VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
JUNE 26, 2015

The Criminal Rules Committee meeting commenced at approximately 9:01 a.m. at the Supreme Court in Montpelier. Present were Chair Scott McGee; Judge Tom Zonay; Laurie Canty, Anna Saxman, David Fenster (via telephone); Bonnie Barnes; Dan Sedon; John Treadwell, Dan Maguire, Mark Kaplan, John Pacht, and Supreme Court liaison Justice Skoglund,, and non-voting member Susan Carr. Judge Maley, was absent. Also present was committee Reporter Judge Walt Morris.

The meeting was opened with the Chair's announcement that Judge Alison Arms has been appointed to replace retired Judge David Suntag, and John Pacht has been appointed to replace member Bonnie Barnes.

1. The Minutes of the March 27, 2015 meeting were reviewed, and unanimously approved upon motion of Anna Saxman, seconded by John Treadwell.

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

Anna Saxman lead a discussion of the redraft of Rule 17 amendments that would authorize "non-proceedings" subpoenas duces tecum, for production of documents other than to court proceeding or deposition. The committee had discussed these amendments at length at its March 27th meeting, and there was brief discussion in advance of approval of Ms. Saxman's redrafts. Ms. Saxman again noted that the redrafts intend to preserve confidentiality and protect against unwarranted disclosure of privileged records, according to the subject of the records and records custodians opportunity to assert objection and have hearing on their objections. Two changes were made to the proposed subsection 17(c)(2): references to "defendant" seeking access and providing notice were changed to "party" in recognition that the state could be seeking the records in issue as well. And, references to "victim" as the subject of the records were changed to "witness", in recognition that in criminal cases, records of potential witnesses other than an alleged victim could be the subject of a subpoena *duces tecum.* At the conclusion of the discussion, on motion of Mr. Sedon, seconded by Ms. Saxman, the Committee unanimously approved of adoption of the final redraft of Rule 17, to be recommended for publication and comment in advance of promulgation. Reporter's Notes are to be prepared, drawing from Ms. Saxman's commentary previously circulated to the Committee.

3. 2013-04—Review of Rules 11, 11.1 and 32 in Consequence of Passage of the Uniform Collateral Consequences of Conviction Act, Act. No. 181 (2014 Adj. Sess.) and recent court decisions.

John Treadwell presented a redraft of proposed amendments to Rule 11, with seven changes based upon Committee concerns and recommendations from the March 27th meeting. The proposed restyling and substantive revisions also address certain pertinent provisions of the Uniform Collateral Consequences of Conviction Act (UCCCA-13 V.S.A. Chapter 231) which are effective January 1, 2016 and will necessitate changes to Rules 5, 11 and 32. The Committee engaged in lengthy discussion of the proposed amendments, focusing upon the seven changes. This discussion consumed the bulk of the meeting time.

The seven changes recommended in the redraft were as follows:

1. Amending language in subsection (a)(2) (Conditional Pleas) to clarify the result of a defendant's prevailing on appeal after entering a conditional plea;
2. Adding subsection (c)(8) to address the court's obligation under 13 V.S.A. § 8005(b) to inform and inquire as to defendant's understanding of collateral consequences of the plea and conviction;
3. Changing reference in subsection (e)(1) from "pro se" to "self-represented defendant";
4. Amending language in subsection (e)(3) to clarify the nature of the advisement provided to the defendant in event of the court's acceptance of the plea agreement (a prior draft had deleted the term "disposition" from the subsection in describing the case outcome; the committee consensus was that this term should be restored to the rule and advisement to address the circumstance in which a deferred sentence was imposed);
5. Amending language in subsection (e)(4) to include reference to deferring decision as to acceptance of a plea agreement in (e)(4)(A) and to personally addressing the defendant in (e)(4)(D);
6. Amending language in subsection (f) to exempt pleas by waiver under V.R.Cr.P. 43(f), and to include language expressly requiring that the court personally address the defendant and make inquiry sufficient to determine that there is factual basis for the plea; and
7. Amending subsection (g) (Record of Proceedings) to include reference to the court's inquiry into factual basis for the plea.

Mr. Treadwell first noted that as to Change # 2 (Advisements per UCCCA, 13 V.S.A. § 8005(b)), he and David Cahill, Executive Director of the Office of State's Attorneys and Sheriffs, were working on a draft of written advisements that would be provided to defendants as to collateral consequences, in compliance with the legislation, once it becomes effective.

As the committee discussion ensued, concern was raised as to inclusion of the requirement that in redrafted subsection (a)(3) that the court consider "the public interest" in the administration of justice. After discussion, the Committee concluded that the phrase should be deleted, resulting in the formulation, "Before accepting a plea of nolo contendere, the court must consider the parties' views and the effective administration of justice."

There was extensive discussion of the provision of proposed subsection (c), which would add provision for the court in its discretion to place the defendant under oath for purposes of colloquy and inquiry into defendant's understandings. Ms. Saxman raised concern that such inquiry under oath can be awkward if the court's inquiries stray from factual basis, perhaps even invoking incrimination concerns. Others felt that the rule should reflect current practice, under

which some judges do inquire of the defendant under oath during colloquy, and at least acknowledge that this was a permissible option. Mr. Pacht inquired as to whether there had ever been a perjury charge, much less conviction, resulting from a plea colloquy under oath. A majority of committee members were of the view that the provision permitting, but not requiring, the colloquy to be conducted under oath should remain in the proposed amendments, and that particular issues associated with the practice in a given case would be appropriately addressed on appeal.

Judge Zonay raised concerns as to the language of the present draft's section (4) and the particular advisements to be given by the court in rejecting a plea agreement, as well as the timing of the advisements (that is, whether the content and consequence of advisement would vary depending upon whether rejection was at time of presentation of the agreement prior to plea, or after deferring acceptance and following a full sentencing hearing). Mr. Pacht felt that adding a specific provision addressed to the circumstance of rejection of plea agreement at or after sentencing hearing would not be necessary, the procedure being otherwise fairly addressed in the proposed rule, and to the contrary would likely be awkward and contrary to practice in the exercise of the court's discretion to provide clear and appropriate direction as to acceptance or rejection of a plea agreement. At conclusion of the discussion, the Committee determined to add the phrase "If the court rejects the plea agreement", to the beginning of proposed subsection (e)(4)(D), to highlight the significance of the court's advisement that if the defendant did not withdraw the plea, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

The Committee next considered the proposed subsections (f) and (g) and their express references to determination of factual basis for either a guilty or nolo contendere plea. The Committee considered that there was no need for requirement of a finding of factual basis for a plea of nolo contendere, and the proposed subsections refer to factual basis only in conjunction with a plea of guilty.

Finally, Mr. Maguire raised concern about the apparent omission from proposed subsection (e)(3) of provision that upon acceptance of the plea agreement, the court inform the defendant that a disposition in accordance with the agreement "or a less onerous disposition" will be included in the judgment (of conviction). The "less onerous" language is included in the current Rule 11(e)(3). Mr. Treadwell replied that the language could reasonably be deleted to address concern that prosecuting attorneys may be deprived of the benefit of the parties' anticipated agreements as to sentence if the courts are expressly authorized to impose "less onerous" sentences than those contemplated by the parties. Others questioned whether this was a significant issue at all, in view of the parties' ability to enter into agreements for a stipulated, or specific sentence to be imposed; or agree to ranges of sentence within which the parties agreed the court could exercise its sentencing discretion. Mr. Treadwell expressed concern that plea agreements are often accompanied by "charge bargaining", in context of agreed dismissal of other charges in return for a specific sentence recommendation, or an agreement not to bring certain other charges that may be known to the State at time of the plea agreement. Charge bargaining having occur as a condition of the recommended sentence, a judge's imposition of a lesser sentence not contemplated by the parties serves to unilaterally modify the agreement, and could invoke separation of powers concerns. Judge Zonay commented that where an agreement

may involve dropping of some charges in return for an agreed sentence on the remaining charges, the prosecutor should not be required to live with the dismissal of some of the charges if the court is not going to accept the rest of the bargain involving the sentence.

