VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE
MINUTES OF MEETING
NOVEMBER 8, 2013

The Criminal Rules Advisory Committee meeting commenced at 1:36 pm at the Vermont Environmental Court in Berlin, Vermont. Committee members in attendance were Judge Suntag, Judge Zonay, Bonnie Barnes, Anna Saxman, Mark Kaplan, Karen Shingler, Cindy Maguire and Committee Chair Scott McGee. Member David Fenster was unable to attend in person but was available by phone and participated in discussions on several of the issues under review. Members Judge Crucitti, Joanne Charboneau and Dan Maguire and non-voting member Susan Carr were unable to attend. 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. Reporter, Judge Walter Morris, was away on a trip. Former Supreme Court liaison member Justice Brian Burgess has retired. A new liaison justice has not yet been appointed.

1. Minutes of the March 22, 2013 meeting were reviewed and unanimously approved on motion by Bonnie Barnes, seconded by Anna Saxman.

2. **Agenda No. 2012-05.** Final approval of Omnibus amendments. The committee briefly discussed the final drafting of the Omnibus amendments and they were reaffirmed for submission to the court.

3. **Agenda No. 2011-02.** V.R.A.P. 3(b)(2) re waiver of automatic appeal was briefly reviewed and reaffirmed for submission to the court.

4. **Agenda No. 2011-06.** The committee's rewrite of Rule 12 was further reviewed. The committee discussed the standard that should govern the timing of the Rule 12(b)(3) motion. The requirement that the motion be raised before trial "if the basis for the motion is then known" and the possible additional language "or should be known with due diligence" was debated and deemed vulnerable to satellite litigation over what was known or what should have been known with due diligence. Member Barnes suggested inserting instead the word "exists" in place of known or should be known so that the specified defenses and objections and requests covered by Rule 12(b)(3) must be raised by motion before trial if the basis for the motion exists. Committee members noted that Rule 12(c)(2) contains a savings clause allowing the court to authorize the untimely filing of a 12(b)(3) motion "for cause". Members believe the "for cause" avenue for presenting a Rule 12(b)(3) motion out of time will provide adequate recourse for defendants. The committee asked that the Reporter include a note that an example of cause would be late production of discovery by the prosecution if relevant to the motion. The proposed amendments to Rule 12 with the further changes approved at the meeting was moved and seconded. The motion passed on a vote of 6 to 2 with members Saxman and Shingler voting opposed.

5. **Agenda No. 2012-02.** The committee gave a final review to the amendments to Rule 41 to address the issue raised in *State v. Voog*. The committee had previously approved the text of the amendments but had not reviewed the final version of the Reporter's Notes. Chair

McGee noted that the Reporter added a discussion of the interplay between a Rule 41 motion for return of property and the provisions of the forfeiture statute. The Reporter also added a sentence noting that denial of a motion for return of property on grounds that the state has a continuing interest in the property is without prejudice to a later renewal of the motion once the state's need for the property is concluded. On motion of Judge Zonay, seconded by member Shingler, the amendment and Reporter's notes were unanimously approved.

6. **Agenda No. 2012-04.** The committee agreed that no further action was required in regard to PCR standards for addressing attorney client conflict. That item is removed from the committee's agenda.

7. **Agenda No. 2012-05.** The committee reviewed the proposed amendments to Rule 6 governing grand jury proceedings. The committee had unanimously approved the proposed amendments at its March 22, 2013 meeting but had not reviewed the final draft of the revisions as approved and had not reviewed the Reporter's Notes.

After the last meeting Judge Suntag had suggested that provisions should be added to Rule 6(d)(1) to authorize the presence in the grand jury room of a security officer as necessary. The Reporter made that change to the final draft presented to the committee.

The committee discussed the Reporter's notes to the proposed amendment to Rule 6 that state that the enabling legislation for the criminal division, 4 V.S.A. §32, "is construed to extend to all matters associated with the convening, empaneling and proceedings of grand juries." Members expressed concern that the committee appeared to be extending the jurisdiction of the criminal division through the Reporter's notes. General discussion ensued regarding the history of grand jury practice in which the court of general civil jurisdiction, which had been the superior court, convened grand juries which created a procedural awkwardness in transferring any indictments back to the criminal court, formerly the district courts, for prosecution. Member Maguire noted that even after a grand jury proceeding and an indictment, it is sometimes the practice for convenience and other reasons, for the state's attorney to then file an information charging the same crime charged in the indictment and proceed on the information rather than on the indictment. Judge Zonay noted that under the court restructuring act we now have one unified court that includes civil and criminal jurisdiction in its various divisions. After further discussion, it was agreed that the Reporter's notes would be changed to simply reflect that under the Court Restructuring Act the superior court has general jurisdiction over grand jury proceedings.

With that further change the Rule was unanimously approved on motion duly seconded.

8. **Agenda No. 2013-01.** The committee revisited Rule 18(a) and discussed whether to conform the language of that Rule to the nomenclature of the Court Restructuring Act. Rule 18(a) had been the subject of several emergency amendments by the Supreme Court, the last of which returned the language to the language that predated the Court Restructuring Act and used

obsolete terms such as "district court" "territorial unit" and "circuit". The committee reporter had presented a draft amendment to Rule 18(a) that updated the nomenclature and authorized joining for trial in one unit offenses committed in multiple units. Committee members questioned how the language would work in practice and how the joinder would occur. Member Kaplan noted that joinder could occur upon request of prosecution or defense. Mr. Treadwell and member Maguire noted that the situation often arises in cases prosecuted by the Attorney General's Office that a defendant will have committed crimes in multiple counties (units). Under the current Rule with the old language, each offense must be separately prosecuted in each county which is burdensome on both the prosecution and the defense. Members raised the issue whether the multiple unit prosecution could be addressed through the venue statute, but other members noted that a change of venue can only be requested by the defense, not by the prosecution. The proposed amendment does not limit the joinder for trial to offenses committed in contiguous units. Joinder may be had for offenses committed in any other unit so long as joinder of such offenses is appropriate and the trial occurs in one of the units where at least one of the offenses occurred. Under the existing language of Rule 18(a) – albeit with obsolete terms – at a time when the state criminal districts were divided into territorial units and circuits within the units, a trial could be held in a circuit within a territorial unit even if no offense was committed in that circuit. The proposed Rule would not allow trial in a unit in which none of the charged offenses occurred.

After further discussion, Chair McGee proposed adding the words "the court may order, upon motion, that " after the last comma in the new proposed language, so that the new language to be added to the Rule in place of the last sentence of the existing Rule will read as follows: "Provided, however, that when a defendant is charged with offenses in other units that could be joined for trial if committed in the same unit, the court may order, upon motion, that prosecution may be held in any of the units where such offenses are charged." The committee discussed a need for more extended Reporter's Notes explaining the change.

Upon motion of Cindy Maguire, seconded by Anna Saxman, the committee voted unanimously to approve the proposed amendment subject to the drafting of an appropriate Reporter's Note that will be circulated to the committee for review and approval.

9. **Agenda No. 2013-02.** The committee next took up a proposed amendment to Rule 17 that would expressly authorize documents subpoenas in the manner now permitted under the civil rules. Member Saxman was the proponent of the amendment and described the difference between the civil rules and the criminal rule on this issue. Members discussed current practice under which the criminal rules limit subpoenas to a subpoena for a hearing or for a trial. Judge Suntag noted that for documents subpoenaed for trial, the party issuing the subpoena can request a court order that the documents be produced in advance of trial to afford an opportunity to review the documents in advance of the trial.

Members questioned whether the new proposed Rule mirroring the civil rule would require disclosure to the opposing side that a subpoena has been issued. Member Saxman said

that would not be required. Judge Suntag raised a concern that the difference between the criminal rules and the civil rules was purposeful and that there should be a protection for witnesses from having records subpoenaed outside the review of the court and without the knowledge of the opposing side. Member Saxman indicated that in nearly all instances, the records subpoenaed are from institutions that routinely file a motion to quash so the matter is presented for the court's review. Members noted, however, that there are instances where that is not the case or would not be the case if the records were subpoenaed from private individuals.

Member Kaplan described an active area of defense practice involving the subpoenaing of phone records. With GPS positioning devices on cell phones, phone records become relevant to issues such as alibi defenses and witness credibility. The committee discussed federal practice under the federal rule. Member Kaplan indicated that documents subpoenas are occurring in which the documents are produced without scheduling a depositions and not in connection with a hearing or trial.

Members then generally discussed the practice in state court. Members indicated that document subpoenas are occurring from the prosecution and defense side. It was noted that the prosecution can subpoena records pretrial by scheduling an inquest or a grand jury proceeding, but there was a suggestion that prosecutors are, at times, subpoenaing records in the manner of a civil subpoena in connection with criminal investigations.

Judge Zonay noted that if parties only want documents and don't need the witness, they can schedule a deposition and issue the subpoena and then, with agreement of opposing counsel, call off the deposition itself as long as the records will be produced. Member Saxman and others commented that that would require disclosure to the prosecution of information that the defense may wish to keep confidential. The defense may wish to look at some records that may or may not be useful to the defense. The defense has no disclosure obligation to the prosecutor and should not be required to telegraph defense strategies by disclosing documents they are subpoenaing. The committee discussed the application of the subpoena procedure to expert witnesses. Member Maguire noted that expert witnesses are covered by Rule 16 disclosure obligations. Member Saxman noted that there are times when, in preparing for the deposition of an expert, there may be other records that should be reviewed that the expert may not have reviewed and thus may not have been disclosed. This could include medical records or school or other institutional records pertaining to a person who is subject to a mental evaluation. Members noted that if the person was the defendant, the defense would be able to obtain the information with a release from the defendant. If the person was the victim, other protections may apply.

Judge Suntag expressed skepticism about broadening the Rule to allow document subpoenas outside the purview of the court, but he also noted that the judges do not want to be involved in pretrial discovery matters, if that can be avoided.

Member Fenster, participating by phone, indicated an awareness of instances where documents have been subpoenaed by the prosecution and by the defense in the manner of a civil

document subpoena and not in connection with a specific hearing date, deposition or trial.

After further discussion, Member Saxman agreed that she would take into account the various comments of the committee members and further consider her proposal and come back to the committee at the next meeting with a specific proposed amendment to Rule 17 if she concluded that the Rule should have such a provision.

10. **Agenda No. 2013-03.** The committee next reviewed Judge Zonay's proposal to amend Rule 30 to address the issue raised by the court's decision in *State v. Vuley,* 213 Vt. 9. Judge Zonay described the operative facts in *Vuley* in which defense counsel made a full detailed objection to a particular instruction at a charge conference held prior to closing arguments and prior to the judge's instructions but then after the court's instructions, defense counsel simply renewed the earlier objections without repeating them in detail. The court held that the objections were not properly reserved. Judge Zonay noted that within several months of the *Vuley* decision the court issued a similar decision in the civil case of *Straw v. VNA*, 2013 VT 102, and issued the same ruling with respect to the requirements for preserving objections to jury instructions.

Members generally discussed the practice with respect to making and preserving objections. Judges Zonay and Suntag expressed their views that as long as objections are properly made at a charge conference held on the record so that the court can fully appreciate the objection and consider whether changes to the instructions are appropriate, there should be no requirement of taking up a further detailed resuscitation of each objection after the instructions are given and before the jury retires and noted that delay at that point in the proceedings is frustrating for the jury. He noted the awkwardness of having to dismiss the jury while there is further discussion of the objections at a time when the jury is ready to begin deliberating.

Judge Zonay presented a proposed amendment to Rule 30 by adding Section (b) which would read, "An objection to the instructions shall be deemed timely and preserved if it is made during a charge conference held prior to closing arguments, and renewed after the charge has been delivered and before the jury retires to consider its verdict. A renewal which incorporates a prior objection by reference shall be deemed sufficient."

Judge Zonay indicated the benefit to all of upholding a charge conference on the record before closing arguments. The proposed amendment to the Rule will underscore the importance of the charge conference. Judge Zonay accepted a friendly amendment to add the words "on the record" after the word "held".

Judge Zonay suggested that our committee should notify the civil rules committee of our planned amendment to Rule 30 and provide them with a copy of our proposed amendment in the interest of promoting a uniform procedure for making and preserving objections. All members of the committee were in agreement with that suggested approach.

Upon motion of Member Shingler duly seconded, the amendment proposed by Judge Zonay was unanimously approved with instructions to the committee Reporter to draft the amendment in proper form and prepare a Reporter's Note and circulate that to the committee for review as well as forwarding it to the civil rules committee for its review. The committee will then make a final review and take action on the proposed amendment at its next meeting.

