[As Approved at Committee Meeting on February 4, 2022]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

MINUTES OF MEETING
November 19, 2021

The Criminal Rules Committee meeting commenced at approximately 1:30 p.m. via Teams video conference. Present were Committee Chair Judge John Treadwell, Judge Alison Arms, Laurie Canty, Dan Sedon, Mimi Brill, Rose Kennedy, Rebecca Turner, Mary Kay Lanthier, and Kelly Woodward. Supreme Court Liaison Justice Karen Carroll and Committee Reporter Judge Walt Morris were also present. Devin McLaughlin, Judge Marty Maley and Frank Twarog were absent. Domenica Padula was absent but Ultan Doyle participated in the meeting on her behalf.

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

1. **Approval of August 13, 2021 Meeting Minutes.**

On motion of Judge Arms, seconded by Dan Sedon, the minutes of the August 13, 2021 meeting were unanimously approved.

2. **Reports**

In the course of reports, the Committee decided to restore to the next meeting agenda the issue of sentence reconsideration after 90 days by stipulation (V.R.Cr.P. 35 and 13 V.S.A. § 7042; Agenda Item:), to at least assess whether there is any legislative activity following the Sentencing Commission's 2021 Report and Recommendations that had not been considered in the last session.

3. **2020-02: V.R.Cr.P. 7** (**Amendment of Indictment/Information**) This proposed amendment was transmitted to the Court with recommendation for promulgation, and awaits the Court's review. But for noticing this status, no action was taken.

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*). The proposal was published on August 3rd, with comment period ending on October 4, 2021. No comments were received. After very brief discussion, on motion of Judge Arms, seconded by Dan Sedon, the Committee unanimously decided to transmit the final draft as published to the Court with recommendation for promulgation.

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

The Criminal Rules Committee has worked on a proposed rule authorizing limited provision of video testimony in criminal proceedings by agreement of the parties for several years now, and through a number of changes in Committee membership. The current subcommittee has prepared a proposed V.R.Cr.P. 26.2, yet there are two remaining issues: (1) content of the judge's colloquy for a defendant's waiver of that aspect of Confrontation addressed to physical presence of witness; and (2) the

procedures/standards for withdrawal of agreement/waivers for video testimony by either defendant or state. In the meantime, V.R.C.P. 43.1 has been promulgated, providing general criteria (and limitations) as to employment of video proceedings in civil (and by reference, family) cases. And, during the Covid emergency, A.O. 49 provisions have addressed remote proceedings and testimonies (by consent, in criminal proceedings) as well.

At the August 13th meeting Justice Carroll reported that the Court has comprised a ***Task Force on Remote Hearings*** expressly charged with responsibility to recommend guidelines for hearing types to routinely schedule for remote hearings, and parameters for scheduling other proceedings for remote hearings.[1] At the November 19th meeting, Judge Arms (who also serves on the Criminal Division Oversight Committee) indicated that the Court's Oversight Committees had long ago submitted a number of recommendations for remote proceedings and testimony intended for Task Force consideration. Justice Carroll indicated that the present focus of the Remote Hearings Task Force in reviewing issues and proposals was upon what is to follow A.O. 49, assuming its ultimate expiration. She expressed the view that, considering the fluidity of current discussions, as well as variations in unit practices and technological capabilities, it would not necessarily be productive to now propose specific rules for promulgation. Dan Sedon stated that in his assessment, given the extensive historic work of the Criminal Rules Committee, the Committee should nonetheless try to advance the proposed Rule 26.2. He indicated that the proposal is narrowly tailored, and seeks to deal with an evidentiary issue, rather than the entire realm of remote proceedings and participation. Committee members then engaged in a brief discussion of potential standards for withdrawal from a waiver of right of physical presence of a witness and agreement to video testimony, and concluded that recommendations as to the two remaining Rule 26.2 issues would be best addressed by the established subcommittee (Chair Treadwell joining), which is to meet and provide a specific discussion draft at the next Committee meeting.

