

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

**MINUTES OF MEETING  
September 9, 2022**

The Criminal Rules Committee meeting commenced at approximately 9:33 a.m. via Zoom video conference. Present were Committee Chair Judge John Treadwell, Kelly Woodward, Devin McLaughlin, Mimi Brill, Domenica Padula, Rebecca Turner, Mary Kay Lanthier, and Frank Twarog. and Committee Reporter Judge Walt Morris was also present. Judge Marty Maley, Laurie Canty, Dan Sedon and Supreme Court Liaison Justice Karen Carroll were absent.<sup>1</sup>

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

**1. Approval of May 6, 2022 Meeting Minutes.**

On motion of Rebecca Turner, seconded by Mary Kay Lanthier, the minutes of the May 6th, 2022 meeting were unanimously approved.

After approval of the May minutes, the following two new business items were quickly addressed:

**2. 2022-11: VRCrP 24(a)(2), VRPACR 6(b)(Appendix) and Juror Selection Rule 10(b)(2); Provision of Copies of Juror Questionnaires *Electronically* to Attorneys and Parties. (Request of Laurie Canty)**

Laurie Canty reported that the Judiciary will not be moving to a new Tyler Technologies jury management system; work is ongoing to provide adaptations to the existing Jury Plus system. The plan is to ultimately provide electronic access to completed juror questionnaires by counsel, and self-representers, with incorporated security features. Laurie will advise as to developments on the technology/administrative side when appropriate to facilitate rules amendment when needed.<sup>2</sup>

**3. 2022-12: VRCrP 26(c); VRE 404(b) Other Crimes, Acts Disclosures; Amendment of 26(c) to Comport with Current 404(b) Disclosure Requirements. (Request of Mimi Brill, on behalf of Evidence Rules Committee)**

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<sup>1</sup> Rose Kennedy was not present, having resigned from her office, with appointment of a new State's Attorney member pending.

<sup>2</sup> Juror Rule 10(a)(2) as amended provides that: "Copies of completed juror questionnaires and information contained therein shall be made available to the parties and their attorneys. The court may make such additional orders as appropriate to protect against unauthorized disclosure or distribution of copies provided, either to attorneys or self-represented parties." The Reporters Note to the 2021 amendments states that "Current practice is that nonelectronic copies of completed juror questionnaires are provided to counsel and parties under Rule 10, but policy questions are presented as to whether such information may be provided to counsel and parties in electronic form as well; whether the electronic versions of the completed questionnaires can be securely provided via the Odyssey case-management system or the Judiciary efilng portal; and what means exist to prevent unauthorized disclosure of any electronic version once transmitted to counsel or parties. Those issues are left to further development in light of the resumption of jury trials and continued implementation of electronic filing and the Odyssey case management system." Hence the need for clarification of the Rule at such time as the appropriate technology, including security measures, are in place.

In brief discussion, the Committee consensus was to consider a draft incorporating the Rules of Evidence Committee's recommendation for amendment of V.R.Cr.P. 26(c). It was also agreed that amendment of V.R.Cr.P. 26(d) was warranted to update terminology appearing in a proposed amendment of V.R.E. 807.<sup>3</sup> A draft of the amendments will be provided for next meeting.

**4. 2015-02: Proposed VRCrP 26.2; Video Testimony by Consent/Agreement of Parties.**  
(Published for Comment, Comment period closed on August 8, 2022).

Chair Treadwell reported that this long-worked proposal of the Committee had yielded one comment in response to publication, from Carol Callea of the Inmate Assistance Program. The comments were essentially directed at perceived inadequacies in the remote participation technologies, and not addressed to substantive provisions of the proposed Rule 26.2. In any event, the proposed amendment contains separate provision adopting the technical standards for video and audio conference of A.O. 47 for witness testimony where authorized under proposed Rule 26.2. Since the Committee next moved on to consideration of a package of proposed rule amendments proposed by the Special Advisory Committee on Remote Hearings, addressed to both circumstances of in-person vs. remote appearances and provision of testimony remotely, no formal action was taken on promulgation recommendation of Rule 26.2, until the relationship to and impact of the Remote Hearings proposals upon the proposal could be considered. (See discussion, *infra*, including references to 26.2).

