

CRIMINAL RULES ADVISORY COMMITTEE

June 4, 2021 Meeting
9:30 a.m.
Vermont Supreme Court (via Teams)

AGENDA [Amended]

Meeting Opening; Chair Thomas Zonay; Committee reappointments and transitions; general announcements.

OPENING DISCUSSION: **A.O. 49** amendments pertinent to Criminal Division practice during restoration to “normal” operating procedures; Resumption of jury trials-plan and issues; April 8, 2021 amendment re: venue changes for conduct of resumed jury trials; Court Administrator’s Judiciary Pandemic Response and Recovery Plan.

REPORTS: Status of Odyssey efilng and electronic case management roll outs; Supreme Court Appellate Bench-Bar Meeting on June 8th; Commencement of planning for new electronic Jury Management system.

OLD BUSINESS:

1. Approve minutes of February 5, 2021 meeting.
2. **2018-04: V.R.Cr.P. 24(a)(2)**. Confidentiality of Juror Qualification Questionnaire and Supplemental Questionnaire Responses. Reconciling confidentiality provisions of Rule 24(a)(2) (and identical rule V.R.C.P. 47(a)) with Juror Qualification Rule 10. (Old Agenda Item # 2014-02). **Promulgated as final on April 14, 2021, effective June 14, 2021.** (Morris)
3. **2020-05: V.R.Cr.P. 11(a)(3); In re: Benoit, 2020 VT 58 (7/10/20)**-Request in opinion for consideration of procedural rule to clarify process of preservation of challenges to predicate convictions in post-plea PCR Review. **Promulgated as final on April 5, 2021, effective June 7, 2021.**
4. **2020-07; Proposed V.R.Cr.P. 11(a)(4)**; Following *Benoit*, amendment to add 11(a)(4), which would authorize preservation of challenge to predicate conviction in post-plea PCR review, on approval by the Court *without* agreement of the State. (Status of proposal and redraft). Discussion of implications of opinion in *State v. Michael Lewis*, 2021 VT 24 (4/30/21); *Transmittal of proposal for publication and comment.*
5. **2015—02: Video Testimony; Promulgated V.R.C.P. 43.1; Proposed Criminal Rule 26.2 for Video Testimony by Consent of Parties** (Subcommittee—Sedon, Brill, Kennedy)—Issues for final draft: (1) content of judge’s colloquy for a defendant’s waiver of that aspect of Confrontation addressed to physical presence of witness; (2) procedures/standards for withdrawal of agreement/waivers for video testimony by either defendant or state. *Discussion of whether, and what further action should be taken with respect to proposed criminal rule*

*authorizing video testimony by agreement of parties, during pendency of Judicial Emergency and resumption of “in person” court proceedings.*¹

6. **Appellate E Filing and Case Management; Proposed Amendments of 2020 V.R.E.F. and V.R.A.P. for Commencement of E filing in the Supreme Court.** *Overview of proposed amendments; Committee discussion and comments.* **Note: These amendments have been published for comment, closing on July 2nd.** *Updates as to post-promulgation Odyssey issues in trial court practice and interim rules amendments.*² (Turner; Morris)
7. **2020-02: V.R.Cr.P. 7** (Indictment and Information); Rule 7 Amendment to provide for Standards and/or Limitations upon *Pre-Trial* Amendment of the Information(s) by a Prosecuting Attorney, akin to V.R.C.P. 15(a).³ (Adding multiple counts, or amending misdemeanor to felony charges late in the case—Request of Judge Bent) **Proposed Amendment Published for comment; comment period closes on June 8, 2021.**⁴
8. **2020-03: Collateral Consequence advisement in Fish and Game matters prosecuted as criminal offenses** (Twarog). *Discussion--rule, or administrative recommendation?*
9. **2020-04: V.R.Cr.P. 35 and 13 V.S.A. § 7042. (Sentence Reconsideration; Stipulations to Modify at Any Time)** (Brill; Zonay; Turner). Report on Legislative Response to Sentencing Commission recommendation of statutory enactment.

NEW BUSINESS:

10. **2021-01: V.R.Cr.P. 45(e) (Computation of Time); Abrogation of the “Three Day” Rule in Criminal, Civil and Appellate Rules** (Morris)

Is the “Three Day Rule” still necessary, with Odyssey eFiling and Service in place in all units?⁵

11. **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.** Rules

¹ The July 2020 draft of proposed V.R.Cr.P. 26.2 has been sent to the Court for information and reference in considering any further amendments to A.O. 49, modifying V.R.C.P. 43.1. The April 21, 2020 A.O. 49 amendments, ¶ 5(b), contain provisions applicable to the criminal division; clarifying that in nonevidentiary proceedings, a judge may preside remotely and require others to do so, and in evidentiary proceedings, *upon agreement of the parties*, may do so (to include witnesses). The amendment references the provisions of A.O. 38 where applicable, for standards, and where not, those factors listed in V.R.C.P. 43.1.

² The amended Vermont Rules for Public Access to Court Records were promulgated as final on May 1st, eff. July 1st; the 2020 V.R.E.F. rules were promulgated as final on December 10, 2019, eff. March 2, 2020. The rules have been amended three times since: an amendment to VRPACR 6(b)(5) was promulgated on September 14, effective November 16; emergency amendments to VREF 3 and 4 were promulgated and effective July 15th; and amendments to VREF 2, 4 and 11 were made on February 22nd, effective March 15, 2021. “Roll-out” of electronic filing via Odyssey File and Serve is now completed and effective in all units of the Superior Court; Supreme Court is next.

³ Rule 7(d) addresses conditions of amendment of an information *during* trial, not prior to trial, at whatever juncture.

⁴ Subcommittee: Sedon; Kennedy; McLaughlin; Morris)

⁵ The Civil Rules Committee unanimously voted on May 21st to recommend abrogation of the “Three Day” Rule, as unnecessary. V.R.Cr.P. 45(e): **“Additional Time After Certain Kinds of Service.** *Whenever a party must or may act within a specified time after being served and service is made under V.R.C.P. 5(b)(mailing), (3) (leaving with the clerk), or (4) (sending by electronic means), 3 days are added after the period would otherwise expire under Rule 6(a)(V.R.Cr.P. 45(a)).”*

53/79.2 authorize audio recording by participants, but prohibit video recording absent good cause shown. (Request for review of rules; trial court opinions in *Alvarez; Colehamer*) (Rebecca Turner).

12. Centralized Clerk Review of Criminal Filings in Odyssey; V.R.Cr.P. 8(b); Joinder of Defendants in the Same Information or Indictment.

Reconciling Rule 8(b) Joinder of Defendants with Odyssey Case Management for purposes of access to electronic case record pertinent to each Defendant (as well as completion of any expungements that may be warranted for some (but not all) joined Codefendants). *Discussion: Rule Amendment, or Administrative/Tech Remedy?*⁶ (Canty; Morris)

13. 2021-03: VRCrP 11(b)—Pleas of Nolo Contendere

Discretion of court to accept; should the Rule be amended to accord Defendants a right to enter a nolo plea *without* Court consent? (Request of Senator Benning, LCJR) (Morris).

14. Next Committee Meeting Date(s).

15. Any other business.

16. Adjourn.

AGENDA ITEMS DEFERRED:

17. **2019-02: V.R.Cr.P. 18(b); Venue; Exceptions.** Proposal for additional exception to the general rule, to authorize change of plea and sentencing for “out of unit” charges at regional arraignment, by agreement of the parties. (Zonay proposal). A draft was transmitted to the Court for information and reference only.⁷

18. **2014-06: Proposed New Civil Rule 80.7a** (Civil Animal Forfeiture procedures) per Act 201 (2014 Adj. Sess.), S. 237, effective 7/1/14. (Draft to be sent to Civil Rules Committee for comment.)

19. Preparation of Annual Report to Supreme Court.

[6/3/2021]

⁶ From initial promulgation of the Criminal Rules, Rule 8(b) has authorized joinder of two or more defendants in the same information or indictment. The issue presented is as to case captioning, and retrieval, public access, and expungement of case records as to individual defendants who have been joined.

⁷ Provisions of A.O. 49 as amended presently supplement Rule 18 and control certain aspects of venue.