

[AS APPROVED BY COMMITTEE ON JANUARY 19, 2024]

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

**MINUTES OF MEETING  
SEPTEMBER 29, 2023**

The Criminal Rules Committee meeting commenced at approximately 2:01 p.m. via Zoom video conference. Present were Committee Chair Judge John Treadwell, Judges Mary Morrissey and Alison Arms, Devin McLaughlin, Jessica Burke, Mimi Brill, Rebecca Turner, Mary Kay Lanthier, Ian Sullivan, Gaye Paquette and Kelly Woodward. Committee Reporter Walt Morris was also present. Supreme Court Liaison Justice Karen Carroll, Domenica Padula and Kelly Woodward were absent. Assistant Attorney General Rosemary Kennedy was present on behalf of Ms. Padula.

Chair Treadwell opened the meeting welcoming three new Committee members who had recently been appointed: Mary Morrissey (to replace Marty Maley); Jessica Burke (to replace Dan Sedon); and Ian Sullivan (to replace Dickson Corbett).

**1. Approval of April 14, 2023 Meeting Minutes.**

On motion of Devin McLaughlin, seconded by Gaye Paquette, the minutes of the June 9, 2023 meeting were unanimously approved.

**2. Report of June 19, 2023 LCJR Meeting.**

Judge Treadwell provided a report of this meeting, at which LCJR considered the promulgated V.R.Cr.P. 26.2 and proposed V.R.Cr.P. 26(c) and (d) amendments. He indicated that while the Committee was lacking a quorum, those members present expressed no objections to either of the amendments. Tim Lueders-Dumont appeared on behalf of the State's Attorneys, indicating that changes to 26.2 in response to comments that had been made at the preceding LCJR meeting were appreciated, and where changes were not made, the rationale was understood. There were no LCJR comments in opposition to the 26(c) and (d) amendments.

**3. Promulgated Rules:**

Since the June 9<sup>th</sup> meeting were noted, with effective dates as indicated—

- V.R.Cr.P. 26.2 (Remote Witness Testimony by Agreement w/Waiver)(*Promulgated on June 5, 2023, eff. Sept. 5, 2023*)
- V.R.C.P. 43.1 (Participation/Testimony by Video, Hybrid, or Audio Conference; A.O. 38 (Remote Participation/Testimony in Criminal Division); V.R.F.P. 17 (Incorporates V.R.Cr.P. 26.2 by reference for delinquency and Youthful Offender proceedings, with exceptions; A.O. 47 (Technical Standards for Remote and Hybrid Proceedings)

- V.R.Cr.P. 26(c) and (d); V.R.E. 404(b) Other Crimes, Acts Disclosures; Amendment of 26(c) to Comport with Current 404(b) Disclosure Requirements; Companion Amendment of 26(d) to Comport with Amendment of V.R.E. 807 as to Appropriate Terminology

*(All of the above amendments were promulgated on July 10, 2023, eff. October 2, 2023).*

**4. 2022-08: V.R.Cr.P.47(b); V.R.Cr.P. 45(d)--Provision for reply memoranda** (to comport with provisions of V.R.C.P. 78(b)(1). *(Published for Comment; Comment Period closed on July 10, 2023).*)

The Committee briefly discussed these amendments, for which no comments had been submitted. On Motion of Rebecca Turner, seconded by MaryKay Lanthier, the Committee unanimously approved of the amendments with recommendation for promulgation.

**5. 2023-03: V.R.A.P. 28(e) and 30; Amendments to Require that Appellant File a Printed Case** *(Published for comment on June 7, 2023; comment period closed on August 7, 2023)*

The referenced amendments have been published for comment and will be further considered by the Civil Rules Committee and considered for promulgation recommendation. As with its review of the proposal at the June 9<sup>th</sup> meeting, no Committee objection to the text as published was stated. The Reporter will notify the Civil Rules Committee Chair.

**6. Promulgated V.R.C.P. 43.1; Further Committee Review and Provision of Comments/Suggested Further Amendments to Comport with Criminal Division Practice and Imperatives.**

The Committee continued its discussion begun on June 9<sup>th</sup>, of the provision in the recently-promulgated amendments to A.O. 38 (¶ 3) which directs that the Criminal Rules Committee to engage in a review of the operation of the provisions of A.O. 38, in relation to V.R.C.P. 43.1, V.R.F.P. 17, and V.R.P.P. 43.1, as they exist and as may be amended, to consider adoption of any provisions of the same related to remote or hybrid participation in criminal proceedings, and to advise the Court no later than June 30, 2025 whether the Order should be further amended. Devin McLaughlin read this charge to the Committee.

At the June 9<sup>th</sup> meeting a 43.1 review subcommittee was established for this purpose, with initial membership of Devin McLaughlin, and Judges Arms and Treadwell. New Committee member Ian Sullivan agreed to join in the efforts of this subcommittee. Judge Treadwell suggested that it made no sense to commence review sooner than six months of experience with the amended rule had ensued, in order to provide an experienced-based assessment. Judge Arms suggested that a survey of the bar, or assistance of the VBA in securing attorney views as to practice under the amended 43.1 would be helpful. Committee consensus was to defer any action on the part of the subcommittee for at least six months. This item will be brought forward on the meetings Agenda at an appropriate future date.

**7. 2021-04: (Speedy Trial Standards) V.R.Cr.P. 48(b)(1); A.O. 5 Review Joint Subcommittee;** *(Report of Progress in Subcommittee Meetings, and Discussion of Data Needs and Alternative Recommendations. Case Age Data Update; Proposed Amendments of Rule*

48(b)(1)). See also, *Administrative Directive 24 (2010)*. (Subcommittee members: Arms; Lanthier; Padula; Sedon; for Crim.Oversight, Sally Adams; Josh O’Hara; John Pacht)

Judge Arms provided an update on the efforts of this joint subcommittee since the June 9<sup>th</sup> Committee meeting. She indicated that the work of the subcommittee had continued on two fronts: (1) working with Carolyn Keyes to refine a case disposition data tool that would shed light on time to disposition based on case types (felony/misdemeanor), with unit-specific data and possibly key case features contributing to delay. This, to inform subcommittee recommendations as to modification of the existing disposition guidelines of Administrative Directive No. 24; and (2) refinement and completion of a subcommittee report for review and comment by the Criminal Rules and Criminal Division Oversight Committees.

Judge Treadwell asked if the subcommittee had a deadline for completion of a report. Reporter Morris indicated that the subcommittee had set its own goal of a Fall, 2023 report, but that the effort to secure reliable and current case disposition data had moved that goal forward into 2024.

The Committee engaged in further discussion of the key case delay factors in A.D. 24, and whether there could be any data provided as to the impact of those delays. Reporter Morris indicated that Court Operations division had instructed staff to “flag” competency determinations appearing the case record, in an effort to identify that activity in data searches. However, his understanding was that such “flagging” and the ability to retrieve such data, would be prospective only. Jessica Burke inquired as to whether cases in diversion status were being considered as among “active” and thus aging cases. Ian Sullivan indicated that cases in diversion status were considered to be inactive. Reporter Morris stated that inactive cases are culled out of the data that Carolyn Keyes is providing to the subcommittee, so they do not count in the case age data sets.

Dan Sedon has completed his terms of service on the Committee, warranting a Criminal Rules replacement on the joint Speedy Trial Committee. Ian Sullivan agreed to join the joint subcommittee in Dan’s place. The subcommittee will be meeting again on November 13<sup>th</sup>, and a further report of progress will be given at the next Committee meeting.<sup>1</sup>

**8. 2021-02: V.R.Cr.P. 53 and V.R.C.P. 79.2 (Recording Court Proceedings); Issues Associated with Defense Request to Video Record Jury Trial.** Rules 53/79.2 authorize *audio* recording of proceedings by participants, subject to certain limitations and court discretion, but prohibit video recording by participants absent good cause shown.

The issue presented in prior Committee discussions is whether Rule 79.2(d)(3)/(e) should have minor, clarifying amendments to make it clearer that despite a general prohibition on participant video recording, the Court would have authority, for good cause shown, to authorize video recording consistent with 79.2(e).<sup>2</sup> The particular example bringing the issue forward was the decision of the trial court, in resumption of trials with modified jury selection and significant courtroom reconfiguration procedures, to deny a defense request to video record proceedings to preserve a record for assessment of trial fairness. See, *State v. Alvarez*, Case No. 108-2-20

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<sup>1</sup> Which is scheduled for December 8, 2023.

<sup>2</sup> See Minutes, 6/4/21, pp. 4-6; 8/13/21, pp. 3-4; 11/19/21, pp. 3-5; 5/6/22, pp. 3-5; 12/2/22, p.8; 6/9/23, pp. 2-3.

WmCr, 5/10/21 (authority to grant request deemed unclear; Defendant had not expressly relied upon a good cause exception).

A subcommittee had considered and prepared a draft of focused amendments for this purpose but action on them was held in abeyance during the months awaiting and responding the package of remote proceedings amendments prepared and proposed by the Special Advisory Committee on Remote Hearings. In the June 9<sup>th</sup> discussions, Judge Treadwell noted that the specific presenting issue in the *Alvarez* case would appear to be moot, in view of widespread resumption of jury trials as before the Covid emergency, without special procedures for jury selection, or significant courtroom modifications previously employed. Others expressed the view that there were still situations that might warrant video recording, such as for reviewing accuracy of interpreter services.

In the renewed discussions of September 29<sup>th</sup>, the Committee had before it two alternative drafts: (1) the subcommittee recommendation, and (2) a discussion draft provided by Reporter Morris. This discussion draft would add text to the existing bar in 79.2(c)(3)(A) to expressly refer to the good cause exception of 79.2(e)(3), and text to the latter section to clarify the meaning of “good cause”.<sup>3</sup>

Judge Arms expressed her view that the rule did provide the court with discretion to allow participant recording under the “good cause” exception of 79.2(e)(3). She felt that any amendment should reflect a balance between authorizing video recording for specific basis related to fair trial, and merely removing the current general prohibition. Rose Kennedy agreed, stating that the court should remain the arbiter, and it would be chaotic to just remove the general bar. Ian Sullivan shared his observation that in particular circumstances, without specifying a factual scenario, there could be an established need to provide video recording as to demonstrative behavior in the courtroom.

The Committee consensus was to have the subcommittee meet again, and a draft proposal forwarded again for consideration at the next meeting, with alternative versions of amendment as necessary, to facilitate consideration of the best track to promulgation, if that was the Committee’s recommendation. This, in hopes that a published proposal of amendment would at least bring forward broader comment in favor of promulgation (or not).

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<sup>3</sup> (c)(3) *Participants*.

(A) A participant may possess and use a device in a courtroom, and may orally record, subject to the general limits on use in paragraph (d)(1) and the excluded items in subdivision (e). A participant may not use a device to visually record proceedings, except under terms of a waiver authorized by the court upon showing of good cause, as set forth in paragraph (f), or to transmit under any circumstance. The court may permit, preclude, or limit use of a device by a participant as set forth in paragraph (e)(3).

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(e)(3)

• other good cause. including but not limited to a particularized showing of a case-specific need for permitting the mode and scope of recording requested.

**9. Rule 10(b)(2); Provision of Copies of Juror Questionnaires *Electronically* to Attorneys and Parties.** (*Request of Laurie Canty; update from Reporter Morris*).

Reporter Morris indicated that this issue appears to have been resolved without need for rules amendment, with administrative procedures in place for encrypted provision of completed questionnaires electronically to counsel with cases scheduled for jury selection.

**10. 2023-04—Amendment of 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. Amendment of V.R.Cr.P. 41.1(m)(1)(definition of “offense”) and 41.1(n)(definition of “minors”).**

The Committee considered these amendments, brought forward by Judge Treadwell, in two parts. As to NTO issuance via reliable electronic means, the Committee unanimously approved of the proposed amendments, on Motion of Devin McLaughlin, seconded by Rebecca Turner, with recommendation for publication for comment.

As to the 41.1(m)(1) and (n) amendments (addressing NTOs issued as to minors), the Committee considered both the existing sections and suggested definitions to be problematic. MaryKay Lanthier stated that juvenile delinquency proceedings have historically been considered to be entirely rehabilitative, and not criminal in nature. And, that usage of the term “offense” and as a matter that would be “triable” create concern. Rebecca Turner added that without any stated limitations, NTOs could potentially be extended to even the most minor matters of delinquency. Further, as to the term “minors”, given recent legislative enactments extending the jurisdiction of the family division in delinquency and Youthful Offender proceedings, individuals who are not “minors”, i.e., over the age of majority, could likely have interests that should be specifically clarified with respect to NTO process. The Committee consensus was to pass on any approval or recasting of these latter amendments, with a suggestion that Marshall Pahl of the Defender General’s Office be invited to confer with the Committee as to amendment of these sections, with consultation with other members of the Family Rules Committee conversant with juvenile delinquency procedure. These amendments will be considered further on the next meeting Agenda.

NEW BUSINESS:

**11. 2023-05: Administrative Order No. 11 (Proposed Rules; Public Notice and Opportunity to Comment)** (*General revisions and updates; guidance re: effective date of rules; Comment period closed on August 7, 2023*).

These amendments serve to update text to add reference to newer Advisory Committees that were not in existence at time of last amendment, and to establish uniform issuance and effective dates for newly promulgated rules. There were no Committee member comments as to the substance of the amendments, nor any opposition, and the Reporter will forward that information on behalf of the Committee to Emily Wetherell, Deputy Clerk of the Court.

**12. 2023-06: Criminal Rule 5(c) and PACR Rule 6(b)(5)** (*Issue under consideration by the Advisory Committee on Rules for Public Access to Court Proceedings*).

Under V.R.Cr.P. 5(c), a criminal information and affidavit is filed by the judge after *completing arraignment*. Cf. PACR Rule 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).

Reporter Morris indicated that this issue, and the differing text in these rules, are being considered by the Advisory Committee on Rules for Public Access. The item was relatively new to the Committee's agenda, and in the interests of time, was passed to consideration at next meeting.

Per the new meetings calendar established by the Committee, the next Criminal Rules Committee meeting will be held on Friday, December 8<sup>th</sup> at 9:30 a.m. The meeting adjourned at approximately 4:00 p.m.<sup>4</sup>

Respectfully submitted,

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

[1/8/24]

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<sup>4</sup> The December 8<sup>th</sup> meeting was subsequently postponed due to a Defender General training day, to Friday, January 19<sup>th</sup> at 9:30 a.m.