**PRIORITY NEW BUSINESS ITEMS:**

**5. 2022-13: Special Advisory Committee on Remote Hearings; Proposals of Amendment of V.R.C.P. 43.1; V.R.Cr.P. 26(a)(ii); V.R.F.P. 17.** (Distributed to Procedural Rules Advisory Committee Chairs and Reporters on August 18, 2022).

**6. 2022-14: Promulgated A.O. 38 Amendments (Remote Proceedings in Criminal Division)** (Promulgated ,Effective 9/6/22; Published for comment, comment period closing on October 17, 2022).

The bulk of the ensuing Committee discussions at the September 9<sup>th</sup> meeting focused upon this group of amendments which are addressed to standards of party and judge presence, in person or remotely at court hearings, as well as provision of witness testimony remotely, whether by party agreement or per court order. The Court promulgated the amendments to A.O. 38 in conjunction with transition away from the emergency provisions of A.O. 49, and ultimate revocation of A.O. 49, with intent to carry forward those provisions of A.O. 49 dealing with remote vs. in-person appearances in criminal division cases, and provision of witness testimony by agreement of the parties.

Given the timing of distribution of the Remote Hearings Committee proposals, the Committee had limited time to consider those proposed amendments in advance of the September 9<sup>th</sup> meeting.

Emily Wetherell provided an overview of the proposed amendments, and the process of their development by the Special Advisory Committee on Remote Hearings. She indicated that it was hoped that comments and recommendations could be provided by each of the respective Rules Advisory Committees in time for consideration by the Court at its November administrative meeting. At the outset, she acknowledged that when V.R.C.P. 43.1 was promulgated in 2019, it was of no application to criminal

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<sup>3</sup> The V.R.E. 807 terminology was ultimately amended as proposed in a promulgation of November 7, 2022, effective January 9, 2023.

division proceedings, with the extant A.O. 38 covering video and audio conferencing there. The recent amendment to A.O. 38 adopts a limited incorporation of V.R.C.P. 43.1 factors for consideration by the judge in determining whether, and under what conditions, remote participation and testimony will be authorized.

In the ensuing discussion, the first principal issue with adoption of the proposed V.R.Cr.P. 43.1 (and V.R.Cr.P. 26) for criminal proceedings was identified in the proposed definition of non-evidentiary proceedings (where presence of the defendant would not be required) as proceedings in which the Vermont Rules of Evidence do not apply. Committee consensus was that there are many criminal proceedings in which the V.R.E. either does not apply, or applies only with Court-dictated modifications, making the proposed definition simply inapplicable given other provisions of law. Rebecca Turner indicated that the proposed Rule 43.1 should categorically not be considered for incorporation into the criminal rules. She was of the view that given the substantiality of the suggested changes, it was inappropriate to expect any short period of Committee consideration and provision of any comments or recommendations. John Treadwell pointed out that the amendment of A.O. 38 references both non-evidentiary proceedings, and “other proceedings where the presence of the defendant is not required by law”.<sup>4</sup> He further stated that while he appreciates the need for a uniform, or common rule regarding remote proceedings, the unique Constitutional issues related to a defendant’s presence, and Confrontation Rights compels a different approach (than that reflected in the V.R.C.P. 43.1 amendments. Domenica Padula agreed with what had been said about the need for a different approach particularly tailored to criminal proceedings.

Devin McLaughlin remarked that there was evident consensus that the civil procedures and practices reflected in the proposed rules was that a different approach rather than mere adoption of 43.1 by reference was clearly warranted in criminal cases. However, he emphasized that during the Covid-19 emergency and practice under A.O. 49 the value of being able to easily convene remotely for status conferences and other matters not requiring a defendant’s physical presence was recognized as a great improvement, saving not only lawyer time in travel and waiting, but also in client loss of work, travel and child care expenses. In his assessment, going forward, the Committee should focus on ways to reconcile these improvements with a Defendant’s right of presence so that the benefit of remote proceedings would not be lost altogether.

At this point in the Committee discussion, Alison Arms raised concern about whether the Committee’s proposed V.R.Cr.P. 26.2 would actually be reflective of current conditions of defendant appearance in court; that the timelines prescribed (for declaration of agreement for remote testimony) and written waivers would not work for the large number of cases involved. She asserted that rules (for remote testimony) should reflect the need for flexibility in the day to day flow of cases, and witness availability issues that arrive on short notice, needing practical and agreed resolution.<sup>5</sup>

Reporter Morris replied that the proposed 26.2 is actually quite limited in scope, beginning with a presumption of a defendant’s presence in court, with a specific witness’ testimony presented remotely by agreement of the parties. And, since such testimony invokes a Sixth Amendment right to the physical presence of a witness, knowing and voluntary waiver was required. The proposed 26.2 does not purport to extend to the issue of remote proceedings of remote appearances generally.

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<sup>4</sup> Neither the promulgated A.O. 38, nor the proposed amendment of V.R.Cr.P. 26 set forth any definition of the term “non-evidentiary proceedings”. The Reporters Note to the proposed V.R.Cr.P. 26 amendment explicitly states that the term is to be as defined in proposed V.R.C.P. 43.1.

<sup>5</sup> The proposed 26.2(c) does authorize an exception for shorter notice upon agreement of parties and court approval.

As to the promulgated A.O. 38(a)(2)'s apparent incorporation of V.R.C.P. 43.1 standards regarding presence of a defendant and other parties, the Committee was of the unanimous view that a separate rule reflecting Constitutional Confrontation and right of presence issues in the criminal division was imperative, and that this provision could result in conflict with the provisions of existing V.R.Cr.P. 43. Further, that the provisions of 38(a)(1) and (b)(1) authorizing a judge to preside remotely, given the lack of definition of non-evidentiary proceedings in A.O. 38 and the inapt definition of such provided in proposed 43.1(b)(3), presented uncharted issues seen as problematic, centering up the scope of a defendant's right to the presence of the fact finding judge. As to provision of witness testimony remotely by agreement, Committee members noted that the proposed V.R.Cr.P. 26.2 is specifically intended to provide standards appropriate to criminal division imperatives and practices.

Rebecca Turner also noted that A.O. 38(a)(2) apparently refers to "witnesses" who may be required by a judge to appear remotely in "nonevidentiary" proceedings, an inconsistency in itself. She suggested that a sunset provision be added to the promulgated A.O. 38, to enable the Criminal Rules Committee to take a more studied approach, and provide division-appropriate recommendations for amendments to address issues of both presence/remote participation, and provision of witness testimony remotely. Alison Arms indicated her agreement with this approach, while stressing that proposed V.R.C.P. 43.1(c)(5) does set forth a very helpful list of factors to be considered by a judge in deciding whether to "permit, require or deny participation, the presentation of testimony, or presiding from a remote location by video, hybrid or audio conference" that should be considered for incorporation into separate criminal rules for remote participation and testimony. She also suggested a recommendation that the text of promulgated A.O. 38(a) ("Nonevidentiary Proceedings") be amended to reference only "status conferences", deleting the phrase "...and other proceedings where the presence of the defendant is not required by law...". Devin McLaughlin pointed out the need for uniformity in remote participation policy among the units, and problems that might arise with inconsistencies between units, given that many attorneys practice in a number of counties, and conflicting appearance requirements, if appearance is not based on necessity can be chaotic.

John Treadwell pointed out that the A.O. 38 promulgation remained subject to comment period that does not close until October 17<sup>th</sup>, and that while the Committee may provide present comments of its own, process would call for the Committee to provide any final recommendations after close of the comment period. Reporter Morris will inquire of the Court as to whether any specific Committee recommendations are expected sooner than that.

As to the package of proposed rules amendments forwarded by the Special Advisory Committee on Remote Hearings, including proposed V.R.C.P. 43.1 and V.R.Cr.P 26(a)(ii), the unanimous consensus of the Committee was to provide detailed comments expressing Committee concerns, as well as Committee intention to chart a course separate from that set forth in the referenced rules, to develop remote participation and testimony rules that more accurately and effectively address unique imperatives and practices in the criminal division. Chair Treadwell suggested further Committee discussion as to formation of a subcommittee, or other plan for this effort. It was decided that the Committee would continue its discussions as to both the Remote Committee proposals, and specific comments and recommendations as to the promulgated A.O. 38 amendments, at its next meeting.<sup>6</sup>

## **7. 2021-04: V.R.Cr.P. 48(b)(1); A.O. 5/Administrative Directive 24—Prompt**

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<sup>6</sup> On October 4, 2022, the Committee Chair and Reporter provided a detailed letter to Scott Griffith, Chair of the Special Advisory Committee on Remote Hearings, expressing the concerns that had been raised by members as to that Committee's proposed amendments of V.R.C.P. 43.1 and V.R.Cr.P. 26(a)(ii). This letter is incorporated herein as an Appendix to the meeting minutes.