11. **Agenda No. 2013-04.** The committee next took up the proposed addition of Rule 11.1 proscribing the colloquy required for Marijuana convictions. This proposal was generated in response to the legislation in Act 076 now codified at 18 V.S.A. §4230 and made effective July 1, 2013 which mandates a specific colloquy warning of potential collateral consequences in connection with entering a plea of guilty or no contest to a violation of 18 V.S.A. §4230.

The committee Reporter had prepared a proposed new Rule 11.1. The committee reviewed the draft proposed new Rule. Members noted that in some respects the language of the proposed Rule did not exactly track the mandatory language of the statute. The committee consensus was that the language should track the statute more exactly. To accomplish that, the language in the draft proposal was changed to state that in addressing the defendant as specified in the statute, the court shall advise the defendant that the charge may have collateral consequences such as loss of education, financial aid, suspension or revocation of professional licenses and restricted access to or loss of public benefits such as housing.

The committee also approved including in new proposed Rule 11.1(b) the word "collateral" in the phrase negative "collateral" consequence, even though the statute addressing the statute uses the term "negative consequence" without the word collateral. The balance of the statute consistently uses the word collateral to modify the word consequences and the omission of the word collateral when the statute refers to "negative consequences" appears to have been inadvertent.

The committee reviewed the proposed rule addition drafted by Reporter Morris but with the language changes to the initial draft as proposed by Member Saxman. The proposed new Rule with the amendments suggested by Member Saxman was approved with the changes noted above to make Rule 11.1(a) conform exactly to the language of the statute and with the addition of the word collateral in Rule 11.1(b) to modify the phrase consequence in the third line of proposed Rule 11.1(b). (Upon motion by Member Kaplan, and seconded by Member Saxman, the proposed new rule with the changes noted above was unanimously approved.)

12. **Agenda No. 2013-05.** The committee next reviewed a change in the method of computing time in response to a request by the civil rules committee which is reviewing a similar proposal known as the "a day is a day" rule for computing the running of time under the Rules. The committee reviewed proposed amendments to Civil Rule 6. The rule would eliminate the different approach to counting days when a particular time is 10 days or less compared with 11 days or more. The rules would be amended to specify the exact number of calendar days for particular filings or responses, and the new Rule would describe precisely how days are counted.

A time period ending on a holiday or a weekend would be extended to the next day as under the current rule. More specific guidance would also be given with respect to electronic filing and circumstances in which the clerk's office is inaccessible.

Initial concern was raised that keeping a 10 day limit but eliminating the exclusion of weekends and holidays would be strongly opposed. Chair McGee indicated that the proposal would include enlarging the prior 10 day time frames to a uniform 14 day time frame. That enlargement is not referenced in the Rule on computing time, so an amendment converting to a day is a day rule for computing time will require amendments to all rules in which a time of 10 days or less is specified. Judge Zonay noted that with respect to sentencings, Rule 32 indicates that any objection to facts contained in the PSI must be submitted not less than 3 days prior to the sentencing hearing. If the committee adopts the day is a day rule for computing time, it will need to consider whether that 3 day time specification or other similar short time specifications will need to be modified as well.

On motion of Judge Zonay with a second by Judge Suntag, the committee unanimously approved adopting a day is a day rule for computing time and instructed the committee Reporter to prepare an amendment to Rule 45 and related amendments to Rules which now contain time frames of 10 days or less for the committee's review at its next meeting. The committee Chair will advise the civil rules chair of the criminal rules committee agreement with the adoption of a day is a day rule for computing time.

13. **Agenda No. 2013-06.** John Treadwell requested committee review of a proposed amendment to Rule 16 to eliminate the conflict between the prosecutor's Rule 16 discovery obligations and the protection for victims prescribed by statute in 13 V.S.A. §5310. Mr. Treadwell proposed the addition of a third subsection to V.R.Cr.P. 16(d) to expressly exempt from disclosure victim contact information in accordance with the statutory protection. The additional subsection as proposed by Mr. Treadwell would read 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 information will prejudice the defendant." On motion by Member Maguire, seconded by Member Barnes, the committee voted 5-2 with one abstention to adopt the proposed amendment. Members Shingler and Kaplan opposed the motion. Member Saxman abstained. The committee Reporter will prepare a draft amendment to be circulated to the committee before forwarding to the court.

14. **Agenda No. 2013-07.** Chair McGee brought to the committee's attention a request to consider a Rule amendment to provide a procedure for addressing expungement petitions filed under 13 V.S.A. §7601. Judges Zonay and Suntag indicated that the court has developed its own forms for handling such procedures and there does not appear to be a bottleneck or a problem. All were in agreement that no action by the committee is required.

15. **Agenda No. 2013-08.** The committee passed on any further consideration of

changes to Rule 41 regarding tracking devices in the aftermath of recent U.S. Supreme Court decisions. Member Saxman will further review this issue and is at liberty to bring the matter back for committee review at a future meeting.

16. **Agenda No. 2013-09.** The committee next reviewed a proposed amendment to V.R.P.C. 3.8 regarding prosecutor responsibilities in responding to information suggesting that a convicted defendant may have been wrongly convicted. Judge Zonay questioned why the committee was addressing this issue since it is not within the purview of the committee's responsibilities. Chair McGee indicated that the civil rules committee, which is the committee charged by the Supreme Court to oversee and amend from time to time the Rules of Professional Conduct, is in the process of reviewing this proposed amendment and asked that the proposed amendment be presented to the Criminal Rules Committee for discussion and any comments that may be appropriate for passing on to the civil rules committee. Chair McGee made clear that the item was not an action item. General discussion followed. Member Fenster participated by phone and provided a thoughtful critique of various provisions of the proposed Rule as they would affect and their impact on Vermont prosecutors. He noted the very broad scope of the Rules drafted which requires all prosecutors to act on information that comes to their attention, not solely the prosecutor in whose county a conviction may have occurred. He also noted the lack of resources in most Vermont prosecutor offices to actually investigate such new information. State's Attorney's offices no longer have investigators assigned to them, and State's Attorneys do not have direct line authority over law enforcement officers in the different departments operating in the county. Member Fenster expressed, in general, his view that he believes is shared by his fellow prosecutors. Member Fenster also questioned why the Rule would be limited to prosecutors. He noted that all attorneys when they become aware of a miscarriage of justice should have a responsibility to take appropriate action to address it or to bring it to the attention of an appropriate person or entity. Of course, miscarriages of justice should be corrected, but he questioned whether this rule provides the right balance and the proper mechanism. Another member suggested that it might be appropriate to establish an office within the Attorney General's office where this type of information could be referred and investigated as appropriate. After further discussion it was agreed that there would be no committee comment, as such, but that the committee agreed that the Chair should advise the Civil Rules Committee that the matter was discussed and that members of the committee representing different components of the criminal justice system will likely submit comments directly to the Civil Rules Committee on the proposed Rule.

17. **Agenda No. 2013-10.** Kinvin Wroth, Reporter for the Civil and Probate Rules Committees, is asking all rules committees to consider revising their rules governing the appointment of interpreters to conform to the policy of the judiciary, as announced by Chief Administrative Judge Davenport, which is to have the Vermont Judiciary pay for interpreter services for litigants and witnesses when those services are needed. The applicable criminal rule is V.R.Cr.P. 28. Chair McGee read the language of the existing Rule which authorizes the court to provide reasonable compensation as provided by law but does not mandate the payment.

After brief discussion, the committee voted unanimously to amend the criminal rule in a manner consistent with amendments being proposed for the civil and probate rules. Chair McGee was instructed to coordinate the drafting with the other rules committees, and with the assistance of the committee Reporter, prepare a draft proposed rule amendment to be considered by the committee at the next meeting. Agenda No. 2013-10

18. **Agenda No. 2013-11.** The Attorney General's office has requested consideration of a further amendment to Rule 41 to allow for a reliable electronic return of warrants rather than requiring hand delivered returns by the officers. Member Maguire and Mr. Treadwell described recent cases where officers have had to drive long distances to return warrants in far away counties where the warrants themselves were obtained electronically.

All members were in favor of amending the Rule as requested. Member Maguire and Mr. Treadwell agreed to prepare a proposed amendment for committee review at the next meeting.

19. **Next meeting date**: the Criminal Division Oversight Committee has scheduled its next three meetings for **January 31, 2014, March 7, 2014** and **May 23, 2014.** The Criminal Rules Committee will tentatively schedule those same three dates for its next three meetings with the understanding that the January meeting may be canceled if committee business can wait until the March meeting.

20. Meeting was adjourned at 4:26 p.m.

Respectfully submitted,

P. Scott McGee, Chair and Acting Scribe