VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
December 2, 2011

The Criminal Rules Committee meeting commenced at 1:40 p.m. at the Vermont Supreme Court in Montpelier. Members present were Judges Crucitti, Suntag, and Zonay; Mark Kaplan, Anna Saxman, Dan Maguire, Karen Shingler, Bonnie Barnes, Cindy Maguire, and David Fenster. Joanne Charbonneau and Susan Carr were unable to attend and provided notice of their absence in advance. Justice Brian Burgess was present as the liaison to the Committee from the Supreme Court, as was committee Reporter Judge Walt Morris. Former member, Assistant Attorney General John Treadwell, was present at the committee's request to assist the committee's review of pending rule amendment proposals.

1. Minutes of the April 29, 2011 meeting were reviewed, and unanimously approved upon motion of Judge Zonay seconded by Judge Crucitti.

2. Report on status of e-filing and need for criminal rules amendments:

Bonnie Barnes reported that there had been little action taken by the e-filing committee of import to the criminal rules, although if e-filing is instituted, the critical issues will center upon the points in progression of a criminal case requiring filing of various documents, what becomes of an original signed hard copy document, and whose responsibility the filing, and the entry of these "documents" will be. Apart from that Bonnie's assessment was that it was likely that we would ultimately need only to add a definitional term making clear that e-filing constitutes filing. The committee's information is that institution of e-filing in criminal cases is still a long way off; and that if any initiative is pursued, the committee will then have ample time to examine any issues and provide recommendations. The consensus of the committee is that e-filing in criminal cases is a matter for continued monitoring, but no present action.

3. Proposed Amendment to Rule 44.2 (withdrawal of counsel):

Judge Suntag reported on the proposal of the Criminal Division Oversight Committee to amend Rule 44.2 to provide for automatic withdrawal of appearance of counsel upon completion of the case. This proposal had been referred from our committee back to CDOC, for further consideration of proposed time lines, and impact upon court clerks of the obligation to enter automatic withdrawals. Anna Saxman noted that some defense attorneys feel that automatic withdrawal is not needed; that others don't care one way or the other; that others feel automatic withdrawal of counsel could prove problematic to the defendant who is seeking representation in post conviction matters that may not involve sentence reconsideration as such or petitions for post conviction relief. After discussion of the impact of timelines, on motion of Mark Kaplan, seconded by Cindy Maguire, the committee unanimously approved of a

proposed amendment to Rule 44.2 that would make withdrawal of counsel automatic upon the entry of final judgment and expiration of ninety (90) days from the date of initial sentence. The Reporter's Notes will contain reference to a defendant's right to assignment of counsel upon application to the court in any subsequent case matters. Judge Morris will present a draft amendment for final approval at the next committee meeting.

4. 2010-05--Amendment of Rules to Conform to Court Restructuring Legislation:

Reporter Walt Morris presented an overview of amendments to various rules of criminal procedure to conform to text and provisions of the court restructuring legislation. Proposed amendments were unanimously approved, upon motion of Anna Saxman, seconded by Karen Shingler. The final draft is to use gender-neutral terminology. With respect to Rule 6, Grand Jury, the committee requested further information as to the impact of the restructuring legislation upon the manner of summoning grand juries, which the rule presently entrusts to the "jury commission" and the "clerk of the county". Walt is to poll judges and clerks as to grand jury practice, and provide a memorandum with proposed amendments to comport with current statutes and practice. Judge Morris will present a proposal for conforming amendments for final approval at the next committee meeting.

5. 08-08, 09, 10, 11(video conferencing in courts): By statute, there is no video conferencing in the courts at this time. The committee has provided extensive prior comment on the issue. The issue is considered moot at this point, requiring no further action.

6. 2011-02—V.R.A.P. 3(b)(2); Requirement of "in person" waiver of right to automatic appeal in "life sentence" cases:

The committee discussed Justice Johnson's request for review of the waiver in open court requirement of the Rule. Anna Saxman had not been able to prepare any draft of any rule amendment, but agreed to do so before our next meeting. The committee did discuss two approaches. One is to obtain waiver of appeal in open court at time of the plea colloquy (perhaps amending both VRAP 3(b)(2) and VRCrP 11); second is to amend VRAP 3(b)(2) to provide alternative means of waiver, or amend the requirement altogether.

7. 2011-03—Review status of Jury Questionnaire distribution protocol:

The committee discussed distribution of juror questionnaires. The civil and criminal division oversight committees both concluded that there should be no electronic distribution and no copies made and resolved to leave the system as it is. Attorneys or self represented litigants must come to the court to review the hard copy and make notes. Whatever system exists cannot result in disparate treatment of attorneys versus self represented litigants.

Committee members noted that there is no prohibition against copying verbatim all information on the sheets if time permits. There appears to be general agreement that there should be a way to distribute that information to attorneys while protecting confidentiality as

appropriate. David Fenster and Anna Saxman noted concern that practices as to access to juror information vary from county to county.

