VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
August 8, 2014

The Criminal Rules Committee meeting commenced at approximately 1:39 p.m. at the Vermont Environmental Court in Berlin. Present were Judges Suntag, Zonay, and Maley; Laurie Canty, Bonnie Barnes, Anna Saxman, David Fenster, Dan Maguire, Mark Kaplan, John Treadwell and Committee Chair Scott McGee. Committee members Karen Shingler, and non-voting member Susan Carr were absent. Also present were Josh O'Hara and Matt Gerety of the Defender General's office, as was committee Reporter Judge Walt Morris.

Committee Chair Scott McGee opened the meeting with welcomes to new Committee Members Maley and Canty, who replace members Crucitti and Charbonneau, whose terms had expired. The Chair noted that the Committee is presently without a Supreme Court liaison justice, in view of the recent appointment of Justice Geoffrey Crawford to the federal bench.

1. Minutes of the January 31, 2014 meeting were reviewed, and unanimously approved upon motion of Judge Zonay, seconded by Anna Saxman.

2. 2013-02—Proposed Amendment to Rule 17 (to expressly permit document subpoenas and procedures associated with them)

The Committee was provided with three alternative approaches to rules which would more expressly address the issues presented with "non-proceedings" documents subpoenas issued under Rule 17: Anna Saxman's draft as reformatted, and with some annotations provided by the Committee Reporter; Maine Rules of Criminal Procedure 17 and 18; and federal Rule 17. At Anna Saxman's request, consideration of proposed Rule 17 amendments was tabled without objection, until the next Committee meeting, at which time they will again be on the agenda for presentation by Ms. Saxman.

3. 2013-03—Proposed Amendment to Rule 30 (Specificity of objections to jury instructions sufficient to preserve appellate error claim)

The proposed amendment would permit preservation of objections to jury instructions provided by the court at the conclusion of the trial, without the necessity for full and detailed repetition of the objections and bases therefore, as long as the objections have been raised, argued, and determined by the Court at an earlier charge conference conducted on the record, and as long as the objection is renewed by "reasonable reference" to the prior record before the jury retires to deliberate. The Committee reviewed a final draft of the proposed amendments, incorporating minor changes adopted at its January 31st meeting. The minor changes clarify that objections to instructions must appear on the record at a *charge conference*; and that for preservation, there must be *reasonable* reference to a prior objection

asserted after instructions are given and before the jury deliberates. The accompanying Reporter's Note was also amended to clarify that the amended Rule would not preclude assertion of objection to an instruction the basis of which is first presented in the instructions as actually provided by the Court to the jury. On Motion of Judge Zonay, seconded by Jurdge Suntag, the final draft of the Rule 30 amendments was approved by the Committee for forwarding to the Court.

4. 2013-04—Status of November 13, 2013 Rule 11.1 Emergency Promulgation, and Rule 11, in Consequence of Passage of the Uniform Collateral Consequences of Conviction Act, Act. No. 181 (2014 Adj. Sess.)

The Committee Reporter advised the Committee that the legislature has adopted the Uniform Collateral Consequences of Conviction Act, which was signed into law by the Governor on June 10, 2014. Under this legislation, in pertinent part, the Attorney General must establish and maintain a publicly-accessible database of state and federal collateral consequences of conviction; and the courts would be required to provide a prescribed advisement of specified collateral consequences, and sources of more information about them to defendants in criminal cases at three separate times (initial appearance; change of plea; and sentencing). The colloquy requirements are in addition to those already prescribed by Rule 11(c); they may be provided orally or in writing; the Court must however confirm that the defendant has received the advisements, has had an opportunity to discuss them with counsel, if represented, and understands that there may be collateral consequences to a conviction. The Department of Corrections would be required to provide additional advisement upon release from any term of incarceration. The provisions for the database, and collateral consequence advisements to a defendant, are effective January 1, 2016. The Committee engaged in discussion of the impacts of the new law, and existing Rule 11 issues that are reflected in several recent decisions of the Court. Judge Suntag indicated that any examination of Rule 11 advisements should have careful regard to use of "plain language" to facilitate understanding. The Committee Reporter stated that this was the approach taken in adoption and periodic revision of Vermont's Model Criminal Jury Instructions. The Committee unanimously agreed to establish a Subcommittee, chaired by John Treadwell and including Anna Saxman and David Fenster, to take a comprehensive look at Rules 11, and 11.1, (and 32, as it may be affected) and present initial proposals of amendment for consideration at the next meeting. The Committee acknowledged that review of these proposals may be the subject of several meetings' work.