Ms. Barnes and others indicated that the federal practice is quite different in regard to changes of plea and sentencing. She noted that there are not nearly as many instances in which the parties agree on the sentence, but if there is an agreement, the federal court either accepts it or rejects it. There was further discussion. Ultimately, upon the suggestion by Judge Zonay, the Committee agreed that the term "less onerous disposition" would be restored to the Rule, given long-standing practice and the presence of the phrase in the rule for many years, acknowledging the court's authority to impose a less onerous disposition than contemplated by the plea agreement in appropriate cases.[1] Judge Zonay further noted that in any event, the primary focus of the present revision of Rule 11 is to provide for reformatting, clarity, and compliance with the Uniform Consequences of Conviction Act.

As a matter of formatting/styling, the Committee requested that the Reporter consider and propose suggestions for recaptioning certain subsections of the Rule, including that addressing acceptance of the plea agreement, suggestions to be presented at the next Committee meeting.

Other than as noted, there were no objections or concerns expressed by Committee members as to the redraft changes presented by Mr. Treadwell. With the specific changes that were the subject of Committee action during the meeting, the proposed amendments, with Mr. Treadwell's redrafts, were unanimously approved by the Committee on motion of Judge Zonay, seconded by Mr. Maguire. Mr. Treadwell will present a final draft for Committee consideration at its next meeting. The Reporter will provide a draft of Notes to accompany the proposed amendments to the Rule.

As to the issue of whether the Committee should propose any amendments to the existing Rule 11.1 (which requires a prescribed rights advisement and colloquy for defendants pleading guilty or nolo contendere to a charge of violation of 18 V.S.A. §4230(a)(5) (possession or cultivation of marijuana), Mr. Treadwell noted an apparent conflict between the rights advisements of that statute, upon which Rule 11.1 is based, and those mandated under 13 V.S.A. § 8005 (Uniform Collateral Consequences of Conviction Act). Mr. Treadwell stated that in his assessment, until the conflict in statutory provisions is resolved, it would not be advisable to amend the provisions of Rule 11.1. After brief discussion of the issue, there was unanimous agreement not to recommend any amendment of Rule 11.1 at this time.

4. 2015-02: Video Arraignment and Other Court Appearances

Chief Administrative Judge Brian Grearson joined the meeting to provide a report on the status of the Court's pilot project for video arraignments. The Committee has been asked to consider implications for the criminal rules of expanded provision for video arraignment and other court appearances consistent with the provisions of Administrative Order No. 38. The Court, with legislative input, considers that movement to options for video arraignment and other

[1] Reporter's Note: the language in issue has been included in Rule 11(e)(3) since date of promulgation of the original Rules of Criminal Procedure in 1973.

appearances for Defendants in custody can potentially result in significant budgetary savings for prisoner transports, and that the technology now exists to provide fair and reasonable opportunity for attorney-client consultation. Judge Grearson reported that the working group on the pilot project has considered a number of models from other jurisdictions, and recently had visited in New Hampshire to observe and obtain more information as to their system. For a number of reasons, Judge Grearson does not favor the New Hampshire system, primarily in that defendants are apparently for the most part without counsel at initial appearance. However, economic imperatives associated with the prisoner transport budget, coupled with the vastly improved technology available, dictate that the Court must consider reasonable alternatives for video arraignments and other proceedings. Judge Grearson reported that the plan is to commence operation of the pilot project in the Chittenden Unit, then to move on to the Franklin Unit, and to eventually have a state-wide system for video arraignments. Judge Grearson repeatedly emphasized that the issues of opportunity for meaningful attorney-client communication, before and during video appearance will be fully and fairly addressed as a condition of movement to video arraignments, and that the technology exists to permit such.

The Committee had an extensive discussion about the proposed pilot project, and the subject of video arraignments generally. Many on the Committee expressed opposition to moving in the direction of video appearance in that it takes away from the lawyer's and client's ability to freely communicate as needed during the proceeding, impedes the lawyer's ability to form a bond of trust with the client, and to provide the support that should come from having one's lawyer physically by their side. Mr. Sedon was passionate in stating his own view of the importance of being physically present with the client, both for facilitating communications about the case, and the client's rights and options, and also on the human side in providing support and comfort and development of an effective bond with the client. Judge Grearson answered a number of questions about the project from Committee members. He indicated that the Defendant would have a separate room to communicate privately with counsel, and counsel will not only have a screen set up at the table in the courtroom, but an ability to go to a separate room for a private conference, both before the hearing, and during the hearing as needed. Judge Grearson reported that in contrast to the prior video arraignment pilot program, the Department of Corrections is fully supportive of the effort and is committed to providing both appropriate space, and staffing to assure that Defendants will have meaningful participate in the entire process from the facilities, and that multiple Defendants will have their needs to participate met without the delays that had been experienced during the prior pilot.

After Judge Grearson left the meeting, the discussion continued. Chair McGee indicated that when the Committee's input was sought in conjunction with the last pilot, it was charged with sampling views from all aspects of the criminal justice system and informing the Court of how the project was working in practice. Justice Skoglund expressed her view that such an effort on the part of the Committee could prove very helpful in assessment of the functioning of the video arraignment pilot project. Apart from the report of Judge Grearson, no further action was contemplated on the part of the Committee at this time. The Committee's involvement in some capacity on request of the Court is likely, though.

5. 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 rules do not presently authorize e-mail service of documents, which has apparently become a widespread practice. Notices to counsel are now being provided by the Clerks via email. The Advisory Committee on Criminal Rules has long urged that the civil rule be amended to extend to email service. The Advisory Committee on Rules of Civil Procedure has agreed to take up proposed amendment of the rule to authorize email service. The Committee will be meeting in July and the proposed amendment of Rule 5(b) is on their agenda, and Chair McGee indicated that he will follow up with them to encourage action on their part.[2]

6. 2014-02: Proposed Amendment to Rule 24(a)(2) (Disclosure/Distribution of Completed Juror Questionnaires to Counsel)

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

7. 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 Pretrial Services Legislation, Act No. 195 (2014 Adj. Sess.)

This item was not reached due to lack of time. The Committee has already forwarded for publication and comment proposed amendments to Rule 5 for related advisements to Defendants of the process, and attendant rights. The comment period was due to close on July 17, 2015.

8. 2014-06: Proposed new Civil Rule 80.7a (Civil Animal Forfeiture procedures) per Act 201 (2014 Adj.Sess.), S. 237, effective July 1, 2014.

The legislation substantially revises procedures for civil forfeiture in cases of animal cruelty. The Committee is requested to consider rules for such proceedings, similar to those for civil forfeiture or immobilization of vehicles (V.R.C.P. 80.7) and civil license suspension (V.R.C.P. 80.5). Committee Reporter Morris presented a redraft that was discussed, addressing the issue raised of whether the Rules of Evidence would strictly apply, or rules analogous to those prevailing at sentencing per Rule 32, or the Small Claims rules. The Committee concluded that in these proceedings, the Rules of Evidence would not be applicable, and after discussion of alternatives, determined that the Small Claims model for admission and consideration of evidence would be adopted. On motion of Mr. Maguire, seconded by Mr. Sedon, the Committee approved of the proposed amendments, with a final draft to be submitted for review by the Committee Reporter at the next Committee meeting.

9. 2014-08: Proposal to amend Rule 32 to specify procedures for restitution hearings (*State v. Morse*, 2014 VT 84, 7/25/14).