The committee discussed the difference between what the access to information and public records statutes might require versus the information that is collected. Some information collected is not to be available to the public while other information is to be available to the public. The litigants are entitled to see all of the information.

David Fenster noted that it should not be difficult to place some security on the information so that it could be viewed remotely but not copied or downloaded or printed, as with "Read Only" files. He pointed out that there were really two issues: one being getting all information that is collected available for review by attorneys representing litigants, and the second being whether and how to distribute the information electronically.

There was some discussion noting that in juvenile court cases, disposition reports are now being made available electronically to attorneys. It was pointed out that since the information can be written down verbatim, it seems silly not to allow wider distribution, and that there may be other measures available to address confidentiality concerns. There was apparently an incident (no specific details provided) in which an attorney was given copies and provided them to the client who, in turn, may have made improper use of the information, causing the court to tighten controls for access to the documents.

Mr. Fenster will send a letter to the Criminal Division Oversight Committee with his observations about steps that can and should be taken and the issues that need to be addressed.

8. <u>2011-04—Procedure for Tracking Search Warrants and Returns:</u>

All agreed that there is no current system. Most courts keep a big file where all search warrants are filed—likely by year. The manner of record keeping depends upon the practice of each Clerk, some more organized than others. There is no uniform organization, and the warrant documents do not get added to a later case filing unless there is a special request for that. Bonnie described the federal system, which gives a docket number to each new warrant. A magistrate's file is opened for the warrant. The docket number then gets incorporated into the case docket if the case goes forward. If it doesn't, then it stays as a magistrate's docket number and the docket number is eventually "retired". We did not have information about the particular details of the means by which the original warrant docket number gets transferred to the opened case docket number. The federal system does permit production of reports on numbers of warrants issued, returns, and other warrant events. It allows for a tickler system, so that if returns are not filed in a timely fashion, the magistrate is notified and, in turn, makes an inquiry of the officer. In contrast to Vermont practice, the federal magistrate is charged with specific responsibility for receipt and filing of warrant documents, and returns, to the clerk.

Justice Burgess stated that he did not believe that we necessarily needed to adopt all of the tracking measures of the federal system, and all appeared to concur. Judge Suntag noted that most warrants are now being issued electronically and that the electronic filing has helped to ensure a better record. Judge Crucitti noted, however, that he believe there does need to be some type of tracking system for warrants and certainly a better system than exists now. The committee agreed to continue discussion of these issues and consideration of amendments to Rule 41 as an agenda item at the next meeting. Judge Suntag indicated that the issues will be brought up at the next Criminal Division Oversight Committee meeting. Judge Crucitti will write a letter to the CDOC indicating that the Rules committee sees the issues as warranting attention. He agreed to examine current practices for filing, registering and accessing search warrant documents and provide a report at the next committee meeting as well.

9. 2011-05—Review of Amendment to Rule 11(c)(7); Warning in plea colloquy of consequences of conviction to U.S. immigration and admission status:

The committee unanimously approved of amendment of V.R.Cr.P. 11(c)(7) to comport with current provisions of the federal rule. This section addresses a judge's warnings during plea colloquy of the consequences of criminal conviction to immigration status and eligibility for admission and citizenship application, consistent with the holding of *Padilla v. Kentucky,* 130 S.Ct. 1473 (2010).

Concern was also expressed as to the manner of colloquy on this issue by some judges, asking the defendant directly if they are a citizen of the United States. This concern, and the need for judge's inquiry that does not serve to provoke potentially incriminatory response, can be addressed in the Reporter's Notes, indicating that it is not intended that there be inquiry as to a defendant's actual immigration status.

10. 2011-06—Review of proposed amendment of F.R.Cr.P. 12 to consider whether conforming amendment of V.R.Cr.P. 12 should be proposed, as to pre-trial proceedings and deadlines for filing of motions:

Federal Rule 12 is under revision, to provide clarity as to motions that must be made before trial, deadlines for filing of such motions, and the consequences of failure to timely file. Committee members noted that there is wide variance in treatment of motion filing deadlines among the judges; that some routinely consider extensions upon request, and that others strictly apply case deadlines permitting no variance. It was observed that the current structure of the rule does not in many instances reflect current practice, under which counsel establish with court approval felony case preparation and discovery deadlines, and the courts focus upon general case flow standards and speedy trial concerns. The current rule 12 references a "status conference", the successor to the former "omnibus hearing" at no less than 28 days after arraignment as the deadline for motions.

