VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
Minutes of Meeting
MARCH 27, 2015

The Criminal Rules Committee meeting commenced at approximately 1:37 p.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 and Dan Maguire. Supreme Court liaison Justice Skoglund, Judge Maley, Mark Kaplan, and non-voting member Susan Carr were absent. Also present was committee Reporter Judge Walt Morris.

The meeting was opened with the Chair's announcement that Judge David Suntag has retired at the end of February, 2015, and the appointment of a replacement Judge to serve on the Committee is anticipated.

1. Minutes of the November 21, 2014 meeting were reviewed, and unanimously approved upon motion of Dan Maguire, seconded by Dan Sedon.

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

Anna Saxman lead a discussion of a 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 bulk of the extensive and detailed committee discussion focused upon whether, and in what circumstances notice to the party opponent of issuance of such subpoenas would be required, and what if any special protections to address confidentiality of certain records should be included in the amendments. After Anna provided an overview of the redraft, the Committee considered whether, if notice of issuance of such subpoenas *were* required, there should be ex parte recourse to a judge at a Defendant's request to preserve particular case strategies from disclosure to the prosecution. The federal practice is to permit such ex parte issuance upon application and hearing. After discussion, the Committee unanimously concluded that notice should only be required in the event that the Defendant sought to subpoena educational or other records of a victim which are by law confidential. The redraft continues to provide that a party/attorney seeking to issue a subpoena duces tecum must take "reasonable steps to avoid imposing undue burden or epense on a person subject to that subpoena." This language is derived from the federal rule. In addition, the amendments clarify the process for motions to quash subpoenas duces tecum, determination of such motions, and the status of the records sought pending court resolution of any disputes as to access. Another issue of Committee concern went to the question of standing to object to such subpoenas, and the right of the State to be heard as to objections. Committee members acknowledged that as to matters of confidentiality, confidentiality would be a matter for the victim to assert, and not the State, but that there may be circumstances in

which the victim is not in a position to capably assert objection. In contrast, institutional custodians of records are presumptively knowledgeable as to confidentiality required by law and routinely do assert objection. Judge Zonay was of the opinion that there is case authority, notably *State v. Simoneau,* 176 Vt. 15 (2003), which may accord independent State standing to object, or at least articulate further a victim's objection, in appropriate cases. Ultimately, the Committee concluded that the issue of standing should be addressed by reference in the Reporter's Notes, and addressed by the court on a case by case basis. At the conclusion of the discussion, on motion of Ms. Saxman, seconded by Mr. Sedon, the Committee unanimously approved of adoption of the redraft of Rule 17, which primarily adds subsections (c)(1) and (2), with the deletion of the provisions for notice to all parties and ex parte issuance at defense request.

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 preliminary proposal of amendments to Rules 11/11.1, noting that certain pertinent provisions of the Uniform Collateral Consequences of Conviction Act are effective January 1, 2016 that will necessitate changes to Rules 5, 11/11.1 and 32. The redraft would serve to reformat Rule 11. The Committee engaged in significant discussion About the standard applicable when a court rejects a plea agreement, and what advisement the court must provide to a Defendant in that event. There was specific discussion as to the court's options if it felt that a proposed sentence was either too low, or too high, and whether an articulation of basis of rejection by the judge would serve to permit either a Defendant, or the State, to withdraw from the plea agreement. The redraft effectively eliminates the apparent authority of a court to impose a less burdensome outcome notwithstanding a plea agreement with fixed terms. Committee reactions to the proposed amendments were generally favorable; various editing suggestions were made, such as in broadening the language of proposed subsection (e)(3) as to the manner of the court's acceptance of a plea agreement (e.g., that the court will dispose of the case "in a manner consistent with the plea agreement" rather than "the agreed disposition will be included in the judgment"; providing further clarification of the references to factual basis in subsections (f) and (g). Concern was generally expressed that to the extent possible, language in the redraft not serve to dissuade the reasonable process of plea bargaining. Mr. Treadwell will present further revisions to address issues and concerns raised by Committee members for consideration at the next meeting. Mr. Treadwell also described generally the process of advisements that will be required under the Uniform Collateral Consequences of Conviction Act, noting that these may be provided to Defendants either orally or in writing. The Committee discussed generally the potential and dynamics of providing written advisements to Defendants and acknowledgment and understanding of any written advisements and waivers, acknowledging that further discussion of these issues will be warranted.

4. 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 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. Chair McGee and Reporter Morris indicated that there had been efforts to communicate with Bill Griffin, Chair of the Civil Rules Committee, but that the status of this amendment on the Civil Rules Agenda remained unclear. Apparently, the Civil Rules Committee had considered that the Advisory Committee on Rules for Electronic Filing would have primary authority with respect to the issue. With unanimous approval of the Committee, Chair McGee indicated that he would formally request that the amendment of V.R.C.P. 5(b) be restored to that Committee's agenda for consideration and hopefully, adoption.[1]

5. 2014-02: Proposed Amendment to Rule 24(a)(2) (Disclosure/Distribution of Completed Juror Questionnaires to Counsel)

At its August 8, 2014 meeting, the Committee unanimously agreed to establish a subcommittee (Chaired by David Fenster) 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. While Rule 24(a)(2) currently provides that information provided in response to written jury questionnaires "shall be open to the parties to the proceeding", the practice of disclosure is highly variable among the units. In some units, Clerks provide copies of the questionnaires for counsel to review away from court premises; in others, Clerks apparently insist that review of any questionnaires, including by counsel, occur in the Clerk's office without provision of copies.

