

[As Approved on June 9, 2023]

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

**MINUTES OF MEETING  
April 14, 2023**

The Criminal Rules Committee meeting commenced at approximately 9:33 a.m. via Zoom video conference. Present were Committee Chair Judge John Treadwell, Judge Alison Arms, Judge Marty Maley, Dan Sedon, Mimi Brill, Rebecca Turner, Mary Kay Lanthier, Laurie Canty, Kelly Woodward and Committee Reporter Judge Walt Morris. Domenica Padula, Frank Twarog, Devin McLaughlin, Dickson Corbett and Supreme Court Liaison Justice Karen Carroll were absent. Betsy Anderson, Esq. of the Attorney General’s office attended the meeting on behalf of Ms. Padula.

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

**1. Approval of December 2, 2022 Meeting Minutes.**

On motion of Alison Arms, seconded by Dan Sedon, the minutes of the December 2nd, 2022 meeting were unanimously approved.

Items of Old Business addressed: At the outset of discussion, Chair Treadwell stated that as indicated in the meeting Agenda, the group of “remote proceedings” amendments under consideration—A.O. 38; A.O. 47; V.R.Cr.P. 26.2; and V.R.F.P. 17—would be addressed as a matter of priority, with other noticed business being reached only as time permitted.

**2. V.R.Cr.P. 47: Motion Reply Memoranda and Timing Thereof.**

The Committee briefly discussed a draft provided in advance of the meeting, of proposed Rule 47 amendments that would explicitly authorize reply memoranda and prescribe their timing (the present rule does not make provision for them). In addition, a provision addressing service of affidavits in support of and in opposition to a motion is transferred from Rule 45(d) (the “Time” rule) to Rule 47 as of more pertinence there.<sup>1</sup> The Committee unanimously approved of forwarding the proposed amendments to the Court for publication.<sup>2</sup>

**3. Discussion/Action with Respect to the “Remote Proceedings” Amendments.**

This Agenda item did in fact take up the rest of the Committee meeting time. The Committee engaged in extensive discussion of this group of amendments. The most current draft of each was sent to Committee members in advance of the meeting. Committee consideration, and decisions as to each were as follows:

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<sup>1</sup> John Treadwell had provided an overview of these proposed amendments at the December 2<sup>nd</sup> meeting. 12/2/22 Minutes, p. 9.

<sup>2</sup> These were transmitted to the Court on May 2<sup>nd</sup> and published for comment on May 8<sup>th</sup>, with comment period closing on July 10, 2023.

--**A.O. 38.** The most recent amendments of A.O. 38 were promulgated by the Court on August 9, 2022, effective September 6, 2022, without opportunity for publication and comment, or Advisory Committee review, to effectuate transition from the Covid Judicial Emergency and the interim rules prescribed by A.O. 49, to permanent rules for remote proceedings in the various divisions of the Superior Court. A post-promulgation comment period was provided, and the Advisory Committee was directed to consider any comment, and report back to the Court on whether to permanently adopt the amendments, or make further changes.<sup>3</sup>

The referenced amendments carried forward distinctions that had been housed in A.O. 49, treating remote participation and testimony in criminal proceedings in two categories—“non-evidentiary” and “evidentiary” (the latter requiring consent of the parties, for remote testimony). From first consideration, the Committee has noted that this distinction—at least without clear definition, is problematic in that there are a number of criminal proceedings in which the Rules of Evidence do not apply, or apply only with modifications, where “testimony” is provided by witnesses.<sup>4</sup>

The proposed A.O. 38 amendments had defined non-evidentiary proceedings as those where the presence of the defendant is not required by law (where on its own motion, the court could preside remotely, as well as require “parties, witnesses, counsel or other necessary persons” to do so; and evidentiary proceedings as those where the presence of a defendant is required by law, listing those proceedings, yet authorized the *court* to preside remotely, requiring agreement of the parties for provision of witness testimony remotely. Committee members expressed concern as to a scenario in which, the judge, as fact finder in a disputed matter, might elect on their own to preside remotely, while all other parties would be physically present in the courtroom. In the course of the discussion, Rebecca Turner circulated a list of authorities addressed to a defendant’s right to physical presence of the judge as fact-finder by email to Committee members. Among the comments opposing a judge’s option to preside remotely where a defendant has a right of presence, Judge Maley indicated that depending on the technology, remote testimony might provide a judge and parties with a *better* opportunity to observe a witness’ testimony, close up and more clearly, than that from observing at a distance within the courtroom. Even so, he agreed that requiring a defendant’s consent for a judge’s physical absence where defendants themselves have a right of was a better course.<sup>5</sup>

In addition, A.O. 38 Subsection I(c) as promulgated contained a provision—“Factors”--directing the court in determining whether to allow remote witness testimony to consider the factors in V.R.C.P.

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<sup>3</sup> Comments were received from the Office of the Defender General expressing concerns as to A.O. 38 as promulgated. These comments, were sent on to Scott Griffith, Chair of the Special Advisory Committee on Remote Proceedings, on February 13<sup>th</sup>, to supplement comments that had already been provided on behalf of the Criminal Rules Committee as to the promulgated A.O.

<sup>4</sup> The pending proposed amendments of V.R.C.P. 43.1 do define “evidentiary proceeding” as “...one in which live oral testimony is taken. All other proceedings are nonevidentiary.”

<sup>5</sup> In the context of this discussion of remote hearings procedure, and practices as to receipt of remote testimony, Judge Arms mentioned the “Standing Orders” for remote proceedings that have been issued in a number of the units of the Criminal Division, and whether these should be at all referenced in text of the administrative orders or rules under consideration. Judge Maley indicated that in Franklin, the decision was made not to issue Standing Orders. Reporter Morris indicated that apparently there are varying “Standing Orders” in 8 of the 14 Criminal Division units. These (accessible on the judiciary website) mostly address remote *participation*, and where remote testimony is addressed, agreement of parties is required. The Committee took no action as to incorporating references to any Standing Order.

43.1, the related but inapplicable civil rule, which authorizes remote witness testimony on motion of a party or the court, and without agreement of a defendant. Where Confrontation Clause or Due Process interests are invoked, court-ordered remote witness testimony without consent and waiver or over objection of a defendant would not be permissible, making the provisions of Rule 43.1 inapposite in this regard. In any event, the Committee has undertaken to in the longer-term examine whether certain provisions of 43.1 might be suitable for adoption as to remote proceedings in the criminal division, which are yet consistent and not conflicting with V.R.Cr.P. 43, constitutional Confrontation and Due Process rights.

Finally, an amendment of the promulgated A.O. 38 suggested by the Special Advisory Committee on Remote Proceedings would remove delinquency cases from the A.O. and house provisions governing remote participation in delinquency and Youthful Offender cases in proposed amendments of V.R.F.P. 17.

After discussion, the Committee decided to recommend the following changes to the latest draft:

- (1) References in the captions and text of promulgated A.O. 38(I)(a) and (b) to “Nonevidentiary” and “Evidentiary” proceedings would be modified to proceedings “...In which (or where) a defendant’s presence is not required (or is required as applicable)”, to avoid confusion as to what is evidentiary, and key the greater latitude for remote participation to proceedings in which defendant’s presence is not required, while permitting a defendant’s agreement and waiver of presence for remote participation by a judge as well as remote witness testimony in the proceedings already identified in the A.O. In clarifying a defendant’s right of presence as distinguishing the application of either (a) or (b), Committee members acknowledged that there may be proceedings not specifically listed in (b) requiring more limited authorization for court discretion.
- (2) Section (b)(1) (remote presiding of judge where a defendant has not waived an applicable right of presence) would be modified to require that a judge may preside remotely only “upon agreement of the parties”.
- (3) Subsection (c) (Factors) would be modified to provide that in determining whether to allow a witness to provide testimony remotely by agreement of the parties under (b)(2), “...the parties and the court must observe the requirements of factors in V.R.Cr.P. 26.2 V.R.C.P. 43.1(h)(c)(6)(video) and V.R.C.P. 43.1(d)(3) and (4)(audio).” This to incorporate by reference the provisions of proposed V.R.Cr.P. 26.2 as to agreement for, and manner of taking, remote witness testimony in criminal cases. The Committee will continue its longer term review of V.R.C.P. 43.1 to determine whether any of its provisions might be adopted for criminal proceedings.
- (4) There was no objection to removing A.O. 38’s current incorporation of delinquency proceedings by reference and moving provisions for remote participation and testimony to an amended V.R.F.P. 17.<sup>6</sup>

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<sup>6</sup> Note though, the Committee’s recommendations for addition of a required colloquy and waiver by the youth for provision of remote witness testimony in delinquency and Youthful Offender cases, *infra*.

- (5) Finally, the Committee determined to recommend a specific “Sunset” date for the application of the A.O. 38 promulgation that was effective September 6, 2022, to facilitate more thorough examination of further amendments, in context of conduct of remote proceedings in the criminal division; and delinquency and Youthful Offender cases under the forthcoming proposals to add V.R.Cr.P. 26.2, and amend V.R.Cr.P. 43.1, A.O. 38, A.O. 47, and V.R.F.P. 17.

On motion of Alison Arms, seconded by Dan Sedon, the Committee unanimously approved of the substantive changes to A.O. 38 noted, and for transmittal of the amendments to the Court with promulgation recommendation. A separate Committee vote was held as to inclusion of a “Sunset” provision in the amended promulgation. On motion of Mimi Brill, seconded by Rebecca Turner, the Committee unanimously approved of inclusion of a two-year “Sunset” in the recommendation to the Court.

#### **--A.O. 47 (Technical Standards for Remote and Hybrid Proceedings)**

A revised A.O. 47 (Technical Standards) was proposed by the Special Committee on Remote Hearings, and published for comment on December 13, 2022, with comment period closing on February 13, 2023.

In discussion, the proposed amendments were viewed favorably by Committee members, as articulating greater clarity than the existing A.O., and stating more affirmative obligation in assuring participant ability to see and hear other participants in video conference, for both those participating remotely, and those in the courtroom to see and hear the remote participant. Similarly, in contrast to the existing A.O. subsection (g), which requires “means for a party to consult with counsel” where a party participates remotely, the proposed amendment (a renumbered (e)) requires that “The parties *must be able to* consult privately with counsel for full and confidential communication during the proceeding.”

Two new subsections would be added to A.O. 47, addressing access to public proceedings, whether fully remote, or hybrid (some participants in person, some remote). While these are housed in a document specifying technical standards for remote video and audio proceedings, they substantively regulate public rights of access to remote and hybrid proceedings. And, they are of pertinence to a defendant’s Sixth Amendment right to a “public” trial. For fully remote proceedings, upon request and absent extraordinary circumstances, public access will be provided. For hybrid proceedings, public access in person will be provided; opportunity to hear and view through remote means “may” be provided. In the context of discussion of public access to remote or hybrid proceedings, Laurie Canty stated that an Administrative Directive (TC-3, effective 2/21/23) had been issued to provide additional detail as to provision of public access to remote and hybrid proceedings.<sup>7</sup> Alison Arms and John Treadwell shared some observations concerning Webex access in hybrid proceedings, including that a remotely viewing non-participant cannot observe the entire courtroom. Judge Arms noted that the Administrative Directive should not in any event be inconsistent with the provisions of an Administrative Order promulgated by the Court. Ms. Canty was of the view that that would not occur, given close involvement of Trial Court Operations in the process.

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<sup>7</sup> Ms. Canty provided a copy of TC-3 to Committee members during the course of the meeting via email.

Ultimately, the Committee consensus was to report support for the proposed A.O. 47 amendments to Scott Griffith, Special Committee Chair, and the Committee Reporter will do so.

### **--V.R.F.P. 17 (Remote Proceedings in Delinquency and Youthful Offender Cases)**

These amendments of V.R.F.P. 17 were also proposed by the Special Advisory Committee on Remote Hearings and are under review by the Family Rules Committee as well.

The Committee reviewed a draft prepared by the Committee Reporter, of suggested changes to the proposed V.R.F.P. 17 amendments that would move remote proceedings rules for delinquency cases from A.O. 38, to Family Rule 17, and incorporate Youthful Offender cases there as well. The suggested revision would add a subsection (c), to provide that in merits proceedings, prior to permitting remote witness testimony, the court must engage in a colloquy to assure that the youth is knowingly and voluntarily waiving the Confrontation right to the witness' physical presence, akin to the procedure outlined in the proposed V.R.Cr.P. 26.2(d). In discussion, it was suggested that one further change should be made to expressly reference 26.2 in the text of 17(c).<sup>8</sup> The Committee was in unanimous agreement to recommend that the proposed rule be so revised, with its decision to be reported to the Chair and Reporter of the Family Rules Committee.<sup>9</sup>

### **--V.R.Cr.P. 26.2 (Testimony by Video Conference by Agreement of Parties)**

At its December 2<sup>nd</sup> meeting, the Committee had approved of a final draft of this proposed rule for promulgation, with one minor addition to the accompanying Reporter's Notes.<sup>10</sup> Dan Sedon, who has long served on the Rule 26.2 subcommittee, brought up the subject of the proposed rule's requirement for a formal written notice of subsection (c). He suggested that while the original focus of the proposed rule had been upon advance notice for remote *trial* testimonies, for valid reasons previously considered by the Committee, formal written notice and a signed waiver by a defendant might not be necessary for proceedings other than trial, where remote witness testimony might be agreed to by parties and approved by the court without the difficulties and potential prejudice driving the need for formal advance notice for remote testimony at a scheduled trial by jury or court. Mr. Sedon acknowledged the continued need for advance written notice for remote witness testimony at trial, to address parties' witness scheduling needs and trial preparations, and facilitate the orderly progress of trial. A record colloquy with and waiver by a defendant would still be required for any remote witness testimony

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<sup>8</sup> The phrase, "...in a manner consistent with the provisions of V.R.Cr.P. 26.2" would be added to the text at the end of proposed subsection (c).

<sup>9</sup> The Committee Reporter also mentioned that the last sentence of proposed 17(b) states, "The testimony of a party may not be taken by video or audio conference without that party's consent" and suggested that a clarification of what is meant by "party" should be considered by either Family Rules or the Special Committee, in the context of the Criminal Rules Committee's recommended addition of a 17(c). That suggestion will be communicated to the Family Rules Committee Reporter, Judge Davenport.

<sup>10</sup> To add text to the note for subdivision (f)(criteria to be considered by the Court) noting, but distinguishing, the factors prescribed in V.R.C.P. 43.1(c)(6) in determining whether to permit, require, or deny testimony by video conference. The latter rule authorizes the Court to order video testimony on motion, even over a party's objection, in consideration of whether good cause for such is established in consideration of those factors. Testimony cannot generally be ordered over a Defendant's objection, and without agreement, and waiver of Sixth Amendment (and more limited Fifth Amendment) Confrontation rights to the physical presence of the witness. The suggested text was added to the Reporter's Note (p.6) of the draft under consideration at the April 14<sup>th</sup> meeting.

under the proposed 26.2(d), akin to that required for waiver of a defendant's right of presence under V.R.Cr.P. 43(d)(1)(A).

On motion of Mr. Sedon, seconded by Mimi Brill (also a member of the 26.2 subcommittee), the Committee unanimously approved of revision of the proposal to limit application of subsection (c) to provision of remote witness testimony at trial, and for transmittal of the proposed amendment as edited to the Court with recommendation for promulgation.<sup>11</sup>

#### **4. Next Committee Meeting:**

The next Committee meeting will be scheduled after poll of the membership.<sup>12</sup> Chair Treadwell suggested that at the next meeting, the Committee might consider moving to a fixed schedule of quarterly meetings, on the same day/time each month, to facilitate long term booking and maximum Committee member attendance.

On Motion of Dan Sedon, seconded by Rebecca Turner, the meeting was adjourned at approximately 12:13 p.m.

Respectfully submitted,

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

[6/7/23]

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<sup>11</sup>Following last circulation of the final draft as revised for member comment on May 4, 2023, the proposed rule was transmitted to the Court with Committee recommendation for promulgation on May 19, 2023.

<sup>12</sup> After poll, the next Committee meeting was scheduled for June 9, 2023 at 1:30 p.m.