5. 2013—05—Proposed Amendment to Rule 45(a) (Computation of Time); Proposed Amendment of Other Specific Criminal Rules in which Deadlines Would be Amended to Comport with Amendment of Rule 45(a)

At its January 31, 2014 meeting, the Committee unanimously approved of a final draft of amendments to Rule 45(a) modeled after, and virtually identical to, the provisions of federal Rule 45, which adopt a "Day is a Day" rule for computing the running of time. The text of proposed amendments to Rule 45(a) is also identical to amendments contemporaneously proposed to V.R.C.P. 6 by the Advisory Committee on Rules of Civil

Procedure. The purpose of the amendments is to standardize and simplify the manner of computing the running of time. The computation method does not apply when a court order has established a specific date as a deadline or where statute provides otherwise. Under the existing rule, for time periods of less than 11 days, intervening Saturdays, Sundays and legal holidays are excluded from the computation.

Committee Reporter Morris again reviewed the approved draft and Reporter's Notes, as well as proposals of amendment to the deadlines established in a number of other specified Rules. The Rules affected are 12.1 (Notice of Alibi, Insanity or Expert Testimony—current 10 day deadline would be amended to 14 days); 29 (Motion for Judgment of Acquittal—current 10 day deadline would be amended to 14 days); 33 (New Trial—current 10 day deadline would be amended to 14 days) 32(d)(4) (Sentence and Judgment; Sentencing Information—current deadline for filing of written objections to PSI contents and requests for redaction amended from 3 days to 5 days prior to the sentencing hearing); and 47 (Motions—current 10 day deadline for filing written responses to motions amended to 15 days).

Discussion of general and specific impacts of the proposed Rule ensued. Judge Suntag questioned whether a Vermont rule should address deadlines in terms of "hours" as the federal rule does. Since there are some provisions of rules and the statutes pertinent to criminal proceedings that potentially invoke the calculation of hours, the Committee determined to retain these provisions of the federal rule in proposed amendment of Rule 45. In consideration of the impact of the amendments upon Rule 12.1, David Fenster asserted that a proposed deadline of 14 rather than 10 days for disclosure of alibi, insanity, or expert testimony prior to trial was inadequate and impractical, and that the deadline, excepting for good cause shown, should be extended to 30 days rather than 14 days. The Committee was in unanimous agreement to extend the period for pre-trial disclosure of alibi, insanity or expert testimony from the existing 10 days to 30 days.

In the context of consideration of the amendments to Rule 12.1, the Committee Reporter advised that the legislature had passed Act No. 096 (2014 Adj. Sess.) the Respectful Language Act, which requires elimination of certain terminology in statutes or rules that has become outmoded and disrespectful. This legislation may have implications for certain terms in present use in the criminal rules, and the Reporter will apprise the Committee of amendments that may be warranted.

Discussion ensued about the impact of extending the deadline for written objections to PSI contents from 3 to 5 days, centering upon the types of objections typically raised to PSI contents, including factual assertions therein, and whether greater or lesser time would be required to secure and produce evidence at sentencing hearing to respond to them. Ultimately, the Committee concluded that no change to the proposed amendment from 3 to 5 days was necessary or warranted.

Upon Motion of David Fenster, seconded by Judge Zonay, the Committee unanimously approved of the amendments to Rule 45(a), and Rules 12.1; 29; 32(d)(4); 33; and 47 for forwarding to the Court, with the one revision as noted to Rule 12.1.

