

**STATE OF VERMONT
VERMONT SUPREME COURT
JUNE TERM, 2023**

**Order Promulgating Addition of Rule 26.2 to the Vermont Rules of Criminal Procedure
and Amending A.O. 47**

Pursuant to the Vermont Constitution, Chapter II, § 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 26.2 of the Vermont Rules of Criminal Procedure be added to read as follows:

RULE 26.2. TESTIMONY BY VIDEO CONFERENCE

(a) **Testimony by Video Conference.** Notwithstanding Rule 26(a), with the court's prior approval, the parties may agree to take testimony from a witness in an evidentiary proceeding by contemporaneous video conference presented in open court. For purposes of this rule an evidentiary proceeding is one in which live oral testimony is taken.

(b) **Contemporaneous Video Conference.** Contemporaneous video conference means a conference among people at different places using an interactive technology that sends and receives video, voice/audio, and data signals so that two or more individuals or groups can communicate with each other contemporaneously using cameras, audio microphones, audio speakers, and computer monitors, and similar technology that meets the technical requirements established pursuant to subdivision (h).

(c) **Written Notice Required for Trial Testimony.** The party intending to submit testimony at trial by video conference must 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.

(d) **Express Waiver by Defendant on the Record.** 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 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).

(e) **Party Responsible for Coordinating.** The party seeking to introduce testimony by video conference is responsible for coordinating the technology for viewing into the courtroom, including any costs. However, to the extent available, and with consent of the court, court technologies may be used in the preparation or presentation of the testimony provided by the provisions of this rule.

(f) **Manner of Taking Video Conference Testimony.** The witness providing video conference testimony must be visible to the court, the defendant, counsels, jury, and others physically present in the courtroom.

(1) The witness appearing remotely must be located in a courtroom, government office, law office, or other suitable place conducive to the taking of testimony as approved by the court.

(2) A video conference technician is the only person allowed in the presence of the remote witness unless the court, in its discretion, determines that another person may be present. Any person present with the witness must be identified for the record, and issues associated with their presence addressed, prior to the taking of the testimony.

(3) The court and the witness must be able to see and hear each other simultaneously and communicate with each other during the proceeding.

(4) The defendant, counsel from both sides, and the witness must be able to see and hear each other simultaneously and communicate with each other during the proceeding.

(5) A defendant who is represented by counsel must be able to consult privately with defense counsel during the proceeding.

(6) Direct examination and cross-examination of the witness will proceed in the same manner as permitted at trial.

(7) A verbatim record of the testimony must be taken in the same manner as for other testimony.

(g) **Withdrawal of Agreement and Waivers for Video Conference Testimony.** A party may withdraw its agreement and waivers associated with video conference testimony only upon good cause shown, and as found by the court. In the determination of whether good cause is presented, the court may consider the following among other factors:

(1) The timing or juncture in the case at which the withdrawal is requested;

(2) Prejudice that would result to either party in consequence of the withdrawal, in terms of availability or unavailability of witnesses; undue hardship or inconvenience to witnesses; or additional costs that would be borne by either party in consequence of the withdrawal;

(3) Undue delay in case progress, or waste of judicial resources resulting from the withdrawal;

(4) Whether reasonable alternatives are available to secure the subject witness's testimony other than by video conference;

- (5) The adequacy of the court’s initial colloquy with the defendant regarding the defendant’s waiver and agreement, if raised in the motion for withdrawal.
- (6) Whether the defendant was represented by counsel at time of waiver and agreement and the time of the request to withdraw, including defendant’s assistance of counsel pertaining to the waiver and agreement;
- (7) Whether the defendant’s waiver and agreement to video testimony was given knowingly and voluntarily;
- (8) The failure or inadequacy of the technology employed or to be employed, in the course of presentation of the witness’ testimony; and
- (9) Any other material factor relevant to whether good cause is presented for withdrawal from the waiver and agreement for video testimony previously given to, and accepted by the court.

(h) **Technical Standards.** The Supreme Court by Administrative Order will establish technical standards that must be applied in all proceedings under this rule.

Reporter’s Notes

Rule 26.2 is added to provide for video conference testimony in criminal proceedings, upon agreement of the parties and approval by the court. In contrast to the provisions of V.R.C.P. 43.1 and V.R.P.P. 43.1, the present amendment makes no provision for receipt of video testimony over defendant’s objection, and absent express waiver, in recognition of the Sixth Amendment and Article 10 rights to confrontation and cross examination accorded to the accused, subject only to the limited exception authorized by V.R.E. 807 (providing for testimony of victim who is a minor or person with a mental illness, or an intellectual or developmental disability based on findings of substantial risk of trauma and impairment of ability to testify).

The rule is not intended to address issues of remote participation and presence of criminal case participants (including the defendant) generally, as those are governed by other provisions of law, including the constitutionally premised V.R.Cr.P. 43 and Administrative Order No. 38. See also State v. Grace, 2016 VT 113, ¶¶ 12-19, 204 Vt. 68, 165 A.3d 122.

When confrontation rights are applicable, the appellate cases simply do not permit the court as a general rule to authorize remote testimonies without consent, or over the defendant’s express objection. The context is determinative, ranging from the trial itself, State v. Tribble, 2012 VT 105, 193 Vt. 194, 67 A.3d 210; New Mexico v. Truett, 376 P.3d 184 (N.M. 2016), to pre-trial suppression hearings, State v. Grace, 2016 VT 113, to violation of probation merits hearings. State v. Eldert, 2015 VT 87, 199 Vt. 520, 125 A.3d 139 (citing State v. Austin, 165 Vt. 389, 685 A.2d 1976 (1996) and discussing “good cause” standard for denying probationer confrontation rights); see also Crawford v. Washington,

541 U.S. 36 (2004); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

In Tribble, the Court noted that most jurisdictions have recognized the validity of an attorney's waiver of the Right to Confrontation on a defendant's behalf via stipulations for admission of evidence, where the attorney's waiver is made for tactical reasons, and with a defendant's record awareness and agreement. However, such waivers by attorney are consistently held to be ineffective, where the defendant dissents from or objects to the attorney's decision. 2012 VT 105, ¶¶ 14, 15. In Tribble, the defendant had clearly expressed objection to his attorney's stipulation to admission of a "preservation" deposition of an expert witness at trial in lieu of testimony in person. The Court observed that there are a number of cases establishing that valid attorney waiver of confrontation rights may occur if the waiver is stated by the attorney on the record in the presence of the defendant, with no objection voiced by the defendant. The Court explained, however that it had "found no authority to support the proposition that counsel can stipulate to the admission of out-of-court testimony thereby waiving defendant's Confrontation Clause rights in the face of defendant's express objection." Id. ¶ 37. The Court found "no doubt" that the defendant dissented from his attorney's decision to stipulate to admission of the deposition testimony, and that admission of the testimony was thus error. Id. ¶ 38. The Court did not expressly reach the issue of whether a defendant's silence in the presence of an attorney's record stipulation to waiver of confrontation rights would constitute a waiver on the defendant's part, or whether a personal colloquy with a defendant would be required to establish waiver. State v. Koveos, 169 Vt. 62, 732 A.2d 722 (1999), held that a defendant could not argue that his Confrontation rights were denied when he had specifically agreed to the process which resulted in admission of a pretrial deposition without live testimony of the witness.

Subdivision (a) authorizes provision of witness testimony via video conference by agreement of the parties and with approval of the court.

Subdivision (b) defines contemporaneous video conference.

Subdivision (c) prescribes the timing and required content of a notice of intent to provide testimony of a witness via video conference at trial. As a general matter, notice of intent to provide such testimony must be given to the court no less than 14 days prior to the proceeding in issue. By agreement of the parties, and court finding of good cause, a shorter period of notice may be recognized, provided that any advance notice must otherwise comply with any particular notice

requirement imposed by V.R.Cr.P. 26. In addition to other prescribed content, the notice must include a signed waiver by the defendant of any claims as to that component of confrontation rights related to the physical presence of the witness providing video-conference testimony.

The advance notice requirement where the testimony of a trial witness via video conference is contemplated is driven by a number of important considerations, not least among them the paramount interest of a defendant to confront state witnesses at trial and the significance of waiver of the right to the physical presence of the witness, and the interests of parties and the court in clarity of procedure, where a case is to be scheduled for fixed jury selection and trial dates. The advance notice seeks to avoid surprise, and potential disruption of a trial set for fixed dates, and permits reasonable scheduling of the testimony of the remote witness, consistent with the progress of the trial. Advance notice also serves to permit the details and circumstances of the remote witness' testimony to be settled, and parties' reasonable expectations as to such known in advance, facilitating fair and efficient conduct of the trial. And it serves to provide opportunity for meaningful colloquy by the court with the defendant prior to trial as to waiver of the right to physical presence of the witness, and the consequences of such waiver. The advance notice requirement of subdivision (c) does not apply to remote witness testimony given by agreement other than at trial. However, all other requirements of the rule do apply as pertains to such testimony.

Subdivision (d) provides that before approving witness testimony via video conference, the court must address the defendant directly in open court and determine that the defendant understands the nature of the confrontation rights related to presence of the witness that are being waived, and that the waiver is knowing and voluntary. See Tribble, 2012VT 105, and related cases. The specific elements of the court's colloquy with the defendant are not prescribed by the rule. At a minimum, per paragraphs (d)(1) and (2), the court must 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. The court must advise the defendant that the waiver is a personal decision, that an attorney cannot make that decision without the defendant's express agreement, that the waiver and agreement is final and binding, and that, once given and accepted by the court, may not be withdrawn absent good cause as provided in (g).

Subdivision (e) provides that the party seeking to produce the testimony of the witness via video conference is responsible for coordinating the technology into the courtroom and bears the

expenses for audio/visual arrangements. However, given widespread employment of Webex and other technologies employed in courtrooms for remote proceedings, to the extent available, and with consent of the court, court technologies may be used in the preparation or presentation of the testimony provided by the provisions of this rule.

Subdivision (f) prescribes the specific requirements for the manner of provision of the video conference testimony, including but not limited to locations; persons authorized to be in the presence of the remotely testifying witness; ability for the participants to observe each other; and ability of counsel and defendant to consult privately during the proceeding. Under (f)(1) and (2), location of the witness and presence of any other person with the witness are as approved or determined by the court. The standards required under subdivision (f) parallel, but are not identical to, the factors that must be considered by the court under V.R.C.P. 43.1(c)(6) in determining whether to permit, require, or deny testimony by video conference.

Subdivision (g) provides criteria for the court to consider if a party seeks to withdraw from agreement for testimony of a witness by video teleconference. Establishment of good cause is required for court approval of any withdrawal. The subdivision specifies criteria to guide the court in the exercise of its discretion to grant or deny any such request to withdraw from waiver and agreement. These criteria include among other factors good cause attributable to the failure or inadequacy of the technology to be employed in the presentation of a witness's testimony.

These criteria recognize the difficulties presented in a trial on the merits of a criminal charge that has commenced before jury or judge, where jeopardy has attached, and where in reliance upon agreement and waiver for remote testimony, a party may be unable to physically produce the witness for testimony at trial. The rule entrusts the decision to grant or deny a request to withdraw from agreement for testimony by video conference to the court's discretion because that determination must be made in the presenting, case-specific circumstances, with opportunity for the parties to be heard in context of those existing case dynamics.

2. That Administrative Order 47 be amended to read as follows (new matter underlined; deleted matter struck through):

Administrative Order No. 47

TECHNICAL STANDARDS FOR VIDEO AND AUDIO CONFERENCE ADOPTED

PURSUANT TO V.R.P.P. 43.1(e), ~~OR~~ V.R.C.P. 43.1(e), OR V.R.Cr.P. 26.2

The following Technical Standards are adopted and must be applied in all video and audio conference proceedings under V.R.P.P. 43.1, ~~or~~ V.R.C.P. 43.1, V.R.Cr.P. 26.2 and other rules incorporating provisions of ~~that~~ those rules:

§ 1. **Video Conference Proceedings.** In any proceeding in which the use of video conferencing is otherwise appropriate under V.R.P.P. 43.1, ~~or~~ V.R.C.P. 43.1, or V.R.Cr.P. 26.2:

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3. That these amendments be prescribed and promulgated, effective on September 5, 2023. The Reporter's Notes are advisory.

4. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 5th day of June, 2023.



Signed by the Vermont Supreme Court

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice