

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

**MINUTES OF MEETING
July 24, 2020**

The Criminal Rules Committee meeting commenced at approximately 9:30 a.m. via Teams video conference. Present were Committee Chair Judge Thomas Zonay, Judge Marty Maley, Dan Sedon, Katelyn Atwood, Rose Kennedy, Mimi Brill, Devin McLaughlin, Rebecca Turner, Laurie Canty, Domenica Padula, and Committee Reporter Judge Walt Morris. Supreme Court Liaison Justice Karen Carroll, Frank Twarog, Judge Alison Arms, and Kelly Woodward were absent.

The Chair opened the meeting. Reporter Morris indicated that the Court had reappointed four members whose second terms on the Committee were expired (Sedon; Kennedy; Maley and Canty) to their third terms ending in 2023. Each has agreed to reappointment. On motion of Dan Sedon, seconded by Katelyn Atwood, the meeting minutes of the February 14th and May 8th meeting were approved with two minor corrections.

1. 2018-03: V.R.Cr.P. 32(c)(4); State v. Lumumba, 2018 VT 40 (4/6/18).

Adding requirement of disclosure of probation conditions sought in PSI, and record objection to any proposed in order to preserve claims of error. The Reporter noted that the amendment was promulgated as final on May 4, 2020, effective on July 6, 2020. There was no Committee comment. The rule will be subject to Committee review in light of experience, upon expansion of judicial operations.

2. 2018-04: V.R.Cr.P. 24(a)(2). Confidentiality of Juror Qualification Questionnaire and Supplemental Questionnaire Responses.

Reporter Morris outlined for the Committee the latest draft of this set of consolidated rules amendments, which seek to reconcile confidentiality provisions of Rule 24(a)(2) (and identical rule V.R.C.P. 47(a)) with Juror Qualification Rules 4 and 10, and to clarify in a new Public Access Rule 6(b)(19) that the content of juror responses to questionnaires related to service is not publicly accessible, absent a finding of good cause by a judge (employing *Press-Enterprise* balancing standards. There would be no change to existing rights of access to juror questionnaire content by attorneys and parties for use in voir dire in specific cases. Judge Morris pointed out the changes that had been made to the draft in response to recommendations of the Committee in prior review.

Redraft (January, 2020) of joint proposed amendments, including V.R.Cr.P. 24(a)(2) and V.R.C.P. 47(a) incorporating recommendations of Public Access to Court Records (**PACR**) Committee from October 4, December 20, 2019 and February 21, 2020 meetings. (Status report; Final redraft of package for publication and comment is up for approval at PACR meeting on July 31st--Morris).

3. 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, Hughes)—Redraft of a proposed V.R.Cr.P. 26.2 considered by Committee on May 8th in view of declaration of Judicial Emergency, and amendments made to A.O. 49 on April 21st, modifying V.R.C.P. 43.1.¹ **Unresolved**

¹ The April 21st 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*

issues: (1) agreement for video testimony and waiver (of physical presence of witness) process, colloquy and findings; (2) standards for withdrawal of waivers once given and accepted by the court. (Last Committee draft of 26.2 provided to Court *for reference only* on June 12, 2020).

5. 2019-02: V.R.Cr.P. 18(b); Venue; Exceptions. Proposal for additional exception to general rule, to authorize change of plea and sentencing for “out of unit” charges at regional arraignment, by agreement of the parties.² (Zonay proposal). Status of draft to be transmitted for publication and comment. Intervening amendments to A.O. 49 on March 24th authorize Chief Superior Judge to both assign venue for certain proceedings, and to order change of venue if necessary.

6. Advisory Committee on Access to Court Records (**PACR**) and Special Committee on Rules for Electronic Filing (**VREF**); status report on implementation of promulgated rules; post-promulgation amendments.³ (Morris)

7. 2020-02: V.R.Cr.P. 7 (Indictment and Information); Should Rule 7 be Amended 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)?⁴ (Adding multiple counts, or amending misdemeanor to felony charges late in the case--Judge Bent) (Discussion draft for further consideration).

8. 2020-03: Collateral Consequence advisement in Fish and Game matters prosecuted as criminal offenses (Twarog). Discussion--rule, or administrative recommendation.

9. . Preparation of Annual Report for the Supreme Court.

NEW BUSINESS:

10. 2020-04: VRCrP 35 (Sentence Reconsideration; Stipulations to Modify at Any Time) (Brill).

11. 2020-05: *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. (Zonay Draft).

12. Next Committee Meeting Date(s).

13. Any other business.

14. Adjourn.

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.

²Note: the last amendment of Rule 18 was a 2015 amendment of Rule 18(a) to permit trial of multiple charges in a single adjacent unit. (Agenda Item 2013-01).

³Emergency amendments to V.R.E.F. rules 3(b) and 4 were promulgated as final on July 15, 2020, eff. immediately. These amendments clarify that: (1) all filings on behalf of a government agency, including by non-attorneys, be made electronically; (2) that non-electronic “courthouse” stipulations and agreements such as plea agreements may be filed (and then scanned into the electronic record) with court permission; and (3) as to registration and access, the filer must choose a type of registration-independent user or user within a “firm”; an attorney may authorize others to file and view documents on attorney’s behalf; and that to view filings of other parties, an filer must also register in the judiciary portal and receive elevated access to do so.

⁴ Rule 7(d) addresses conditions of amendment of an information *during* trial, not prior to trial, at whatever juncture.

AGENDA ITEM DEFERRED:

15. 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.)(Note: recent opinion, *State v. Ferguson*, 2020 VT 39 (5/29/20) re: bounds of hearsay in affidavits admitted per statute in animal forfeiture proceedings).