6. 2013-06—Proposed Amendment of Rule 16 (To Add a New Subdivision to Eliminate Conflict Between Rule 16 Discovery Obligations and Protections for Victims (non disclosure of information) Set out in 13 V.S.A. § 5310)

Rule 16 prescribes the prosecuting attorney's discovery obligations, including disclosure of the names and addresses of all known witnesses. The referenced statute prohibits disclosure of address and place of employment of an alleged victim absent a finding that non disclosure would prejudice the defendant. To conform the Rule to the statute, at its November 8, 2013 meeting, a majority of the Committee approved in concept of a proposal to add a third subsection to V.R.Cr.P. 16(d) which would provide as follows:

> "(3) *Victim's residential address or place of employment.* Disclosure shall not be required of a victim's residential address or place of employment unless the court finds, based upon a preponderance of the evidence, that non-disclosure of the evidence will prejudice the defendant."

The Committee Reporter and John Treadwell lead a discussion of a proposed final draft amending Rule 16(d) as indicated, with accompanying Reporter's Notes. Since the Committee had previously discussed the amendment at length, there was no comment or question presented in the course of consideration of this agenda item. Upon motion of Judge Zonay, seconded by John Treadwell, all Committee members voted to approve of the proposal for forwarding to the Court, with Anna Saxman abstaining.

7. 2013-10—Proposed Amendment to Rule 28 (Interpreters); Consideration of Contemporaneous Amendment of V.R.C.P. 43(f) Proposed by Advisory Committee on Rules of Civil Procedure

At its January 31, 2014 meeting, the Committee considered and approved a proposal to amend V.R.Cr.P. 28, to clarify the process for appointment and compensation of interpreters in criminal proceedings. Under the amended Rule, the court has an affirmative duty to appoint an interpreter when necessary. The compensation of the interpreter is paid for by the State, via the Court Administrator's Office, for persons who are principal parties in interest or witnesses in criminal proceedings. The Reporter's Notes clarify that it is the responsibility of counsel to secure and pay for interpreter services necessary for purposes of attorney/client communications other than in judicial proceedings. Consistent with the provisions of the Respectful Language Act, Act No. 96, Sec. 1 (2014 Adj. Sess.), the amended rule references "deaf or hard of hearing person" rather than person "with hearing impairment". As on January 31st, there was again some discussion of whether interpreters would be provided for jurors who are deaf or hard of hearing (conclusion in the affirmative) or with limited proficiency in English (conclusion in the negative, in view of 4 V.S.A. § 962(a)(4)). The Committee reviewed and

considered proposed amendments to V.R.C.P. 43(f) relating to interpreters that have been approved by the Advisory Committee on Rules of Civil Procedure. The two proposals are similar, yet have significant differences. After discussion, the Committee concluded that in view of distinctions in procedure and practice in the Criminal Division of the Superior Court, it would approve of its own draft version of amendments to Rule 28, without changes, while acknowledging the work and prerogatives of the Civil Rules Committee. Upon motion of Judge Zonay, seconded by Anna Saxman, the proposed amendments to Rule 28, and accompanying Reporter's Notes, were unanimously approved for forwarding on to the Court.

8. 2013-11—Proposed Amendment to Rule 41(e)(3),(5) and (6) to Permit Filing of Search Warrant Returns and Accompanying Documents by Reliable Electronic Means.

