VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
January 31, 2014

The Criminal Rules Committee meeting commenced at approximately 1:40 p.m. at the Vermont Environmental Court in Berlin. Present were Judges Crucitti, Suntag and Zonay; Joanne Charbonneau, Bonnie Barnes, Anna Saxman, David Fenster, Dan Maguire and Committee Chair Scott McGee. Committee members Karen Shingler, Mark Kaplan, and non-voting member Susan Carr were absent. John Treadwell was present in his new capacity as the designee member of the Attorney General. Justice Geoffrey Crawford was present as the newly-appointed liaison to the Committee from the Supreme Court, as was committee Reporter Judge Walt Morris.

1. Minutes of the November 8, 2013 meeting were reviewed, and unanimously approved upon motion of Judge Zonay, seconded by Anna Saxman.

2. Status of Proposed Rules Published for Notice and Comment ("Omnibus" Amendments to Conform to the Judicial Restructuing Act and Adopt Gender-Neutral Language; Amendments to Rules 6 (Grand Jury); 12 (Pre-Trial Process/Motion Deadlines); 18a (Venue for Offenses Charged in Multiple Units that are Subject to Joinder); 41 (Return of Property)

The Committee Reporter advised that the last package of proposed rules forwarded to the Court for consideration has been published for notice and comment, with the comment period ending on February 21, 2014. Committee Chair Scott McGee indicated that as of the date of our meeting, no comments had been received.

3. 2013-02—Proposed Amendment to Rule 17 (to expressly permit document subpoenas)

Anna Saxman presented draft amendments to Rule 17, and lead the Committee discussion. Under the proposal presented, subpoenas *duces tecum* would be authorized for production of documents other than in connection with trial, hearing or deposition (which are provided for under current rule). Noting that V.R.C.P. 45 already authorizes use of a "non-proceedings" subpoena *duces tecum*, Ms. Saxman described the protections that would be accorded to those served with a subpoena as follows: (1) a motion to quash, subject to *in camera* review in the discretion of the court; (2) a general obligation that a party issuing and serving a subpoena "take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena"; and (4) express provision for filing written objection/motion to quash within 14 days of service of the subpoena, in which case the material sought are not to be made available for inspection and copying except pursuant to court order.

The Committee engaged in lengthy discussion of the proposal, the manner in which it would be implemented, and issues presented. Judge Suntag continued to assert that given the unique dynamic of criminal cases, and the fact that subpoenas are a form of court order, it would in his view be inappropriate to authorize issuance of "non-proceedings" subpoenas *duces tecum* without at least providing notice to the party opponent. Member Fenster noted that in his experience, both state and defense have engaged in the practice of service of such subpoenas for delivery of documents in discovery. Ms. Saxman noted that in addition to the ample protections provided in the proposal, other provisions of law limit or bar access to certain records that are accorded confidentiality, such as a student's educational records; substance abuse or mental health treatment records; or access to any educational or other confidential records of the alleged victim of a crime (13 V.S.A. § 6007 requires written notice to the state that the records have been requested prior to service of any subpoena requesting such records). Ms. Barnes raised the issue of whether work product privilege would serve to bar notice, or any disclosure, that a party was seeking certain records as a function of case strategy, excepting those circumstances in which *Brady* mandates disclosure. She raised concern that in some cases, a requirement of notice would preclude or hinder defense efforts to engage in exploration of defenses (giving alibi and a request for employer time sheet records as an example) or development of a theory of the case without "tipping" the state off to legitimate defense preparation. She also noted that the federal rules permit application for *ex parte* application for subpoenas *duces tecum* with grounds stated. Ms. Barnes described the federal process in further detail. Member Fenster noted that in his assessment, current Federal Rule 17(c) appears to require that notice be provided to a party opponent of issuance of a "non-proceedings" subpoena *duces tecum.*[1]

Judge Zonay indicated that Maine Rules of Criminal Procedure 17 was amended, and new Rule 18 adopted effective January 2014 to explicitly require that unless otherwise provided by statute, notice of a subpoena *duces tecum* shall be provided to the party opponent.[2] Judge Zonay also referenced a decision of the 6th Circuit in ***U.S. v. Llanez-Garcia,*** 735 F. 3d. 483 (11/5/2013) which construes a defense attorney's ethical obligations associated with issuance of a subpoena *duces tecum* without notice, as well as federal Rule 17 itself and the Court's authority to regulate documentary discovery.[3]

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[1] F.R.Cr.P. 17(c)(1) states that "The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them." Subpoenas for this purpose are referred to as "Early Production" subpoenas.