[2] Reporter's Note: Since the Criminal Rules Committee's June 26th meeting, the Civil Rules Committee has in fact approved of proposals of amendment of V.R.C.P. 5 to authorize electronic service and filing. The proposed amendments have been published for notice and comment, with the comment period closing on December 21, 2015.

This item was not reached due to lack of time. However, a final proposed rule approved by the Committee has been published for notice and comment, with the comment period closing on July 17, 2015.

10. 2014-09: Proposal to amend Rule 32 to specify procedures for objection to sentencing information including PSI sentencing recommendations, and general and special conditions of probation, if recommended in PSI (*State v. Cornell, 2014 VT 82,8/1/14); State v. Bostwick, 2014 VT 97 (8/1/14)).*

This item was not reached due to lack of time. The Committee has deferred action on the proposed amendments pending completion of work of the Criminal Division Oversight Committee, which had recently completed a report of its survey of general and special conditions of probation. Further action would follow from Committee discussion at the next scheduled meeting.

11. 2015-01: Amendments to Rules 4(a)(b), 5(c); Electronic Filing of Probable Cause Affidavits; Electronic Filing of Sworn Documents in lieu of "hard" copies; Conformity with V.R.E.F. 7(c).

Committee Reporter Morris presented a draft of an amendment to be made to Rule 4(b), 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. Following brief discussion, on motion of Mr. Treadwell, seconded by Judge Zonay, the Committee unanimously approved of the amendment without change, a final draft to be presented for Committee review and approval at the next meeting by the Committee Reporter.

12. 2015-03: Amendment to Rule 23; Waiver in Event of Jury Separation of greater than 48 hrs (life cases) or 30 days (other cases) from voir dire/selection and trial; *State v. Breed*, 2015 VT 43 (3/12/15).

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

13. Status of Proposed/Promulgated Rules:

The Chair reported that the following proposed amendments previously approved by the Committee have been published for comment by the Court, with comments due no later than July 17, 2015:

2014-04: Rule 5 (Act 195 Advisement)
2013-06: Rule 16 (Non disclosure of certain victim information in discovery)
2013-03: Rule 30 (Preserving objections to jury instructions)
2013-11: Rule 41 (Electronic filing of search warrant returns)
2014-08: Rule 32 (Restitution amendments)

The Chair reported that at time of the meeting, the following proposals of amendment had been forwarded to the Court for publication for comment:

2013-10: Rule 28 (Interpreters) (publication has been deferred given differences between Civil Rules and Criminal Rules versions)[3]

2013-05: Rule 45 (Time and related amendments) A brief report was provided as to the status of these amendments. The Committee requested that the Reporter provide a "side by side" summary of time provisions that are similar in both criminal and civil rules, to identify areas of consistency, overlap or conflict prior to final action on promulgation recommendation.[4]

14. Next Meeting

No date was established for next meeting. However, since the Committee now again has a member (Judge Arms) who is also a member of the Criminal Division Oversight Committee, Chair McGee indicated that our next meeting will be coordinated to be held in the afternoon following a next meeting of the CDOC in the morning.

15. Adjournment

The meeting was adjourned at approximately 11:58 a.m. Chair McGee offered the appreciation and thanks of the Committee to Bonnie Barnes for her years of service. The Chair also noted that new member John Pacht had been in attendance for most of the meeting, and had participated fully in the discussions.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter

[Approved on November 20, 2015]

[3] Reporter's Note: The Civil Rules version, amending Rule 43(f), was published for notice and comment by the Court, with comment period ending on October 5, 2015. These amendments have been recommended to the Court for final promulgation.

[4] Reporter's Note: Following the June 26th meeting, the proposed amendments to V.R.Cr.P. 45 were published for notice and comment, along with the companion amendments to V.R.C.P. 6 and related amendments, with comment period ending on October 5, 2015. Both civil and criminal rules were reviewed by the Legislative Committee on Judicial Rules on September 24, 2015. The amendments to Rule 45 are thus now back before the Committee for final promulgation recommendation.