

[As Approved at Committee Meeting on 9/9/22]

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

**MINUTES OF MEETING  
May 6, 2022**

The Criminal Rules Committee meeting commenced at approximately 1:33 p.m. via Zoom video conference. Present were Committee Chair Judge John Treadwell, Laurie Canty, Dan Sedon, Devin McLaughlin, Mimi Brill, Rose Kennedy, Domenica Padula, Rebecca Turner, Mary Kay Lanthier, and Frank Twarog. Supreme Court Liaison Justice Karen Carroll and Committee Reporter Judge Walt Morris were also present. Judges Alison Arms and Marty Maley, and Laurie Woodward were absent.

Chair Treadwell opened the meeting, after presence of a quorum was noted.

**1. Approval of February 6, 2022 Meeting Minutes.**

On motion of Dan Sedon, seconded by Rose Kennedy, the minutes of the February 6th, 2022 meeting were unanimously approved.

**2. Reports**

In view of the need for priority consideration of proposed amendments of V.R.Cr.P. 25 (Disability of a Judge; Disability Occurring During Trial) at the Court's request, the customary reports were interspersed in context of consideration of the other noticed Agenda items, as relevant.

**3. 2022-01: V.R.Cr.P. 25 (Disability of Judge; Disability of Judge During Trial)**

At the February 6<sup>th</sup> meeting, the Committee discussed at length the proposed amendments of Rule 25 that would update existing provisions for substitution of a judge due to judge disability during trial. The existing rule authorizes substitution post-verdict only. After extensive discussion of the text of draft amendments prepared by the Committee Chair and Reporter at the request of the Court, there was no consensus as to adoption of the proposed amendments (which were modeled upon the current federal rule). Based upon his experience, Frank Twarog noted the underlying reasons for distinctions between the Vermont and federal provisions (much longer trials, being a principal distinction). It was clearly the majority view that if any rule were adopted for substitution of a judge during trial, it should be temporary, in the context of A.O. 49; that any substitution should be with consent of the parties; and that the provisions of the draft as to requiring a substitute's certification of familiarity with the trial record; perhaps require "extraordinary circumstances"; and be narrowly tailored in its terms.

Justice Carroll had then stated that she would convey these advisements to the Court, and on February 6<sup>th</sup>, indicated that the Court had not yet had opportunity to again consider the proposed amendments. The Committee will await any further request or direction from the Court.

**4. 2020-07: V.R.Cr.P. 11(a)(4)** (post-*Benoit* procedure for preservation of post-conviction challenge to predicate conviction while pleading guilty to the enhanced offense, where there is *no plea agreement*). It was noted that this amendment was promulgated on April 18<sup>th</sup>, and effective June 20, 2022.

**5. 2015—02: Video Testimony; Proposed Criminal Rule 26.2 for Video Testimony by Consent of Parties; cf. V.R.C.P. 43.1; Supreme Court Task Force on Remote Hearings** (Subcommittee—Sedon, Brill, Kennedy)

The Committee completed its final review of these long-considered amendments, that would add a Rule 26.2 to address provision of video testimony upon consent of the parties. With one further edit (deletion of a paragraph in the Reporters Notes referencing *Maryland v. Craig* and a 6<sup>th</sup> Circuit case (*Wandahsega*)), on motion of Dan Sedon seconded by Mimi Brill, the Committee unanimously approved the draft for transmission to the Court with request for Publication, and Comment.<sup>1</sup> (*The proposed rule, with accompanying amendment to A.O. 47, was published for comment on June 6th, with comment period closing on August 8, 2022.*)<sup>2</sup>

**6. 2021-04: V.R.Cr.P. 48(b)(1); A.O. 5—Prompt Disposition of Criminal Cases.** (Adopted in 1972 and apparently last amended in 1978; referenced in *State v. Reynolds*, 2014 VT 16, 196 Vt. 113, 121, with indication in opinion that the issue of non-binding time frames and possible revision or repeal of A.O. 5 would be referred to the Criminal Rules Committee). See also, Administrative Directive 24 (11/23/2010).

At time of the February 6<sup>th</sup> meeting, the joint A.O. 5 review subcommittee had not yet met, and member composition was clarified. It is anticipated that the subcommittee will be meeting a number of times in advance of the next scheduled Criminal Rules Committee meeting.