Several judges noted that time frames are meant to be followed and enforced. If there is a deadline for a motion and it is not observed, there should be a consequence, but the judges all believe that they have discretion to extend motion and discovery deadlines. Anna Saxman indicated that the problem perceived is with the discretion, that it is being exercised in different ways by different judges. Mark Kaplan commented that sometimes the case is proceeding before a judge whose practice is more liberal in regard to deadlines so that if a deposition gets extended, there is no need to request an extension of motion deadlines. But Mark indicated that he has had cases transferred to another judge who then will deny a motion because the deadline has passed. Anna also indicated that refusal to allow motions after deadlines had passed is a very active and current issue; that there may be cases on appeal raising the question. The Rule, if amended consistent with the current federal proposal, would provide standards of prejudice, and cause for assessing the consideration of late-filed motions.

A committee consisting of Judge Zonay, Anna Saxman, and John Treadwell was appointed to further review the federal proposal, and our current Rule 12, and to provide recommendations as to any proposed amendments.

11. 2011-07—Waiver pleas of guilty/nolo--Amendment of Rule 11(c) to address apparent conflict with Rule 43 provisions for required appearance/waiver of appearance in court:

Rule 11(c) references a plea colloquy, that must be conducted "personally and in open court". Yet many minor cases are disposed of upon written waivers and signed requests to enter pleas given at the clerks' windows and later approved by the court. Rule 43 specifies the circumstances in which personal presence of the defendant in court is required, and when appearance may be waived. The concern is that failure to strictly observe the provisions of Rule 11(c) as to personal colloquy in cases such as DUI-1st offense would give rise to a challenge as to the validity of that conviction where is later appears as a predicate offense, either for sentencing purposes, or in determining whether a 3rd or subsequent conviction would be a felony. After discussion, on motion of Judge Zonay, seconded by Judge Suntag, the committee unanimously agreed to amend Rule 11(c) (and necessarily, Rule 11(d), *Insuring that a plea is voluntary*, to add the phrase, "Except as authorized by Rule 43…" at the beginning of each subsection. A draft of the amendment is to be presented at the next committee meeting.

12. Request for emergency amendment to V.R.Cr.P. 18 to include allowance for holding hearings in any unit for persons arrested for failure to appear or for violation of probation conditions:

Upon request of the Supreme Court, the committee considered proposed emergency amendment of Rule 18 to provide an additional exception to the normal venue requirements for bail review hearings where a person is lodged in a unit other than the unit where the charge is pending. The amendment, which provides further exception for *"A hearing to review bail or conditions of release after arrest upon a warrant for failure to appear in another unit,"* was, upon motion of Cindy Maguire seconded by Dan Maguire, unanimously approved by the

committee. The proposed emergency amendment, with a Reporter's Note indicating that review of bail or conditions of release established in hearings held under the venue exceptions would be subject to review in the initiating unit as a matter of course upon motion.

In discussion of the emergency amendment, there was discussion of what the "bail review" hearing referred to in the amendment was properly called. In that the proceeding occurs when a defendant is in custody on a warrant; it is not strictly speaking a status conference, nor is it an arraignment; nor is it a hearing on a motion. Yet the courts routinely schedule and conduct such hearings to consider what bail or conditions should be set upon execution of an arrest warrant. The committee ultimately concluded that the specific language describing the hearing in V.R.Cr.P 18(b)(3) adequately describes what the hearing is intended to address.

Further concern was raised as to whether, once bail or conditions of release were set by a judge in the other unit, the defendant would be barred from seeking any review of that bail or those conditions in the initiating unit. The concern being that a judge setting bail in the other unit might not have available all pertinent information for the establishment of bail or conditions, and a defendant should have the opportunity to seek such review, and not be barred, in the initiating unit. The same concern was presented on behalf of the State's Attorneys. Hence, the agreed inclusion of reference in the Reporter's Notes to the availability of subsequent review as a matter of course upon motion.

[The Emergency Rule, including amendments previously recommended by the committee, has been promulgated by the Supreme Court and posted for public comment.]

Discussion of the specific change to Rule 18 lead to consideration of whether a further (4^{th}) exception to normal venue rules should be adopted to permit changes of plea and sentence in misdemeanor cases in any unit, upon agreement of the parties, and concurrence of the State's Attorney of the unit initiating the charges. Several members of the committee considered that this was an advisable and prudent change, to permit prompt and just disposition of minor cases "on the spot", provided that there was agreement to such. Permitting disposition in another unit would serve to avoid delay and expense of resetting a change of plea proceeding in the initiating unit, if there was really no good reason to have to do so. David Fenster indicated that the proposal would bring up issues of accurate communications between the State's Attorney, perhaps defendant's attorney, in the initiating unit, and those attorneys in the other unit conducting the proceeding. Much pertinent information about the case and defendant might not be available to the State's Attorney in the other unit. Judge Crucitti noted that sometimes the prosecutors may not be agreeable to disposition of a case in another unit, even though it is clear that a case should be reasonably disposed of, and that judges should have that option. Cindy Maguire requested an opportunity to poll the State's Attorneys as to the issue, and report back to the committee, and the committee agreed to table the issue to its next meeting.

The meeting was adjourned at approximately 4:05 p.m.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter