

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

**MINUTES OF MEETING
February 7, 2025 Meeting**

The Criminal Rules Committee meeting commenced at approximately 9:36 a.m. via video conference. Present were Committee Chair Judge John Treadwell, Judge Heather Gray, Jessica Burke, Meghan Place, Mimi Brill, Mary Mossey, Jordana Levine, Ian Sullivan, Frank Twarog, Andrew Schmidt, and Rebecca Turner. Assistant Attorney General Elizabeth (Betsy) Anderson was present on behalf of Domenica Padula. Committee Reporter, Shannon Heery, was also present. Judge Mary Morrissey joined the meeting at 9:53 a.m. Supreme Court Liaison Justice Karen Carroll joined at 10:42 a.m.

Committee Chair Judge Treadwell opened the meeting with general announcements and by welcoming new committee member, Andrew Schmidt, to his first meeting.

1. Approval of November 1, 2024 Meeting Minutes

On motion of Jordana Levine, seconded by Ian Sullivan, the minutes of the November 1, 2024 meeting were unanimously approved.

2. Rules Report

Judge Treadwell provided the Committee with updates as to any rules amendments. There are no proposed Criminal Rules amendments before the Court at this time. There are likewise no Criminal Rules before the Legislative Committee at this time.

On January 1, 2025, promulgated rule V.R.Cr.P. 41.1(b) and (c) became effective.

- **2023-04 Amendment to V.R.Cr.P. 41.1(b) and (c)** (Promulgated on May 5, 2024, effective January 1, 2025).

OLD BUSINESS:

3. 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 held a robust discussion on the operation of remote hearings following amendments to A.O. 38 adopted in July of 2023 and effective in October of 2023.¹ The Committee's extensive discussion expanded upon prior committee discussions on the same issue and echoed many of the same concerns expressed in the past.² During the fulsome discussion, each committee member had an

¹ In A.O. 38 (¶ 1), the Vermont Supreme Court adopted amendments to conform to concurrent amendments to Vermont Rule for Family Proceedings 17 and Vermont Rule of Civil Procedure 43.1. The order addresses circumstances of remote participation by courts and the parties where the presence of the defendant is not required by law, circumstances where parties may participate remotely by agreement, and proceedings where the defendant's presence is required by law.

² In A.O. 38 (¶ 3), the Vermont Supreme Court directed this Committee 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 may be amended, to consider adoption

opportunity to express their view of the impact of Administrative Order 38, including advantages of remote proceedings as well as sincere concerns that remote proceedings during criminal proceedings have become too widespread and have significant impacts on participants in the criminal process.

The committee will continue this discussion in our May 2, 2025 meeting. Judge Treadwell and Reporter Heery will assemble a report for review by the Committee members to summarize the Committee's discussions during meetings.³ The report will assist the Committee in advising the Court regarding the impact of the order and proposed additional amendment(s) to A.O. 38 by the June 29, 2025 deadline.

4. 2021-04: (Speedy Trial Standards) V.R.Cr.P. 48(b)(1); A.O. 5/A.D. 24 Review Joint Subcommittee, Joint Subcommittee Final Report and Recommendations.

Judge Treadwell noted that this issue has been resolved because A.O. 5 was withdrawn in favor of a new directive aligning the rule with Constitutional standards, and Justice Carroll confirmed.⁴

5. 2021-02: V.R.Cr.P. 53 and V.R.C.P. 79.2 (Recording Court Proceedings) and V.R.Cr.P. 53.1 (Use of Video Recording Equipment Where the Official Record is Made by Video Recording); Issues Associated with Defense Request to Video Record Jury Trial.

Judge Treadwell, in consultation with other committee members, reviewed planned actions to consult with the Civil Rules Committee to obtain input on the redrafted language of the proposed amendment. This may also include input from the Oversight Committee. The committee will revisit this after consultation with other committees.

6. 2023-04: V.R.Cr.P. 41.1(m)&(n): Non-Testimonial Identification Orders; “Minors”; “Offense”; Application in Delinquency and YO Cases; Revision for Currency of Terms and Consistency with Current Practices and Statutory Expansion of Jurisdiction.

Judge Treadwell reported he informed the Chair of Family Rules, Judge McDonald-Cady, of the Criminal Rules Committee Members who will serve on the joint committee. They include Judge Heather Gray, Jordana Levine, and Domenica Padula. The joint Committee intends to find time to meet in advance of upcoming committee meetings.

7. Joint subcommittee with Committee on Rules for Public Access to Court Records to address access status of inquests, subpoenas duces tecum, and nontestimonial orders.

This agenda item was taken out of order because original agenda item 7 (the discussion on V.R.Cr.P. 3(k)) required a longer committee discussion. The joint committee with the Committee on Rules for Public Access includes J. Dooley, Laura LaRosa, and Tracy Shriver from the public access committee,

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.” A.O. 38 (¶ 3). The Committee began its discussion on the amendments to A.O. 38 prior to the order becoming effective on October 2, 2023. This discussion was initiated at the Committee meeting on June 9, 2023 and continued on the following previous committee meeting dates: September 29, 2023, April 12, 2024, and November 1, 2024. *See*, Minutes of Committee Meetings, 9/29/23; 4/12/24; and 11/1/24. The committee was able to have the most robust conversation during this meeting given that the order has now been in effect for 16 months, allowing for a better assessment of its operation and impact.

³ An extended summary of the Committee's discussion is memorialized in this separate report.

⁴ *See*, Order Abrogating Administrative Order No. 5, Prompt Disposition of Criminal Cases, December 16, 2024.

and Judge Morrissey from our committee. Judge Morrissey updated the committee on the joint committee's status. The joint committee met to discuss the issue but has not yet come to a consensus. More meetings will follow to discuss the issue further. This item will remain on the agenda for our May 2nd meeting to assess whether our committee needs to take any action.

8. 2024-02: V.R.Cr.P. 3(k); Court May Add Required Contents for Affidavits/Sworn Statements Submitted per V.R.Cr.P. 5(b) for After-Hours Bail Calls, to Determine Hold without Bail/Bail/Conditions of Release.

Judge Treadwell introduced our last item for consideration. The language⁵ proposed for this amendment is intended to address the disparate way various counties manage after-hours bail requests. In some jurisdictions, judges require prosecutors to be involved, while in other counties, they do not. This amendment would authorize a requirement that the State's Attorneys indicate their intended charges and their bail request.⁶

The Committee began by discussing what the current formulation of 3(k) allows as written. A larger discussion ensued on the practices that have developed as a result of the rule as written, emphasizing the differing jurisdictional approaches that have led to disparity in practice. It was noted that when the State's Attorneys are not involved in the process, the judicial officer's decision is made based in large part upon the law enforcement officer's assessment of the charges.

As the committee representative for the State's Attorneys, Ian Sullivan was asked to provide feedback on any concerns from the State's Attorneys regarding the language of the proposed amendments. State's Attorney (SA) Sullivan explained that in his jurisdiction State's Attorneys are instructed to review affidavits and be involved in the after-hours charging decisions and bail recommendations. He noted that he perceived this as the best practice.

SA Sullivan was asked if there was a reason why judges should not have the authority to require law enforcement to consult with the prosecutor's office before deciding bail conditions overnight, particularly given that a charging decision significantly affects the type of bail that may be authorized to be set. SA Sullivan agreed that judges should have that authority.

During the discussion, it was noted that in prior years, trial judges required officers to call the State's attorney when they were requesting bail. It was also noted that there was a time before that when *only prosecutors* were able to call the judge, not the officer.

⁵ The proposed amendments to V.R.Cr.P. 3(k) including striking the language "[t]he affidavit or sworn statement must indicate the crimes to be charged by the arresting officer." Instead, following the phrase "temporary release may be made," a sentence would be added that states "[t]he procedures and standards established by the Presiding Judge of each unit pursuant to Rule 5(b) may require that the affidavit or sworn statement include the charge or charges that the prosecuting attorney intends to file, as well as any conditions of release, including bail or an order to hold without bail, that the prosecuting attorney is requesting."

⁶ See, Agenda Item # 2018-05, Emergency Amendment of Rule 3(k), later amended by Legislature to abrogate requirements of prosecuting attorney participation in bail call, and that affidavit/sworn statement indicate "the charges that the prosecuting attorney intends to file" and substituting the phrase the "crimes to be charged" by the arresting officer. Act 40 (H. 512) § 7 (2019 Adj. Sess.). See, Minutes of Committee Meetings, 9/20/19; 1/25/19; 10/12/18; and 8/3/18, (pp. 1-6--lengthy substantive consideration).

Assistant Attorney General, Betsy Anderson, standing in for committee member Domenica Padula inquired as to why there is divergent practice county by county rather than a rule across the state that would require consistency in each jurisdiction. In response, the history of the 3(k) rule and its amendments was discussed briefly.⁷

Rebecca Turner noted her concerns that it was Constitutionally problematic for law enforcement to go directly to the judge and indicate their position on bail. She also agreed that consistency was important. Attorney Turner suggested shifting the language of the proposed amendment away from permissive language like “*may* require.” She also inquired about the use of the phrase “presiding judge of each unit.” Judge Treadwell clarified that phrase was chosen to be consistent with V.R.Cr.P. 5(b) and ties the two provisions together.

The committee discussed the suggestion of changing “*may*” to “*must*” in the proposed amendment. Again, the State’s Attorney representative was specifically asked for input. SA Sullivan asserted he had nothing else to add at the moment.

Judge Treadwell then asked for the perspective of the judges on the Committee. Judge Morrissey indicated that the bigger issue requiring input from the State’s Attorneys is the charge itself, not the conditions of bail. Therefore, she suggested that the proposed language mandate that the court *must* know what *charges* the State intends to file but include permissive language surrounding the State’s Attorneys position on conditions of release. Judge Gray agreed that the bigger issue was that judges need to know the charges the State intends to file. There was a brief question about allowing it to be the presiding judge’s preference. This was followed by a clarification that if the language remains as drafted in a “*may*” format, it will lead to the same problem indicated earlier, a lack of consistency in jurisdictions.

Following this discussion, and the input of those in the judicial role, the State’s Attorney representative recognized there may be reservations about the change in the rule. SA Sullivan suggested that perhaps the language could be drafted in line with the comments from judicial members that emphasized the need for mandatory language surrounding the charges and permissive language surrounding the bail recommendation. It was briefly proposed that we alter the language to “Chief superior judge;” however, it was quickly noted that changing the language here would mandate changing the language in V.R.Cr.P. 5(b) as well, creating a larger issue with that rule.

Rebecca Turner then brought up the issue with after-hours bail decisions imposing onerous conditions on the defendant. She noted that the proposed changes thus far have been heading in a positive direction by requiring involvement of the State’s Attorneys during this important process. Attorney Turner emphasized the need to support the least restrictive means of bail conditions. Judge Treadwell clarified that this would only create a record of what the State is requesting in a particular case, but it may not substantively affect the defendant regarding what conditions were actually imposed. Attorney Turner noted a key concern surrounded the lack of attorneys during this critical decision after-hours, emphasizing the lack of defense counsel.

Judge Treadwell summarized the discussion of the Committee on this issue indicating an agreement on the need for standardizing the process by creating a consistent requirement for State’s Attorneys involvement in after-hours charging and bail decisions across the state. Based on the discussion by the

⁷ See, *supra*, fn. 6 for references to the history of the rule.

committee a new draft of 3k will be circulated to the committee for discussion at our next meeting on May 2, 2025.

Prior to the conclusion of the meeting, the committee was reminded of our next meeting date of May 2, 2025. Judge Treadwell also informed the committee of the intent to keep the same schedule moving forward: meeting on the first Friday of the month, every three months, unless there are any issues. No member indicated they had an issue retaining that schedule.

The committee concluded its meeting at approximately 11:15 a.m. after a motion to adjourn that was seconded by Jordana Levine.

[4/23/25; SH]