6. **Appellate EFiling and Case Management; Promulgated Amendments of 2020 V.R.E.F., and V.R.A.P. for Commencement of Efiling in the Supreme Court. Experience to Date, and Implications for criminal appellate practice.** A brief report was provided by Ms. Turner, who indicated that a principal post-promulgation issue has been with management of, and difficulty of access to documents in the electronic Appeal Volume, and making sure that it has everything put into it. Other members shared this concern, with Justice Carroll agreeing that it is more difficult to find documents in the case record. The discussion also turned to ability of the Odyssey system to manage high volume documents, especially video exhibits, for purposes of consistency of the electronic case record (and thus, the Appeal Volume). Judge Arms indicated that as to video exhibits, she encourages parties to employ thumb drives and DVD versions. Laurie Canty acknowledged that there were technological problems with uploading/inclusion of such exhibits into the electronic case record, and that technology staff were actively working on resolution of these issues, in coordination with Emily Wetherell. She suggested that the solution may lie in an easier cataloging system. She also indicated that there had been some discussion of Webex recording capabilities and relationship to the electronic case record, but the official record of proceedings remains the FTR audio recording system. Beyond this discussion, the Committee took no action with respect to the issues presented.

7. **2020-03: Collateral Consequence advisement in Fish and Game matters (and other violations prosecuted as criminal offenses** (Twarog).

[1] See, minutes of August 13th meeting, pp. 1-2.

This issue was continued on the Agenda from the August 13th meeting, for determination of whether any further Committee action will be taken. In Frank Twarog's absence, any final decision was again deferred to the next meeting.

8. **Request for Establishment of an Advisory Committee on Rules of Appellate Procedure.**

Ms. Turner and Bridget Asay had written to the Court to request the establishment of an Advisory Committee on Rules of Appellate Procedure, to provide focus upon review and development of the procedural rules of the Appellate Division. At the August 13th meeting, the Committee unanimously determined to communicate support for this proposal to the Court.

In the course of discussion of the VREF and VRAP amendments (noted herein at ¶ 6), Justice Carroll indicated that the Court had considered this proposal, but declined to comprise an Advisory Committee on Rules of Appellate Procedure. The Civil Rules Committee has historically been considered to be the Committee assigned responsibility from time to time to consider appellate rules amendments upon request of the Court. Justice Carroll conveyed that the Court is of the view that it is the body with responsibility for its own rules, while entrusting review of particular appellate rule revisions as necessary to the relevant Advisory Committees.

9. **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.** (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 engaged in extensive discussion of the issues at the June 4th meeting, Committee consensus was to ask that Ms. Turner provide a draft of proposed amendments, or more specific identification of sections and issues for review, for the August meeting.[2] At that time, Ms. Turner had not been able to focus on completion of a draft for consideration. At the August meeting, a subcommittee was appointed, consisting of Ms. Turner, Ms. Kennedy, Mr. Sedon, Ms. Lanthier, and Judge Arms, to meet and provide a report and recommendations to the Committee. At the time of the November meeting, the subcommittee had not met; however, the Committee again engaged in extensive discussion of issues associated with use of video, and video recording technologies, and its capabilities/limitations in the Covid-Era, consistent with the provisions of the emergency rule A.O. 49 and its various amendments.

Ms. Turner indicated that the issues of party/participant ability to video record proceedings, and the place of video "records" in court proceedings were still very much "live issues". In her assessment, there are significant questions as to how to interpret V.R.C.P. 79.2 in the present environment;[3] whether the provisions of the rule still make sense in the video context; what "courtroom" meant (to the 2019 Special

[2] See 6/4/21 Meeting Minutes, pp. 4-6; 8/13/21 Minutes, pp. 3-4.

[3] V.R.Cr.P. 79.2/V.R.Cr.P. 53 were first promulgated in 1988, made permanent in 1992, then abrogated and replaced in 2019.

Advisory Committee), in contrast to Covid-Era A.O. 49 remote hearings; and the baseline considerations that then informed, and would now inform, criteria for use of video technologies, including by parties.

In the course of the ensuing discussion, members articulated a number of issues related to participant/public recording of court proceedings, not only those presented in the *Colehamer/Alvarez* cases. Judge Treadwell reviewed the procedures that have evolved in the Windham unit for voir dire and trial, consistent with requirements of social distancing and courtroom reconfiguration. Presently, 32 jurors are seated in rows of 8, in contrast to the 14 that were originally present and subject to examination under earlier protocols. Counsel tables have now been moved back to their original locations, and the courtroom "geography" for trial is more normative. He indicated that observing Covid protocols severely limited public/media presence in the courtroom at the outset.

As to V.R.C.P. 79.2(e)(3) and its criteria for court consideration of a party's request to video-record, Dan Sedon inquired as to whether the "good cause" exception for permission of party video recording would not be sufficient in the current voir dire and trial environment. Ms. Turner replied that the standard would require a showing that something had gone wrong in the proceeding; and that in any event, "good cause" provides no standard for consistency among courts and judges in permitting party video recording. She also mentioned a specific need for party video vs. audio recording in cases where the adequacy of interpretation services is in question. Ms. Lanthier agreed that often, it is not immediately apparent how critical the availability of a video recording of a proceeding is for later review, especially when the positioning of participants in court proceedings is not as it customarily has been.

Other members expressed the competing considerations that had informed the present rule restrictions and standards governing participant recording, and that the existing rule had been the product of a special joint committee comprised of members of each of the Advisory Rules Committees, not just Criminal Rules. Judge Arms repeated a number of her concerns as to participant video recordings—any video recording cannot substitute for the official (audio) record; however, broadening of standards for participant recording, without clear and enforceable sanctions for abuse, is opening a "Pandora's Box". In her view, video recordings have the capacity to be employed to "destroy peoples' lives".[4]

Rose Kennedy stated her view that the courts should be taking the lead, and responsibility for, video recordings of proceedings if they are employed for, or during remote or hybrid proceedings, serving as custodian and controlling access to them to address the concerns that had been raised. Judge Treadwell agreed that in principle, it made sense for the court to be custodian of any video recording, certainly with respect to Webex or any other recording made employing court technology. Dan Sedon expressed his agreement that the court should control the record, including any video, consistent with provision of access by a party where needed. Justice Carroll asked if a video (official) record was being employed at present in the Bennington unit. Laurie Canty replied that while a video record was used in a few units many years ago, there came a time when there was no technological support for the system being used, and it was discontinued. No unit employs a video record at this time.

The Committee discussion ended with acknowledgment that many issues remain, and factor into a review of V.R.Cr.P. 79.2/V.R.Cr.P. 53. The subcommittee will plan to meet and provide its status report at the next Committee meeting.

[4] See, Minutes of 6/4/21 meeting, pp. 4-6.

10. **2020-07: V.R.Cr.P. 11(b); Nolo Plea; Clarifying Whether, and When a Defendant has a Right to Enter Nolo; Court Criteria for Rejection of Such Plea**. (Request of Senator Benning at LCJR meeting on Dec. 8, 2020)

Following extensive discussion of this item at the June 4th and August 13th meetings, without consensus as to whether Rule 11(b) should be amended to accord a Defendant a right to enter a plea of nolo contendere without the consent of the court, the matter was brought forward on the present meeting agenda for potential motion and consideration of whether there should be any further action, as opposed to tabling, of a proposed amendment.[5]

The preceding discussions included research conducted by Reporter Morris and Ms. Turner, establishing that very few jurisdictions had made any provision for a Defendant's right to enter a nolo plea, with the predominant rule being that court consent is required, given the presenting competing interests.[6] Ms. Turner indicated that since the August meeting, she had found two other jurisdictions authorizing some version of the right, including Ohio (misdemeanors) and Florida. Judges Arms and Treadwell expressed concerns about restricting judicial discretion, and considered that any such changes should be a matter of legislative enactment, if at all. Dan Sedon's observation was that the call for some amendment of the existing restriction (i.e., court consent) stemmed from the fact that a number of judges were resistant to acceptance of nolo pleas, even in circumstances in which such would appear to result in just resolution of cases that would otherwise be bound for trial and its uncertainties. He did suggest that the legislature should consider whether there should be such an amendment. Justice Carroll indicated that while the judges could use some guidance as to acceptance or rejection of nolo pleas, it may be difficult to achieve promulgation of an amendment that cast a categorical right to a nolo plea. Ms. Lanthier noted that this was the third meeting at which the issue had been considered, and that a fundamental starting question was whether such an amendment was appropriate for legislative, versus judicial rule resolution. She suggested that a subcommittee be comprised to look at this issue. However, the issue of composition of such a subcommittee and its charge was passed to the next Committee meeting without present resolution.

11. **2021-04: 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). *Discussion:* Time to review/repeal the Administrative Order?

In discussion, Committee consensus was that A.O. 5 should be reviewed; Judge Treadwell's view that while the existing provisions are expressly stated as non-binding, there could be Rule 48 implications, depending upon the presenting circumstances. Judge Arms indicated that A.O. 5 review has been discussed in the Criminal Division Oversight Committee, and that committee hasn't taken any action. Dan Sedon added that there are implications for post-conviction effective assistance cases as well in assessment of attorney performance standards. Rebecca Turner suggested that the Committee should keep A.O. 5 for review and recommendation, or work together with Criminal Oversight. Justice Carroll stated that she would confer with the Court to secure its direction on a joint committee approach, and the Committee wait for the Court's request/direction.

12. **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.**

[5] See, 8/13/21 minutes, pp. 5-8; 6/4/21 minutes, p. 8.

[6] Virginia and Alaska had been identified as having provision for a right to a nolo plea in certain circumstances.

Is the "Three Day Rule" of V.R.Cr.P. 45(e) still necessary, with Odyssey eFiling and Service in place in all units?[7] The Committee continued its June 4th discussion of the proposal to eliminate the "three day rule" in computation of time, which essentially adds three days to the calculation of a due date for purposes of service mandatory responsive pleadings. The conclusion was that while a small group of people could theoretically be adversely affected, the benefits of consistency among the rules, and broader recourse to electronic filing, outweighed any disadvantages. The unanimous conclusion of the Committee, on motion of Dan Sedon seconded by Judge Arms, was to advise the Court that a similar abrogation of V.R.Cr.P. 45(e) is warranted, and recommended, with a companion amendment identical to the already published V.R.C.P. 6(e) to be transmitted for publication and comment.[8]

Next Committee Meeting Date: The Reporter will poll members as to availability for a next meeting date (via videoconference). An invitation and meeting link will be emailed to all Committee members.[9]

On Motion of Judge Arms and Dan Sedon, the meeting was adjourned at approximately 3:30 p.m.

Respectfully submitted,

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

AGENDA ITEMS DEFERRED:

13. **2019-02: V.R.Cr.P. 18(b); Venue; Exceptions** (Zonay proposal). *Committee has deferred action subject to further developments/A.O. 49 amendments pertaining to venue during pendency of Judicial Emergency.*

14. **2014-06: Proposed Added 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).

[2/2/2022]

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[7] The Civil and Criminal Rules for computation of time are identical "companions". The Civil Rules Committee unanimously voted on May 21st to recommend abrogation of the "Three Day" Rule, (V.R.C.P. 6(e)) as unnecessary. Current V.R.Cr.P. 45(e) provides that: ***"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)).*" The Civil Rules proposal to abrogate V.R.C.P. 6(e)(and its proposal to also abrogate V.R.A.P. 26(c)) was published for comment on September 16th, with comment period closing on November 15th.

[8] The proposed amendment abrogating V.R.Cr.P. 45(e) was published for comment on January 11, 2022 with comment period ending on February 14, 2022. In both the Civil and Criminal "packages" of amendment, an additional amendment was included that would revise the term "Last Day" in the "time" rules to include *email filing up to midnight* of the date in issue, consistent with the Court's direction to permit (non-efiler) filing by email, on a permanent basis. Such email filing is now authorized under the terms of A.O. 49, which is not intended to be of permanent duration. The pertinent section of the Criminal Rules is 45(a)(4)(A).

[9] Following poll, the next meeting date was established for Friday, February 4, 2022 at 9:30 a.m.