**7. 2020-03: Collateral Consequence advisement in Fish and Game matters (and other violations prosecuted as criminal offenses; Provision of Advisements in Delinquency Cases<sup>3</sup>** (Twarog).

This issue was introduced to the Committee by Frank Twarog, with focus upon the apparent absence of the statutory collateral consequence advisements in those Fish and Game violations prosecuted as criminal offenses. Committee action had been deferred in part by reference of the issue to the Sentencing Commission, which had apparently been in process of cataloguing and

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<sup>1</sup> In the context of discussion of proposed 26.2, Mimi Brill indicated that the Advisory Committee on Rules of Evidence had just met and was considering updating amendments to VRE 404(a) in light of amendments that that Committee has recommended to VRE 807 responding to the decision in *State v. Bergquist*, 2019 VT 17, (for which the comment period closed in February, 2020).

<sup>2</sup> On the subject of the Supreme Court Advisory Committee on Remote hearings, Justice Carroll provided a report in the context of extensive discussion of VRCrP 53/VRCP 79.2 review (see below).

<sup>3</sup> See, 13 V.S.A. Ch. 231; §§ 8005, 8006. The UCCCA expressly applies not only in felonies, but in misdemeanor and delinquency cases. Per 10 V.S.A. § 4552, the Criminal Division has exclusive jurisdiction over fish and wildlife violations, excepting minor violations defined at § 4572. The content of the Uniform Fish and Wildlife Information prescribed at § 4553 contains warnings as to license suspension consequences of a “failure to comply with the instructions” contained on the information, and of the accrual of points that can be used to suspend or revoke license in event of an admission of the violation. But there is no express reference to UCCCA advisements.

recommending decriminalization of certain minor offenses, including F&G, and converting some to civil violations.

Committee consensus has been that since there is no dispute that the statutory advisements must be provided in both delinquency and the referenced F&G cases, alteration of the pertinent forms should suffice to remedy the issue.

Laurie Canty reported that revision of the F&G complaint to include the UCCC advisements was in the works, and she'll again check on the status of revision of that form for report at next meeting.<sup>4</sup>

**8. 2021-02: V.R.Cr.P. 53 and V.R.C.P. 79.2 (Recording Court Proceedings); and V.R.Cr.P. 53.1 (Use of Video Recording Equipment Where the Official Record is Made by Video Recording); Issues Associated with Defense Request to Video Record Jury Trial; Efforts of Special Advisory Committee on Remote Hearings, and Rules Amendments to be Recommended.** (Subcommittee: Turner; Kennedy; Sedon; Lanthier; Arms)

Rule 53 (which “defaults” to V.R.C.P. 79.2 for its terms) authorizes *audio* recording by participants, but prohibits video recording absent good cause shown. Ms. Turner has requested that the Committee review the existing rules, in context of the resumption of jury trials and trial court opinions in *Alvarez*; *Colehamer* denying defense requests for video recording of proceedings. An additional consideration is that the existing rules on recording predate the Covid experience and practice in the Criminal Division under the terms of A.O. 49 and its various amendments.

The Committee has engaged in extensive discussion of the issues at numerous meetings,<sup>5</sup> and extensive discussion ensued again on February 6<sup>th</sup>. Justice Carroll began by providing an update on the activities of the Special Advisory Committee on Remote Hearings that had been appointed by the Court, chaired by Scott Griffith. She noted that while issues of presence in courthouses for proceedings, and remote proceedings alternatives have been governed by A.O. 49 and its various amendments, the Special Advisory Committee’s charge is to examine circumstances under which remote proceedings will occur on an on-going basis, post-Judicial Emergency. The Court contemplates that the Special Advisory Committee will draft and propose rules governing remote proceedings generally, then refer the drafts to the respective rules Advisory Committees in interest for their comment and suggested revisions. Proposed revisions might possibly include Rules 53/79.2, impacting issues of present focus of the Criminal Rules subcommittee.<sup>6</sup>

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<sup>4</sup> As to delinquency, Committee consensus was that the UCCC advisement would not be required for most if not all cases, given closure and confidentiality accorded there. (A proposed amendment adding VRFP 1.1—procedure in YO cases, including UCCC advisements) was published for comment on May 10<sup>th</sup>, comment period closing on July 11<sup>th</sup>, and on the Agenda of Family Rules Committee meeting on July 22<sup>nd</sup>, 2022).

<sup>5</sup> See 6/4/21 Meeting Minutes, pp. 4-6; 8/13/21 Minutes, pp. 3-4; 11/19/21, pp. 3-5.

<sup>6</sup> However, the rules of relevance to particular practice in the Criminal Division, circumstances of Defendant presence and testimony of witnesses are the emergency provisions of A.O. 49, ¶ 5(b); A.O. 38, and existing Rules 26 and 43.

Reporter Morris indicated that he had been reaching out to determine status of any substantive amendments being considered by the Special Committee, but there had been no final drafts available at this juncture, and it is not known whether the Special Committee is considering amendments of 79.2 at all. The Special Committee has apparently been functioning with policy and operations subcommittees, the latter being focused on potential rules amendments. Justice Carroll stated that Scott Griffith would be convening a meeting of all Division Oversight and Advisory Rules Committee Chairs to provide more specific information as to the rules under consideration and process of joint review, finalizing and proposing pertinent amendments to govern remote proceedings in all divisions going forward.

Rebecca Turner then provided a report of the Criminal Rules subcommittee that had met on March 18th. She provided Committee members with a written report summarizing issues identified by the subcommittee, and a suggested draft revision of two subsections of V.R.C.P. 79.2 that would serve to permit hearing participants to possess and use recording devices at in-person hearings, subject to court discretion to permit, preclude, or limit use of devices. Essentially, 79.2(a) would be amended to provide that the rule applies only when proceedings are held in person (to distinguish, and maintain, a categorical provision upon recording of remote proceedings); and 79.2(c)(3)(A) would be amended to remove the present categorical prohibition upon participant recording, but providing that the court would have discretion to permit, prohibit, or limit participant recording of proceedings subject to the existing criteria of 79.2(e)(3). In Ms. Turner's assessment, these limited, focused changes would serve to provide clarity as to court discretion to permit participant recording (the absence of which was referenced in the trial court decision in *Alvarez*). She further emphasized that a particular need for participant recording was demonstrated by the continuous issues that have surfaced in both remote and in-person proceedings with quality and perceived inadequacies of courtroom technologies, remote (Webex) transmissions out and in, and the A.O. 49 and unit-specific measures implemented as to courtroom "geography" in terms of locations of parties, jurors and witnesses under Covid-19 driven physical arrangements. MaryKay Lanthier added that she felt that the specific, targeted amendments recommended to 79.2 could be separated and pursued even though the Special Advisory Committee was engaged in a more comprehensive review of all rules of relevance to remote proceedings post-Judicial Emergency, and possibly recording of proceedings.

Dan Sedon observed that the issues were quite complex, and that those associated with remote proceedings were in a sense a distraction from focus upon the question of participant recording during in-person proceedings, in the courtroom, and subject to the immediate regulation of the judge. Ms. Turner again indicated that the 79.2 changes recommended by the subcommittee were limited, focused, and not intended at all to impact recording of *remote* proceedings at this time. Committee members expressed views that any amendment to authorize remote proceedings recording would be highly problematic, if not warranted, and some believed that it was essential to preserve prohibition of such, even though as a practical matter the court has very limited ability to prevent that, much less discern whether a proceeding is being recorded by the remote participant. Consensus was also to the effect that *transmission* of participant recording or livestream out from the courtroom should not be a current focus. Judge Treadwell was of the view that a general prohibition on recording was warranted, even if subject to focused exceptions, for proceedings that would otherwise be closed to the public (ex. TPR hearings); Justice Carroll the same, as to matters such as existing prohibition of photographing/recording jury members.

Justice Carroll felt that the Criminal Rules subcommittee recommendations were important and would be informative in the Court’s discussions. In her view, the particular amendments suggested would be useful to have in mind. But she indicated that given the very lengthy process of promulgation of 79.2—one of the longest rules promulgation processes the Court had ever engaged in—she discerned that there may be very limited appetite for any major revision of the rule, especially other than in the context of review and recommendations on the part of the Special Advisory Committee on Remote Proceedings, with the participation and recommendations of all rules Advisory Committees in interest, including Criminal Rules. Dan Sedon indicated that while there had not been another Criminal Rules subcommittee meeting scheduled, it would be most appropriate that subcommittee members participate with any other rules committees in interest, and expected that Criminal Rules would have full opportunity to consider any relevant amendments.

Since the product of the work of the Special Committee on Remote proceedings, in terms of substantive rules amendments, was not known at time of the meeting, the Rules 53/79.2 amendment issues will be carried forward to the Agenda of the next Committee meeting.

**9. Activity of Special Committee on Remote Proceedings (Apart from Rules 53/79.2 Implications).**

As noted, a meeting of all Rules Advisory Committee chairs is to be convened by Scott Griffith. Consideration to be continued on Agenda of next meeting.

**10. 2021-01: V.R.Cr.P. 45(a)(4)(A) & (e) (Computation of Time); Abrogation of the “Three Day” Rule in Criminal, Civil and Appellate Rules; *email* Filing up to Midnight.**

The Committee previously approved of promulgation of these amendments which were transmitted to the Court, along contemporaneous with a package of companion Civil and Appellate rules amendments related to computation of time, and V.R.C.P. 5, pertaining to filing and service.<sup>7</sup>

**11. 2022-02: V.R.Cr.P. 44.2; V.R.C.P. 79.1 and Related Procedural Rules (Appearance and Withdrawal of Attorneys; Pro Hac Vice a Matter of Course Upon Presentation of PHV Licensing Card)**

There was no objection to this package of amendments, the amendments of Rule 44.2 were approved for promulgation by the Committee at the February 6<sup>th</sup> meeting. The proposed amendment has been transmitted and is before the Court for promulgation consideration.

**12. 2020-04: V.R.Cr.P. 35 and 13 V.S.A. § 7042. (Sentence Reconsideration; Stipulations to Modify at Any Time)**

Rebecca Turner reported that no action had been taken to amend §7042 during this Legislative session and was not likely. She indicated though that the Sentencing Commission has a continuing interest, and will consider further alternatives, especially as related to the issue of

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<sup>7</sup> V.R.Cr.P. 49(b) and (c) default to V.R.C.P. 5 by reference in matters of filing and service. The amendments were promulgated by the Court on May 9<sup>th</sup>, effective September 6, 2022.

racial disparities in sentencing. The Committee will continue to monitor Sentencing Commission efforts, even though consensus is that a statutory amendment is required for any change.

### **13. 2022-03: Proposed Amendments of VRAP 33.1 and 34 (Procedures for Remote and In-person Arguments).**

Emily Wetherell joined the meeting and provided an overview of these amendments of the appellate rules that would address circumstances in which hearings in both “rocket-docket” and “full court” appeals would be remote or in person, and procedures under which in-person arguments may be requested and authorized. The “default” for “rocket” appeals would be a remote hearing, unless request for in person hearing is made and good cause shown. The “default” for “full court” hearings is an in-person hearing, unless request is made for remote participation, under the procedures prescribed for such. Ms. Wetherell indicated that in the proposed amendments, the Court was informed by a survey of the bar on attorneys’ experiences with remote arguments during the period of the Judicial Emergency. According to Ms. Wetherell, most respondents favored remote participation for “rocket” arguments, and in-person hearings for “full court” arguments.

Rebecca Turner raised a number of concerns as to the amendments. In her view, the preference for all arguments should be in person, unless waived. And, as to self-representing incarcerated Appellants, the proposals serve to make explicit a practice of telephone-only participation which serves to “entrench” unequal access to court proceedings for this population. Ms. Turner also pointed out that the proposals do not appear to address remote vs. personal appearance in VRAP 9 bail appeals. Ms. Wetherell acknowledged that omission and agreed that it needs to be addressed.<sup>8</sup> No other Committee members had comments, although John Treadwell stated that A.O. 38 has already long addressed remote appearances by audio and video conference in non-evidentiary proceedings in criminal and delinquency cases.

### **14. Next Committee Meeting:**

The next Committee meeting will be held on Friday, September 9, 2022 at 9:30 a.m. via Zoom. The Reporter will provide an invitation and link to join.

On Motion of Rebecca Turner, seconded by Rose Kennedy, the meeting was adjourned at approximately 3:20 p.m.

Respectfully submitted,

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

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<sup>8</sup> These amendments were promulgated by the Court on an emergency basis on August 9<sup>th</sup>, effective October 1, 2022. In apparent response to Ms. Turner’s comment, VRAP 9 is also amended to address audio or video participation in bail appeals.