

VERMONT SUPREME COURT
Advisory Committee on Rules of Criminal Procedure
2022-2023 Annual Report
December 28, 2023

The Advisory Committee on the Rules of Criminal Procedure submits this report to the Vermont Supreme Court pursuant to Administrative Order No. 20, § 5. This report covers the committee's activities for the calendar years 2022/2023. During this period, the committee met on February 4, May 6, September 9, and December 2, 2022; and April 14, June 9 and September 29, 2023 to consider amendments and other matters pertaining to the Vermont Rules of Criminal Procedure and relevant provisions of the Vermont Rules of Civil, Family and Appellate Procedure.

During 2023, Rutland State's Attorney Rosemary Kennedy, Esq. resigned from the Committee upon transitioning to a position of Assistant Attorney General. Ms. Kennedy was replaced by Dickson Corbett, Esq., Orange County State's Attorney on September 13, 2023. However, shortly thereafter, Mr. Corbett was appointed to serve as a Superior Court Judge. His seat on the Committee was filled by appointment of Ian Sullivan, Esq., Rutland County State's Attorney. The terms of Dan Sedon, Esq. and Judge Marty Maley ended. Jessica Burke, Esq. was appointed to replace Mr. Sedon; Judge Mary Morrissey was appointed to replace Judge Maley.

After long service, Laurie Canty ended her tenure on the Committee, and Gaye Paquette replaced her.

Members continuing in terms of service during this period are: Judge John Treadwell, Chair; Judge Alison Arms; attorneys Devin McLaughlin, Frank Twarog, Mimi Brill, Rebecca Turner and Domenica Padula; and Kelly Woodward, Victims' Advocate. Justice Karen Carroll serves as the Committee's Supreme Court Liaison.

This report summarizes the status of proposed rule amendments and the committee's activities under the following headings: I. Amendments promulgated by the court; II. Amendments promulgated by Legislative enactment; III. Promulgated amendments of civil rules of import to criminal proceedings; IV. Proposed Amendments that have been through the comment period and are being recommended to the court for promulgation; V. Proposed amendments being recommended for circulation to the Bar and public for comment; VI. Amendment requests considered by the committee but not recommended for further action at this time; and VII. Matters remaining on the committee's agenda.

I. AMENDMENTS PROMULGATED BY THE COURT

At the outset of 2022, the Judiciary was still operating under the terms of the Emergency Administrative Order 49, first promulgated on March 16, 2020, and subject to numerous successor amendments. Due to the Covid Emergency, the Courts were initially closed, then opened, with most judicial proceedings being conducted via video conference technology. Jury trials were suspended, and then authorized beginning on January 14, 2022, as Court premises were determined to have ventilation systems adequate to provide safety measures for those present. Alternate means of conducting jury trials were authorized. Certain of the intervening A.O. 49 amendments reflected the gradual return to capacity for in-person proceedings. On August 9, 2022, effective September 6, 2022, most of the provisions of A.O. 49 were deleted, with permanent rules or policies going into effect.¹

During calendar years 2022/2023, the court promulgated the following amendments to the criminal rules:

¹ The Criminal Rules amendments are as noted below.

1. Amendment to add V.R.Cr.P. 11(a)(4) to provide an additional procedure whereby a defendant may preserve a post-conviction relief (PCR) challenge to a predicate conviction while pleading guilty or no contest to an enhanced offense, where the State has not consented to preservation of the challenge under the terms of Rule 11(a)(3). The amendment provides that, with the approval of the court, a defendant may preserve a PCR challenge to a predicate conviction when entering a plea of guilty or nolo contendere even in cases where there is no plea agreement, or consent to the preservation otherwise given by the State, by stating on the record at the change-of-plea hearing an intent to challenge one or more of the convictions through a PCR petition, specifically identifying the convictions to be challenged, and stating the basis for the challenges. *Committee Agenda Item 2020-07* (Promulgated on April 18, 2022, effective June 20, 2022).

