

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

**MINUTES OF MEETING
April 12, 2024**

The Criminal Rules Committee meeting commenced at approximately 9:34 a.m. via Zoom video conference. Present were Committee Chair Judge John Treadwell, Judges Alison Arms and Mary Morrissey, Devin McLaughlin, Mimi Brill, Jessica Burke, Rebecca Turner, Mary Kay Lanthier and Kelly Woodward. Supreme Court Liaison Justice Karen Carroll and Committee Reporter Walt Morris were also present. The following members were absent: Domenica Padula, Ian Sullivan, Laurie Canty and Frank Twarog. Also present was Professor Shannon Heery of the Vermont Law and Graduate School.

1. **Committee Transitions.**

Judge Treadwell opened the meeting, introducing and welcoming Professor Heery as the Court's appointee as Committee Reporter to replace Judge Morris, who will be concluding his long service on June 30th. Ms. Heery is an Assistant Professor at the law school, teaching courses in criminal law and procedure and evidence. Prior to teaching she served as a career Public Defender in Brooklyn and Baltimore in serious felony cases. Judge Treadwell also indicated that Committee members Alison Arms and Devin McLaughlin are "terming out" from Committee service as of June 30th, and that replacements need to be sought. Kelly Woodward shared that due to retirement plans, she would not be seeking renewal of her current term, which is up as well. Judge Treadwell thanked all of those who were leaving Committee service for their efforts; appreciation and thanks were expressed all around, on the part of those continuing their service, and those transitioning out.

2. **Approval of January 19, 2024 Meeting Minutes.**

On motion of Devin McLaughlin, seconded by Rebecca Turner, the minutes of the January 19, 2024 meeting were unanimously approved.

OLD BUSINESS

3. **2023-04: Proposed Amendment of VRCrP 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 closed on February 12, 2024).

Judge Treadwell stated that no comments had been received in response to publication of the proposed amendments. On Motion of Judge Morrissey, seconded by Devin McLaughlin, the Committee unanimously approved of transmittal of the amendments to the Court with recommendation for promulgation.¹

¹ The proposed amendments were transmitted to the Court for promulgation consideration on April 15th.

4. 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.

In its July 10, 2023 order promulgating amendments to Administrative Order 38 (which, with V.R.Cr.P. 26.2 and 43, governs remote participation and testimony in criminal proceedings), the Court directed the Criminal Rules Committee to engage in a review of V.R.C.P. 43.1 and related rules of other court divisions, to determine if any provisions of Rule 43.1 should be adopted as to Criminal Division practice.² At the time, the Committee consensus was to defer any review until at least a six month period of experience in implementing Rule 43.1 and the other recently promulgated remote participation/testimony amendments. The status of the review was thus brought forward for consideration at the April 19th meeting. After clarification of the Court’s request, the Committee discussed whether, and what data or other information would best inform any review and recommendations. Judge Arms stated that as was the case with evaluation of Speedy Trial/Case Disposition Timelines, it would be difficult to secure competent data from electronic case records that could meaningfully reflect impact of remote proceedings rules upon the quality of case processing as experienced by litigants and counsel. Anecdotally, there is a considered view that conducting short matters such as status conferences remotely has been beneficial, in terms of travel convenience to counsel with matters in multiple units, savings of attorney billings for travel time, and savings to litigants who would otherwise be missing work or incurring childcare expenses to attend court.

Devin McLaughlin asked what questions the Committee is seeking to answer with respect to remote proceedings and Civil Rule 43.1. Judge Morrissey’s view was that the primary question—what features of Rule 43.1, if any, should be adopted for criminal practice—lends itself more to a survey of remote proceedings participants themselves, rather than any data analysis. Since remote participation in criminal proceedings is not governed by Rule 43.1 at all, many attorneys and other stakeholders would have little experience at all with Rule 43.1 procedure, but would certainly have experience and views, positive or negative, as to remote proceedings in Criminal Division under the currently applicable rules.³

Rebecca Turner suggested that a survey be conducted of the prosecution and defense bars at upcoming annual training events, to gain comments and suggestions as to what alteration of current remote proceedings rules and practices would be helpful, and what aspects of remote proceedings are working well and should not be changed. To assist with survey responses, a copy of V.R.C.P. 43.1 should be provided as well. The purpose of the survey would not be to just secure complaints, but constructive comment as to what works and what would benefit from changes. Judge Morrissey suggested that the views of victims’ services participants should also be sought. Kelly Woodward advised that she would do so with the Victims’ Advocates, and that it would be a good idea to seek the views of Jenn Pullman of the Center for Crime Victims’ Services. The Committee consensus was to request that the Reporter follow up with a written communication to Judge Arms, Rebecca Turner, Ian Sullivan, and Kelly Woodward asking that they seek agenda time and discussion and comments of their respective colleagues in the course of the upcoming annual trainings, in order to provide a report of any comments and suggestions as to remote

² The text of the order: “That the Advisory Committee on Rules of Criminal Procedure is directed to review the operation of the provisions of this Order, 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 this Order should be further amended.”

³ i.e., A.O. 38; V.R.Cr.P. 43; and V.R.Cr.P. 26.2.

proceedings at the next Committee meeting. Comments of the trial judges will also be sought during the annual Judicial College.

5. 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 and Disposition Data Update; Proposed Amendments of Rule 48(b)(1)). See also, Administrative Directive 24 (2010). (Subcommittee members: Arms; Lanthier; Padula; Sullivan; for Crim.Oversight, Sally Adams; Josh O’Hara; Arms) (Consideration of Final Subcommittee Report for Transmission to the Court).*

The final draft of the Report of the Criminal Case Disposition Review Subcommittee was provided to all Committee members in advance of the meeting. Judge Treadwell opened the discussion by recalling the initial task presented in Justice Carroll’s request on behalf of the Court.⁴ Judge Arms briefly outlined the Report’s key points and indicated that it has already had initial consideration by the Criminal Division Oversight Committee. Judge Arms indicated that Committee member comments would be appreciated, in hopes that the final Report can be forwarded to the Court soon for its consideration, with approval of both Criminal Rules, and Oversight Committees. Justice Carroll thanked the members of the Joint Subcommittee for their long efforts in examining the complex issues presented and preparation of the Report.

An extensive discussion ensued, Judge Arms reported at length on the subcommittee’s background work, the statistical challenges, and development and content of the Report. She pointed out that one of the recommendations of the Report calls for an examination of all procedural rules that have impact upon the occurrence of key case events, and progress to the point of timely trial readiness, to see whether current timelines and events, such as continuances, unnecessarily contribute to delay. As to the specific request of the Court, Reporter Morris indicated that a principal recommendation is to update Administrative Order No. 5, drawing in some key provisions related to Speedy Trial that are presently housed in Administrative Directive No. 24 (such as periods that are excluded from the calculation), to provide for a more affirmative and comprehensive guidance document, conforming the two. The “tiered” approach of the various timelines in A.D. 24 would be eliminated, in favor of disposition guidelines for misdemeanors of 180 days, and for felonies, 365 days, understanding that many minor matters will reach disposition in far less than 180 days, and serious felonies would likely exceed 365 days to disposition. The statutes would continue to mandate a time certain for commencement of trial for individuals charged with certain violent felonies where bail is denied, or where held without bail (7553a; 7553b) (60 days). And the recommendation is that the existing guideline of A.O. 5 § 2 for proceeding to trial where a defendant is incarcerated (90 days, except for exceptional circumstances showing cause) be retained.

There was extensive Committee discussion of the report and specific issues, including the relevance of data as to case features contributing to delay; whether amendment of A.O. 5 as suggested would serve to create substantive rights; the significance of case Clearance Rates vs. case age to disposition; variation among the units in terms of trial capabilities; current prosecution and defense caseloads; and the significant, growing case backlog in most units.

⁴ i.e., The formation of a joint committee of members of Criminal Rules and Oversight Committees “...to review the Administrative Order [5] and make recommendations to the Court as to whether the Administrative Order should be updated to more meaningfully consider current filings, caseloads, and disposition timelines.”

As to relevant data, Judge Arms repeated her assessment at prior meetings that despite diligent efforts to secure more detailed case delay data, beyond “macro” data as to case ages by type (i.e., felony, misdemeanor), the Odyssey case management system has distinct limits as to drawing out case feature data, such as pendency of competency issues, other forensics or substitutions of counsel, to support characterization of cases as “complex” or “super complex”. Inability to systemically do that does not mean that complex factors are irrelevant. Judge Arms’ view is that judges and counsel in each unit will continue to identify their particularly complex cases in planning, focusing on the facts of the individual cases. To assist in this, Judge Arms has, and did suggest use of felony scheduling orders that are meaningfully stasued. Judge Arms also indicated that it would be helpful to have stronger progress deadlines on minor “excludable,” potentially expungable misdemeanors, to enable the units to place greater attention on more serious offenses. Jess Burke stated that in her experience, there is disparate treatment of cases in certain counties as to terms of resolution of cases and bail conditions issues that would have seen prompt resolution in other units. On the issue of reasonable disposition of less serious offenses, Judge Arms, Judge Morrissey, Rebecca Turner, and Justice Carroll each expressed their views, and recognition, that legislative initiatives could generally be of assistance in addressing the broader problem of caseloads for both the State and Defense. These could include stronger deadlines for disposition of minor offenses, or provisions directing their alternative treatment through community justice centers/diversion, or dismissal options for the judge. Judge Arms mentioned the pre-Covid case disposition data brought forward by Josh O’Hara from judiciary annual statistical reports prior to 2021 establishing that despite challenges, cases were reasonably progressing to disposition.⁵ Her point was that the current case backlogs should not be considered primarily attributable to the Covid emergency period.

Rebecca Turner asked how Clearance Rates were factored into the Report recommendations. Judge Arms was of the view that while case Clearance Rates are not irrelevant to case management practices, even a goal of a 100% clearance rate would not necessarily speak to a given unit’s timely progress to case disposition, given disparate resources among the Criminal Division units. And, the Subcommittee consensus provides credence to case disposition standards suggested by the National Center for State Courts, which emphasize that speed in disposition/clearance of cases does not necessarily equate to just outcomes. The discussion then turned to the case disposition delay factor of inadequacy of attorney and unit resources to reasonably move cases, as well as practices policies in certain units that serve to hinder case disposition. Jess Burke shared her view that there is disparate treatment of cases. Judge Arms expressed her concern for practitioners, given a patchwork of case management procedure around the state, including those resulting from Standing Orders formerly issued by Presiding Judges as to participation in remote proceedings. Judge Morrissey and Jess Burke were of the view that much greater attention needs to be placed on adequacy of resources, both as a case delay disposition factor, and in provision of additional resources. Justice Carroll indicated that case overloads were a concern, and that such were a factor that should be reasonably considered among the guidelines.

Although under current caselaw, the A.O. 5 guidelines are considered to be advisory, and not mandatory, Rebecca Turner stated her hope that the Court in responding to the Report would keep in mind that emphasis should be placed on a Defendant’s constitutional Speedy Trial rights and underlie any specific measures.

Justice Carroll offered to draft a summary of the key Committee comments that were yielded during the discussion, to accompany the transmission of the Report to the Court, for the Court’s

⁵ See Report, pp. 11-13.

consideration of the findings and recommendations. She indicated that the Court would be having an annual retreat in May, and that it would be helpful if the Justices could accord some time then to discuss and consider the Report's recommendations.⁶

At the conclusion of the discussion, on motion of Judge Arms, seconded by Devin McLaughlin, the Committee unanimously approved of sending the Report to the Court. Judge Arms, and Judge Treadwell also serve on the Criminal Division Oversight Committee, which is chaired by Judge Tomasi, and a request will be made for that Committee's timely consideration of approval as well at its April 26th meeting, in hopes of a joint submission to the Court.

6. 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*).

The issue, presented in many 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).⁷

Following discussion at the September 29th meeting, at the January 19th meeting, the Committee considered two alternative drafts: the first, a draft proposed by the subcommittee; the second, a discussion draft prepared for consideration as an alternative. After lengthy discussion, the Committee came to some consensus text, to be reworked by the Reporter for consideration at the next meeting.⁸ At the April 12th meeting, upon suggestion by Chair Treadwell, consensus was to pass on this item until the next meeting, to permit the subcommittee to consider a final draft of a proposed amendment that could be

⁶ The key comments, as recorded by Justice Carroll, were as follows:

1. The report recommendations should be considered "guidelines" as opposed to "deadlines." Each case presents its own challenges. and the judge should maintain discretion in granting motions to continue, etc. where appropriate.
2. The "low hanging fruit" cases, for example numerous repeat misdemeanor offenses that often result in disparate outcomes yet receive the least amount of attention, should be a focus. The parties and the court should prioritize resolution of these cases.
3. The Court should recognize that the stakeholders in these cases are already overburdened. This includes both prosecutors and defense attorneys. According to the Defender General's Office, prior to Covid defense attorneys generally had caseloads around 80 but now are up to 174 or double the pre-Covid amount. Setting in place hard and fast deadlines does not acknowledge the heavy workload of those involved in the system. This should be considered by judges when moving cases forward.
4. Somewhat similarly, consideration should be given to a defendant's Due Process rights: defendants have a right to competent counsel and overburdened attorneys run the risk of charges of attorney malpractice; there is a separate, Due Process component of speedy trial/case disposition that should be considered as well.
5. Although there are resources issues, adhering to deadlines in expungable misdemeanor cases would help to clear the docket.

⁷ 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; 1/19/24, pp. 2-4.

⁸ A draft of this consensus text was sent to Committee members for review in advance of the April 12th meeting. The redraft included modified text in the 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.

recommended for circulation to the other Advisory Committees in interest prior to a request for publication and comment.⁹

The latest redraft will be considered at the next meeting, along with any suggestions resulting from an interim meeting of the subcommittee.

7. **2023-04—Amendment of V.R.Cr.P. 41.1(m)(1)(definition of “offense”) and 41.1(n)(definition and procedure for NTOs addressed to “minors”).**

Proposed amendments of V.R.Cr.P. 41.1(m)(1) and (n) (addressing NTOs issued as to minors), would be aimed at revision of dated terms in the present rules that the Committee considers to be now outmoded and problematic. The Rule including the sections in issue, was originally drawn from a proposed Federal Rule which was published for comment, but never ultimately adopted.¹⁰ Committee consensus has been that the text is outmoded, and could benefit from additional provisions as to the reach of offenses that are subject to NTOs for minors, as well as to explicit procedural protections such as a Right to Counsel. In prior meetings, alternative approaches of other jurisdictions had been briefly discussed.

In Committee discussion, Rebecca Turner reported that after conferring with Marshall Pahl, who serves as Juvenile Defender and member of the Family Rules Committee, it would appear that at least as to delinquency and Youthful Offender cases, V.R.F.P. 1(h) would supersede V.R.Cr.P. 41.1(n). Yet, the provisions of those rules are in part inconsistent, and in part duplicative. And, to the extent that a minor may be, or is ultimately charged with an offense in the Criminal Division, V.R.F.P. 1(h) would not be applicable.¹¹

Given the close connection to the Family Rules governing delinquency and Y.O cases, Ms. Turner was of the view that it would be helpful to request that the Family Rules Committee consider the issues, and provide a response as to that Committee’s recommendations for best approach to amendments of any of the pertinent rules, to reconcile them. Devin McLaughlin agreed, stating that while in his view

⁹ As to participant audio and video recording of proceedings, V.R.Cr.P. 53 defaults to and adopts by reference the provisions of V.R.C.P. 79.2, which is within the province of the Advisory Committee on Rules of Civil Procedure.

¹⁰ (Proposed Federal Rule 41.1 (April 1971), 52 F.R.D. 409, 462 (1971)).

¹¹ V.R.F.P. 1(h) (and V.R.F.P. 1.1(a), by reference) prescribe procedure for “Physical and Mental Examinations” in delinquency and Y.O. cases. 1(h) explicitly adopts by reference V.R.Cr.P. 16.1(a)(1)(I) as the applicable rule. 16.1(a)(1)(I) in pertinent part provides that “upon motion and notice” (and presumably, opportunity for hearing) the court may order a “physical or mental examination”. However, subsection (I) prescribes *only one* subset of a range of other non-testimonial evidentiary procedures ((A)—(H)) which are more akin to the types of NTO identification evidence covered by V.R.Cr.P. 41.1. V.R.F.P. 1(h) and 1.1(a) do not authorize these at all; to the contrary, V.R.Cr.P. 41.1 is applicable by reference, without exception or modification, in delinquency and YO cases. The text of 41.1, including subsection (m) is more broadly stated, as to the range of identification procedures which may be sought, provided that “the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named or described in the affidavit committed the offense.” V.R.Cr.P. 41.1(c)(3). There are other distinctions. In contrast to 16.1(a), which is essentially a discovery rule, an NTO under 41.1 may be issued *ex parte*. Under 41.1(h)(6), at the request of the subject person, the court may modify the NTO as to time and place of appearance. And, as with a search warrant, a return on an NTO issued under 41.1 must be provided to the court. For 41.1(m) NTOs, a guardian ad litem must be provided for the minor, the GAL to be served with the court order prior to execution, consulting with and present with the minor during the procedure. While V.R.F.P. 6(b) and (c) require appointment of an attorney and GAL in delinquency and Y.O. cases, there is no explicit reference to a right to counsel or a GAL in 16.1(a) (likely, because a 16.1 examination predominantly occurs in Criminal Division in a *pending* case).

some revisions of 41.1(n) would ultimately be necessary, it made sense to have Family Rules weigh in at this point. This was the consensus of the Committee, the item will remain on the Agenda, and the Reporter will communicate a request to the Family Rules Chair and Reporter. In the course of discussion, Mimi Brill was of the view that whatever avenue is pursued as to amendment, there should be explicit reference to a right to counsel for minors subject to NTOs.

8. **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). The item was brought forward for update, if any as to PACR Committee action. Reporter Morris indicated that to his current knowledge, no action had been taken. A status report will be provided at next meeting.¹²

9. **2024-01: Vermont Digital Evidence Portal (VREP); Expanded to all Criminal Division Units eff. 2/12/24; Any Implications for Criminal Rules?**

Chair Treadwell indicated that since the VREP has only recently been made available statewide, perhaps there are some technological issues with use, but in his assessment, there were no present implications for the body of the Criminal Rules. Committee consensus was to take no action, this item to return to the Agenda if and when any Criminal Rules implications were raised.

After brief discussion of the previously established annual meetings calendar, the next Criminal Rules Committee meeting will be held on Friday, August 2nd at 9:30 a.m. On motion of Alison Arms, seconded by Devin McLaughlin, the meeting was adjourned at approximately 11:29 a.m.

Respectfully submitted,

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

[5/1/24; 5/7/24; 5/22/24; 7/1/24; 7/29/24]

¹² Post-meeting reference to the minutes of the PACR Committee's 9/23/23 meeting indicates that following discussion, that Committee determined that no rules amendment was warranted, and the item has been removed from their agenda.