The Criminal Division Oversight Committee has previously considered conditions of access to juror questionnaires, no action had apparently been taken, and that committee is not presently considering any policies with respect to access to juror questionnaires. However, the issue is currently within the purview of the Advisory Committee on Public Access to Court Records (which is chaired by Judge Zonay). Judge Zonay agreed to update Criminal Rules as to actions taken by the Advisory Committee on Public Access at our next scheduled meeting.

[1] The matter was placed on the Agenda for the June 12, 2015 meeting of the Advisory Committee on Rules of Civil Procedure.

6. 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.)

Mr. Fenster and Judge Morris provided a very brief report as to current Implementation efforts for Act No. 195 and its pertinent parts establishing a process of pre-trial risk assessment and needs screening, 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 closes on July 17, 2015.

7. 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 draft that was discussed, with issues raised as to 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, but a provision addressing admission of reliable hearsay would be included in the rule. Ms. Saxman indicated that the legislature was considering amendments to the forfeiture statutes in drug cases which, if passed should be referenced in preparing this rule for approval by the Committee. Reporter Morris will present a redraft at the next Committee meeting.

8. 2014-08: Proposal to amend Rule 32 to specify procedures for restitution hearings (*State v. Morse*, 2014 VT 84, 7/25/14).

The discussion draft of amendments to Rule 32 to specify procedures for restitution hearings was unanimously approved by the Committee with an amendment suggested by David Fenster that would impose a duty of "reasonable inquiry" on both State and Defendant to discover and disclose the existence of insurance coverage for losses compensable in restitution. The redraft will be submitted to the Court for publication and comment.

9. 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 proposal, considered by the Committee consistent with direction in the opinions in the referenced cases, would broaden the scope of required written objections to the contents

of PSI reports, extending beyond factual assertions in the PSI, to other sentencing information such as conditions of probation or other supervision, risk assessments, and sentencing programming. Existing Rule 32(c)(4)(A) requires state or defendant to file written objections *"…to facts contained in the presentence investigation report"* at least three days prior to the sentencing hearing, unless good cause is shown for later objection" (emphasis added). The proposed amendment would adopt the existing federal standard, which requires advance written objection not only to facts contained in the PSI, but "…to other material information contained therein,…" broadly defined to include documents, recommended conditions of sentence and references that would not be considered "sentencing facts" in an evidentiary sense.[2]

At its November, 2014 meeting the Committee decided to defer further action on this proposal until completion of a review of all conditions of release and probation by the Criminal Division Oversight Committee. Reporter Morris reported that the Oversight Committee was nearing completion of its work, and would be presenting its findings to the trial judges for comment. Reporter Morris will report further on the status of this work and next steps if any for Criminal Rules, at our next meeting.

10. 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 outlined amendments that might be made to Rules 4 and 5, consistent with the provisions of V.R.E.F. 7(c), and the practice in some of the units in which affidavits of probable cause are being filed electronically. As was the case with filing of search warrant documents and returns by reliable electronic means, the issue of which document constitutes the "original" and preservation of originals was a matter of concern. Reporter Morris will present more specific proposals of amendment for Committee consideration at the next meeting.

11. 2015-02: Video Arraignment and Other Court Appearances

The Court is moving forward with a pilot project for video arraignments, and 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 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. This is the experience in a number of other jurisdictions, notably New Hampshire, which has adopted

[2] The F.R.Cr.P. 32(f) requires parties to file written objections to PSI contents, "…including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the (PSI) report." (parenthetical reference added).

procedures for video arraignments. A working group has been comprised to implement a pilot project. The Court is mindful of the necessity for provision of meaningful opportunity for attorney-client communication in any video-conferencing. In our discussions, a number of Committee members have expressed this very concern. The consensus of the Committee was that proposed amendments to the rules could be considered to address video arraignment and other appearances in the criminal division, and to specify the procedures for assuring meaningful attorney-client consultation, but that more information as to the technology, and the operation of a system of video arraignments is needed to enable the Committee to proceed. Judge Grearson, who is working on the pilot project, will be invited to the next Committee meeting to provide a briefing on the details.

12. Status of Annual Report, and Proposed Amendments that were approved at August 8, 2014 Committee meeting, to be sent to the Court for Circulation for Public Comment:

The Annual Report for 2013-2014 and an accompanying promulgation order (Rules 5; 16 (disclosure of victim information); 28 (interpreters); 30 (preserving objections to jury instructions); 32 (restitution); 41 (electronic filing of search warrant returns) and 45 (time) were reviewed, and unanimously approved for forwarding to the Court.

13. Adjournment

The next Committee meeting will be scheduled for a date in May, 2015. On motion of Anna Saxman, seconded by Dan Sedon, the meeting was adjourned at approximately 4:25 p.m.

Respectfully submitted,

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Walter M. Morris, Jr.
Committee Reporter