2. Amendment to V.R.Cr.P. 45(a)(4)(A) and (e) provide that when a filing is via email, it can be completed up to midnight of the last day; eliminates the “3 Day Rule” in calculation of times. *Committee Agenda Item 2021-05* (Promulgated on May 9, 2022, effective September 6, 2022).

3. (Emergency) Amendment of A.O. 38 to continue in effect remote proceedings rules drawn from A.O. 49 ¶ 5(b) in anticipation of the expiration of the authorizing provision of A.O. 49. Promulgated on August 9, 2022, effective September 6, 2022.

4. (Emergency) Amendment of V.R.Cr.P. 24(d) to make permanent certain provisions of A.O. 49, ¶3(b) that on an interim basis authorized judges to seat more than four, and as many alternate jurors as reasonably required, to accommodate trial disruptions that might occur due to illness. Promulgated August 9, 2022, effective September 6, 2022.

5. Order Permanently Adopting Amendments to V.R.Cr.P. 79.2, V.R.Cr.P. 53, and other division procedural rules governing possession and use of recording and transmitting devices in the courtroom to accommodate advances in technology. Promulgated on December 12, 2022, effective immediately.

6. Order Amending V.R.Cr.P. 44.2, and other division procedural rules to make clear that pro hac vice is a matter of course on motion upon presentation of the Court Administrator’s licensing card by the admittee. Promulgated December 12, 2022, effective February 13, 2023.

7. Order Deleting Most of the Provisions of A.O. 49, with others remaining in effect until September 30, 2022, to allow permanent rules to go into effect for the few remaining provisions. Promulgated August 9, 2022.

8. Order Adding V.R.Cr.P. 26.2 and Amending A.O. 47 to allow for video testimony in evidentiary criminal proceedings, upon agreement of the parties and approval of the court. The new rule sets our requirements for video testimony and procedure for issues presented. The technical requirements of A.O. 47 are adopted as applicable to proceedings under V.R.Cr.P. 26.2. Promulgated on June 5, 2023, effective September 5, 2023.

9. Order Amending V.R.Cr.P. 26(c) and (d) updates the existing rule to add notice requirements where introduction of other acts evidence is sought under V.R.E. 404(b). Nonsubstantive amendments are made to terminology in Rule 26(d). Promulgated on July 10, 2023, effective October 2, 2023.

10. Order Amending A.O. 47 (Technical Standards for Remote and Hybrid Proceedings) updating standards and addressing access to public proceedings for nonparticipants. Promulgated on July 10, 2023, effective October 2, 2023.

11. Order Amending Administrative Order No. 11, updating text of rules for Advisory Committee proceedings, including public notice/opportunity to comment; adds newly comprised Advisory Committees to

existing list; establishes a regularized process for issuance of amendments, and effective dates thereof. Promulgated on October 10, 2023, effective January 1, 2024. *Committee Agenda Item 2023-05*.

12. Order Amending V.R.Cr.P. 47(b); V.R.Cr.P. 45(d), to add provision for motion reply memoranda in criminal cases, to comport with provisions of V.R.C.P. 78(b)(1). Promulgated on October 10, 2023, effective January 1, 2024. *Committee Agenda Item 2022-08*.

II. AMENDMENTS PROMULGATED BY LEGISLATIVE ENACTMENT

During this period, there were no amendments of the Criminal Rules promulgated by legislative enactment.

III. PROMULGATED AMENDMENTS OF CIVIL/FAMILY/APPELLATE RULES OF IMPORT/RELATION TO CRIMINAL PROCEEDINGS

1. Order Permanently Adopting Amendments to V.R.C.P. 79.2 (Governing possession and use of recording and transmitting devices in the courtroom). These were originally the subject of emergency amendment; the promulgation adopts the emergency amendments as permanent. V.R.Cr.P. 53 adopts the substance of V.R.C.P. 79.2 by reference. Promulgated December 12, 2022, effective immediately.

2. Order Amending V.R.F.P. 1(a)(1) and 17, to make V.R.C.P. 43.1 applicable to delinquency proceedings for purposes of remote proceedings under V.R.F.P. 17; adopts provisions of amended V.R.Cr.P. 26.2 regarding remote witness testimony, given applicable confrontation rights. Promulgated July 10, 2023, effective September 2, 2023.

3. Order Amending V.R.A.P. 28(e) and 30, to make a printed case a requirement for most appeals, even where there is an appeal volume. And to require that if there is no printed case, or a document is not in the printed case, parties must cite to the location of the document in the appeal volume. Promulgated on October 10, 2023, effective January 1, 2024.

IV. PROPOSED AMENDMENTS RECOMMENDED FOR PROMULGATION

There are no proposed amendments that are recommended for promulgation at this time.

V. PROPOSED AMENDMENTS RECOMMENDED FOR PUBLICATION/CIRCULATION TO THE BAR AND COMMENT

The Committee has recommended that the Court circulate to the public and the bar for comment the following proposed amendment:

Proposed Order Amending V.R.Cr.P. 41.1(b) and (c) to make the rule consistent with V.R.Cr.P. 41(d)(4), enabling applications for nontestimonial identification orders to be made by reliable electronic means, as well as in person, with supporting affidavits sworn to either in person, or by telephone if the application is by reliable electronic means. (Comments due by February 12, 2024). *Committee Agenda Item No. 2023-04*.

VI. PROPOSED AMENDMENTS NOT RECOMMENDED

1. Amendment to Rule 10(b)(2) of the Rules for Qualification, List, Selection and Summoning of All Jurors. Inquiry was made by the Division for Trial Court Operations as to whether, in order to provide for electronic distribution of completed juror questions under established administrative procedures, amendment of any applicable procedural rules would be required. Upon due consideration, the Committee concluded that consistent with the existing rules, including those most recently amended in 2021, no rules amendment would be necessary to enable electronic distribution.

2. Proposal of Amendment of V.R.Cr.P. 5 to Comport with 2020 amendment of F.R.Cr.P. 5(f) (Oral and Written Orders at Initial Appearance Directing *Brady* Discovery Disclosures) (*Request of Will Kraham, Esq.*)

The Committee considered a proposal that Rule 5 be amended to require the Court to enter certain *Brady* disclosure orders at time of initial appearance, consistent with relatively recent amendments to F.R.Cr.P. 5. Under the federal procedure, at initial appearance in each case, the Court must issue both oral and written orders to the prosecution for compliance with the obligation to disclose exculpatory evidence to the defendant, as well as to inquire of the prosecution whether it confirms understanding of this obligation and will fulfill it. Upon due consideration the Committee concluded that adoption of the federal Rule 5(f) was not necessary: First, a defendant's discovery rights under Vermont law are already far broader than those accorded in the federal system by reason of the scope of V.R.Cr.P. 16, V.R.Cr.P. 15 (depositions), related procedural rules, and Constitutionally-premised decisions of our Supreme Court. Second, the amendment does not fundamentally add to existing mutual discovery obligations which generally serve to facilitate case progress, subject to judicial intervention where necessary. The federal system remains one in which a defendant's discovery rights are significantly limited, and the federal amendment appears to be focused on *Brady* disclosures only.² Vermont judges have ample authority under Rule 16.2 to closely regulate discovery as necessary, and to impose meaningful sanctions for discovery order violations. Vermont 16.2 is more broadly stated than the equivalent federal rule. *Committee Agenda Item 2023-01.*

3. V.R.Cr.P. 16; Amendments to Comport with 2022 amendment of F.R.Cr.P. 16(a)(1)(g), (b)(1)(c). (Additional Discovery Disclosure Obligations for Prosecution and Defense with Respect to Expert Witnesses)

The Committee considered recent substantial amendments of federal Rule 16 related to expert witness disclosures by both prosecution and defense. These were intended to address perceived shortcomings due to a lack of enforceable deadlines, and the existing rule's lack of specificity as to what expert information must be disclosed. The federal amendments also require certain disclosures as to the expert witness' history, going back up to four years (witness testimony in other cases) and ten years (publications authored). Committee consensus was that the federal amendments would be unduly burdensome, given Vermont practice under existing rules, and ample authority for the court to regulate expert witness discovery. *Committee Agenda Item 2023-02.*

VII. MATTERS REMAINING ON THE COMMITTEE'S AGENDA

The following matters remain on the Committee's agenda for further consideration:

1. Review of provisions of V.R.Cr.P. 43.1 (Participation/Testimony by Video, Hybrid, or Audio Conference). Review of the provisions of these amendments (promulgated on July 10, 2023, effective September 2, 2023, as they exist and may be amended, per direction of the Court in its July 10, 2023 order amending A.O. 38, ¶ 3, to consider whether any provisions of the former rule related to remote or hybrid participation in criminal proceedings should be adopted in the criminal rules, providing any recommendations no later than June 30, 2025.

2. Speedy Trial Standards (V.R.Cr.P. 48(b)(1); A.O. 5/A.D. 24) Review Joint Subcommittee. Per request of the Court, a joint subcommittee of the Criminal Division Oversight and Criminal Rules Committee continues to engage in its work of review of the referenced authorities, to provide a report and

² V.R.Cr.P. 16(b)(2) already contains an explicit prosecutorial obligation to "as soon as possible, after a plea of not guilty" to disclose to the defendant "...any material or information...which tends to negate the guilt of the defendant...or would tend to reduce his punishment..."

recommendations as to amendments. A substantial part of the subcommittee's work has been given to securing meaningful data as to annual case age to disposition, to inform any recommendations as to current and relevant speedy trial and case disposition guidelines. *Committee Agenda Item 2021-04*).

3. 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. A subcommittee has provided a report to the Committee. *Committee for consideration of short, clarifying amendments to authorize recording of proceedings, in the discretion of the Court. (Subcommittee: Turner, Kennedy, Sedon, Lanthier, Arms). Committee Agenda Item 2021-02.*

4. Proposal to amend V.R.Cr.P. 41.1(m), to correct/revise/clarify existing reference to the term "Offense" in conjunction with issuance of nontestimonial identification orders in delinquency proceedings. *Committee Agenda Item 2023-04.*

5. V.R.Cr.P. 5(c) and V.R.P.A.C.R. 6(b)(5). *(Issue under consideration by Advisory Committee on Rules for Public Access to Court Records).* Under V.R.Cr.P. 5(c), a criminal information and affidavit is filed by the judge after completing arraignment; V.R.P.A.C.R. 6(b)(5), says it is a public record once probable cause is found. Related are the statutes that make information and affidavits confidential if the person is referred to Diversion after probable cause is found. 3 V.S.A. §§ 163(c)(5); 164(e)(5). *Committee Agenda Item 2023-06.*

The Committee wishes to thank all the members of the Vermont bench and bar, the members of the Joint Legislative Committee on Judicial Rules, Court Administrator Therese Corsones, Deb Laferriere, Emily Wetherell, Esq., Larry Abbott, and others who have participated in the rule-making process through their thoughtful suggestions, comments, and assistance and to especially thank Dan Sedon and Laurie Canty, for their long and valued service and guidance as members. The committee also wishes to thank Hon. Karen Carroll for her service as the Supreme Court liaison Justice. Finally, the Committee thanks the Reporter - the Hon. Walter M. Morris, Jr. – for his extensive and invaluable contributions to the work of the Committee and for his preparation of this Report.

Respectfully submitted,

John R. Treadwell, Chair
For the Committee:
Hon. Alison Arms
Mimi Brill
Jessica Burke
MaryKay Lanthier (VBA Representative)
Devin McLaughlin
Hon. Mary Morrissey
Gaye Paquette
Ian Sullivan
Frank Twarog
Hon. Charity Clark (Domenica Padula, designee)
Hon. Matthew F. Valerio (Rebecca Turner, designee)
Kelly Woodward
Hon. Justice Karen Carroll (Court Liaison Justice)
Walter M. Morris, Jr. (Committee Reporter)