

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE  
MINUTES OF MEETING  
NOVEMBER 20, 2015**

The meeting was called to order at approximately 1:34 p.m. on Friday, November 20, 2015. Present were Supreme Court liaison Justice Marilyn Skoglund, Judge Alison Arms, Judge Thomas Zonay, Judge Martin Maley, Attorney General designee John Treadwell, Defender General designee Anna Saxman, Rutland Criminal Division Court Clerk Laurie Canty, Dan Sedon, Mark Kaplan, John Pacht, Addison County State's Attorney David Fenster and Chair Scott McGee. Committee member Dan Maguire was unable to attend due to a conflict and committee reporter Judge Walter Morris was unable to attend due to a conflict.

1. Minutes of June 26, 2015 meeting were approved unanimously.

(These minutes will follow the numbering of the Agenda for ease of reference, but the order listed will be the order in which they were discussed at the meeting)

**1-A. Report of meeting with Joint Legislative Committee on Judicial Rules.** Chair McGee reported on his meeting with the Joint Legislative Committee on Judicial Rules on September 24, 2015. A summary of that meeting prepared by Legislative Council attorney Eric Fitzpatrick had earlier been circulated with the materials for the meeting. Chair McGee described two proposed rule amendment concerns raised by members of the Joint Legislative Committee.

*Pre-trial substance abuse screening (proposed amendment to Rule 5)(Agenda Item 8 and committee index #2012-04).* Joint Legislative Committee members had questions regarding notice of the screening option and whether it needed to be given to every defendant and whether it could be waived or incorporated into a written notice.

General discussion among the Criminal Rules Committee ensued about the working of the pre-screening system. There appears to be in place in every county a process for defendants to be advised through the citation of the availability of the pre-screening option which is then followed up with a personal inquiry by a pre-trial monitor to each cited defendant (the process for incarcerated defendants was not specifically reviewed).

The judges do not receive confirmation as to whether a defendant has been contacted by a pre-trial monitor and advised of the screening program. Consideration may be given at some point to requiring that the monitors notify the court that those slated for initial appearance have been contacted and have received notice of the voluntary option. The Committee agreed that the proposed pre-trial screening amendment to Rule 5 should be forwarded to the court without further modification as part of the packet of rules that have been out for comment and are being recommended for promulgation. The criminal rules committee will continue to monitor whether the pre-trial screening program is working as intended.

*A Day Is A Day Rule for counting time (Agenda Item 5 and committee index #2013-05).* Chair McGee described his discussion with the joint legislative committee about the day-is-a-day rule. The proposed changes to the criminal rules differ from the proposed changes to the civil rules in regard to designating the holidays by name rather than generically and in not enlarging the time to move for a new trial under VRCrP 49 because the Criminal Rules provide an option to move to enlarge the time for filing such a motion. The Civil Rules contain no such option to enlarge the time for filing a motion for a new trial, so the Civil Rules Committee has proposed enlarging the time for filing for a new trial.

Chair McGee noted that the new method of counting time will affect counting time for time limits set by statute. The one statutory time change noted in the discussion with the Joint Legislative Committee is the state's right to appeal under 13 V.S.A. §7403. The statute provides a seven day appeal time. That time will remain unchanged, but under the proposed amendment to counting time, the statutory time frame will now be counted as seven straight days with no exclusions for weekends and holidays – unless the seventh day falls on a weekend or holiday in which case the time will be extended under the proposed new counting time rule to the next date when the court is open.

To avoid ambiguity on this issue, the civil rules advisory committee is including language that their proposed counting-time rule change will apply not only to the times provided for by the rules but also to times specified in “any applicable statutes.” After discussion, the criminal rule committee agreed that a similar addition of the reference to “any applicable statutes” should be made to the proposed amendment to the Criminal Rules.

Judge Morris will add that reference to the committee's proposed amendment and the counting time proposed amendment with that change will be circulated to the committee for final approval before forwarding to the court to be promulgated simultaneously with the parallel proposed amendments to the Civil Rules.

2. **Proposed amendment to Rule 17 (Committee Index #2013-02).** The committee considered revisions to the proposed amendment to Rule 17 prepared by Anna Saxman. The committee agreed that the reference to “witness” should be changed to “person” in accordance with the discussion at the last meeting, and a typographical error was noted and corrected.

On motion by Judge Zonay, seconded by Mr. Pacht, the committee approved the proposed amendment with the changes noted with the understanding that committee reporter, Judge Morris, will prepare a final version and a Reporter's Note for the proposed amendment which will then be circulated to the committee for final approval before forwarding to the court.

3. **Rule 11 and 5 proposed amendments (Committee Index # 2013-04).** Mr. Treadwell led the discussion in reviewing his redraft of Rule 11 and his proposed addition of subdivision 6 to Rule 5(d) to add to the advice given to defendants at their initial appearance notice of the Uniform Collateral Consequences of Conviction Act. The rewritten format of Rule



11 in a proposed amendment drafted by Mr. Treadwell had been previously reviewed by the Committee. Further discussion ensued as follows:

Re Rule 11 (a)(3), the Committee noted that the reference to "in the public interest" was intended to be stricken. All members remained in agreement that the language should be stricken.

Re Rule 11(c)(8) re notice of Uniform Collateral Consequence of Conviction Act: Considerable discussion ensued regarding the statutory requirement that in the Rule 11 proceeding the court confirm that the defendant had earlier received notice of the collateral consequences of a conviction at the time of initial appearance and that the defendant receive a further more detailed notice at the Rule 11 proceeding as required by the statute (now codified at 13 V.S.A. §8005(b)). The Committee discussed whether the two notices could be waived and whether waiving notice at the time of initial appearance satisfied the requirement of the statute that the defendant receive actual notice of the collateral consequences. After considerable further discussion, all agreed that at the initial appearance the defendant must acknowledge receipt of the notice even if oral recitation of the notice is waived. Defendants and attorneys who are waiving a reading of the notice will need to include in their comments to the court an acknowledgment that they received notice of the collateral consequences just as they acknowledge receipt of the Information and Affidavit. Members were in agreement that the presiding judge at initial appearances and arraignments will need to add to the court's colloquy an inquiry confirming that the defendant has received the notice.

To implement the notice requirement, Mr. Treadwell and Mr. Fenster reported that the attorney general and state's attorneys are preparing a form containing the initial appearance required advisements that will be attached to the Information packet given to each defendant in every new case. The prosecutors are also working on a separate form that will contain the information required during the Rule 11 proceeding.

Justice Skoglund and Judge Arms advised that the Criminal Division Oversight Committee will want to develop a standardized form. The Committee agreed that it made sense to consolidate the notices required under 13 VSA §8005(a) and §8005(b) into one consolidated notice form that will be attached to the Information in every case. The prosecutors will attach the notice to the Information and Affidavit as part of the packet that they deliver to the court for the court and for the defendant. Mssrs. Treadwell and Fenster agreed to continue work on a combined form and to forward it to the CDOC for further review and adoption.

On motion by Mr. Pacht, seconded by Mr. Fenster, the proposed amendments to Rules 11 and 5 were approved unanimously. Committee Reporter, Judge Morris, will be asked to prepare a final form of the proposed amendments with Reporter's Notes. The Reporter's Notes should include reference to the use of written notice of the advisements and acknowledgment of receipt by the defendant.

4. **Rule 28 Interpreters: (Committee Index #2013-10).** The Committee had previously approved a proposed amendment to Rule 28 to incorporate the revisions requested by the Chief Administrative Judge to ensure court funding of services requiring an interpreter. That prior proposed Rule amendment was forwarded to the court. The court has been holding the proposed amendment pending receipt of the civil rules committee's proposed amendment to their Rule 43 addressing the same issue. The civil rules committee has now completed its work. Chair McGee reported that he and Judge Morris have reviewed the proposed amendment to the civil rule and believe it is well stated and that Criminal Rule 28 should be amended to track the language of the proposed amended civil rule in keeping with the court's desire to have one uniform rule for both divisions.

