, expressing concern that they would preclude lawful discovery and defense attorney contact with alleged victims in case preparation. The documents provided to the Committee included the Reporter's reply to the effect that the amended Rule goes only to the prosecuting attorney's discovery obligations; that it does not preclude an alleged victim's voluntary communication with counsel; and that the statute and rule both provide for recourse to court for compelled disclosure of alleged victim address and place of employment information for cause.

6. **2013-03: Proposed Amendment of Rule 30 (Preservation of Objections to Jury Instructions)**

The Court has considered the Civil Rules Committee proposal to amend the equivalent rule V.R.C.P. 51(b), as well as the draft amendment proposed by our committee. A third version has been proposed for consideration by both committees. Copies of the three versions were provided to Committee members. Due to competing agenda items, this item was not reached for substantive Committee discussion. Reporter Morris indicated that he would be discussing the competing versions with designees of the Civil Rules Committee in an effort to reach an acceptable uniform amendment, and will update the committee at its next meeting.[4]

7. **2014-01: Proposed Amendment to Civil Rule 5(b)(2) (V.R.Cr.P. 49(b) to Provide for Service of Pleadings/Papers by Email in Criminal Cases**

V.R.Cr.P. 49(b) provides that "service upon the attorney or upon a party shall be made in the manner provided in civil actions." So, service in criminal cases is governed by the provisions of V.R.C.P. 5(b). The Civil Rules Committee has published for comment amendments to V.R.C.P. 5 that would authorize both filing of documents, and service of documents by email. These amendments to the civil rule would track existing provisions of F.R.C.P. 5. Since the proposed civil revisions address electronic filing, they also relate to the judiciary's implementation of systems for electronic filing, and promulgation of rules generally applicable to electronic filing and public access. In consideration of both criminal and civil proposals of amendment, the Court invited the participation of both Committee Chairs and Reporters at its May 10, 2016 administrative meeting. Chair McGee reported that in consequence of that meeting, the Court has indicated that the Criminal Rules Committee should proceed with its drafting of an independent proposed rule for electronic service in the criminal division. The Committee proceeded to discuss a draft proposal for amendment of Rule 49(b) that would authorize service of case documents by electronic means. The proposed amendments address service among parties only, and not the filing of documents with the court. Under the proposal, service among represented parties via electronic means would be the "default" means, unless a party files written objection to such service with the Court. No written agreement for electronic

[4] Judge Helen Toor has been designated as the lead contact for civil rules on the issue of preservation of objections to jury instructions.

service would be required for represented parties. In the case of a self-representing defendant, the "default" service would be by delivery, ordinary first-class mail, or by third-party commercial carrier, unless the self-representing defendant files with the court a written election to receive and provide service via email. The committee determined to delete reference in the draft to a requirement that an attorney or party's email address for service match a registered email in the judiciary's electronic filing system. After further discussion in which David Fenster indicated that a provision requiring updates of email addresses during the pendency of a case could prove burdensome to the State's Attorneys' offices, the committee also agreed to minor amendment to clarify attorney and self-representing party obligation to update email address changes as necessary, while retaining the obligation to update email addresses for purposes of service.

Upon motion of Judge Zonay, seconded by David Fenster, the committee unanimously approved of the proposed amendments with the referenced changes. A redraft with Reporter's Notes is to be provided for final approval by the Committee at its next meeting.

8. **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)**

Judge Zonay reported that there had been no further action taken by the Committee on Public Access to Court Records since the last criminal rules meeting. This proposal will be subject to consideration at the next scheduled criminal rules meeting.

9. **2014-08: Proposal to amend Rule 32 to specify procedures for restitution hearings (*State v. Morse*, 197 Vt. 495 (2014)).**

The final proposed rules approved by the Committee were published for notice and comment, with the comment period closing on July 17, 2015. No comments were received.[5] The proposal was considered by the Legislative Committee on Judicial Rules on September 24, 2015, and by the Court at its administrative meeting in January 2016. In response to comments from the Court, the final proposal was redrafted to include provision requiring that a defendant must disclose in writing claimed inability to pay restitution at least 14 days prior to the scheduled restitution hearing. The intent of the amendment would be to provide the court and the prosecutor with notice that they will be required to develop evidence on ability to pay from a defendant, or others with pertinent information, so that the requirements of the statutes as to findings in restitution cases may be met. Committee discussion of the revised proposal focused upon both the substantive requirement of advanced notice on the part of a defendant, and the consequences of the failure of a defendant to provide timely written notice of intent to assert an inability to pay. While under statute and current case authority, the prosecutor bears the burden as to the element of proving a defendant's ability to pay restitution, there was consensus that an advance disclosure requirement would be helpful in avoiding continuances to secure further evidence. However, there was extensive Committee discussion of the consequence of a

[5] The originally proposed and published amendments addressed restitution procedures generally, including a requirement of disclosure of the existence of insurance that would serve to compensate the victim of the offense, if known, by both the defendant and the prosecution, no later than 14 days prior to the restitution hearing.

defendant's failure to provide advance notice of a claimed inability to pay restitution. The central issue was whether a defendant would then be barred from presenting any evidence as to inability to pay, or be subject to a "default" determination of ability to pay, or whether the proper remedy in event of a defendant's failure to provide timely notice of inability would be the granting of a prosecution request for continuance, to permit supplementation of evidence at a subsequent hearing addressed to ability to pay. In discussion, it was noted that in most cases, even if untimely, a defendant's evidence would prove helpful to the Court's decision, provided that there was no prejudice to the prosecutor's ability to respond to defendant's evidence. Ultimately, on Motion of Judge Zonay, seconded by David Fenster, the Committee determined to keep the proposed amendment language requiring 14 days' advance notice of a defendant's claimed inability to pay restitution, while adding references to the Reporter's Note to the effect that a failure to provide notice should not be construed as a waiver of the right to present evidence, and that an untimely defense notice of claimed inability to pay would serve to sustain a prosecutor's request for continuance. The Committee Reporter will redraft the accompanying Notes for review and approval at the next Committee meeting. The revised amendments will be subject to publication and comment, and further review by the committee.

10. **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)).**

Alison Arms briefed the Committee on the report and recommendations of the Criminal Division Oversight Committee for amendment of conditions of release and conditions of probation. The report and recommendations has been provided to the Court, but at time of the present meeting, the Court had not provided response or comment. The "tension" at work in the proposed revisions lies in the need to provide reasonable specificity and plain language clarity in court-ordered conditions, without being overly broad, while at the same time retaining a meaningful and effective "core" of supervision conditions, consistent with conditions of release or sentence, and the judge's intentions in imposing them. Judge Arms indicated that the Oversight Committee had ultimately established five "core" standard conditions, with other recommended conditions that might be ordered by the court addressed to particular case circumstances.[6] The Court in its decisions has provided clear indication that any conditions of release or probation supervision must bear an identifiable nexus to the circumstances of each case, and that where not warranted in consideration of case circumstances, such conditions may not be enforceable. Justice Skoglund noted that among other issues, there was a perceived need for consistency among the units in the probation conditions being ordered.

[6] The statute, 28 V.S.A. § 252, establishes one mandatory condition of probation—that if the offender is convicted of another offense while the probationary sentence is still subject to revocation, the court may impose revocation of probation—and 18 specified conditions which the court may impose in its discretion. The statute empowers the court to impose such conditions as "deemed reasonably necessary to ensure that the offender will lead a law-abiding life or to assist the offender to do so." See, *State v. Pettitt,* 197 Vt. 403, 411-12 (2014)(citing *State v. Rivers,* 178 Vt. 180, ¶ 9 (2005)). For certain enumerated minor ("qualifying") offenses, 28 V.S.A. § 205(c) directs that probation must be administrative in nature and subject only to four standard conditions, unless the court finds that additional conditions are required in the interests of justice.

Following Judge Arms' report and discussion of the recommendations of the Criminal Division Oversight Committee, the Committee focused upon consideration of the merits of proposed amendment of Rule 32 to require prior written objection to all PSI contents, including recommended probation conditions, broadening the present rule which requires such objection to factual assertions pertinent to sentence. Mark Kaplan noted that PSIs in the federal system in his experience do not contain specific probation or supervision recommendations; that federal probation/parole officers prepare a preliminary draft PSI which is provided to the parties for comment prior to submission to the Court. Committee members noted the difference in resources available in the federal system, and the pressures upon state corrections staff which not infrequently results in delay in date of PSI submission, which triggers the present requirement for timely written objection and redaction requests.

