

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE**

**MINUTES OF MEETING
JUNE 9, 2023**

The Criminal Rules Committee meeting commenced at approximately 1:30 p.m. via Zoom video conference. Present were Committee Chair Judge John Treadwell, Judges Alison Arms, and Marty Maley, Devin McLaughlin, Dan Sedon, Mimi Brill, Rebecca Turner, Mary Kay Lanthier. Domenica Padula, Frank Twarog, Supreme Court Liaison Justice Karen Carroll and Committee Reporter Walt Morris were also present. Laurie Canty was not present; however, Gaye Paquette (who has been appointed as superior court clerk representative to replace Laurie) was present and participated as a new Committee member. Dickson Corbett did not attend, given his appointment to the Superior Court bench in April.¹ Domenica Padula and Kelly Woodward were absent as well.

Chair Treadwell opened the meeting, after presence of a quorum was noted. He addressed Committee transitions, noting Gaye's appointment to replace Laurie, Marty Maley's upcoming retirement and Dan Sedon's ineligibility for reappointment after serving three terms, both requiring successor appointments, and the continuing need for appointment of a State's Attorney member to replace Dickson.

1. Approval of April 14, 2023 Meeting Minutes.

On motion of Dan Sedon, seconded by Marty Maley, the minutes of the April 14, 2023 meeting were unanimously approved.

ITEMS OF OLD BUSINESS ADDRESSED:

2. V.R.Cr.P. 26(c) and (d); V.R.E. 404(b) Other Crimes, Acts Disclosures; Amendment of 26(c) to Comport with Current 404(b) Disclosure Requirements; Companion Amendment of 26(d) to Comport with Amendment of V.R.E. 807 as to Appropriate Terminology. (*Proposed amendments were published for comment on 3/6/23, comment period closed on May 8, 2023*).

Chair Treadwell noted that no comments had been received in response to publication of the proposed amendments, excepting verbal references by one State's Attorney suggesting that the added disclosure requirements may prove burdensome. After brief Committee consideration of the burdens question, in context of existing discovery and other disclosure obligations for both prosecution and defense, on motion of Judge Maley, seconded by Mimi Brill, the unanimous decision was to forward the proposed amendments on to the Court with recommendation for promulgation.²

3. Remote Participation and Testimony Amendments Status; Review and Provision of Comments and Suggested Edits as to V.R.F.P. 17 (Delinquency/Y.O.) to Comport with Criminal Division Practice and Imperatives (A.O. 38; V.R.Cr.P. 26.2; V.R.C.P. 43.1; V.R.F.P. 17; A.O. 47)

¹ The States Attorney member position authorized by A.O. 20 is vacant. This position is subject to appointment by the Court under the standing process and is not by designation.

² These amendments were ultimately promulgated by the Court on July 10, 2023, effective October 2, 2023.

Reporter Morris noted that the Committee's proposed V.R.Cr.P. 26.2 had finally been promulgated by the Court on June 5, 2023, effective September 5th. He thanked Dan Sedon and existing and former subcommittee members for the long work on the amendment. All of the other remote participation and testimony amendments had now been transmitted to the Court with recommendation for promulgation by the Special Advisory Committee on Remote Proceedings, the Criminal Rules Committee, and Family Rules Committee (V.R.F.P. 17). These are all awaiting promulgation action on the part of the Court. As to the V.R.F.P. 17 amendments, additional changes recommended by the Criminal Rules Committee at the April 14th meetings have been communicated to the Family Rules Committee, and the Court is also aware of these additional recommendations. The Committee reviewed and approved a "last" draft of proposed edits to 17 at the June 9 meeting, and this will also be forwarded to Family Rules for reference. Progression of the Rule 17 amendments to promulgation awaits further action by that Committee, which should be forthcoming for approval as part of the greater package.

As to V.R.C.P. 43.1--Remote Participation and Testimony—given the likely outcome of the various pending rules promulgation requests, and final text of approved amendments, Committee consensus was to continue review of 43.1 for potential conflicts with Criminal Division practice, assuming an amended A.O. 38 and promulgated V.R.Cr.P. 26.2. Another, significant goal of this review is to examine whether there are beneficial features of an amended 43.1 which should be adopted in proposed Criminal Rules amendments going forward. In past discussions the Committee has noted that conducting certain minor proceedings remotely under A.O. 49 has been beneficial for counsel, defendants and case participants in terms of travel savings, and avoidance of expense of lost work and child care for attendance at proceedings which are appropriately held remotely. Frank Twarog added his comments as to positive experiences in managing multiple court appearances effectively, remotely, and the time and expense savings resulting.

A 43.1 review subcommittee was established, with initial membership of Devin McLaughlin, and Judges Arms and Treadwell. Committee composition and efforts will be discussed further at next meeting.

4. 2021-02: V.R.Cr.P. 53 and V.R.C.P. 79.2 (Recording Court Proceedings); Issues Associated with Defense Request to Video Record Jury Trial. Rules 53/79.2 authorize *audio* recording of proceedings by participants, subject to certain limitations and court discretion, but prohibit video recording by participants absent good cause shown.

The issue presented in prior Committee discussions is whether Rule 79.2(d)(3)/(e) should have a minor, clarifying amendment to make it clearer that despite a general prohibition on participant video recording, the Court would have authority, for good cause shown, to authorize video recording consistent with 79.2(e).³ The particular example bringing the issue forward was the decision of the trial court, in resumption of trials with modified jury selection and significant courtroom reconfiguration procedures, to deny a defense request to video record proceedings to preserve a record for assessment of trial fairness. See, *State v. Alvarez*, Case No. 108-2-20 WmCr, 5/10/21 (authority to grant request deemed unclear; Defendant had not expressly relied upon a good cause exception).

A subcommittee had considered and prepared a draft of focused amendments for this purpose, but action on them was held in abeyance during the months awaiting and responding the package of remote

³ See Minutes, 6/4/21, pp. 4-6; 8/13/21, pp. 3-4; 11/19/21, pp. 3-5; 5/6/22, pp. 3-5; 12/2/22, p.8.

proceedings amendments prepared and proposed by the Special Advisory Committee on Remote Hearings. In the June 6th discussions, Judge Treadwell noted that the specific presenting issue in the *Alvarez* case would appear to be moot, in view of widespread resumption of jury trials as before the Covid emergency, without special procedures for jury selection, or significant courtroom modifications previously employed. Rebecca Turner replied that the issue has arisen in another context, such as in assessment of the adequacy of interpretation services in the courtroom in one case. MaryKay Lanthier agreed that the suggested clarification was still needed. Dan Sedon remarked that the clarifying amendment would not cause harm but would be helpful in a particular case where good cause was presented.

Committee Reporter Morris noted that the substantive rule for amendment is one primarily entrusted to the Civil Rules Committee, and any amendment of 79.2 would require review by that Committee as well. Devin McLaughlin then suggested that a potential avenue might be amendment of the Criminal Rule (53), to decouple it from incorporation 79.2 by reference, replacing it with full text of an equivalent free-standing criminal rule. Morris noted that typically, the Court prefers to have rules such as this which are of general application across court divisions to be vested in a primary rule, with incorporation by reference on the part of other procedural rules. In any event, A.O. 11 (general rules promulgation procedures) dictates collaboration among advisory rules committees on amendments of mutual impact.

The Committee consensus was to bring the draft proposed amendments forward again for consideration at the next meeting, along with consideration of the best track to promulgation, if that was the Committee's recommendation.

2021-04: (Speedy Trial Standards) V.R.Cr.P. 48(b)(1); A.O. 5 Review Joint Subcommittee;
(Report of Progress in Subcommittee Meetings, and Discussion of Data Needs and Alternative Recommendations. Case Age Data Update; Proposed Amendments of Rule 48(b)(1)). See also, Administrative Directive 24 (2010). (Subcommittee members: Arms; Lanthier; Padula; Sedon; for Crim.Oversight, Sally Adams; Josh O'Hara; John Pacht)

Judges Arms and Morris provided a brief update on the efforts of this joint subcommittee, which will meet again on June 20th. Judge Arms reported that she, Josh O'Hara and Judge Morris had been regularly communicating with Carolyn Keyes of the Court's Information Technology Division, who has developed an interactive criminal case disposition data tool, that is capable of providing "real time" data as to case ages to disposition, sorting out by case type (felony; misdemeanor and specific charges in each category) and unit. While this tool will be useful for general case management purposes, it will be of assistance to the Speedy Trial review effort in providing some reference points for current "reality based" recommendations as to revision of deadlines for Speedy Trial. Frank Twarog indicated that a major contributor to case disposition delay lies with continuance practice. In his experience in the federal system, each continuance request must set forth why continuance is in the interests of justice, and the judge must make the finding that continuance serves such, and outweighs the interests of the public and defendants in a speedy trial. There was general discussion of the features of the data tool, and concern expressed as to having time parameters that took into account delays due to Covid court closures, versus current, post-Covid emergency experience in case dispositions going forward, so that any recommended Speedy Trial deadlines reasonably reflect current reality. Judge Arms indicated that the time parameters of data sought would be reflective of current experience.

Joint Subcommittee progress reports on both the Case Disposition Data Tool, and recommended revisions of V.R.Cr.P. 48(b)(1) and A.O. 5/A.D. 47 will be given at the next Committee meeting.

5. Rule 10(b)(2); Provision of Copies of Juror Questionnaires *Electronically* to Attorneys and Parties. (*Request of Laurie Canty; update from Reporter Morris*).

Reporter Morris indicated that he has had continuing communication with Laurie Canty, Joanne Charbonneau and Sierra Colgan of Trial Court Operations as to the plans to launch electronic provision of completed juror questionnaires to counsel. He indicated that security concerns as to the mode of electronic transmission of the questionnaires to counsel appear to have been resolved and that the existing rules (notably, Juror Qualification Rule 10) provide clear indication of confidentiality maintenance obligations, and court authority to enter protective orders associated with attorney and party access. An update will be provided as to the launch at next meeting.

6. 2022-03: Proposed Amendment of VRAP 3(e) (To make docketing statements optional for Appellees) *Referral from Ella Spottswood, Esq.*

In brief discussion, the Committee consensus was that there was no objection to, and it would support this proposed amendment of the appellate rules that would make docketing statements optional for appellees. Rebecca Turner indicated that in practice, an appellee's docketing statement is not filed regularly in any event, and there would not in her assessment serve a particular purpose, unless case-specific need were presented, and an appellee elected to file one. This particular amendment is within the primary responsibility of the Civil Rules Committee, and the Reporter will share the Committee's assessment with that Committee's Chair and Reporter.

7. 2023-01: V.R.Cr.P. 5; Amendment to Comport with 2020 amendment of F.R.Cr.P. 5(f) (Oral and Written Orders at Initial Appearance Directing *Brady* Discovery Disclosures) (*Request of Will Kraham, Esq.*)

The Committee considered the proposal that Rule 5 be amended to require the Court to enter certain *Brady* disclosure orders at time of initial appearance, consistent with relatively recent amendments to F.R.Cr.P. 5. Under the federal procedure, at initial appearance in each case, the Court must issue both oral and written orders to the prosecution for compliance with the obligation to disclose exculpatory evidence to the defendant, as well as to inquire of the prosecution whether it confirms understanding of this obligation and will fulfill it.

The Committee discussed the proposal at length. The unanimous view of the Committee was that adoption of the federal Rule 5(f) was not necessary, for a variety of reasons: First, a defendant's discovery rights under Vermont law are already far broader than those accorded in the federal system by reason of the scope of V.R.Cr.P. 16, V.R.Cr.P. 15 (depositions), related procedural rules, and Constitutionally-premised decisions of our Supreme Court. Second, the amendment does not fundamentally add to existing mutual discovery obligations which generally serve to facilitate case progress, subject to judicial intervention where necessary. The federal system remains one in which a defendant's discovery rights are significantly limited, and the federal amendment appears to be focused on *Brady* disclosures only.⁴ Further, Vermont judges have ample authority under Rule 16.2 to closely regulate discovery as necessary, and to impose meaningful sanctions for discovery order violations. Vermont 16.2 is more broadly stated than the equivalent federal rule.

⁴ V.R.Cr.P. 16(b)(2) already contains an explicit prosecutorial obligation to "as soon as possible, after a plea of not guilty" to disclose to the defendant "...any material or information...which tends to negate the guilt of the defendant...or would tend to reduce his punishment..."

Finally, while *Brady* violations can and do occur in the Vermont criminal division, the trial courts have recently shown no reluctance to enter dismissals upon finding of *Brady* disclosure violations upon Defendant (or State's Attorney) motions. Judges Maley and Arms were of the view that adoption of federal 5(f) would add little to existing and ample Vermont discovery obligations, while imposing just another advisement task to the arraignment process (the substance of which would in any event likely be waived with little recognition by the parties, as part of a litany waiving Rule 5 rights.) Rebecca Turner, Devin McLaughlin and Dan Sedon concurred that the suggested amendment was not necessary. Judge Arms commented that meaningful sanctions upon any significant discovery violation is generally the focus, rather than awareness of mutual discovery obligations and compliance as a general matter.

Upon Committee consensus that no further action would be required as to the suggested amendment, the Reporter will notify Attorney Kraham (along with the Committee's appreciation for his request).

8. 2023-02: V.R.Cr.P. 16; Amendments to Comport with 2022 amendment of F.R.Cr.P. 16(a)(1)(g), (b)(1)(c). (Additional Discovery Disclosure Obligations for Prosecution and Defense with Respect to Expert Witnesses)

The Committee then discussed the recent substantial amendments of federal Rule 16 related to expert witness disclosures by both prosecution and defense. These were intended to address perceived shortcomings due to a lack of enforceable deadlines, and the existing rule's lack of specificity as to what expert information must be disclosed. The amendments also require certain disclosures as to the expert witness' history, going back up to four years (witness testimony in other cases) and ten years (publications authored).

Frank Twarog remarked that in a very serious case such as a DUI-fatality, he would certainly wish to explore such expert disclosures in discovery. But in his assessment, in broader, general application to Vermont practice, these amendments are clearly too burdensome. Dan Sedon shared the view that in the most serious cases, the parties routinely handle more expert discovery (beyond the disclosures required by V.R.Cr.P. 16(a) or 16.1(b)) through close communication as to any disclosures that are considered insufficient, or in need of supplementation. Along similar lines, Judge Arms stated that in her experience, expert disclosure/discovery disputes are rare, and best resolved through communications, with the judge taking a lead in terms of establishing clear discovery schedules from the outset, that are continuously reviewed as needed. She did not see a need for adoption of the federal amendments. Judge Treadwell agreed, stating that he had not seen the need, in his experiences in handling expert witness disclosures and issues on the bench, although he did recall having one case in practice in which there was a significant dispute as to scope of expert witness disclosures.

As with the proposal to adopt F.R.Cr.P. 5(f), the Committee consensus was that there was no need for adoption of the F.R.Cr.P. 16 amendments, given the significant differences between Vermont and federal procedural rules and the more extensive rights of discovery available via our existing rules. No further action will be taken as to this Agenda item.

9. 2022-08: V.R.Cr.P. 47(b); V.R.Cr.P. 45(d)--Provision for reply memoranda (to comport with provisions of V.R.C.P. 78(b)(1). (*Published for Comment; Comment Period Closes on July 10, 2023*).

It was briefly noted that the comment period for these amendments had not yet closed, this item will be on the next meeting Agenda.

NEW BUSINESS:

10. 2023-03: V.R.A.P. 28(e) and 30; Amendments to Require that Appellant File a Printed Case
(Published for comment on June 7, 2023; comment period closing on August 7, 2023)

It was briefly noted that the referenced amendments had been published for comment and would be further considered by the Civil Rules Committee after comment period closure. No Committee member objection was stated, in context of a discussion of difficulties that have been experienced in both searching and citing the electronic appeal volume.

11. Recognition of Dan Sedon's Committee Service; Process of Nominations to Court for Replacement Members.

Chair Treadwell addressed the need to provide recommendations to the Court for the appointment of replacement Committee members (including not only Dan Sedon, but also Dickson Corbett). Reporter Morris noted that under the Committee Charge and Designation in Administrative Order No. 20, there are a few member slots established by designation subject to Court approval (Attorney General; Defender General), the others are subject to the Court-established nominations process, and approval in the Court's discretion. These include authorized attorney members, as well as a State's Attorney and a Victim's Advocate representative. There was a brief discussion of potential nominees, then Judge Treadwell invited Committee members to provide him with suggestions for replacements within two weeks' time, in the interest of advancing the process to appointment of new members prior to the September 29th meeting.

12. Establishing Regular Calendar for Quarterly Committee Meetings.

In consideration of the next meeting date, the Committee returned to previous discussions of the benefits of simply establishing a regular annual schedule of quarterly meeting dates on a specified day of the month, and time. The Committee consensus was that the last Fridays of the months of September, December, March, and June were the best options, consistent with judiciary and legislative calendars. The exception identified was as to the month of December, for which the second Friday of the month was identified as a reasonable option. The Committee Reporter will provide a meeting calendar for the ensuing year, beginning with September.

13. Next Meeting Date and Adjournment.

Per the new meetings calendar established by the Committee, the next Criminal Rules Committee meeting will be held on Friday, September 29th at 9:30 a.m. On (his final) motion by Dan Sedon, the Committee unanimously agreed to adjournment, and the meeting adjourned at approximately 3:35 p.m.

Respectfully submitted,

Walter M. Morris, Jr.
Superior Court Judge (Ret.)
Committee Reporter

[9/25/23]