[AS APPROVED AT MEETING ON MAY 6, 2022]

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

**MINUTES OF MEETING**
**February 4, 2022**

The Criminal Rules Committee meeting commenced at approximately 9:35 a.m. via Zoom video conference. Present were Committee Chair Judge John Treadwell, Judge Alison Arms, 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. Judge Alison Arms and Laurie Woodward were absent.

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

**1. Approval of November 19, 2021 Meeting Minutes.**

On motion of Judge Treadwell, seconded by Mary Kay Lanthier, the minutes of the November 19th, 2021 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 request of the Court, Chair Treadwell and Reporter Morris had prepared a draft of proposed amendments of V.R.Cr.P. 25 that would authorize substitution of a judge due to disability during trial. The existing Vermont rule authorizes substitution of a judge only post-verdict of guilty, subject to the proviso that if the substitute judge is satisfied that he or she cannot perform post-verdict duties because they did not preside at trial, or for any other reason, they may grant a new trial. The draft of the proposed amendments, modeled upon F.R.Cr.P. 25 (with modifications) was circulated to Committee members in advance of the meeting.[1]

[1] The draft would amend V.R.Cr.P. 25 as follows: **RULE 25. DISABILITY OF A JUDGE**

(a) **DURING TRIAL**. A judge designated by the Chief Superior Judge may complete a jury trial if:

(1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and

(2) the judge completing the trial certifies familiarity with the trial record.

(b) **AFTER A VERDICT OR FINDING OF GUILTY**.

Justice Carroll indicated that the Court was actually considering an emergency amendment of A.O. 49, rather than making any permanent amendment at this juncture, consistent with other Covid-related emergency provisions of A.O. 49. Consideration of a rule dealing with judge disability during trial was prompted by recent experience in a case in which, three days into testimony, the presiding judge tested positive for Covid, requiring quarantine, and the parties were unable to agree on a continuance to resume proceedings at a later date, resulting in declaration of a mistrial. As Justice Carroll put it, the Court was considering the options, in view of earnest efforts to resume jury trials, and the prospect, still at this time, that a presiding judge might become unexpectedly ill to the point of requiring a substitute judge if trial was to proceed.

In discussion, Committee members expressed mixed views as to the proposed amendments. Most felt that if any amendment was made to authorize substitution of a judge during trial, it should be temporary only, consistent with the status of the other provisions of A.O. 49. And most favored a condition that any substitution of judge be made only with the consent of the parties. Rose Kennedy stated that in view of the movement to resume jury trials to clear backlogs, it was important that the prospect of need for substitution be addressed, and a properly drafted rule would be helpful. If not a rule, in her view it was incumbent upon the parties to clearly address in advance expectations in the event that the presiding judge were to become ill during trial. An additional consideration, shared by members, is that an advantage of having some rule addressing substitution could at least prevent a scenario in which a judge declines to stay home while sick, in the perceived interest of avoiding a mistrial. Members shared the view that not only judges, but attorneys at times stay "on the job" when it would perhaps be better to focus on getting better.

Frank Twarog stated that judge substitution issues are not unique to the Covid era. He also pointed out that as pertains to the federal rule and its relation to Vermont trials, federal trials are often far longer than state proceedings, at times months long; as well as the time passing from time of verdict to sentencing, which presents a different dynamic as to needs for substitution. In considering a rule for substitution during trial, Rose Kennedy suggested that an option to assure familiarity with the trial record could be to have a retired judge view the proceedings via Webex, for purposes of determining whether that judge could not have missed any key aspects of the trial. A concern, whether having viewed by Webex or not, would be whether a substitute would have sufficient familiarity in a complex case to assume presiding.

Rebecca Turner's view was that focus should be upon reasons why it might be a problem for a judge to substitute in a trial in progress, primary consideration being the difficulty of a substitute

---

(1) *In General.* After a verdict or finding of guilty, a judge designated by the Chief Superior Judge may complete the court's duties if the judge who presided at trial cannot perform those duties because of unavailability, death, sickness, or other disability.

(2) *Granting a New Trial.* The successor judge may grant a new trial if satisfied that:

(A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or

(B) a new trial is necessary for some other reason.

to have a whole familiarity with the preceding record, and the "flavor" of the case, especially where testimonial assertions are competing and assessment of credibility is crucial. She referenced two cases—a 1915 Second Circuit case[2], and State v. Fuller, 144 Vt. 485 supporting the principle that extraordinary caution should be exercised in any substitutions, even in the post-verdict situation authorized under current V.R.Cr.P. 25. In her view, while the Covid experience presents unique issues for trial, there is reason to believe that circumstances are improving, and court proceedings may be moving through former Covid-driven constraints.

Judge Treadwell observed that the current Rule 25 does not even address the issue of judge substitution from jury selection to time of commencement of trial, where trial has not commenced and no evidence has been presented. And in his view, the more complex the case, the more unlikely it would be to see a substitution of another judge to complete the proceeding. Devin McLaughlin stated that he would actually not like to see a Defendant lose the option to proceed to completion of trial with a substitute judge—there may be particular case circumstances of strategies in which a Defendant would prefer to proceed to the current trial's completion.

As the discussion proceeded, it was clearly the majority view that if any rule were adopted for substation 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.

There was no consensus as to affirmatively recommending the adoption of an amended rule authorizing substitution of a judge during trial. Committee comments were in the nature of advisements on the issues presented. Justice Carroll thanked Committee members for their observations, and indicated that she would share them with the Court.

**4. 2020-02: V.R.Cr.P. 7** (**Amendment of Indictment/Information**) This proposed amendment was promulgated by the Court on November 15, 2021, effective January 18, 2022.

**5. 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*). This proposal, which follows the 2021 amendment to add V.R.Cr.P. 11(a)(3), was transmitted to the Court on January 29th with recommendation for promulgation.

**6. 2015—02: Video Testimony; Proposed Criminal Rule 26.2 for Video Testimony by Consent of Parties; Promulgated V.R.C.P. 43.1; Supreme Court Task Force on Remote Hearings** (Subcommittee—Sedon, Brill, Kennedy)

Dan Sedon reported that the subcommittee has met again, and prepared a recommended draft of an added V.R.Cr.P. 26.2 that addresses the two issues that had remained for resolution—

[2] *Freeman v. U.S.*, 227 F. 732 (2nd Cir. 1915); see also, *Morgan v. State*, 2005 WL 901769 (AK); (mem.; not reported in P.3d), construing *Freeman* opinion in context of current F.R.Cr.P. 25 authorizing substitution.

(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.[3] In outlining the provisions of the latest draft addressed to these issues, Dan indicated that the subcommittee recommended that a Rule 11 type of colloquy not be prescribed for waiver and agreement, but that the colloquy should be akin to that for waiver of trial by jury, or to a Defendant's decision to elect or decline to testify. In determining that a Defendant's waiver of the right to physical presence of a witness is knowing and voluntary, no specific colloquy is prescribed and remains in the court's discretion, except that the judge must (1) inquire as to whether the defendant had adequate time to discuss waiver and agreement with counsel—including the pros and cons of permitting testimony of a witness by video teleconference; and (2) Advise the defendant that the waiver is his or her sole personal decision; that his or her attorney cannot make that decision without their express agreement; and that the waiver and agreement is final and binding, and once given and accepted by the Court, may not be able to be taken back by them later.

As to criteria for considering a request to withdraw from waiver and agreement for video testimony once given, and accepted by the Court, the subcommittee did find it helpful to set forth a number of criteria for the Court's consideration in the exercise of its discretion in determining whether good cause is presented.[4] As to the good cause standard, Mr. Sedon described that as a workable "middle ground" standard, to be guided by the criteria set forth. Devin McLaughlin inquired if not good cause, what other standards could be employed? Mr. Sedon indicated there

---

[3] The Committee has worked on this rule for a number of years now, through several changes in Committee membership. 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. In prior meetings, subcommittee chair Dan Sedon urged that the Committee at least try to advance the proposals recommended in the draft V.R.Cr.P. 26.2, to provide basis for consideration of remote testimony in the Criminal Division in context of other rules authorizing remote testimony.

[4] These criteria include:

(1) The timing, or juncture in the case at which the withdrawal is requested;

(2) Prejudice that would result to either party in consequence of the withdrawal, in terms of availability or unavailability of witnesses; undue hardship or inconvenience to witnesses; or additional costs that would be borne by either party in consequence of the withdrawal

(3) Undue delay in case progress, or waste of judicial resources resulting from the withdrawal;

(4) Whether reasonable alternatives are available to secure the testimony of the subject witness other than by video conference;

(5) The adequacy of the court's initial colloquy of the defendant at time of provision of his or her waiver and agreement;

(6) Whether the defendant is represented by counsel, at time of waiver and agreement and the time of request to withdraw; Defendant's assistance of counsel pertaining to provision of the waiver and agreement;

(7) Whether defendant's waiver and agreement to provision of video testimony is found to have been given knowingly and voluntarily; and

(8) Any other material factor relevant to whether good cause is presented for withdrawal from the waiver and agreement for video testimony previously given to, and accepted by the court.

(Judge Morris pointed out that these recommended criteria were actually quite analogous to those referenced by the Court in *State v. Harry Williams,* 2020-272, e.o., 9/23/21, reviewing denial of a Rule 32(d) motion to withdraw plea. (Citing *U.S. v. Hamilton,* 510 F.3d 1209, 1212 (10th Cir. 2007)). See also, *State v. Scarola,* 2017 VT 116, ¶ 22, 206 Vt. 335, cited in the *Williams* e.o.

could conceivably be a strict standard (binding; no withdrawal) or a more deferential standard. Mr. McLaughlin indicated that he was supportive of the good cause standard.

Rebecca Turner asked if the subcommittee had given consideration as to defeated or altered expectations as to the capabilities of Webex transmission/depiction of the witness as a basis for withdrawal from waiver and agreement to the video testimony. What if the technology employed fails, or will fail, to provide adequate video and audio transmission, to permit equivalent circumstances for credibility assessment? The Committee consensus was to add an additional criterion to the list--(8) Failure, or inadequacy of the technology employed, or to be employed in the presentation of the witness' testimony.

As pertains to adequacy of technology, Judge Morris noted that from the outset, the proposed rule has also incorporated a proposed Administrative Order that expressly adopts the existing Technical Standards of A.O. 47 in all proceedings under V.R.Cr.P. 26.2.

One final change to be noted in the draft 26.2 is in subsection (e) Party Responsible for Coordinating—this subsection will now state that "…to the extent available, and with consent of the court, court technologies may be used in the preparation or presentation of the testimony provided by the provisions of this rule." The former draft disclaims any court personnel assistance in provision of the testimony, and the change anticipates employment of the Court's Webex or other technologies as pertinent to the particular testimony.

Committee discussion turned to whether anyone had experienced provision of a witness' testimony via video conference. Frank Twarog, Dan Sedon and Devin McLaughlin had all done so, Mr. McLaughlin primarily in family cases. All reported that from a technological perspective, provision of the video testimony went well. Frank Twarog noted that there may be a "slippery slope" warranting caution (meaning, movement to normative, rather that exceptional, use of video testimonies in criminal trials).

With the revisions noted, along with minor edits to a final version of the proposed rule, on motion of Devin McLaughlin, seconded by Mimi Brill, the Committee approved of the proposed amendments. The Committee will have opportunity to review the final proposal, prior to transmittal to the Court for publication and comment, at its next meeting.

**7. 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?

At the November 19th meeting, 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 then indicated that A.O. 5 review has been discussed in the Criminal Division Oversight Committee as well but that committee hasn't taken any action. In the interim, a letter dated December 15, 2021 has been received from Justice Carroll on behalf of the Court requesting that

a joint committee be comprised to work with representatives of the Criminal Division Oversight Committee to provide recommendations. Rose Kennedy, Domenica Padula, MaryKay Lanthier, Dan Sedon, Mimi Brill and Alison Arms have volunteered, and been appointed to serve as Criminal Rules representatives to the joint committee. Chair Treadwell indicated that the Oversight Committee has not yet appointed representatives, but that he will communicate this Committee's designees to Judge Tomasi, Chair of Criminal Oversight, in hopes that a meeting will be scheduled.

**8. 2020-03: Collateral Consequence advisement in Fish and Game matters (and other violations prosecuted as criminal offenses; Provision of Advisements in Delinquency Cases**[5] (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 recommending decriminalization of certain minor offenses, including F&G, and converting some to civil violations. Mr. Twarog pointed out that the form complaint issued in F&G cases provides an option for plea of guilty/nolo by waiver, but there is apparently no collateral consequence advisement. Dan Sedon agreed with this assertion. Concern was also raised as to whether the advisements were being provided in delinquency cases in Family Division at preliminary hearings and in connection with admissions of delinquency.

Committee consensus was that since there is no dispute that the statutory advisements must be provided in both categories of cases, and procedure is already governed by V.R.Cr.P. 5(d)(6) and 11(h), alteration of the pertinent forms should suffice to remedy the issue.

Laurie Canty indicated issuance and revision of forms is the responsibility of the Court Administrator's Office, and that she would bring this issue to the attention of the Criminal Division Oversight Committee at its next meeting.

**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

[5] 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.

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, August 13th, and November 19th meetings.[6] At the August meeting, a subcommittee had been 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. The subcommittee had not met, and effort will be made to convene a subcommittee meeting to discuss approaches to the complex issues presented and provide a report to the full Committee at its next meeting. The Committee acknowledges that many proceedings recording 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.

**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)

The Committee held extensive discussions of this item at the June 4th, August 13th and November 19th 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.[7] Following brief discussion, Committee consensus was to table this issue from further consideration at this time.

**11. 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.**

Per Committee recommendation on February 4th, there being no being no comments received from publication, these proposed amendments were transmitted to the Court with recommendation for promulgation on March 23rd. They are before the Court for consideration along 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.[8]

**12. 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)**

Reporter Morris indicated that amendment of a number of equivalent procedural rules governing pro hac vice appearance is sought, to permit pro hac vice appearance as a matter of course upon presentation of an attorney's PHV licensing card issued by the Court Administrator per A.O. 41 § 16.[9] The operative language would now provide that foreign attorneys "shall" be

[6] See 6/4/21 Meeting Minutes, pp. 4-6; 8/13/21 Minutes, pp. 3-4; 11/19/21, pp. 3-5.
[7] See, 8/13/21 minutes, pp. 5-8; 6/4/21 minutes, p. 8; 11/19/21 minutes, pp. 5-6.
[8] V.R.Cr.P. 49(b) and (c) default to V.R.C.P. 5 by reference in matters of filing and service.
[9] Contemporaneous, identical amendments would be made to VRCP 79.1(e); V.R.C.rP. 44.2; VRFP 15(e); VRPP 79.1(d); and VRAP 45.1(d).

admitted on motion of an actively associated Vermont attorney, rather than "in the discretion of the court". The amendment would not change the provision of the existing rules, including V.R.Cr.P. 44.2, which authorize the court to at any time revoke such admission for good cause. Committee members expressed no opposition to such an amendment in conjunction with a contemporaneous amendment of the equivalent other procedural rules, and authorized transmission of this position to the Court for purposes of a combined amendment promulgation.

**13. Supreme Court Task Force on Remote Hearings.**

Reporter Morris indicated that the Supreme Court Special Advisory Committee on Remote Hearings was at that time planning to meet again soon and is charged with preparing a report to the Supreme Court. Laurie Canty provided a brief description of the membership and work of this committee. Reporter Morris stated that he would follow any developments from that Committee's work, and provide an update to the Criminal Rules committee at next meeting.[10]

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.[11]

On Motion of Dan Sedon, seconded by Rebecca Turner, the meeting was adjourned at approximately 11:33 a.m.

Respectfully submitted,

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

**AGENDA ITEMS DEFERRED:**

**14. 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.*

**15. 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).

[5/5/2022]

[10]The Committee on Remote Hearings had met on January 6th; its next meeting took place on April 14th.
[11] Following poll, the next meeting date was established for Friday, May 6, 2022 at 1:30 p.m.