Judges Arms and Zonay noted that from a judge's perspective in imposing sentence, it was critical to draw upon all pertinent facts and circumstances, and that dispositive information may not be available, or revealed, until during the sentencing hearing itself. Committee consensus was that the requirement of written objection and redaction process as to factual content of a PSI was valuable, serving either to narrow matters of factual dispute, or provide parties with notice of the need to produce dispositive evidence at contested evidentiary hearing. However, significant concern was raised as to broadening the written objection requirement and redaction process to include content other than facts set forth in the PSI, such as recommended probation or programming conditions, as unduly burdensome and invasive of the traditional prerogative and discretion of the trial judge to fashion a sentence based upon all pertinent factors. Judge Arms questioned what the consequence might be in the event of a failure to file timely written objection when evidence critical to a fair hearing is sought to be presented. Is a party to be "defaulted" and precluded from providing either important programming information or evidence that a judge would also consider critical and dispositive? She asserted though that there was certainly a need for a "bright line" requirement of timely written objection as to PSI contents, as shown in those cases in which the court must grant a continuance of sentencing to permit the state to produce evidence to respond to defense objection to PSI facts that is not timely given. In her view, too many sentencing hearings are subject to delay as a result. David Fenster commented that the state also finds itself in the position of making objection to programming and conditions recommended in a PSI, and to bar objection to these at sentencing in event of failure to timely object in writing would be problematic for the state as well.

After conclusion of the extensive discussion of the proposed amendment of Rule 32 to require advanced objection in writing to PSI contents in addition to factual assertions contained therein, as in the broader provisions of Federal Rule 32(f)(1), on motion of Devin McLaughlin, seconded by Mark Kaplan, the Committee determined not to approve or forward the referenced proposed amendment to the Court. (10 members voting not to approve; one member voting in favor of approval).

11. **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 presented a final draft of an amendment to be made to Rule 4(b), with Reporter's Note, to authorize electronic filing of probable cause affidavits consistent with the provisions of V.R.E.F. 7(c), and the practice of electronic filing that is already happening in some of the units in the Criminal Division. The draft, with accompanying Reporter's Note, had been approved at the Committee's meeting on November 20, 2015. Following brief discussion, the Committee unanimously approved of amendment to the proposal to also provide that information, which accompany all probable cause affidavits, may be filed by reliable electronic means. The final proposal will be submitted to the Court for publication, comment, and further consideration by the Committee.

12. **2015-02: Video Arraignment and Other Court Appearances**; **Administrative Order No. 38**

Anna Saxman and David Fenster reported on the work of a special subcommittee, of which they are members, to consider and propose procedural rules for the use of video appearance and evidence in each of the court dockets. Administrative Order No. 38 already authorizes video conferencing, including arraignment in the criminal division, provided that certain conditions are met. The special subcommittee is apparently nearing consensus on proposals to add a new Rule of Civil Procedure 43.1 which would authorize participation, or provision of testimony, extending to trial proceedings, via video conference or telephone in both the civil and family divisions, provided that certain conditions are met. The proposed new rule sets forth a number of factors that may be considered by the court in determining whether to permit, require, or deny video conferencing or provision of evidence. Copies of the proposed Civil Rule 43.1 were distributed to the members of the Criminal Rules Committee. The new rule is accompanied by a set of Technical Standards for Video Appearance apparently approved by the Electronic Filing Rules Committee on September 30, 2015. The standards are intended to assure that fairness of proceedings is not impaired, and that measures are provided to enable assure confidential and effective consultation between parties, including defendants, and counsel in any video proceeding.

Ms. Saxman and Mr. Fenster reported that there is deep division as to adoption of the procedures of proposed Civil Rule 43.1 for use in the criminal division. Ms. Saxman and Mr. Fenster indicated that there are three principal issue areas: (1) personal appearance of the defendant, rather than via video, an ongoing concern of the defense bar; (2) provision of evidence via video by agreement of the parties; and (3) the prospect of pre-approval by the Court of provision of certain *categories* of evidence (such as chemist's testimony in suppression and civil license suspension proceedings) as opposed to general authority to permit presentation of evidence via video. Ms. Saxman and Mr. Fenster reported that while presentation of evidence via video may be advantageous to *both* prosecution and defense (as in cases where a remotely located expert witness could testify for either defense or prosecution, permitting the evidence to be received and considered at much lesser expense), there is as Ms. Saxman characterized it, concern that a party not employ the process to "hijack" the proceeding, depriving it of essential fairness.

After extensive discussion, the Committee concluded that it would be productive to appoint a larger subcommittee, comprised of Ms. Saxman, Mr. Fenster, John Treadwell and Dan

Sedon, to carry forward consideration of adoption of any or all of the provisions of proposed Civil Rule 43.1 in the form of proposed rules amendments that would be applicable in the criminal division. The subcommittee is to report on its efforts at the next Committee meeting. In the meantime, the Court has moved forward with its Pilot Project for video arraignments under A.O. 38, as discussed by the Committee during Judge Grearson's appearance at the meeting on June 26, 2015.[7]

13. **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 legislation substantially revises procedures for civil forfeiture in cases of animal cruelty. A final draft of a proposed new rule was approved at the Committee's November 20, 2015 meeting. Judge Morris indicated that he has not completed the accompanying Reporter's Notes, but will circulate the final draft with completed Notes for committee comment prior to submission to the Court for publication and comment.

14. **2015-03: Amendment to Rule 23; Waiver in Event of Jury Separation of greater than 48 hrs (life imprisonment cases) or 30 days (other cases) from voir dire/selection and trial; *State v. Breed*, 198 Vt. 574, 581-82 (2015).**

This item was not reached due to lack of time. It will be considered at the next scheduled Committee meeting.

15. **2016-01—Amendment of Rule 3(c); Arrest without Warrant for Certain Misdemeanors; Nomenclature Amendment for Cruelty to Child**

This is a non-substantive amendment addressing nomenclature only in consequence of the legislature's amendment of 13 V.S.A. § 1304, cruelty to a child, creating a new felony offense codified as § 1304(b), while retaining the existing misdemeanor offense as § 1304(a). Rule 3(c), which lists certain "nonwitnessed" misdemeanor offenses for which an officer may arrest without warrant will now reference the correct statutory citation. Reporter Morris indicated that the proposed amendment has already been published for comment, comment period ending on July 15, 2016. There was no Committee comment or objection as to this proposed amendment. In the absence of comment received in consequence of publication, a transmittal will be sent to the Court with a request for final promulgation of this non-substantive change.

16. **2016-02--Rule 42; Criminal Contempt Procedures**

In advance of the 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

[7] See Agenda Item # 4, pp. 4-5, Minutes of 6/20/15 meeting.

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 lack of time. It will be considered at the next scheduled committee meeting.

17. **2016-03: Act No. 169, S.155; Privacy Legislation; Implications for V.R.Cr.P. 41**

John Treadwell reported that the legislature had passed, and the Governor has signed into law, privacy protection statutes which in pertinent part become effective on October 1, 2016. The new statutes encompass scope of 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; prescribe procedures for law enforcement use of drones for surveillance, with and without search warrants; and prescribe 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. The enactment, which in pertinent parts is effective on October 1, 2016, will necessarily require review of existing provisions of Rule 41. The Act No. 169 implications will be an agenda item for the next scheduled Committee meeting.

18. **Status of Proposed/Promulgated Rules**

As noted, the following proposed amendments have been published for comment, comment period closed, and final promulgation orders issued:

Rule 5-Pre-trial substance abuse screening advisements.
Rule 16(d)-Non-disclosure of certain alleged victim information.
Rule 41(e)-Electronic filing of search warrant returns.

The following proposed amendments have been recommended/reviewed by/are otherwise before the Court for final promulgation/next action:

Rules 5 & 11—Uniform Collateral Consequences of Conviction advisements.
Rule 28/Civil Rule 43(f)—Interpreters (action deferred due to differences in committee versions of rule; currently back on criminal rules agenda).[8]
Rule 30/Civil Rule 51(b)--Preservation of objections to jury instructions.
Rule 45/Civil Rule 6—Computation of Time and related amendments.
Rule 49(b)/Civil Rule 5—Service by reliable electronic means (action deferred due to differences between committee versions; Court has directed criminal rules to draft a separate rule, and item is currently back on criminal rules agenda)

[8] Reporter's Note: The Civil Rules version, amending Rule 43(f), was published for notice and comment by the Court, with comment period ending on October 5, 2015. The Criminal Rules version amending Rule 30 was published for notice and comment, comment period ending on March 11, 2016.

The following proposed amendment has been published for comment, comment period not yet ended:

Rule 3(c)(16)—Non-substantive nomenclature amendment; arrest without warrant; cruelty to a child (misdemeanor offense).

The following proposed/promulgated amendments will be considered at the next meeting of the Joint Legislative Committee on Judicial Rules: 5 (pretrial assessment); 5 & 11 (UCCCA advisements); 16(d); 41(e); 28; 3(c)(16).

19. **Annual Report**

Chair McGee indicated that as one of his last outgoing responsibilities, he will prepare a draft of the next Annual Report to the Court for review and Committee comment prior to transmittal.

20. Next Meeting Date(s)

Chair McGee indicated that his office would circulate a "Doodle" poll of committee members to establish next meeting dates in September and December, and that dates would be established consistent with maximum committee availability.

21. **Adjournment**

The meeting was adjourned by the Chair at approximately 4:29 p.m.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter

[As approved on October 7, 2016]