

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

**MINUTES OF MEETING  
May 2, 2025 Meeting**

The Criminal Rules Committee May 2, 2025 meeting commenced at approximately 9:34 a.m. via video conference. Present were Committee Chair Judge John Treadwell, Judge Mary Morrissey, Jessica Burke, Meghan Place, Mimi Brill, Mary Mossey, Jordana Levine, Ian Sullivan, Andrew Schmidt, Domenica Padula, and Rebecca Turner. Committee Reporter, Shannon Heery, was also present. Unable to be present today were members Judge Heather Gray, Frank Twarog, and Supreme Court Liaison, Justice Karen Carroll.

Committee Chair Judge Treadwell opened the meeting by announcing that Committee member, Mimi Brill, would be terming out of her role on June 30<sup>th</sup> of this year. Judge Treadwell informed the Committee that he would be in the process of identifying potential replacements, apprised the Committee of that process and the need to maintain professional balance and geographic diversity on the Committee. Judge Treadwell then thanked Mimi Brill for all of her work with the Criminal Rules Committee.

Meeting Opening; Chair John Treadwell; General Announcements

**1. Approval of February 7, 2025 Meeting Minutes and Annual Report for 2023-2024.**

On motion of Jordana Levine and seconded by Rebecca Turner, the minutes from the Committee's February 7, 2025 meeting were approved. On motion to approve and submit to the Court the Committee's Annual Report made by Ian Sullivan and seconded by Domenica Padula, the annual report was also approved by the Committee.

**2. Rules Report:**

There were no updates to rules at this time. The Legislative Committee on Judicial Rules (LCJR) met after our last meeting, but they did not have any Criminal rules to consider.

**OLD BUSINESS:**

**3. 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.**

The Committee began discussion with agenda item 4, regarding the use of video recording equipment where the official record is made by video recording. Judge Treadwell informed the Committee that more individuals will be contributing to this discussion across committees. Judge Treadwell will report back to the Committee any recommendations regarding the proposed draft language of the amendment.

**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** (As directed in Court’s July 10<sup>th</sup> promulgation order amending A.O. 38, ¶ 3).

The Committee discussed Reporter Heery’s memorandum summarizing Committee discussion on the impact of remote proceedings and A.O. 38, in advance of the Court’s June 30, 2025 directive.<sup>1</sup> Reporter Heery began with a brief overview of the report and the task of this Committee to determine the appropriate language for our response to the Supreme Court.

Rebecca Turner opened the discussion of the Committee noting the report’s emphasis on the phrase “to consider adoption of any provisions of the same,” related to V.R.C.P. 41.1, V.R.P.P. 41, and V.R.F.P. 17. Ms. Turner suggested we first answer the specific question asked in the report regarding whether we want to suggest the Court adopt any of those provisions into the language of A.O. 38.

Mimi Brill agreed but noted that it would be important to capture the Committee consensus of concerns regarding remote arraignments.

Judge Treadwell agreed that Ms. Turner’s question was a good starting point. Judge Treadwell summarized that Criminal Rules has two main rules that govern when people need to be present and what that means, V.R.Cr.P. 43 and V.R.Cr.P 26.2. Because of those specific rules and their content, Judge Treadwell indicated V.R.C.P. 43.1 is largely irrelevant and our rules need not incorporate its language; thus, the answer to the first question would be, “no,” we do not need to incorporate language from V.R.C.P 43.1, unless we thought it was important to include a reference to 43.1(h), which includes the factors a judge should consider in approving remote appearances by parties,<sup>2</sup> directly within A.O. 38.

Ms. Turner suggested we keep it even simpler in our response, and not adopt any language of V.R.C.P. 43.1, noting that if parties think those factors are relevant, they can reference the Civil Rule as needed. This would avoid confusing the issue in a Criminal Case.

Judge Morrissey indicated she did not see a downside to adding a reference to V.R.C.P. 43.1 because those factors may provide helpful guidance in certain proceedings.

Judge Treadwell noted that there is a provision in the Reporter’s Notes of A.O. 38 that incorporates V.R.C.P 43.1’s factors that can be considered, but that the court is not obligated to consider those as a part of A.O. 38.<sup>3</sup> Judge Treadwell noted some Committee members appeared to be nodding in agreement. At this point, Judge Treadwell asked if there were any additional comments, to which there was no response.

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<sup>1</sup> In paragraph 3 of AO 38, 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 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).

<sup>2</sup> See, V.R.C.P. 43.1(h).

<sup>3</sup> See, A.O. 38, Reporter’s Notes, 2022 Amendment (“The rule incorporates the factors in Vermont Rule of Civil Procedure 43.1 for the court to evaluate whether to allow remote witness testimony.”).

Judge Treadwell then asked the Committee if he was correct in assessing the consensus of the Committee was that our answer to the Court on the first question should be that we do not recommend adopting the language of the other rules. The Committee indicated that it was.

At this point, the Committee turned to consideration of the next question: should this Committee recommend to the Court any additional amendments to A.O. 38? Specifically, should we suggest including an explicit reference to rule V.R.Cr.P. 43 and V.R.Cr.P. 26.2 governing the circumstances under which remote proceedings can be held? Judge Treadwell noted that he did not believe that A.O. 38 was intended to broaden the scope of remote proceedings that were acceptable in criminal cases.

Judge Morrissey agreed and suggested that we should suggest to the Court to clarify the language. Ms. Turner also agreed.

Reporter Heery asked the Committee if there were specific ideas for the language they would suggest adding to A.O. 38, referencing the text of A.O. 38 and the report.

Judge Treadwell suggested that perhaps instead of beginning the rule with “notwithstanding,” we suggest amending the language to “consistent with Rule V.R.Cr.P. 43.”<sup>4</sup>

At this point, the Committee reviewed the rule together focusing on the specific language within A.O. 38. Judge Morrissey and Rebecca Turner offered suggestions for alterations to the language, and the Committee came to a consensus of suggesting that the Court begin A.O. 38 with “Consistent with V.R.Cr.P. 43, and notwithstanding any rule or provision to the contrary in the Criminal Division. . .” Judge Treadwell noted that the second question had now been resolved.

Judge Treadwell then turned the Committee’s attention to the final question remaining for this Committee to address in response to the Supreme Court’s directive, based upon the report and robust discussion at the last meeting: existing remote arraignments and the discourse on practices that need to be implemented and improved. Judge Treadwell led off this discussion by noting that he was not sure this is a Criminal Rules Committee issue, but rather, may be properly considered by the oversight or remote proceedings committees.

Ms. Turner referenced Ms. Brill’s initial request to include this concern in our suggestions to the Court. Ms. Turner pointed to a swell of responses in the Committee’s discussion related to the concerns of video arraignments. Ms. Turner asked whether we could suggest an amendment to A.O. 38 regarding the use of video arraignments because of the substantive matters and Constitutional rights that govern. Ms. Turner shared her thoughts that the oversight committee relates more to logistics and less to the Constitutional or legal imperatives for regional arraignments. Ms. Turner indicated she would like to continue the discussion and not rush to the idea that this is not an appropriate suggestion regarding A.O. 38’s language.

Judge Treadwell responded that he did not see the distinction as clearly that this is not something for the oversight committee to consider. He suggested that there is a need to consider the question of practical implementation, recognizing the purpose of A.O. 38.

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<sup>4</sup> See, A.O. 38, which begins “**Section I. Authorizations and Requirements**, Notwithstanding any rule or provision to the contrary in the Criminal Division . . .”.

Ian Sullivan agreed that there were components of remote arraignments that are technical rather than substantive; however, he saw a fair amount of interplay between them. He indicated he was considering that a criminal rule that established the minimum standard for what is necessary to conduct a hearing of that nature remotely would actually be addressing the substantive or procedural rights of a defendant, rather than just a technical issue. SA Sullivan likened this analysis to the V.R.Cr.P. Rule 11 colloquy required for a knowing and voluntary plea.

Judge Morrissey indicated that she agreed this is more of a practice issue. She suggested that when the remote or oversight committees reviews it, they may believe remote arraignments cannot happen as they exist, and, if there is a way to implement all concerns or address main issues, provide appropriate suggestions. However, she noted she was not sure they would have the same concerns about remote arraignments that were specified by this Committee. She reiterated that this appears to be a practice issue more than a rule issue and may be a better option than a suggestion that is not practicable.

Rebecca Turner responded by referencing the report summarizing this Committee's concerns regarding a broken remote arraignments system and how that system is impacting substantive rights of defendants. She suggested that we urge with immediacy that the Court address this now because it is wrapped up with substantive rights of the defendants. She noted a joint committee between Criminal Rules and Oversight seems to make sense because it is not clear how you divorce this from being a criminal rules issue, referencing SA Sullivan's earlier comments. Ms. Turner discussed the procedural checks that Criminal Rules often implicate and reiterated her support for immediate change to remote arraignments that arose during our last meeting and is indicated in the report. Ms. Turner thought setting up a joint committee as a suggestion was the very least we could offer.

Andrew Schmidt agreed with Ms. Turner, but noted he could see Judge Morrissey's point that this is a practice issue. However, he agreed with SA Sullivan's take that there are other practice and procedure rules that criminal rules govern. Mr. Schmidt agreed that the Committee's concerns required immediate action.

Judge Treadwell offered that because there is no dispute that there are significant issues that need to be addressed with remote arraignments, and additional issues that require identification, there should be some efforts to immediately address it. He offered an alternative in our response to the Court that we provide a series of options for the Court to consider.

Rebecca Turner acknowledged that the Court has the ultimate decision and thus identifying issues with a joint committee, so long as this Committee continues to have a role in the discussion, would be one good option. She emphasized that this Committee needed to have a continued voice in the resolution of this issue.

Mimi Brill shared her thoughts next, noting frustration because the issues that occur as a result of remote arraignments are so serious and so significant. She believed that this Committee's identification of those issues and its concerns indicated that remote arraignments should not continue while these options provided to the Court are considered. Ms. Brill thought the notion of forming a committee while we continue disregarding individuals' rights is unacceptable. Ms. Brill asserted that this Committee should require immediate action, specifically discontinuing remote arraignments, rather than waiting to see the result while violating individual rights.

Judge Treadwell appreciated Ms. Brill's point of view but indicated that this Committee likely does not have the authority to stop remote arraignments. He suggested that perhaps attorneys for the defendant could have the ability, but that was a different discussion than is before this Committee.

SA Sullivan shared two thoughts. First, he suggested that a rule provide a readily accessible framework to address things going wrong in remote arraignments, and what the particular relief should be. The second was his concern about the length of time spent in the remote world of proceedings, noting that everyone on the Committee has a lot of experience with in-person arraignments prior to the COVID-19 pandemic. However, he noted his concern that there are classes and classes of new practitioners who have never experienced in-person arraignments and their benefits. He suggested that the longer remote arraignments are treated as the norm, the more people think that there is no alternative. SA Sullivan concluded he does see some urgency to resolve this issue not just on an individual level but on a systemic level for the future of criminal practice.

Judge Treadwell responded that these are all points we can make in our report to the Court. He made clear that he did not think there were members who are comfortable with the current state of remote arraignments. He then asked if we had a consensus about what the Committee should provide to the Court.

Reporter Heery requested more responses and more specific options that this Committee would like the Court to consider, noting that the Committee members had the experience on the ground that could offer concrete language to alleviate concerns that remote arraignments are not currently in compliance with V.R.Cr.P. Rule 43.

Jordana Levine responded that there are so many things wrong with remote arraignments on so many different levels that it feels hard to address or offer solutions for immediate change.

Judge Morrissey said she agreed the Committee unanimously agrees that there need to be changes made as it relates to remote arraignments and that the Court should receive a summary of the issues and a request from this Committee to review these issues and remote arraignments as soon as possible, perhaps by the Civil Oversight Committee or another committee, and including criminal rules so we could address this issue with immediacy. Judge Morrissey noted that a joint committee could be put together very quickly and that would likely be a suggestion that is well received by the Court.

Judge Treadwell further indicated that we could add in language in our response to the Court that there were members of this Committee who recommended the immediate ceasing of remote regional video arraignments.

Rebecca Turner responded noting that she took Ms. Brill's point to heart and was now concerned that the second we recommend that the Court build a new committee, the solution becomes months and years away, if it ever comes to fruition. She suggested that we be more specific and we begin by taking a poll regarding language suggesting the Court should cease remote arraignments a review of the issues is completed. Ms. Turner suggested indicating that the current practice is inconsistent with Rule V.R.Cr.P. 43 on the ground and that it is so alarming that we believe remote arraignments should cease until the Court develops appropriate and practical remedies.

Judge Morrissey responded that her concern is that suggestion is offered in a complete vacuum. She noted that realistically, the current infrastructure does not exist to allow for this change; there is a real concern about transportation that that viewpoint does not consider.

Mary Mossey agreed with Judge Morrissey. She recognized that this Committee could suggest no further remote arraignments, but the resources on the ground will not be able to handle transportations of individuals from jail and arrive on time without issues. As it is, Ms. Mossey noted, the Franklin County Sheriff's Department has been struggling with resources, which, she believes, is why remote hearings have continued. Ms. Mossey provided insight into the operations of the Sheriff's department who are currently working with less than half of their usual workforce and expecting to lose even more; they have not been successful in recruiting others to join. Ms. Mossey discussed other factors that would prevent efficient transportation with this reduced workforce, including long drives and the lack of state deputy positions. Ms. Mossey noted that when people are required to be present for their arraignments, they are transported. Ms. Mossey said a firm rule to stay stop immediately would require the Court to develop alternatives for transporting individuals to their arraignment, and, given the resources, it does not appear likely that there would be compliance with a rule that all arraignments occur in person.

SA Sullivan discussed logistics pre-COVID, recalling that while in-person arraignments regularly occurred, they were also happening on a regional basis.

Judge Treadwell agreed that the Rule requires regional arraignments.

SA Sullivan recalled that if a female individual was arrested, there was communication with the Chittenden SA's office regarding coverage of that individual's case during the arraignment. SA Sullivan indicated that this was a primary concern in his mind.

Jordana Levine expressed the concern that a stand needs to be taken at some point. Ms. Levine made clear she understood the concerns about the sheriff's office not being able to transport individuals effectively and that viewpoint has been echoed in Windsor County; however, sheriffs there have recently indicated it could be done. Ms. Levine noted they still have to transport individuals to multiple locations. She expressed that merely saying we do not have the resources just enables a process that is harmful to the system and to the people that are a part of the system; it excuses courts not following the rule. Ms. Levine recognized that there were different challenges in each county that arise to effectuate required transportation to in-person arraignments. In fact, she noted that currently in Woodstock, defense attorneys are asked to sit in the back of a police cruiser to complete intake interviews with charged individuals. Ms. Levine concluded that if courts wait for the resources to get people transported there is major concerns about the current process. Instead, she concluded that the rule should be made and the resources will follow.

Jess Burke also provided her thoughts to the Committee. She noted that transportation of charged individuals does not always create the best situation, and there is a lot that can go wrong. She acknowledged what all had mentioned about the issue, but suggested that there may be issues that have been overlooked, including complications on both sides and ways to bridge the gap. She agreed that what is occurring currently is unacceptable, but stated this Committee needs to look outside of the vacuum of merely demanding these transports. Ms. Burke commented that demand will not answer all of the problems, but instead, may create additional issues by placing charged individuals in transportation vehicles with officers at a high level of frequency.

Judge Treadwell intervened to note that we had essentially arrived back at where we started. He again proposed that we include in our response a summary of the most significant issues captured in our report and the absolute necessity of the Court addressing those issues on an urgent basis with immediate action.

Rebecca Turner suggested an additional amendment to our response, to highlight the urgency, including that there was considerable discussion among our members that there was such an urgent problem that there is a need to have remote arraignments cease immediately until these problems can be fixed. She clarified that this is not about a vacuum solution, but the Court has requested this Committee's perspective and we should be clear about our concerns and that there are people on this Committee who do believe remote and regional arraignments should stop immediately.

Judge Treadwell summarized this stating there are members of the Committee who are so concerned about existing practices of remote arraignments that they believe remote arraignments should cease immediately. Judge Treadwell asked Reporter Heery if that would suffice to draft a response to the Court and Reporter Heery indicated it would.

Mimi Brill asked if Reporter Heery could include a link to the drafted memorandum provided to the Committee so that the Court could review the full discussion that occurred regarding remote arraignments and Committee concerns.

Judge Morrissey agreed that the report should be included.

Judge Treadwell also agreed that the report should be included. Judge Treadwell concluded the discussion by informing the Committee that Reporter Heery and Judge Treadwell will finalize language, with a link to the report, and provide it to the Committee for review prior to submitting it to the Court.

**5. 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.**

Turning to agenda item 5, Reporter Heery indicated that the joint committee with members from family rules and this Committee was still working to schedule a meeting time where most members could be present. The joint committee will likely meet in May, before this Committee's next scheduled meeting of August 1, 2025 and there will be updates on the drafted language of 41.1(m)&(n) at that time.

**6. 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.**

The Committee next discussed the language in multiple drafts of proposed amendments to V.R.Cr.P. 3(k). Since the last meeting, a new draft, along with the prior draft, was circulated to the Committee for consideration. Judge Treadwell began by referencing the Committee's February 7<sup>th</sup> support of the new draft language “must,” which would require the affidavit to include the charges the

prosecutor intends to file.<sup>5</sup> He noted, however, that the 2019 legislative amendment may create issues with this suggestion.

Rebecca Turner asserted the “must” language should not be an issue. She referenced current litigation on the separation of powers issue. Moreover, she viewed the prior legislative amendment as distinguishable from what this Committee sought to address. Ms. Turner indicated using the “must” language would ensure that an *attorney* reviews the charges and recommendations. Ms. Turner clarified that she believed the appropriate language to include within the proposed amendment to V.R.Cr.P. 3(k) would use the imperative “must,” requiring the affidavit include both the prosecutor’s charges and position on bail conditions. Ms. Turner noted this would alleviate concerns about the unauthorized practice of law and charging individuals without the involvement of an attorney in that process.

Judge Treadwell voiced that he did not share the same understanding of why the language is necessary, but rather, that it clarified V.R.Cr.P. Rule 5(b). Judge Treadwell reiterated concerns about adding the “must” language given the legislative amendment. He also indicated that the “may” language arguably provides more flexibility, and that this Committee would therefore only be recommending that the presiding judge in the county decides as to how the process will occur.

After a question, Judge Treadwell clarified that the language “presiding judge in the unit,” is included to echo V.R.Cr.P. 5(b) and allows for the presiding judge in a jurisdiction to establish the rules of practice for that jurisdiction. Judge Treadwell then summarized the Committee’s options as three proposed amendments:

- (1) “Must - Must”<sup>6</sup>
- (2) “Must - May”<sup>7</sup>
- (3) “May - May”<sup>8</sup>

The Committee already had drafts of options 2 and 3, and Reporter Heery provided option 1 in the chat for the members.

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<sup>5</sup>The language that gained support by various members of the committee during the February 7<sup>th</sup> meeting would amend V.R.Cr.P. 3(k) to add a final line that read: “The procedures and standards established by the Presiding Judge of each unit pursuant to Rule 5(b) *must* require that the affidavit or sworn statement include the charge or charges that the prosecuting attorney intends to file, and may require that the affidavit also include conditions of release, including bail or an order to hold without bail, that the prosecuting attorney is requesting.” *See*, V.R.Cr.P. 3(k), for reference (emphasis added here for clarity, but not included in the draft).

<sup>6</sup> “The procedures and standards established by the Presiding Judge of each unit pursuant to Rule 5(b) *must* 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.” [Draft 3]

<sup>7</sup> The procedures and standards established by the Presiding Judge of each unit pursuant to Rule 5(b) *must* require that the affidavit or sworn statement include the charge or charges that the prosecuting attorney intends to file, *and may require* that the affidavit also include conditions of release, including bail or an order to hold without bail, that the prosecuting attorney is requesting.” [Draft 2]

<sup>8</sup> “The 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.” [Draft 1]

Judge Morrissey clarified her position that consultation with the State’s Attorney should be required, but she did not believe that the affidavit needed to include the State’s Attorneys’ recommendations as to bail.

SA Sullivan noted he would want to read the affidavit again following a middle of the night conversation to ensure it accurately reflected his position. He further indicated he believed it was best practice for the prosecutor to review it before they contacted the judge.

Rebecca Turner asserted that putting that consultation in writing in the submitted affidavit achieves compliance with fundamental due process concerns and allows all parties to understand what the judge is ruling upon. Furthermore, she noted the rule including “must” language will require consistency in this practice across jurisdictions.

Judge Treadwell suggested a vote by the Committee on which proposed language they preferred.

Judge Morrissey moved to adopt the “must - may”<sup>9</sup> draft. The motion was seconded by Domenica Padula. Six Committee members voted in favor of the “must - may” language.

The Committee next voted to see who favored the “must – must” draft. Five Committee members were in favor of that version of the proposed language.

No Committee members present were in favor of the “may – may,” version of the draft.

Based upon the close vote by the Committee, and that a few members were not present today, Judge Treadwell suggested we continue to consider the language and vote again at the next meeting in August. Reporter Heery will circulate all three drafts in advance of the next meeting for the members’ consideration.

**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.**

Judge Morrissey updated the Committee on the work of the joint committee considering access status of inquests, subpoenas duces tecum, and nontestimonial orders. The Committee has met three times to discuss these issues. Despite attempts to obtain feedback from the bar members, there has been little response. Through the Committee’s work, they have developed proposed amendments that will be circulated.

**NEW BUSINESS:**

**8. Any Other Business.**

Justice Treadwell informed the Committee of a new rule under consideration by the Civil Rules Committee that addresses post-conviction proceedings. The relevance to this Committee is that the proposed civil rule would specifically allow resentencing by agreement to settle post-conviction relief proceedings. Criminal procedure rules would apply to such proceedings in the civil division, but only by agreement of respondent and state. After some discussion, Judge Treadwell added that the rule would include language that the court can either accept the agreement of the parties or reject it; however, the

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<sup>9</sup> See, *supra*, fn 7.

court would not be able to modify it. If there is no agreement, the court does not have to return the case to the criminal division based upon this rule.

Having no further business, Judge Treadwell reminded the Committee that the next scheduled meeting date is August 1, 2025. The Committee meeting adjourned at 10:55 a.m.

[7.29.25; SH; Approved 8.1.25]