**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). See also, Administrative Directive 24 (11/23/2010).

Alison Arms reported that the joint Criminal Rules/Oversight subcommittee has begun meeting, and had discussed the Speedy Trial rules of some other jurisdictions, and explored the need for competent data as to case aging by types (misdemeanor/complex misdemeanor/felony/complex felony/super-complex felony. As she described it, several issues were in play: first, whether Vermont should adopt a binding or “hard” rule (such as New York’s statutory model) warranting dismissal at a prescribed juncture following state declaration of readiness to proceed to trial; or in contrast, rules which serve to facilitate prompt trials, and impose specific obligations upon parties and court to get there; second, better defining and updating the existing criteria for consideration of a case as “complex”, to include resolution of mental health/competency issues; and third, securing competent unit-based case age data by case type, in order to provide recommendations as to realistic trial and case disposition guidelines as benchmarks. A separate but much related issue is whether the judicial system would have the capacity to reasonably respond to any established timelines for Speedy Trial. The anecdotal conclusion of the subcommittee has been that existing timelines of either A.O. 5 or A.D. 24 are unrealistic. Ms. Arms indicated that the joint subcommittee will continue to meet on an ongoing basis, and provide reports to the full committee as to progress, and recommendations with drafts of either rules amendments, administrative orders or a combination of them, in order to update and provide realistic Vermont Speedy Trial guidelines and requirements.

#### **8. Other Items of Business:**

Given the time expended by the Committee in consideration of the aforementioned business, the Committee was unable to address any of the other items noticed for the September 9<sup>th</sup> meeting Agenda. These will be carried forward for consideration at the next scheduled committee meeting.

#### **9. Next Committee Meeting:**

The next Committee meeting will be scheduled after poll of the membership.<sup>7</sup>

On Motion of Mary Kay Lanthier, seconded by Devin McLaughlin, the meeting was adjourned at approximately 11:27 a.m.

Respectfully submitted,

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

[12/2/2022]

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<sup>7</sup> After poll, the next meeting date was scheduled for Friday December 2<sup>nd</sup> at 9:00 a.m.

**Appendix to September 9, 2022 Minutes:  
[Letter to Scott Griffith]**

John Treadwell  
Superior Court Judge  
Chair, Advisory Committee on Rules of Criminal Procedure  
[John.Treadwell@vermont.gov](mailto:John.Treadwell@vermont.gov)

Walter M. Morris, Jr.  
Superior Court Judge (Ret.)  
Reporter, Advisory Committee on Rules of Criminal Procedure  
[Walter.Morris@vermont.gov](mailto:Walter.Morris@vermont.gov)

October 4, 2022

Scott Griffith, Chair,  
Special Advisory Committee on Remote Hearings  
[Scott.Griffith@vermont.gov](mailto:Scott.Griffith@vermont.gov)

Re: Special Advisory Committee on Remote Hearings; Proposals of Amendment of V.R.Cr.P. 26; V.R.C.P. 43.1; and V.R.F.P. 17; Comments of Advisory Committee on Rules of Criminal Procedure

Dear Scott:

On behalf of the Advisory Committee on Rules of Criminal Procedure, we are writing to provide commentary as to the recent package of proposed amendments put forward by the Special Advisory Committee on Remote Hearings, including particularly the proposals of amendment of V.R.C.P. 43.1, and the adoption of the provisions of an amended V.R.C.P. 43.1 in Criminal Division proceedings by reference, in an amended V.R.Cr.P. 26(a)(ii), in both non-evidentiary and evidentiary proceedings (albeit, in the latter, with consent of all parties).

Our comments are in three parts: (1) Comments as to adoption of V.R.C.P. 43.1 in criminal proceedings, by reference in an amended V.R.Cr.P. 26(a)(ii); (2) Substantive comments as to proposed V.R.C.P. 43.1, apart from the relationship to, or incorporation in criminal proceedings; and (3) Comments as to other procedural rules that are either promulgated or proposed, that are of direct relevance to remote participation and testimony in criminal proceedings, and the relationship of those to the procedures of the proposed 43.1 (i.e., existing A.O. 38 and V.R.Cr.P. 43; and the proposed V.R.Cr.P. 26.2).

**I. Proposed Adoption of V.R.C.P. 43.1 in Criminal Proceedings by reference in an Amended V.R.Cr.P. 26(a)(ii).**

The Criminal Rules Committee is of the unanimous view that the incorporation-by-reference approach in the proposed amendments of V.R.C.P. 43.1 and V.R.Cr.P. 26 in the criminal division would be inadvisable, if not inappropriate, given the distinct constraints presented in criminal cases in view of the Constitutional fair trial rights that attend to the accused. The Committee appreciates that the period of Judicial Emergency, and the necessary practices authorized by A.O. 49 have brought forward and highlighted certain advantages of remote judicial proceedings that are actually efficient and beneficial,

particularly in categories of routine matters that do not invoke significant rights of presence of a defendant, or witnesses where Confrontation concerns are not in play. And, it may be fairly observed that in certain case circumstances, whether in the criminal, civil or family divisions, the ability to participate remotely has actually enhanced the right to appear at public proceedings, and saved individuals and families from additional expense of appearance, in terms of lost work, or added child care obligations, or transportation burdens.

Logically, continuation of some if not many of these A.O. 49 authorizations for remote participation in criminal cases makes sense. And in turn, new modes of practice conjure up questions as to what it means to “participate”—to be in a judicial proceeding--on an ongoing basis in the future.

In other court divisions, where practices were trending to remote mode even before the Covid-19 Emergency (ex., admission of videotaped depositions in lieu of live testimony in civil jury trials; widespread telephone appearance and participation in child support establishment and enforcement proceedings), the “transition” to (or continuation of), a new model of court experience may not be so great. However, criminal division practice, notwithstanding practices under A.O. 49, has continued to have focus upon personal appearance of judge, attorneys, parties and jurors with relatively more limited exceptions.

What presence and participation in *criminal* proceedings should mean, and what limits upon remote participation should be retained on an ongoing basis in the absence of judicial emergency, present some particularly profound questions, not only for judges, lawyers, defendants, victims, witnesses, and jurors, but for the general public as well.

The model of incorporation of Rule 43.1 by reference in V.R.Cr.P. 26(a)(ii) provides inadvisable levels of ambiguity and uncertainty for the conduct of criminal cases. First, the draft proposed 43.1 contains definitions of “evidentiary” and “nonevidentiary” proceedings that are incompatible with criminal practice. These sections (43.1(b)(2) and (3)) define the terms as where the Vermont Rules of Evidence do, or do not apply. There are many criminal proceedings that may be considered “evidentiary” even though the Rules of Evidence either do not apply, apply with modifications, or are simply subject to their own standards, imposed either by other procedural rule, or appellate decision, or statute. See, V.R.E. 1101(b) (excepting grand jury proceedings, sentencing, probation revocation, finding of probable cause for arrest and search warrants, inquest and extradition, and summary contempt) and V.R.E. 104(a)(exempting issues of admissibility of evidence); and the various other proceedings in which the Rules of Evidence do not apply or are modified, and standards of admissibility and proof imposed by other rule or appellate decision, such as routine bail arguments at arraignment and on requests for modification; proceedings on request to hold without bail (“weight of the evidence” hearings); challenges to probable cause and for lack of *prima facie* case. The current definition does not fit the legal structures for treatment of evidence in the criminal division. And this is of critical concern where proposed Rule 43.1 would apparently serve to obviate the need for personal presence in many instances in which such is, or has been the norm—or has not been required--in the criminal division.

Rule 43.1(a)(1) and (c)(1) and (2) would authorize the court, on its own motion or motion of a party, to permit or require parties and other key participants, including but not limited to the judge and witnesses, to participate remotely, even if that is over the objection of a party; and to establish whole categories of nonevidentiary proceedings that will be held remotely in that judge’s unit. The proposed 43.1(c)(2) similarly authorizes the unit judge for good cause to establish whole categories of *evidentiary* proceedings that will be held in that unit remotely, and places a burden upon an objecting party to request that such a standing order for remote proceeding be modified or vacated. Practice under these provisions presents two distinct

problems: First, the possibility (indeed, likelihood) that among the units, disparate provisions will be made among the assigned judges as to which proceedings are, or are not, to be held remotely, resulting in confusion and conflict among units as to whether personal presence or remote participation is required, permitted, or not authorized, depending upon the practice and preference of the judge. Such is not in the best interests of effective judicial administration. Indeed, given that many criminal defense attorneys—whether assigned or retained—practice across multiple units the potential inconsistency of local obligations regarding personal or remote appearance is burdensome, and in some circumstances, however limited they may be, possibly prejudicial. As to categories of remote evidentiary proceedings, these rules do require that the judge’s order be issued “for good cause”, determined with reference to the numerous factors of proposed 43.1(c)(5). And second, such procedures for either nonevidentiary or evidentiary proceedings are perceived as inconsistent with the rights of presence accorded to Defendants prior to Judicial Emergency and A.O. 49, which generally required a Defendant’s *waiver* of right to presence, or an express *agreement* of the parties to the remote participation, or remote provision of witness testimony.

Proposed 43.1(c)(3) contains an additional feature permitting a judge to inform the parties of intent to preside remotely “over all or any portion of a trial or other proceeding” by notice to all parties prior to the scheduled date of proceeding, without any specification of a period of advance notice. The notion of remote participation by the presiding judge, with all other parties and jury being present, or some remote as well, and other present, is certainly novel to Vermont criminal practice. The Advisory Committee on Criminal Rules has not had adequate opportunity to examine the Constitutional fair trial implications of such a practice, certainly as pertains to jury trial, or otherwise as to the right to the presence of the fact-finding judicial officer in other aspects of a criminal proceeding.<sup>8</sup> And, since Confrontation rights refer to confrontation before the fact-finder remote appearance of the judicial officer when that officer is the finder of fact implications substantial constitutional questions.

The Committee understands that the Special Advisory Committee is seeking comment in a compressed timeframe. The Committee notes that it identified substantial issues presented by the proposal for practice in the Criminal Division. These issues raised questions under the federal and state constitution, Vermont statutes and various rules. The Committee has not been able to complete a thorough consideration of the issues presented by the proposal.

All of this said, the Advisory Committee on Criminal Rules proposes to chart a separate course with respect to promulgation and modification of procedural rules for remote proceedings in the Criminal Division. Certainly, as indicated, there are provisions of the proposed 43.1 that are worthy of consideration, and adoption as remote hearing practices have evolved under A.O. 49. Criminal Rules proposes to give thoughtful consideration to adoption of those provisions that are suitable for, and make sense for criminal proceedings as well. However, at this juncture, the Committee recommends that the adoption-by-reference approach of proposed V.R.Cr.P. 26(a)(ii) not be a part of the suggested promulgation, given what are perceived as the significant provisions which are perceived as the wrong “fit”, if not inappropriate in application to criminal cases.

## **II. Substantive comments as to proposed V.R.C.P. 43.1, apart from the relationship to, or incorporation in criminal proceedings**

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<sup>8</sup> As to this issue, the ABA Standards for Criminal Justice (3d.ed. 2000), *Special Functions of the Trial Judge*, Standard 6-1.8(a) provides that “The trial judge should maintain a preference for live proceedings in the courtroom with all parties physically present.” Yes, a dated standard, but certainly it well states the preferable mode of proceedings.



A number of the potentially problematic provisions of the proposed V.R.C.P. 43.1 amendments in application to criminal cases are already noted above.<sup>9</sup> On the positive side, Committee consensus was that the factors listed in V.R.C.P. 43.1(c)(5) do provide useful guidance and clarity for the judge in assessment of whether good cause exists to require or permit remote participation or testimony in those circumstances authorized. Overall, for those proceedings in those divisions where it is appropriate, the body of amendments of 43.1 carries forward procedures observed under A.O. 49, with some beneficial modifications, including addition of specific authority in 43.1(d) (Conduct of Proceedings) as to the options and authority available to the Court in managing video, hybrid or audio proceedings.

### **III. Other procedural rules that are either promulgated or proposed, of direct relevance to remote participation and testimony in criminal proceedings, and the relationship of those to the procedures of the proposed 43.1 (i.e., A.O. 38; V.R.Cr.P. 43; and the proposed V.R.Cr.P. 26.2).**

While the Criminal Rules Committee sees the wisdom in continuing to consider certain aspects of the proposed V.R.C.P. 43.1 that would be beneficial if adopted for proceedings in the Criminal Division, present consensus is that we have a working model of rules and procedures governing remote participation and testimony at present in promulgated A.O. 38 and existing V.R.Cr.P. 43, as amended in 2020.<sup>10</sup> In addition, the Committee has proposed the addition of V.R.Cr.P. 26.2, which is the product of several years of work, and would provide much-needed guidance as to circumstances in which parties have agreement for provision of remote witness testimony.

Proposed V.R.Cr.P. 26.2 is in fact the product of over five years of committee work, and this proposed rule, governing provision of video testimony by agreement of parties, is carefully crafted to the unique strictures applicable to receipt of remote testimony in criminal proceedings, including but not limited to trial, and the constitutional Confrontation rights attendant to the Defendant there, but in other components of criminal proceedings in which confrontation interests may otherwise be implicated. Proposed 26.2 sets the timing and required content of a notice of intent to provide testimony of a witness via video conference with a specificity not required by existing or proposed 43.1. A signed waiver of the Defendant is required of any claims as to that component of confrontation rights related to the physical presence of the witness who will testify remotely. The proposal requires the court to address the defendant directly in open court and determine that the defendant understands the nature of the rights being waived, and specifies some content of colloquy by the court as to circumstances of the defendant's waiver and understanding. The proposed rule sets out the requirements for the manner of providing video conference testimony, with much greater detail than either current or proposed 43.1. Finally, the rule provides specific criteria for the court to consider if a party seeks to withdraw from agreement for testimony of a witness by video teleconference, once given, to address the difficult circumstance in which parties have relied upon Defendant's waiver and consent, trial is scheduled and ready to commence. These components of the proposed V.R.Cr.P. 26.2 are of critical significance to provision of remote testimony in the Criminal Division, even where that is by agreement and could never be over a Defendant's objection.

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<sup>9</sup> Incl., unworkable definitions of "evidentiary" and "nonevidentiary" hearings based upon application of the Rules of Evidence or not; prospect of inconsistent and conflicting standing orders among units under (c)(1)(A) and (c)(2)(A); prospect of ordering remote testimony of a witness over objection of another party; the prospect that the judge would participate remotely in a criminal proceeding, with all or some other parties physically present in the courtroom; or that one party/counsel would be perceived to have "advantage" by being physically present with the judge in the courtroom, while the other party/counsel are not.

<sup>10</sup>Some Committee members strongly urged adoption of a sunset for the recently-amended A.O. 38, to assure interim review as to its continuation in light of experience with its application in the Criminal Division.

The consensus of the Criminal Rules Committee is that the above-referenced rules provide a framework for remote participation and testimony by agreement without present incorporation of 43.1 by reference, and adoption of all of the attendant procedures that may be better suited to practice in other divisions.

#### **IV. Proposed Amendment of V.R.F.P. 17 Testimony and Participation Remotely in the Family Division.**

The Committee did not have opportunity at its September 9<sup>th</sup> meeting to discuss the proposed amendments of V.R.F.P. 17.

#### **V. Summary of Comments as to Proposed Amendments to V.R.C.P. 43.1 and V.R.Cr.P. 26.**

The Criminal Rules Committee strongly recommends that the proposed amendment of V.R.Cr.P. 26 (which incorporates by reference the procedures of V.R.C.P. 43.1 in Criminal Division proceedings) not be considered, or subject to promulgation at this time.

The Committee will undertake considered review as to which aspects of the proposed 43.1 may be appropriately adopted for criminal proceedings, with following recommendations for promulgation of amendments either to the Rules of Criminal Procedure, or existing/amended V.R.C.P. 43.1; or both.

After final review and potential revision in consideration of the draft of proposed Rule 43.1, the Committee plans to transmit to the Court with recommendation for promulgation the proposed amendment adding V.R.Cr.P. 26.2, to govern provision of witness testimony by agreement of the parties in Criminal Division proceedings.

We thank the Special Advisory Committee on Remote Proceedings for the opportunity to comment on the proposed package of rules governing remote participation and testimony in all of the divisions of the Superior Court. We acknowledge the work of the Committee, and anticipate continued communication as to the drafting and promulgation of each of the proposed rules in issue.

Very sincerely,

John Treadwell,  
Superior Court Judge  
Chair, Advisory Committee on Rules of Criminal Procedure

Walt Morris,  
Superior Court Judge (Ret.)  
Reporter, Advisory Committee on Rules of Criminal Procedure