[2] M.R.Cr.P. 17(c) (addressing attendance of witnesses in possession of documents) states that "Notice of the service of the subpoena (for documentary evidence/objects) and a copy of it shall be provided to opposing counsel or, when applicable, a *pro se* defendant, contemporaneously with service." M.R.Cr.P. 18 was adopted to expressly address a subpoena for documents where the subpoenaing party's interest is in securing documents, rather than attendance of a witness in possession of documents. M.R.Cr.P. 18(c) also requires the referenced notice to party opponents.

[3] (The decision-citing certain "uncertainties" in construction of the interplay of Rules 16 and 17--holds that there was no bad faith on the lawyer's part, and no sanction was warranted in the case circumstances.) In construing Rule 17(c)(1), the court notes the existence of federal Rule 17(c)(3), providing that subpoenas seeking information about the *victim* of a crime from third parties may only issue upon prior court approval.

Following extensive discussion, the general consensus of the Committee was to explore an amended proposal which would authorize *ex parte* application for "non-proceedings" subpoaenas *duces tecum,* akin to the federal rule and practice. In the absence of an *ex parte* application and court approval for issuance without notice to a party opponent, notice would be given to the party opponent upon issuance of document subpoenas, whether by defense or prosecution. Ms. Saxman indicated that she would provide a re-draft of the proposal to incorporate the Committee recommendations for consideration at the next meeting.

The Committee engaged in further discussion about the need for more conspicuous warnings for those receiving subpoenas *duces tecum*, and whether there should be additional express advisements as to confidential and protected information that would not be subject to subpoena and would only be produced upon opportunity for hearing and court order. One suggestion was to add a list of such "protected" documents to the subpoena itself. Judge Crucitti suggested that in his experience, a subpoena has been issued to the wrong custodian, and documents produced by that custodian that would have been the subject of objection/motion to quash by the proper custodian. The Committee consensus was that the existing subpoena form should contain some form of additional and more conspicuous warning/advisement of the availability of a process to challenge production of documents. Ms. Saxman indicated that she would undertake to provide a draft subpoena form addressing these concerns for consideration at the next meeting. The Committee acknowledged that a new recommended subpoena form would be referred to the Criminal Division Oversight Committee for review and adoption.

4. <u>2013-03—Proposed Amendment to Rule 30 (Specificity of objections to jury instructions sufficient to preserve appellate error claim)</u>

The proposed amendment permits 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 amendment is intended to avoid the necessity for lengthy further consideration of instructions issues that have already been fully and fairly addressed, either *in camera* or out of the jury's hearing, while the jury sits and waits to begin deliberations. The trial judge members of the Committee noted that none had changed their charge conference rulings with respect to a substantive objection after the instructions had been given to the jury in response to post-instruction objection (with the obvious exception of inadvertent omissions noted by counsel). Committee members all agreed that lengthy post-instruction, pre-deliberation delay while prior objections are restated at length, and the same rulings provided, is unnecessary; awkward; and not good practice. An attorney would have the *right* to renew a particular objection, but such would not be necessary to preservation upon a prior record articulation and ruling; and would have the right to assert an objection arising for the

first time, based upon a new ground, in consequence of the Court's instructions as actually given. With minor modifications, on Motion of Judge Suntag, seconded by Judge Crucitti, the amendment as proposed was unanimously approved by the Committee for forwarding to the Court.

5. 2013-04—Status of November 13, 2013 Rule 11.1 Emergency Promulgation, and Committee Proposal Adopted on November 8, 2013; Report on Proceedings of Joint Legislative Committee on Judicial Rules Meeting on December 13, 2013

On November 13, 2013, the Court promulgated Rule 11.1, providing for certain additional plea colloquy in cases of unlawful marijuana possession, consistent with the provisions of Act 75 (2013 Adj.Sess.). Effective July 1, 2013, a specific colloquy as to the potential collateral consequences of a conviction of an offense under 18 V.S.A. § 4230 is now required. The emergency promulgation did not reflect the changes in the Rule, and accompanying Reporter's Notes, recommended by the Committee at its November 8th meeting. These changes were essentially to use language which tracks the provisions of the statute more exactly, and to add the word "collateral" to further modify the term "negative consequence" as it appears in Rule 11.1(b). Upon further discussion, the Committee determined (Member Saxman abstaining) that no further action would be warranted , in consideration of the Court's emergency promulgation and the potential for further legislative enactment as to collateral consequences of conviction during the remainder of the current session.