The Committee considered a final draft of amendments to Rule 41 that would authorize law enforcement officers to file search warrant returns and inventories by reliable electronic means. The restyled draft sets forth the substance of the amendments just as unanimously approved by the Committee at its January 31st meeting. Committee Member John Treadwell lead the discussion of the proposed amendments, noting that it is often impractical, if not onerous, for officers to physically file search warrant returns and inventories in timely manner for searches conducted at great distance from officers' established stations. The problem is especially great in case of searches conducted under auspices of the Attorney General's office. Mr. Treadwell noted that under Rule 41, issuance of search warrants themselves is already authorized by reliable electronic means, and is now a routine and accepted practice. In Mr. Treadwell's assessment, there is no real distinction between the two processes, and no reason not to permit the filing of returns by reliable electronic means. Other Committee members, including Anna Saxman, expressed concern that an officer, rather than the court, would be in possession of the original search warrant return and inventory documents if the "official" return document was a product of copying and electronic transmission. The concern was as to the prospect that the "original" document in possession of the officer and the return documents filed with the Court would differ, or be subject to alteration. Similar concern was expressed as to an officer's failure to disclose an item, such as cash, that might have been seized in a search. Judge Zonay indicated that if the return were filed by electronic means, then the governing document would be that received by the Court, and the officer and State would bear responsibility for, and the consequences of, any omissions, alterations or discrepancies. Ultimately, the Committee agreed to amend the proposal to provide in each instance that if a return is filed by reliable electronic means, the original documents must be filed with the court no later than 15 days following electronic submission. Upon motion of Judge Zonay, seconded by Laurie Canty, the Committee unanimously approved of the proposed amendments to Rule 41, with referenced change, for forwarding on to the Court.

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

David Fenster lead the discussion of this proposed amendment. 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). Mr. Fenster reported that e-mail service of documents, previously available in some units, is no longer available in consequence of the adoption of the Vermont Rules for Electronic Filing in 2010. The Advisory Committee on Rules of Civil Procedure had at one time been considering the proposed amendment to V.R.C.P. 5(b)(2), which would authorize service of documents in criminal cases via e-mail attachment, but it no longer appears on their agenda, and Mr. Fenster understands that the proposed amendment may have been referred by that Committee to the Special Committee on Rules for Electronic Case Filing. Consolidated Amendments to Vermont Rules for Electronic Filing were adopted by the Court on February 6, 2013, effective April 8, 2013. However, these amendments do not address the issue of service of documents by electronic means in a pending case. Upon unanimous recommendation of the Committee, Chair McGee will communicate with the Chair of the Civil Rules Committee to inquire of the status of the proposed amendment, and to request that the Civil Rules Committee consider the amendment for recommendation to the Court.

10. <u>2014-02: Proposed Amendment to Rule 24(a)(2) (Disclosure/Distribution of Completed Juror Questionnaires to Counsel)</u>

The Committee Chair reported receipt of a request that the Committee consider amendment of V.R.Cr.P. 24(a)(2) to require the Clerk to provide counsel with copies of all completed juror questionnaires, to facilitate preparation for voir dire. The concern expressed was that the practice of granting access to juror questionnaires by Clerks varies among the units, with some Clerks providing copies to counsel for their use, and other Clerks requiring that questionnaires are to be reviewed in the Clerk's office, with no copies made. The current rule provides in pertinent part that "(2) A record of the information provided in response to a written questionnaire distributed pursuant to this rule shall be open to the parties in the proceeding. A physical record of the information shall be open to public inspection after the name and address of the person responding have been redacted…" Mark Kaplan indicated that without being able to take possession of copies of juror questionnaires, preparation for voir dire is much more difficult; that having copies greatly facilitates effective preparation for voir dire. Judge Suntag stated that the Criminal Division Oversight Committee had addressed this issue in the past. Laurie Canty indicated that she did not believe that the Criminal Division Operations Manual directly addresses the issue of whether copies of questionnaires may be provided to counsel. Since distribution juror questionnaires invokes juror privacy issues, members of the Committee expressed concern that any proposal for distribution of copies of completed juror questionnaires, to counsel and self representing defendants, should be reviewed by the Advisory Committee on Public Access to Court Records (which is chaired by Judge Zonay).

The Committee unanimously agreed to establish a subcommittee to consider proposed amendments to Rule 24(a)(2) requiring provision of copies of juror questionnaires to counsel and self representing defendants in advance of voir dire, and establishing conditions that might

be imposed by the court upon access, use and safeguarding of information that is considered private, and not subject to public disclosure. This subcommittee will be chaired by David Fenster, and includes John Treadwell and Anna Saxman. The subcommittee will report on its work and proposals at the next scheduled Committee meeting. Chair McGee will also communicate with Judge Carroll, who serves as Chair of the Criminal Division Oversight Committee, to determine whether Oversight has addressed, or will be addressing the issue of access to completed juror questionnaires.

11. 2014-03: Proposal to add V.R.Cr.P. 41.2 (Procedures for Hospitalization Hearings Arising from Competency/Sanity Determinations in Criminal Cases

The Committee Reporter indicated that a request had been received from a judge for consideration of a rule establishing procedures for conduct of hospitalization/treatment hearings after a finding of incompetence to stand trial or insanity, pursuant to 13 V.S.A. §§ 4820-23. The statute specifies that procedures at such hearings are as provided in Title 18, Chapters 181, and 206, subchapter 3. The request for consideration of amendments was made when the legislature was considering S. 287, ultimately enacted as Act No. 192 (2014 Adj. Sess.), An Act Relating to Involuntary Treatment and Medication. At time of the request, the issue of whether hospitalization/treatment hearings should be held in the criminal or family divisions was under discussion. Apart from the basic issue of jurisdiction, a primary concern of the request was addressed to provision of access to court records of other pertinent proceedings involving a proposed patient, and any orders previously given as to competency, sanity, and treatment. While the circumstances which prompted the request appeared to have been rendered moot since Act. 192 as passed did not alter jurisdiction for conduct of hospitalization/treatment hearings, members of the Committee expressed the view that access to prior (or contemporaneous) court records, and treatment records of a proposed patient for purposes of these hearings, was a very significant issue in the criminal division, warranting review. Access to mental health treatment records also invokes provisions for maintenance of confidentiality under federal law. Judge Suntag indicated that he had issued decisions as to records access/redaction in two cases that are subject of pending appeals. In consideration of the pending appeals, the Committee unanimously agreed to defer action on a proposed rule for procedures in hospitalization/ treatment hearings until appellate resolution, or further legislative enactment.

12. 2014-04: Proposal to Amend Rule 5 (Appearance Before Judicial Officer) to Require Advisement to Defendant of Pre-Trial Screening and Assessment; Court's Authority to Order Over Defendant's Objection; and Disclosure of the Results to Court, Prosecutor and Defense Counsel, Per Act No. 195 (2014 Adj. Sess.),

Act No. 195 was signed into law by the Governor on June 17, 2014, and its pertinent provisions establishing a process of pre-trial risk assessment and needs screening were effective immediately. The risk screenings and needs assessments may be engaged in voluntarily by defendants who are charged with felonies, excluding "listed" crimes; misdemeanor and felony drug offenses, excluding trafficking; and persons charged with other

crimes who are identified as having a substantial substance abuse or mental health issue. The referenced defendants may also be ordered by the court to participate in risk assessment and needs screening as a condition of release under 13 V.S.A. § 7554c. The statute imparts an "evidenced based" approach to establishment of bail and conditions of release, as well as consideration of alternatives to incarceration and prompt and effective engagement in services for those whose alleged offenses feature substance abuse or mental health conditions. The new statutes provide that information disclosed in assessments or screenings is not considered public information; further, that upon disclosure to the prosecuting attorney, the prosecuting attorney must divulge the results to the defendant and counsel and to the court. The results of the assessment or screening may not be divulged or used other than for purposes of establishing bail, conditions of release and appropriate programming for the defendant in the pending case. A defendant is accorded use and derivative use immunity by statute for statements made in the course of assessment or screening.

The statute directs the court to promulgate rules "related to the custody, control, and preservation of information consistent with the confidentiality requirements of" new § 7554c(e), and authorizes promulgation of rules on an emergency basis to implement the legislation. Judge Zonay indicated that at its recent meeting on August 1, 2014, the Advisory Committee on Public Access to Court Records approved of a proposed amendment to V.R.P.A.C.R. 6(b)(35) which adds an exception from public disclosure for "Records containing information obtained from a person during his or her risk assessment or needs screening pursuant to 13 V.S.A. § 7544c." This amendment has been recommended to the court for adoption.

The Committee considered a draft proposal which adds an amended Rule 5(i), requiring the court to provide an advisement to the defendant at initial appearance of the nature, purposes and consequences of participation in assessment or screening, consistent with the statute. Anna Saxman noted that in her assessment, the statute presents immediate concerns as to violation of provisions of federal law strictly preserving confidentiality of matters disclosed in substance abuse and mental health treatment. Ms. Saxman and Mr. Kaplan were of the view that the option of "voluntary" participation in risk assessment or needs screening upon suggestion of the court at initial appearance or law enforcement officials prior to that could hardly be considered to be voluntary. Mr. Fenster expressed the view that given the nature of screening and assessment instruments, it was highly unlikely that any information of significantly prejudicial value would be yielded by a defendant participating in the process. In view of the initial divergences of opinion by Committee members, and the fact that the proposed amendment had only recently been added to the Committee's agenda, the Committee was of the unanimous view that further consideration of the proposed Rule 5 amendment be deferred, and the matter place on the agenda for the next meeting.

13. 2011-02: Proposed Amendment to Appellate Rule 3(b)(2); Differing Proposals of Advisory Committees on Criminal and Civil Rules of Procedure

The proposed amendment would eliminate automatic appeal in cases in which a

sentence of life imprisonment is imposed following a defendant's plea of guilty or no contest, as opposed to sentence following a jury verdict of guilt. Both the Civil Rules and Criminal Rules Advisory Committees were requested to consider these proposals of amendment, resulting in differing proposals, which were both considered by the Legislative Committee on Judicial Rules at its June 17, 2014 meeting. The LCJR suggested that aspects of the proposal of the Criminal Rules Committee might be subject to reformatting or clarification of terms, but there was no substantive objection expressed to either proposal to amend V.R.A.P. 3(b)(2), which was considered at length by the Advisory Committee on Criminal Rules and received no public comment in response to publication for notice.

The Committee Reporter stated that the format of the Civil Rules Committee proposal provided greater clarity, and well addresses the bases for amendment and apparent intention of the Court, while preserving the right of a Defendant to affirmatively initiate an appeal if he or she chooses, with advice and assistance of counsel. Upon motion of Judge Zonay, seconded by John Treadwell, the Committee unanimously decided to withdraw from further consideration of the amendments to V.R.A.P. 3(b)(2), in favor of, and with understanding that, the proposal of the Civil Rules Committee will be recommended for adoption by the Court at this time.

Rules Proposals Previously Approved by Committee, Reviewed by Legislative Committee on Judicial Rules, to be Forwarded to Court with proposed final Promulgation Orders:

The Committee unanimously agreed to forward the following proposed amendments to the Court for adoption with proposed final Promulgation Orders:

14. 2010-05: "Omnibus" Amendments to Conform Rules to the Judicial Restructuring Act and Adopt Gender-Neutral Language; Amendments to Rules 6 (Grand Jury);; 18a (Venue for Offenses Charged in Multiple Units that are Subject to Joinder

These amendments make changes to terminology in the body of the criminal rules to conform the rules to the Judicial Restructuring Act and adopt gender-neutral language where necessary. No public comment was received in response to publication for notice, and apart from a few grammatical changes pointed out at hearing before the Legislative Judicial Rules Committee ("LCJR") on June 17, 2014, there were no substantive objections to these amendments. The amendments have been previously approved for recommendation to the Court by the Committee, and will be included in a proposed promulgation order to be provided to the Court.

15. 2011-06: Proposed Amendments to Rule 12 (Pre-Trial Process and Motions Before Trial; Status Conference)

These amendments generally reorganize and amend Rule 12, governing pre-trial process and motions before trial, to conform to current practices in the criminal division. The amendments divide motions into those which may be filed at any time, and those which must be filed before trial, based upon a standard of whether the basis of a motion "then exists" (as opposed to whether the basis is "known" to the party in interest.) The court is given discretion

to establish motion deadlines, in the absence of which motions must be filed no later than 60 days after arraignment. Untimely motions are not cognizable, unless authorized by the court "for cause". The court is required to decide pretrial motions prior to the trial, unless there is good cause to defer a ruling. As with the "Omnibus" amendments, no public comment was received in response to publication for notice, and no objections stated at hearing before LCJR. These amendments, previously approved by the Committee, will be included in a proposed promulgation order for the Court's consideration.

