

[As Approved by Committee at April 12, 2024 Meeting]

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

**MINUTES OF MEETING
January 19, 2024**

The Criminal Rules Committee meeting commenced at approximately 9:31 a.m. via Zoom video conference. Present were Committee Chair Judge John Treadwell, Judge Alison Arms, Devin McLaughlin, Domenica Padula, Jessica Burke, Rebecca Turner, Mary Kay Lanthier and Kelly Woodward. Committee Reporter Walt Morris was also present. The following members were absent: Judge Mary Morrissey, Mimi Brill, Ian Sullivan, Gaye Paquette and Frank Twarog. Supreme Court Liaison Justice Karen Carroll was unable to attend as well.

1. Approval of September 29, 2023 Meeting Minutes.

On motion of Alison Arms, seconded by Devin McLaughlin, the minutes of the September 29, 2023 meeting were unanimously approved.

2. Report of November 13, 2023 LCJR Meeting.

Judge Treadwell provided a report of this meeting, at which LCJR considered the promulgated amendments to V.R.Cr.P. 26(c) and (d) (effective 10/2/23), and V.R.Cr.P. 47(b) and (c) and 45(d) (effective 1/1/24). He indicated that the Committee members present expressed no objections to either of the amendments (both had been previously reviewed by LCJR at its June 19th meeting).

3. Promulgated Rules:

Since the September 19th meeting were noted, with effective dates as indicated—

- **2022-08: V.R.Cr.P. 47(b)&(c); V.R.Cr.P. 45(d)--Provision for reply memoranda** (to comport with provisions of V.R.C.P. 78(b)(1). *(Promulgated on October 10, effective January 1, 2024)*)
- **2023-03: V.R.A.P. 28(e) and 30; Amendments to Require a Printed Case** *(Promulgated on October 10, effective January 1, 2024)*
- **2023-05: Administrative Order No. 11 (Proposed Rules; Public Notice and Opportunity to Comment)** *(Promulgated on October 10, 2023; effective January 1, 2024).*

- 4. Proposed Rule: 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. (Published for comment on December 12; comment period closes on February 12, 2024).

OLD BUSINESS

5. 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.

This Agenda item is brought forward for Committee notice, as the consensus is to defer any review until at least a six-month period of experience in implementing Rule 43.1 and other recently promulgated remote participation/testimony amendments. (*i.e.*, until March/April, 2024).

6. 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 Criminal Oversight, Sally Adams; Josh O'Hara; John Pacht)

Judge Arms indicated that the Joint Subcommittee would be meeting this afternoon, following the Committee's January 19th meeting. The Subcommittee plan is to review and hopefully approve of a final draft report, include any revised case disposition deadline dates. Judge Arms provided an outline of the content of the draft report. Reporter Morris commented that the draft as it stands represents substantial work on the part of a number of the Subcommittee members. Judge Arms indicated that the next step would be provision of the report to both the Criminal Oversight, and Rules Committees, for their comment and suggestions, and further consideration of any comments or recommendations, before casting any final report for submission to the Court. Rebecca Turner asked that meaningful opportunity for comment by the full Committees be provided, and that any draft be provided as soon as possible, to permit such consideration. Judge Arms emphasized that that would absolutely be the plan and process. The issue of case backlogs as related to case disposition status and expectations was mentioned. Judge Arms agreed that this should be a consideration, and encouraged Committee members to offer their views to her or other members of the Subcommittee.

7. 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. (Subcommittee: Turner, Arms, Lanthier, Sullivan, Treadwell).

Rules 53 and 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).¹ At the September 29th meeting, after Committee consideration of two alternative drafts of the amendments,² the Subcommittee reviewing the proposed amendments was asked to meet again, to

¹ 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; 9/29/23, p. 3-5.

² One recommended by the subcommittee; another discussion draft offered by the Committee Reporter. In pertinent part, the subcommittee recommendation was to remove the general prohibition on video recording altogether, leaving latter provisions of the rule which serve to guide the Court's discretion in approving or denying requests to video record; the

consider any revisions that might be made, to include alternative drafts as necessary, with the goal of a consensus draft that might be proposed for publication and comment, if that were the Committee's decision. Any proposal would necessarily also be circulated to, and subject to comment by other rules committees in interest, particularly so in the case of these amendments, in that Rule 79.2 was the product of long consideration by a special committee comprised by the Court to consider rules that would be applicable across the divisions of the Superior Court.

The Criminal Rules subcommittee was unable to meet in the interim. The Committee returned to discussion of the specific amendments that had been suggested. Judge Treadwell again inquired as to whether there was still a need for amendments, referencing the circumstances of the *Alvarez* case, in which the existing rule would have categorically prohibited any video recording of jurors, and there would have been nothing to prevent counsel from making a video recording of the courtroom arrangements, including juror seating during voir dire and trial, when the court was not in session, to provide a record of courtroom alterations.

Committee focus turned to the text of each of the amendment alternatives. The Committee discussed, but did not reach any consensus, on the issue of whether any distinction should remain in the rule between its treatment of oral recording and video recording of proceedings. Judge Treadwell stated that the original Joint Committee made a very calculated distinction between the two, based upon consideration that misuse of an unauthorized video recording could be far more damaging than an oral recording.

Ultimately, the Committee requested that the Reporter circulate a redraft, with accompanying explanatory Reporters Notes, for consideration at next meeting, in an effort to reach consensus on proposed amendments that would reflect clarification, in contrast to substantive change, yet establishing that the rule does permit judicial discretion to permit participant video recording in a given case. Reporter Morris stated his view that the approach of clarification might be considered to facilitate approval of any amendments on the part of other rules Advisory Committees considering them. The redraft would include modified text in proposed amendment of 79.2(d)(3)(A) to clarify the Court's authority to permit participant video recording (under the criteria of subsection (e)(3)), with an accompanying explanatory Reporters Note again clarifying that the Court does have such discretionary authority.

As indicated, a revised draft will be provided for consideration at the next meeting, incorporating member comments and consensus as to changes that were recommended.

8. 2023-04—Amendment of V.R.Cr.P. 41.1(m)(1)(definition of “offense”) and 41.1(n)(definition of “minors”).

These amendments of V.R.Cr.P. 41.1(m)(1) and (n) (addressing NTOs issued as to minors), are aimed at revision of dated terms in the present rules that the Committee considers to be now outmoded and problematic. As noted at the September 29th meeting, juvenile delinquency proceedings have historically been considered to be entirely rehabilitative, and not criminal in nature. And, that continued usage of the terms “offense” and application to matters that would be “triable” create concern. 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

Reporter's 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”.

of majority, could likely have interests that should be specifically clarified with respect to NTO process. The Committee suggestion was that Marshall Pahl of the Defender General's Office be invited to confer with the Committee, with consultation with other members of the Family Rules Committee conversant with juvenile delinquency procedure. Rebecca Turner reported that Marshall was unable to attend the meeting but suggested that the comparable rules of other jurisdictions be consulted. She mentioned North Carolina authority which sets specific standards for NTOs addressed to juveniles, in terms of procedural protections, and limitations upon the types of offenses (i.e., more serious offenses) which are permitted. Devin McLaughlin shared a section of the original Reporters Note to Rule 41.1 that provides indication that NTOs for juveniles are intended to be limited to serious misdemeanors and felonies. Ms. Turner replied that the one year category is actually inconsistent with Vermont law, which establishes the misdemeanor threshold at an offense with potential sanction of over two years.³ Committee consensus was to ask Ms. Turner, and hopefully Mr. Pahl to attend and provide a report at the next Committee meeting as to specific suggestions, to include information as to what approach other jurisdictions with rules comparable to 41.1(n) have taken with respect to minors, delinquency cases and NTOs.

9. Criminal Rule 45(e); Restoring the “3 Day Rule”. *Proposal to restore the rule under consideration by Advisory Committee on Rules of Civil Procedure, following its elimination, per amendment effective September 6, 2022.*

The former rule was eliminated at the initiation of the Civil Rules Committee, with elimination also incorporated into procedural rules of other divisions, including V.R.Cr.P. 45(e), in an effort to simplify the “time” counting rules, and in recognition that self-representers could now file via email, up to midnight on the date a specified filing was due. The Criminal Rules Committee supported these amendments. Reporter Morris indicated that at its January 5th meeting, the Civil Rules Committee had now withdrawn its consideration of this proposal, in part owing to lack of reliable data that would support restoration of the rule. In view of its withdrawal of the proposal, Civil Rules was no longer seeking the input of the other Rules Advisory Committees.

Following brief discussion, the consensus of the Committee was also that an amendment to restore the “3-day rule” to 45(e) was not warranted, no action was necessary, and the item is to be removed from the business agenda going forward.

10. Review/Approval of 2022-23 Annual Report to Supreme Court

Reporter Morris circulated a draft Report to the Supreme Court to members in advance of the January 19th meeting. In brief discussion, no member had suggested edits or objection to offer as to the content of the draft Report. Consensus was to wait one week following the meeting to permit any member to submit

³ The Reporters Notes to the original promulgation of V.R.Cr.P. 41.1 indicate that the rule is taken from “proposed Federal Rule 41.1 (April 1971), 52 F.R.D. 409, 462 (1971)”. However, the proposed federal rule was never adopted, and no federal rule equivalent to V.R.Cr.P. 41.1 is found in the current body of the Federal Rules of Criminal Procedure. See Note, “*Beyond The Davis Dictum: Reforming Nontestimonial Identification Rules and Statutes*”, 79 U. Colo. L. Rev. 189, 198-199 (2008): “Draft Rule 41.1 met its end before ever being submitted to the Supreme Court for approval. The Judicial Conference's Committee on Rules of Practice and Procedure quashed the draft rule because it “evoked a number of serious questions which require further study,” and because the Conference wished to benefit from “experience with such procedure in the states and . . . [from] judicial consideration of the Constitutional questions involved.” In contrast to V.R.Cr.P. 41.1(n), the proposed federal rule did not contain any provisions of application to minors, or delinquency.

comments/suggested edits to the Reporter, after which the Committee Chair would submit the Report to the Court.

NEW BUSINESS

11. 2023-06: V.R.Cr.P. 5(c) and P.A.C.R. 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. 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).

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. An update will be available for report on PACR Committee action on the issue then.

Per the new meetings calendar established by the Committee, the next Criminal Rules Committee meeting will be held on Friday, March 29th at 9:30 a.m. On motion of Devin McLaughlin, seconded by Rebecca Turner, the meeting was adjourned at approximately 10:50 a.m.

Respectfully submitted,

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

[2/5/24]