Committee Reporter Morris reviewed with the Committee the consideration of Rule 11.1 at the Joint Legislative Committee on Judicial Rules meeting on December 13, 2013. The JLCJR did not express any objection or proposals for amendment to Rule 11.1 as promulgated by the Court. Members of that Committee did note the pendency of bills that would address generally issues of collateral consequences of criminal convictions, including with some specificity a number of additional potential collateral consequences that would be added to Rule 5 advisements, the plea colloquy per Rule 11, and at time of sentencing as well. H. 413, which purports to adopt the Uniform Collateral Consequences of Criminal Conviction Act for Vermont, was then under consideration in the House Judiciary Committee. Under this legislation, in pertinent part, the Attorney General would be required to 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 Department of Corrections would be required to provide additional advisement upon release from any term of incarceration. Our Committee Reporter represented to the JLCJR that he would remain in communication with Legislative Council as to the status of H. 413, as well as advise Legislative Council of further action, if any, on the part of the Court or the Advisory Committee on Criminal Rules as to collateral consequences in the interim. While no requests for action are before the Committee, the Committee agreed to continue to monitor the progress of the legislation, and may need to address further Rule 11 and Rule 32 amendments if the legislation passes.

6. 2013-10—Proposed Amendment to Rule 28 (Interpreters)

The Committee considered 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. There was some discussion of whether interpreters would be provided for jurors who are hearing impaired (conclusion in the affirmative) or with limited proficiency in English (conclusion in the negative, in view of 4 V.S.A. § 962(a)(4)). (Upon motion by Member Zonay, seconded by Member Saxman, the proposed amendment and accompanying Reporter's Notes were unanimously approved by the Committee).

7. 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.

Committee Member John Treadwell presented proposed amendments to Rule 41(e)(3)(5)and (6) to permit law enforcement officers to file search warrant returns and accompanying documents by reliable electronic means, and lead a discussion of the impact of the proposed amendments. Mr. Treadwell emphasized that it is very difficult in certain cases, especially those under purview of the Attorney General's Office, to timely file written search warrant returns; that Rule 41(d)(4) already provide for electronic application for and issuance of search warrants; and that the proposed changes would serve to facilitate the timely filing of search warrant returns, as contemplated by the various amendments to Rule 41 and the warrant "accountability" procedures adopted in 2013. Discussion ensued as to whether any confusion would result as to which "document" comprised the actual search warrant return, and members noted that Rule 41 already results in the issuing judge retaining the original, signed copy of the warrant, and service of an electronically transmitted copy upon the subject of the search. After further discussion clarifying that the amendment would not alter the fundamental obligations of law enforcement officers to provide timely and accurate returns upon warrants, on motion of Member Zonay, seconded by Member Barnes, the amendment to provide for filing of search warrant returns by reliable electronic means was unanimously approved by the Committee.

8. 2013—05—Proposed Amendment to Rule 45(a) (Computation of Time)2010-05—:

Committee Reporter Morris reviewed proposed amendments to Rule 45, governing the computation of time periods in criminal cases. The amendments are 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 amendments are proposed contemporaneously with amendments to V.R.C.P. 6 being considered 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.

The Committee Reporter reviewed a listing of all time deadlines prescribed in the Rules, to enable Committee members to assess the impact of counting a "day for a day"as opposed to the present method. Time periods of less than 11 days (10 days are less) are thus shortened under the amended rule by inclusion of any Saturdays, Sundays, or legal holidays.
So, with certain of the deadlines, the Committee determined to extend the deadlines provided elsewhere in the Criminal Rules. Ten day periods prescribed under the existing Rules (12.1-notice of alibi/insanity/expert testimony; 29(c)-post verdict motion for judgment of acquittal; 33-motion for new trial) would be extended by amendment to 14 days. Rule 47(b)'s ten day period for filing memoranda in opposition to motions would be extended to 15 days. Rule 32(c)(4)'s three day period for filing PSI objections/Redaction requests prior to sentencing would be extended from three days to five days.

On Motion of Judge Zonay, seconded by Judge Crucitti, the proposed amendments were unanimously approved by the Committee. The Committee Reporter will prepare a final draft of the proposed amendments, with Reporter's Notes, as well as proposed amendments to the specified Rules in which amendment of existing deadlines will be required, for Committee review and action at the next meeting.

9. <u>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)</u>

Under Rule 16, the State must disclose to the Defendant the names and addresses of all witnesses, together with any record of prior criminal convictions of any such witnesses But the referenced statute provides that "a witness in a criminal proceeding, including any discovery proceedings, shall not be compelled to disclose the *victim's* residential address or place of employment on the record, unless the court finds, based upon a preponderance of the evidence, that nondisclosure of the information will prejudice the defendant." Due to inadvertence, and a lack of communication, the Committee Reporter was unable to present a proposal with accompanying Reporter's Notes for Committee consideration. 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."

Proposed amendments to Rule 16, with accompanying Reporter's Notes, will be presented for consideration at the next Committee meeting.

10. Adjournment

The meeting was adjourned at approximately 4:15 p.m.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter