

STANDING ORDER (eff. Oct. 2, 2023)
Re: Chittenden Unit Criminal Division Remote Proceedings

Costello Courthouse Criminal Division: Remote Proceedings Quick Reference			
TYPE OF PROCEEDING	PRESUMED REMOTE	PRESUMED IN PERSON	EXCEPTION TO IN PERSON PRESUMPTION
Arraignments		X	X (with waiver and court permission)
Status conferences	X		
Suppression hearings		X	X (with waiver and court permission)
Oral argument on a question of law with no testimony	X		
Pretrial Conferences		X	
Jury Draws		X	
Change of plea		X	X (with waiver and court permission)
Sentencing with suspended sentence or imposition of a jail term		X	X (with waiver and court permission)

1. Introduction:

Provisions regarding remote proceedings governed by Administrative Order (“A.O.”) 49 expired on September 30, 2022. *See* A.O. 49, ¶ 2. In addition, the Supreme Court has amended A.O. 38 to address the continuing use of certain remote proceedings in the Criminal Division of the Superior Court:

Administrative Order No. 38 is amended to conform to concurrent amendments to Vermont Rule for Family Proceedings 17 and Vermont Rule of Civil Procedure 43.1. The amendment removes the reference to juvenile delinquency proceedings in the title and in § I because delinquency (and youthful offender) proceedings are now addressed in revised V.R.F.P. 17(c), which incorporates V.R.C.P. 43.1 for certain types of nonevidentiary proceedings. Subdivision I(c) is amended to update the cross reference to the factors for a court and parties to consider in evaluating whether to allow remote audio or video testimony by agreement under (b)(2), which now incorporates by reference consideration of and compliance with the provisions of V.R.Cr.P. 26.2.

Subdivision I(a) addresses circumstances of remote participation by the court and the parties where the presence of the defendant is not required by law; subdivision (b) prescribes circumstances in which parties may participate remotely by agreement of the parties, and in other proceedings where the defendant’s presence is required by law. In contrast to I(a)(1), paragraph (b)(1) reflects the concern that where the judge must serve as a factfinder, and in other circumstances in which a defendant’s presence is required by law, the judge may preside remotely only upon agreement of the parties, and not on the judge’s own motion and over objection.

As a central reference in the application of subdivisions I(a) and (b), V.R.Cr.P. 43 generally prescribes those criminal proceedings for which the presence of a defendant is, or is not, required. Beyond Rule 43, certain constitutional imperatives may require, or provide a defendant’s right to be present, as well. V.R.Cr.P. 43(d)(1) establishes procedures for a defendant’s waiver of the right to be physically present in court, where applicable.

Of course, in criminal proceedings, in contrast to presence and participation, provision of witness testimony remotely contemplates agreement of the parties in accordance with subdivision (b)(2). Thus, subdivision I(c) directs that the court and parties must observe the requirements of V.R.Cr.P. 26.2 in conjunction with any proposal for remote witness testimony by agreement.

Reporters Notes—2023 Amendment, A.O. 38.

2. Defendant's presence¹ is required per V.R.Cr.P. 43(a) at:

- Arraignment, *see* V.R.Cr.P. 43(a)(2);²
- When a plea is offered, *see* V.R.Cr.P. 43(a)(1);
- At every stage of the trial, including the empaneling of the jury and return of verdict, *see* V.R.Cr.P.43 (a)(1); and
- At the imposition of sentence, *see* V.R.Cr.P. 43(a)(1) and (c)(2)³.

Because the Defendant's presence is required at these proceedings, the Court may preside remotely upon agreement of the parties, and/or use audio or video technology to effect the appearance of parties, witnesses, counsel, or other necessary persons, upon agreement of the parties. See A.O. 38, § I.(b)(1) & (2). In determining whether to allow a witness to provide testimony by remote audio or video by agreement of the parties under (b)(2), the parties and the court must observe the requirements of V.R.Cr.P. 26.2.⁴ A.O. 38 § I(c).

¹ Per V.R.Cr.P. 43(d), "[f]or purposes of this rule, a defendant shall be deemed to be present in court if:

- (A) after having the opportunity to consult with counsel in person, telephonically, or via audio or video conference, the defendant makes an on-the-record waiver of the right to be physically present in court at the time of the proceeding; and
- (B) the defendant's appearance at the proceeding is made by means of contemporaneous video or audio conference transmission."

V.R.Cr.P. 43(d)(1). There appears to be a limited exception to this definition with respect to arraignments, for which a Defendant must be physically present, absent their consent. See V.R.Cr.P. 43(a)(2).

² This subsection states specifically, "Arraignments shall be in person and shall be on the record and shall not be performed by video conferencing or other electronic means unless the defendant consents." V.R.Cr.P. 43(a)(2).

³ In part, V.R.Cr.P. 43(c)(2) provides: "In prosecutions for misdemeanors, the defendant, with the consent of the court, may waive appearance under Rule 5 in writing and the court, with the written consent of the defendant and the state's attorney, may permit arraignment, pleas of guilty, nolo contendere or not guilty, trial, and imposition of sentence in the defendant's absence....").

⁴ In particular, Rule 26.2 requires that "[t]he party intending to submit testimony at trial by video conference ... give written notice to the court at least 14 days prior to the proceeding or on such shorter notice to which the parties agree and for which the court finds good cause, provided that notice is otherwise consistent with any notice required by Rule 26. This notice must:

- (1) include a description of the how the testimony will be taken and how the requirements of subdivision (f) of this rule will be satisfied;
- (2) inform the court as to the other parties' consent and agreement;
- (3) include a signed waiver by the defendant of any claims as to waiver of confrontation rights at trial related to the physical presence of the witness providing video conference testimony."

V.R.Cr.P. 26.2(c). Further,

Before approving video-conference testimony, the court must address the defendant directly in open court and determine that the defendant understands that by agreeing to the use of video-teleconference testimony, the defendant expressly waives any claims as to that component of confrontation rights related to the physical presence of the witness providing video conference testimony. The court must determine that the defendant's waiver and agreement are knowingly and

3. **Defendant’s presence is not required** per V.R.Cr.P. 43(c):

- In prosecutions for misdemeanors [specific events undefined by statute] at:
 - Appearance under Rule 5, if
 - waived in writing by Defendant and
 - with consent of court, see V.R.Cr.P. 43(c)(2);
 - Arraignment; pleas of guilty, nolo contendere, or not guilty; trial; imposition of sentence, but only with written consent of Defendant and the State’s Attorney, see V.R.Cr.P. 43(c)(2);
- At a conference or argument upon a question of law, see V.R.Cr.P. 43(c)(3); and
- “[A]t any other proceeding except as provided in subdivision (a) of [V.R.Cr.P. 43(a)]” or as otherwise ordered by the court. V.R.Cr.P. 43(c)(3).

Because the defendant’s presence is not required, the court

- may preside remotely on its own motion and
- may require parties, witnesses, counsel, or other necessary persons to participate remotely by audio or visual conference upon reasonable notice.

A.O. 38, § I(a)(1)–(2).

When conducting remote hearings in arraignments, pleas, trial, imposition of sentence and hearings establishing or amending conditions of probation, parties must participate with both video and audio capabilities. See V.R.Cr.P. 26.2(b); A.O. 38, § II; A.O. 47.

4. **Other: exhibits and documents (plea agreements).**

For remote hearings, parties shall prefile exhibits with the court and exchange exhibits with other parties, seven (7) days prior to the hearing date. *See generally* Vermont Rules of Electronic Filing (2020); *see also* V.R.Cr.P. 45(d) (“When a motion is supported by affidavit, the affidavit shall be served with the motion. Opposing affidavits may be served not later than seven (7) days before the hearing, unless the court permits them to be served at some other time.”).

voluntarily given. In the colloquy, among any other advisements or inquiries within the court’s discretion, the court must:

- (1) Inquire as to whether the defendant had adequate time to discuss waiver and agreement with counsel—including the pros and cons of permitting testimony of a witness by video conference; and
- (2) Advise the defendant that the waiver is the defendant’s sole personal decision; that the attorney cannot make that decision without the defendant’s express agreement; and that the waiver and agreement is final and binding, and once given and accepted by the court, may not be withdrawn without good cause as provided in subdivision (g).

V.R.Cr.P. 26.2(d).

Note that pre-filing exhibits does not mean that the exhibits are deemed admitted. *See* V.R.Elec.F. 8(a) (“All documents and photographs which are offered into evidence as exhibits will be added to the electronic casefile unless the offer is withdrawn.”).

Exhibits need not be pre-filed when a proceeding is conducted in person.

Plea agreements (and related plea documents such as collateral consequences forms, agreed upon probation conditions, restitution judgment orders) must be pre-filed before the change of plea hearing unless the court indicates otherwise.

ORDER

By this Order, the Court provides notice pursuant A.O. 38(a)(2) of the following:

1. Proceedings at which a Defendant's presence is not required will be conducted remotely, unless specific notice of appearance has been otherwise ordered by the Court in advance of the hearing. This includes all status conferences.
2. Although remote proceedings are permissible with agreement of the parties when a Defendant's presence is required, the following hearings will not be conducted remotely unless otherwise ordered by the Court in advance of the hearing:
 - Suppression hearings;
 - Arraignments, unless the case is a misdemeanor and there is filed a written consent;⁵
 - Pretrial conferences;
 - Jury draws;
 - Changes of plea;
 - Sentencing where an incarcerative or suspended sentence is imposed.
3. Any time that a Defendant appears in court in person, defense counsel must also appear in person. This is particularly imperative where the Defendant is incarcerated and is transported for the event. Defense counsel shall confer with their clients prior to any scheduled event to determine whether the client will appear in person.

⁵ Attorneys are encouraged to appear with their clients, however attorneys who are scheduled in multiple counties with insufficient travel time need only inform the Court on the record during the arraignment that they are scheduled in multiple counties and the attorney may appear remotely.

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This order will remain in effect until amended, rescinded, or superseded by subsequent order, as circumstances or applicable statutes, rules, or policies change. Parties should check frequently for any changes or updates to this standing order.

DATED at Burlington, County of Chittenden, Vermont, this the 7th day of August, 2023.



Alison Sheppard Arms
Superior Court Judge