

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
October 7, 2016
[Approved at 2//10/17 Meeting]

The Criminal Rules Committee meeting commenced at approximately 1:30 p.m. at the Supreme Court in Montpelier. Present were Chair Judge Tom Zonay; Judges Marty Maley and Allison Arms; Anna Saxman, David Fenster, John Treadwell, Dan Maguire, Devin McLaughlin and newly-appointed Committee member Mimi Brill. Absent were Supreme Court liaison Justice Skoglund; Mark Kaplan; Dan Sedon, Laurie Canty and Susan Carr. Also present was committee Reporter Judge Walt Morris, and guest Rebecca Turner.

The meeting opened with the Chair's welcome to Mimi Brill as a newly-appointed member of the Committee.

1. The Minutes of the May 20, 2016 meeting were reviewed, and unanimously approved on Motion of Devin McLaughlin, seconded by Dan Maguire.

2. Committee Reporter Morris presented a report of review of promulgated and proposed amendment of Rules 3, 5 (pretrial assessments/needs screening), 5&11 (collateral consequences advisement), 16(d) (disclosure of victim's address), 41 (electronic return on search warrant) 17 (subpoenas duces tecum), and 28(Interpreters) by the Legislative Committee on Judicial Rules at its meeting on June 15, 2016.

3. **2016-04—Proposed Amendment of Rule 11.1 (Additional Colloquy in Certain Marijuana Cases)**

John Treadwell presented a draft 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. 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. Mr. McLaughlin questioned whether there was a need for amendment of 11.1, as opposed to its deletion entirely in view of passage of UCCCA and promulgation of amendments to Rules 5 & 11 prescribing certain UCCCA advisements (set forth in a standard written form). After discussion, the Committee concluded with one abstention (Saxman) that the proposed amendment of 11.1 was warranted. The Reporter is to prepare a final draft with Reporter's Notes for transmission to the Court for publication and comment.

4. **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. This draft included an added provision, approved by the Committee at its May 201, 2016 meeting, for provision of electronic filing of criminal *informations* in addition to affidavits of probable cause. The Committee noted in discussion that on the "non-court" side, attorneys are routinely serving documents by electronic means as a matter of convenience, even if "hard copy" court filing is also required. On motion of Mr. Treadwell, seconded by Mr. Fenster, the Committee unanimously approved of the final draft, to be submitted to the Court for publication, comment, and further consideration by the Committee.

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).

This proposal to make specific provisions for restitution hearings in criminal cases was back before the Committee after initial publication for comment, transmittal to the Court and LCJR review to address a request of the Court following its consideration in January 2016. A redraft of the proposed amendments was presented by the Committee Reporter, clarifying the burden of proof (a preponderance, by the State), adding a requirement of a Defendant's notice of intent to rely upon a defense of inability to pay restitution at least 14 days prior to hearing.

The Committee discussed at length the consequence of a Defendant's failure to provide timely notice of an inability to pay defense, and whether untimely disclosure would bar a Defendant from presenting evidence, or asserting, an inability to pay. Concern was expressed that in absence of a specific consequence of non-compliance in the rule itself, the notice requirement would be rendered meaningless and unenforceable. Ultimately, the Committee concluded that the matter of enforcement/consequences of failure or untimely provision of notice, the matter should be committed to the Court's discretion. The Committee requested that the accompanying Reporter's Notes provide clarification to the effect that failure to provide timely notice would not be construed as a waiver of the right to be heard, or to present evidence as to inability to pay, but that such failure may provide basis for continuance (to enable the State to secure and present responsive evidence) or such other orders as the court deems just under the circumstances. Chair Zonay observed that the issue is presented routinely to the judges in the form of other disputes as to timely compliance with discovery, motions, and other deadlines, and would be addressed as a matter of judicial discretion. With unanimous approval the redraft, with noted addition to the Reporter's Notes, will be sent to the Court for publication, comment, and renewed consideration by the Committee after closure of the comment period.

6. 2013-03: Proposed Amendment of Rule 30 and Civil Rule 51(b) (Preservation of Objections to Jury Instructions)

Chair Zonay reported that he and Reporter Morris met on September 2nd, 2016 with Allan Keyes and Kinvin Wroth of the Civil Rules committee to reach tentative agreement on

identical criminal and civil rules for preservation of objections to jury instructions. Agreement was reached as to common language for both rules, albeit in slightly different format, and presented to the Committee in the form of a redraft, which clarifies the judge's obligation to convene a record charge conference at which objections to proposed instructions may be made; and that an objection made in proper form at the charge conference need not be repeated in order to be preserved, provided that the instructions actually given do not differ from those discussed and ruled upon at the charge conference. Timely objection before jury retirement would still be required if the judge's instructions differed from that settled upon at the charge conference. A party would still be at liberty to renew or raise any objections after the instructions are given, and before jury retirement, but renewal would not be required to preserve objection as indicated. The amendments avoid the necessity for lengthy, repeated statement of instructions already addressed at length in a record charge conference, at a time when the jury is waiting to begin its deliberations. After extensive discussion of the amendments and their impact, on motion of Mr. Fenster, seconded by Mr. Maguire, the amendments were unanimously approved for transmittal back to the Court with recommendation for promulgation.¹

7. 2013-02—Proposed Amendment to Rule 17 (to expressly permit “non-proceedings” document subpoenas and procedures associated with them; and procedural protections for those subject to subpoenas)

Reporter Morris briefly reviewed with the Committee the final proposed amendments of Rule 17 that were to be transmitted to the Court with recommendation for promulgation. He noted that when the Court approves of the amendments, the existing subpoena forms employed by the trial courts should be reviewed by the Criminal Division Oversight Committee for currency and accuracy. Discussion returned to the practical impact of the amendments. Judge Maley inquired as to whether the amendments would mean additional work and responsibilities for the trial judges. Reporter Morris and others agreed that counsel and the judges had developed means of addressing motions to quash and disputes as to the scope of records disclosures, with guidance in the form of pertinent decisions of the court, and that there should be no increased responsibilities. The letter of transmittal to the court will provide indication that there will be a need for follow up as to revision of the subpoena form by CrDOC.²

8. 2013-10—Proposed Amendment to Rule 28 (Interpreters)

At the time of the meeting, the Court was in receipt of recommendations for final promulgation of amendments to “competing” versions of amendment of the Civil Rules and Rules of Probate Procedure (V.R.C.P. 43(f) and V.R.P.P. 43(e) governing interpreter services. The Committee's approval and transmittal of a final draft of amendments to Rule 28 had been

¹ Following the October 7, 2016 meeting, a proposal was made from one of the justices to further modify the draft to require that a written copy of the proposed instructions considered at the charge conference be included in the court record, and that a copy of the final instructions as actually given be included in the record as well. The Committee was polled on the addition of this language, and there were no objections. The final draft with noted additions was transmitted to the Court on January 6, 2016 for its further consideration. Identical additional language was approved by the Civil Rules committee at its meeting on December 16, 2016, and a combined proposed promulgation order is before the Court for its review.

² The transmittal was made on December 2, 2016. The amendments of Rule 17 were promulgated by the Court as final on December 15, 2016, effective February 20, 2016.

delayed in consequence of our receipt of comments from the Vermont Legal Aid Disabilities Law Project, and our invitation to Rachel Seelig, Esq. to attend and participate in the Committee's May 2016 meeting. In the interim, the Court had expressed interest in having simultaneous amendment of identical rules held in common with each of the divisions to the extent possible. At a meeting of the Criminal and Civil Committee Chairs and Reporters on September 2nd, agreement was reached as to proposed common and identical versions of amended rules and Reporter's Notes governing interpretation, subject to review by the respective Committees. Consistent with the Committee's direction at its May 2016 meeting, Reporter Morris indicated that in his assessment, including a review of U.S. Justice Department correspondence and guidance with respect to provision of interpreter services by state judiciaries, it was necessary to restore to the rule specific reference to the circumstances mandating provision of services—"Limited English proficiency, hearing impairment, or other disability which results in the need for interpreter services." A final draft proposal of amendments to Rule 28 was reviewed by the Committee, containing this language and incorporating terms fully consistent with the proposed Civil and Probate rules amendments.

Renewed discussion ensued among Committee members and others present as to aspects of the amendments, the apparent difficulty in accessing information from the Court's website as to the Interpreters Services Program and the Court's Language Access Plan, the adequacy of interpreter services in the Courts generally, and standards for judicial guidance in assuring accuracy of interpretation. It was noted that the renewed discussions were typical of those that had been brought up periodically in the long history of efforts to seek promulgation of more current rules.

As to web access to program information, Reporter Morris indicated that the Court Administrator's Office was in process of a substantial revision of the Interpreters' Program web content, with a view to providing easier access and greater detail. As to judicial standards, he indicated that the judges had received extensive training in assuring competent interpreter services at the Vermont Judicial College, which training certainly could be repeated; that it was his impression that an Access to Justice Committee chaired by Justice Johnson issued a report in 2010 on Interpreters Services which referenced judicial standards, and that there was ample case law from other jurisdictions serving to define standards for competency of proceedings interpretation and judicial responsibilities in oversight. The difficulty of prescribing detailed standards for interpretation in a rule was also noted. The committee consensus was that Reporter Morris should convey to the Court Administrator's Office the concern that clearer and easier access be provided to the judiciary's website content on the Interpreters Program, and that consideration be given to including judicial standards as well. As to the proposal under consideration, on Motion of Mr. Treadwell, seconded by Mr. Fenster, the Committee unanimously approved of the redraft that had been presented for promulgation by the Court. The recommendation is to be transmitted to the Court.³

³ The promulgation draft was transmitted to the Court on November 8, 2016. The Court issued its order promulgating as final the amendments to Rule 28 on January 9, 2017 effective March 13, 2017.

9. 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 Criminal and Civil Rules Committees had presented competing versions of amendments that would serve to authorize service by electronic means. The principal difference was over whether a written consent filed with the Court would be required to enable a party to engage in electronic service (as is the case under the equivalent federal rule and the proposed civil rule. The Criminal Rules Committee was of the view that due to the number of filings, a requirement of written consent in each case would be unduly burdensome. The Criminal and Civil Rules Committee Chairs and Reporters, in meeting on September 2nd, reached proposed agreement under which V.R.Cr.P. 49(b) would continue to defer by reference to V.R.C.P. 51 as to filing (and service) but that Reporter’s Notes would be added to clarify the expectation that a party could file a one-time, “standing” consent to electronic service with the court, which could be revoked by a party in writing as well, obviating the need for multiple “consents”. The proposed amendments of V.R.C.P. 51 would also authorize electronic filing by parties, subject to court permission. A case management system with capability for electronic filing will have to be in place before that can actually occur.

After brief discussion, the Committee unanimously approved of the proposed amendments of Civil Rule 51, with the referenced Reporter’s Note, and the Committee Reporter was authorized to communicate this determination to the Civil Rules Committee and the Court.⁴

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.

10. 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))

Ms. Saxman presented a proposed amendment 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. Treadwell expressed concern that any amendment not serve to broaden the existing circumstances under which waiver pleas have been recognized, emphasizing that it should remain in the discretion of the trial judge not to approve of entry of a plea by waiver in a given case, even if it were otherwise authorized. After brief discussion in which unanimous support for such an amendment was expressed, a subcommittee (Fenster; Saxman; McLaughlin) was appointed to meet, prepare and present a final draft for consideration at the next Committee meeting.

⁴ The Court promulgated as final simultaneous amendments of V.R.C.P. 43(f), V.R.P.P. 43(e) and V.R.Cr.P. 28 on January 9, 2016, effective March 13, 2017.

11. 2015-02: Video Arraignment and Other Court Appearances; Administrative Order No. 38

Anna Saxman and David Fenster have been appointed to serve on a Special 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.⁵ Administrative Order No. 38 already authorizes video appearance by Defendants at arraignment, status conferences, and like proceedings. Primary issues for the Committee's consideration are whether to recommend adoption of amendments to the Rules of Criminal Procedure to authorize video appearance (other than that addressed at present in A.O. 38) and provision of video testimony in criminal cases. The Reporter indicated that the Civil Rules Committee had already proposed a new V.R.C.P. 43.1, authorizing video appearance and provision of video testimony and the conditions thereof.⁶ Ms. Saxman and Mr. Fenster reported no further activity with respect to adoption of the proposed civil rule as a criminal rule. The larger committee of which they are a part will continue to meet. In the interests of time, further discussion of any proposed amendments was passed to the next Committee meeting.

12. 2016-03: Act No. 169, S.155; Privacy Legislation; Implications for V.R.Cr.P. 41

At the Committee's May 20, 2016 meeting, John Treadwell reported that the legislature had passed, and the Governor has signed into law, privacy protection statutes which in pertinent part became 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. Due to lack of time, consideration of this Agenda item was passed to the next Committee meeting. Mr. Treadwell indicated that he would undertake to provide a discussion draft of proposed revisions of Rule 41 for the next Committee meeting.

13. 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 the contempt charged (procedural rights under existing rule) and in addition, state whether any

⁵ A subcommittee of Criminal Rules tasked to consider issues of video appearance and testimony consists of members Fenster, Saxman, Treadwell, and Sedon.

⁶ A copy of proposed amendments adding V.R.C.P. 43.1 was provided to Committee members in the October 7th meeting materials.

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

14. **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 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.

AGENDA ITEMS NOT REACHED FOR LACK OF TIME, CARRIED FORWARD TO NEXT COMMITTEE MEETING:

15. **2013-04—General Revisions of Rules 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.

16. **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.**

17. **2014-06: Proposed new Civil Rule 80.7a (Civil Animal Forfeiture procedures) per Act 201 (2014 Adj.Sess.), S. 237, effective July 1, 2014.**

18. **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).**

19. **2013-05—Rule 45 (Time) and Related Amendments; Simultaneous Amendments of V.R.C.P. 6 Proposed; Companion Legislation.**

20. **Annual Report**

21. **Next Meeting Date(s)**

Friday, February 10, 2017 was established as the next meeting date. Time: 1:30pm.
Location: Vermont Supreme Court Building.

22. **Adjournment**

The meeting was adjourned by the Chair at approximately 4:30 p.m.

Respectfully submitted,

Walter M. Morris, Jr.
Committee Reporter