

**STATE OF VERMONT
SUPREME COURT
JULY TERM 2023**

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 as follows (new matter underlined; deleted matter struck through):

ADMINISTRATIVE ORDER NO. 38. REMOTE PROCEEDINGS IN THE CRIMINAL
DIVISION ~~AND JUVENILE DELINQUENCY PROCEEDINGS IN THE FAMILY DIVISION~~
~~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.~~ **Proceedings in Which a Defendant's Presence Is Not Required.**

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.~~ **Proceedings in Which a Defendant's Presence Is Required.**

In ~~evidentiary~~ proceedings where the presence of a defendant is required by law, including but not limited to jury or court trials, including the jury draw proceeding, contested violation of probation hearings on the merits, sentencing hearings, and contested hearings involving witnesses whom the defendant has the right to cross-examine, the court may:

- (1) preside remotely, upon agreement of the parties;
- (2) use audio or video technology to effect the appearance of parties, witnesses, counsel, or other necessary persons, upon agreement of the parties.

(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 parties and the court will consider must observe the factors requirements of in V.R.C.P. 43.1(e)(6) (video) and V.R.C.P. 43.1(d)(3) and (4) (audio) V.R.Cr.P. 26.2.

Section II. Technical Standards

The technical standards in Administrative Order No. 47 apply to remote proceedings by video or audio conference under this Order.

Reporter's Notes—2023 Amendment

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.

2. That this Order as revised, shall become effective on October 2, 2023.

3. That the Advisory Committee on Rules of Criminal Procedure is directed 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 as 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.

4. The Reporter's Notes are advisory.

5. 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 10th day of July, 2023.



Signed by the Vermont Supreme Court

Paul L. Reiber, Chief Justice

Harold E. Eaton, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice