

STATE OF VERMONT  
SUPREME COURT  
AUGUST TERM

**Order Amending Administrative Order No. 38**

Pursuant to the Vermont Constitution, Chapter II, §§ 30 and 37, it is hereby ordered:

1. That Administrative Order No. 38 be amended to read as follows (new matter underlined; deleted matter struck through):

~~ADMINISTRATIVE ORDER NO. 38. RULES FOR UTILIZATION OF VIDEO  
CONFERENCING AND TELEPHONE CONFERENCING TECHNOLOGY~~ REMOTE  
PROCEEDINGS IN THE CRIMINAL DIVISION AND JUVENILE DELINQUENCY  
PROCEEDINGS IN THE FAMILY DIVISIONS OF THE SUPERIOR COURT

**Section I. Authorizations and Requirements**

Notwithstanding any rule or provision to the contrary in the Criminal Division and in juvenile delinquency proceedings in the Family Division:

(a) **Nonevidentiary Proceedings.** ~~the presiding judge in the Criminal Division of the Superior Court sitting in a facility equipped with video conferencing technology:~~

In nonevidentiary proceedings such as status conferences, and other proceedings where the presence of the defendant is not required by law, on its own motion, the court may:

(1) preside remotely;

(2) require parties, witnesses, counsel, or other necessary persons to participate remotely by audio or video conference upon reasonable notice.

(b) **Evidentiary Proceedings.**

In evidentiary proceedings, including -shall, except as provided in (3), use video conferencing technology to effect the appearance of incarcerated parties and certain witnesses. This requirement does not apply to the following proceedings in criminal cases: jury or court trials, including the jury draw proceeding, contested violation of probation hearings on the merits, sentencing hearings, bail hearings when the state is requesting that the defendant be held without bail, and contested bail or motion hearings involving witnesses whom the defendant has the right to cross-examine, the court may: -

(1) preside remotely;

(2) use audio or video may use telephone conferencing technology to effect the appearance of parties, and certain witnesses, counsel, or other necessary persons incarcerated in facilities without video conferencing equipment, and video conferencing equipment for sentencing hearings, upon agreement of the parties.

(3) may conduct a proceeding governed by subsection (a)(1) involving the in-court appearance of the incarcerated individual if the presiding judge finds, and places the finding and the reasons for it, on the record, that good cause exists for not using video conferencing technology in that proceeding.

(b) the presiding judge in the Family Division of the Superior Court sitting in a facility equipped with telephone conferencing technology may use telephone conferencing technology or video conferencing technology, if so equipped, to effect the appearance of incarcerated parties and certain witnesses upon agreement of the parties or upon a determination by the Court that no party's right to full and fair adjudication will be denied by the process.

(c) **Factors.** In determining whether to allow a witness to provide testimony by remote audio or video by agreement of the parties under (b)(2), the court will consider the factors in V.R.C.P. 43.1(c)(6) (video) and V.R.C.P. 43.1(d)(3) and (4) (audio).

## **Section II. Technical Standards Video Conferencing Equipment**

The technical standards in Administrative Order 47 apply to remote proceedings by video or audio conference under this Order.

~~Except as provided above, for purposes of this Order any requirement that a defendant “be present” or that the proceeding take place “in open court,” or that a defendant appear “personally” in a criminal proceeding, any right a party may have to the presence of a witness, and any right a party may have to be present at a family proceeding may be deemed to have been met if that party or witness appears in Court via approved video conferencing equipment and the following safeguards are met:~~

- ~~(a) The defendant, party or witness is in custody at a facility where a video conferencing station is located;~~
- ~~(b) The video conferencing equipment affords clear, high quality coverage of the defendant, party or witness in custody, counsel, the judge and any witnesses;~~
- ~~(c) Any proceeding conducted by video conferencing technology is recorded verbatim by a Court approved audio visual or audio recording system, or by any other verbatim recording method approved by statute, rule, or administrative order or directive for use if video conferencing technology were not employed, and the recording is made part of the record;~~
- ~~(d) The defendant, party or witness has access to and may consult fully and confidentially with counsel at any time during the proceeding;~~
- ~~(e) Equipment is available for immediate transmission of documents and papers.~~

## **Section III. Telephone Conferencing Equipment**

~~Section II of this Administrative Order shall also apply to proceedings using telephone conferencing equipment with the following safeguards:~~

- ~~(a) All parties, counsel, witnesses and the judge can clearly hear the voice that reaches the court over the telephone; and the person on the telephone can clearly hear all participants at the courthouse;~~
- ~~(b) Any statements made over the telephone are recorded as part of the record of the court proceeding;~~
- ~~(c) The person who is present only over the telephone may consult fully and confidentially with counsel by private telephone line at any time during the proceeding;~~
- ~~(d) Equipment is available for immediate transmission of documents and papers.~~

## **Section IV. Utilization of Video Testimony Pursuant to V.R.E. 807(e) in the Criminal and Family Divisions of the Bennington Unit of the Superior Court**

~~(a) In the Criminal and Family Divisions of the Bennington Unit of the Superior Court, the presiding judge is authorized to permit testimony of a child offered pursuant to V.R.E. 807(e) to be televised by (1) two-way closed circuit equipment as described in V.R.E. 807(e), or (2) one-way communication with the witness and lawyers in a room outside the courtroom and the questions and testimony transmitted to the courtroom.~~

~~(b) Prior to permitting a proceeding where one-way or two-way communication is utilized pursuant to V.R.E. 807(e), the judge shall make findings on the record regarding the necessity of the closed circuit television procedure.~~

~~(c) One-way or two-way televised proceedings may only be used if the following safeguards are in place:~~

~~(1) the video equipment affords the defendant and the jury a clear, high-quality audio and visual representation of the testimony;~~

~~(2) the video media is kept as part of the record;~~

~~(3) the defendant has access to and may consult fully and confidentially with counsel at any time during the proceeding.~~

### **Reporter's Notes—2022 Amendment**

Administrative Order 38 is amended to update its provisions regarding the use of remote video and audio technology for criminal and delinquency proceedings. A.O. 38 previously authorized the use of audio and video technology to secure the presence of defendants and certain witnesses that were incarcerated. In response to the COVID-19 pandemic, remote technology was used more broadly to allow the court to preside remotely and for remote participation by parties, witnesses, counsel, and other persons. These proceedings were authorized by Administrative Order 49, ¶ 5(b). As the Judiciary transitions away from emergency measures implemented in response to the pandemic, it continues to use remote technology when appropriate. The amendments authorize a court to preside remotely and to require parties, witnesses, counsel, and other necessary persons to participate remotely when the court is conducting a nonevidentiary proceeding and the defendant's presence is not required by law. For evidentiary proceedings, the court may preside remotely, and the remote participation of others is authorized only upon agreement of the parties. The rule incorporates the factors in Vermont Rule of Civil Procedure 43.1 for the court to evaluate whether to allow remote witness testimony. In Section II, the technical standards from Administrative Order 47 are incorporated.

2. That this order, as amended, is prescribed and promulgated to become effective September 6, 2022. The Reporter's Notes are advisory.

3. That the Court finds that this emergency amendment must be promulgated without resort to the notice and comment procedures set forth in Administrative Order No. 11, to allow the court to preside remotely and for participation remotely once Administrative Order No. 49 expires. That the amended order be sent out for comment and the Court's Advisory Committees on the

Rules of Criminal Procedure and for Family Proceedings are directed to consider any comments, and report back to the Court on whether to permanently adopt the amendments or make further changes.

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

Done in Chambers at Montpelier, Vermont, this 9<sup>th</sup> day of August, 2022.



Signed by the Vermont Supreme Court

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice

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Nancy J. Waples, Associate Justice