State's Attorney Fenster noted that the earlier version of the Rule 28 amendment approved by the committee had specifically referenced jurors as among the persons who are eligible for interpretive services. Mr. Fenster liked the civil version because it eliminates any reference to jurors which eliminates the inconsistency between the rule's apparent allowance of interpreter services for a juror and the statute that prohibits persons who who don't speak English from serving as jurors. Ms. Saxman noted that some jurors may have hearing impairments or be deaf in which case interpreter services would be needed. After further discussion, the committee agreed that the proposed amendment to the civil rule allows flexibility sufficient to cover jurors, if needed, and contains limits on court-funded services that the criminal rules committee wanted included to avoid court responsibility for providing interpreter services that are not directly related to court-related proceedings.

The language in the proposed civil rule will need to be adjusted in places to adapt the rule amendment references to the criminal rules. Committee members noted that the proposed civil rule amendment uses the term "shall" rather than "must," and that we should remain uniform with our use of the now-preferred term "must" in our version of the rule. Committee Chair McGee agreed to notify civil rules committee reporter Kinvin Wroth and request a conforming change to the civil rules committee proposed amendment. The committee requested that Judge Morris make conforming changes to the proposed criminal rule amendment and prepare a brief Reporter's Note that can incorporate by reference the Civil Rules Committee's more extended note. On Motion by Mr. Kaplan, seconded by Judge Maley, the revision to the committee's proposed amendment was approved unanimously.

The proposed amendment with revisions noted and a Reporter's Note will be circulated to the Committee for final approval and then forwarded to the court.

5. **Rule 45 (counting time)(committee index # 2013-05).** This proposed rule amendment was discussed under Agenda Item 1-A and is covered under that section of the minutes.

6. **E- Service (Committee Index # 2014-01).** The civil rules committee has now proposed an amendment to their service rule (Civil Rule 6) to permit electronic service if



specified protocols are followed. The proposed Civil Rule amendment requires that parties who wish to serve one another by electronic means must file with the court a confirmation of that agreement among other conditions. Committee members did not favor the requirement of involving the court in what is essentially an agreement among the parties to use electronic means of serving papers on one another. Judge Zonay suggested that the Rule should provide only for an opt-out provision with electronic service being the default. Further discussion ensued over whether that opt-out and default should apply to self-represented defendants as well as parties represented by counsel.

The Committee discussed whether the opt-out should simply be across-the-board, but concerns were raised about self-represented defendants who might be unaware of that option and might not realize their papers were being sent to them electronically. Mr. Fenster noted that in his experience most self-represented defendants are very involved with mobile devices, but committee members noted that many persons may be using methods other than email for communicating electronically. Judge Arms favored a uniform rule that applies to all parties whether represented or not. There was general sentiment for that type of uniformity, but in further discussion, some members believed that a differentiation between represented and self-represented parties would be preferable. Judge Zonay asked about other provisions where there is a distinction between represented parties and non-represented parties. John Treadwell mentioned the rule on depositions as the one example that came to mind.

Different formulations were discussed. Ultimately, consensus evolved around an opt-out provision for persons represented by counsel with the default being electronic service and an opt-in provision for self-represented persons with the default being paper service by mail or hand-delivery. All members were in agreement that the court did not need to be involved in decisions about the method to accomplish service between parties.

After further discussion, the committee agreed that Chair McGee should prepare a comment to be sent to the civil rules committee requesting that the proposed amendment to Civil Rule 6 be further amended to specify that electronic service among represented parties shall be the default unless represented parties opt-out and the paper service shall be the default for self-represented parties unless self-represented parties opt-in. Chair McGee will prepare a proposed comment and circulate to the committee for review and revising before sending it to the civil rules committee.

The criminal rules committee retains the right to recommend adoption of its own rule on service if the Civil Rule proves to be too cumbersome in whatever form it is finally adopted.

**7. Proposed Amendment to Rule 24(a)(2) re disclosure of juror questionnaires (committee index #2014-02).** Judge Zonay reported that the committee on Public Access to Court Records which he chairs, will be addressing this issue at its next meeting. He will report back to the criminal rules committee at its next meeting. The committee agreed to table further discussion until the next meeting.

8. **Rule 5 Amendment to add Pre-trial substance abuse screening.** This item has been covered in section 1-A of the minutes reviewing the discussion before the Joint Legislative Committee on Judicial Rules.

9. **Animal Forfeiture. (Civil Rule 80.7(a)) (Committee Agenda #2014-06).** Chair McGee briefly summarized the provisions agreed to at the last meeting. On motion by Judge Maley, seconded by Ms. Canty, committee members voted unanimously to forward the rule as now drafted by Reporter Morris to the Supreme Court once the Reporter's Notes have been added. The proposed rule amendment with the Reporter's Notes will be circulated to the committee for review before forwarding to the court.

10. **Rule 32. Restitution Hearing Procedures (Committee Index #2014-08).** This Rule had been sent out for comment by the Supreme Court and came back without comment. On motion by Judge Zonay, seconded by Mr. Pacht, the committee voted unanimously to forward this proposed rule amendment along with the other rules that have been through the comment period to the court for promulgation.

11. **Rule 32 - Objection to Sentencing Information** This item was skipped initially and is covered below after paragraph # 14.

12. **Electronic Filing of Probable Cause Affidavits (Rules 4(a)(b), 5(d))(Committee Index #2015-1)** On motion by Judge Zonay, seconded by Mr. Pacht, the committee unanimously approved the draft rule prepared by Reporter Morris for the electronic filing of probable cause affidavits. Judge Morris will add a Reporter's Note to be circulated to the committee for approval, and then this proposed amendment will be forwarded to the court.

13. **Video Arraignment and Other Video Arrangements at Court (Committee Index #2015-02).** The committee again discussed the use of video technology for conducting initial appearances and arraignments. Mr. Kaplan expressed grave concerns about the impact such an approach has upon an attorney's ability to establish a rapport and a relationship with a client and have truly meaningful early discussions which can be critical to their representation. Mr. Sedon renewed his comments from the previous committee meeting. Several other committee members noted the limitations on the attorney-client relationship and communications posed by a video hookup. The committee discussed the reason for the video experiment which is to save costs. Committee members questioned whether there might be other ways to reduce transportation costs. That issue appears to have been explored and resolved, at least for the present, with the conclusion that the video approach will cut down considerably on transportation costs and needs to be tried despite the disadvantages noted by committee members.

Committee members Saxman and Fenster have been appointed by the Vermont Supreme Court to a special committee established by Justice Dooley in his position as chair of the e-filing committee, to review the current technology available for video appearances and for consulting with clients and to review the practice under the experiment now in place in Chittenden and



Franklin Counties. Members Saxman and Fenster will report back to the Committee at its next meeting.

14. **Amendment to Rule 42 re Jury Sequestration Issues. (Committee Index #2015-03).** Ms. Saxman led the committee through a review of the VSC decision in *State v. Breed* and then led the discussion of her proposed amendment to Rule 23. Lively discussion followed in regard to concerns about the level of detail and particulars contained in Ms. Saxmans draft proposal. Judge Zonay felt that the laundry list of particulars was a recipe for error and unnecessary. Judge Zonay summarized what is needed as being an admonishment to the jury before they are released regarding not listening or viewing or reading anything about the case and then an inquiry to the jury when they reassemble as to whether any juror has read or heard or viewed any information about the case and then, either upon request of counsel or within the discretion of the court, asking counsel if they have any inquiries. Judge Zonay indicated that the detailed procedure set out in the proposed rule amendment is really more a matter for judicial training then for rule-making. Ms. Saxman indicated that she had incorporated into the rule the procedures that the Vermont Supreme Court had indicated in its decisions as being the preferred practice.

Other discussion included the benefit of obtaining an on-the-record or in-writing consent to any enlargement of time beyond the time provided for in the rule.

Ms. Saxman agreed to rewrite her draft proposal to either eliminate or dramatically shorten and summarize her section (b) and to further streamline the proposal and bring it back to the committee for review at the next meeting. All agreed to table the further consideration of the rule amendment.

11. **Rule 32 - Objection to Sentencing Information (Committee Index #2014-09).** The Committee had before it an earlier draft revision to Rule 32 that was considered at the Committee's November 2014 meeting. This Rule amendment review was triggered by a request from Justice Dooley for the committee to consider proposed procedures for objecting to information in the PSI. The draft prepared by Committee Reporter Morris expanded the current rule which is limited to a requirement of objecting to facts contained in the PSI within three days of the sentencing. The proposed amendment would include a deadline for objections to all other material information in the PSI, including recommendations and conditions and proposed sentence. The "day-is-a-day" counting time amendment in the promulgation pipeline will, as drafted, enlarge the time for objecting from three to five days. Mr. Fenster indicated his biggest concern is with having adequate time to review the report and respond to objections. Members Kaplan, Pacht and Sedon described the difficulties of getting a copy of the report and then reviewing it with a client, who is often incarcerated in a facility far from the court or from counsel's office, and then getting objections filed within the time allowed by Rule. Under current practice and rules, the PSI is distributed 14 days before the sentencing. The logistics of getting the report and getting it to the client and reviewing it all within the time required to file a timely objection can be daunting. Additional time would be useful, but that would require

getting the PSI further in advance of the sentencing which would further delay sentencing in relation to the change of plea.

Judge Zonay expressed the view that objections should be limited to the facts. Other matters such as recommendations and conditions of probation could be the subject of argument but should not require advance objection. Ms. Saxman noted the comments of former committee member, Judge Suntag, who believed that requiring advance notice of all objections was an infringement on the court's responsibility at sentencing. Mr. Fenster agreed that the key issue that should be the subject of objections is the facts. Mr. Fenster described the way prosecutors and defense attorneys use the PSI process to introduce facts that are helpful to their position so that the facts then become a part of the factual setting for the sentencing that does not require independent proof at the time of sentencing, unless objected to. If either side objects to the facts that are in the report, then the rule provides a mechanism for making the objections and having the court make findings as to what facts will be relied upon.

Members Sedon and Fenster agreed that the PSI often may include the results of a test or an evaluation with a summary characterization but without providing the underlying data. Mr. Fenster said he would prefer that the data be a mandated part of the PSI to facilitate the review and allow either side to decide whether to object. Mr. Sedon described the logistical difficulty of receiving information set out in a PSI and then not having enough underlying data or information to know whether to object or not. Investigating assertions in a PSI can take time before the attorney is able to decide whether there is a basis for an objection.

Judge Arms expressed the view that it is preferable to require all objections to information in the PSI, including objections to recommendations or to proposed conditions, to be made in advance in order to alert all parties and the court to the issues that are contested and to avoid surprises where one side or the other may be prejudiced by late notice of an objection.

Justice Skoglund and Judge Arms indicated that the Criminal Division Oversight Committee is in the process of developing a list of probation conditions. They mentioned three categories of conditions. The first includes the standard conditions issued in nearly every case. The second includes conditions addressing program and rehabilitative arrangements. The third includes conditions for more specialized circumstances.

Committee members discussed whether there may be some conditions for which an objection should be required in advance of sentencing and others where the issue can be left for argument at the time of sentencing.

Committee members agreed to table the discussion until the Criminal Division Oversight Committee completes its work - which is anticipated to be accomplished in December. Either Judge Arms or Justice Skoglund will forward to Chair McGee a copy of the draft list of potential probation conditions. Chair McGee will forward the list to the committee to be reviewed in connection with the renewed discussion to changes to Rule 32 at the committee's next meeting.



Members Fenster and Sedon expressed an interest in exploring other provision of Rule 32 that should be improved. One example given would be the time allowed between objections and the sentencing hearing. After further discussion, the committee agreed that each member who has a particular issue to address under Rule 32 will send their comments and suggestions to the chair who will include their submissions and comments in the packet that will go out to the committee before the next meeting.

16. **Promulgation packet of proposed amendments to Rules 5, 16, 30, 32 and 41 that have been through the comment period.** The Committee unanimously approved forwarding to the court for promulgation the five proposed rule amendments that have been through the public comment period. Ms. Saxman indicated that she has remaining concerns about some of the pre-trial substance abuse screening provisions. She agreed to send a comment to the chair who will include it in the packet to be sent to the court.

The next meeting will be set in approximately March to coincide with the meeting in that time frame of the Criminal Division Oversight Committee.

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

Respectfully submitted,

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P. Scott McGee, Chair and acting scribe