16. 2012-02: Proposed Amendment to Rule 41 (Add 41(f)—Motion for Return of Property))

The amendment, proposed in consequence of the decision in *State v. Voog,* 2012 VT 1, makes explicit provision for a motion for return of property which has been lawfully seized, but has no continuing evidentiary value in a pending criminal case. No comment was received in response to publication for notice, and no objection to the amendment raised before LCJR. In fact, members of LCJR stated that the proposed amendment was actually a good idea, especially with respect to securing return of lawful financial and business records and documents. The amendment will be included in a proposed promulgation order for the Court's consideration.

17. 2012-05: Proposed Amendment to Rule 6 (Grand Jury Procedures)

In addition to amendments conforming dated language to the Judicial Restructuring Act and adopting gender-neutral terms, Rule 6 is generally revised and reformatted to comport with current grand jury practice and revision of federal Rule 6. LCJR members expressed two concerns as to the proposal: (1) does the rule (proposed section (c)(3)) restrict access to grand jury materials to *Vermont* prosecuting attorneys? and (2) in the event that the jury does not return a true bill of indictment, should any official or individual have any right of access to the record of proceedings which is considered "sealed", or should this record be unavailable? The Committee discussed these comments. As to the first concern, the term "prosecuting attorney" as used in Rule 6 is defined at V.R.Cr.P. 54(c)(6) to include Vermont state's attorneys, the attorney general and other officials having authority under Vermont law. No need for change of the present language was discerned. Discussion ensued as to the second concern, which was triggered in the language of proposed subdivision 6((f) which provided that in the event an indictment is not returned, the record of proceedings is to be "impounded and kept but the court under seal". This provision is derived from Rule 6(e) of the Maine Rules of Criminal Procedure. Committee members expressed the view that the provision for "impoundment" is not necessary, nor consistent with Vermont grand jury practice, in which the prosecuting attorney retains possession of the record of grand jury proceedings, whether a true bill is returned or not. Grand jury records may be utilized for purposes of on-going investigations, or in conjunction with investigation of other offenses and defendants. The prosecuting attorney has ongoing obligation to preserve confidentiality of all grand jury records, subject to judicial authority with respect to release provided elsewhere in existing Rule 6 and the proposed

amendments. After consideration of eliminating the last sentence of proposed subdivision 6(f) altogether, on motion of David Fenster, seconded by John Treadwell, the Committee unanimously agreed to amend the last sentence to strike the language "…record shall be impounded and kept by the court under seal", and replace it with the language "…record shall be kept by the prosecuting attorney, subject to all other provisions of the rule and the authority of the court thereunder".

18. 2013-01: Proposed Amendment to Rule 18(a)(Venue; Trial of Multiple Charges in Single Adjacent Unit)

The amendment deletes reference to "territorial unit" in defining venue in favor of the term "unit", consistent with jurisdictional changes made by the Judicial Restructuring Act. In addition, on motion, the court is authorized to join for trial in one unit multiple charges pending in multiple units consistent with existing authority to order joinder, in the interests of effective administration of justice, to avert unnecessary multiplicity of prosecutions in several units for similar conduct committed over time by the same defendant or defendants. No comment was received in response to publication of this amendment for notice, and no objection was presented in review by LCJR. As previously approved by the Committee, this amendment will be included in a proposed Promulgation Order for the Court's consideration.

19. Adjournment

Due to elapsed time, the Committee was unable to consider the remaining items (13-17) on its Agenda. These will be taken up at the next meeting. Committee Chair McGee stated that he would be preparing the Committee's Annual Report to the Supreme Court, to be submitted along with the Committee's proposed Promulgation Orders. The next Committee meeting will be scheduled for a date in November, 2014. The meeting was adjourned at approximately 4:40 p.m.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter