

**STANDING ORDER**

**Re: Chittenden Unit Criminal Division Remote Proceedings**

**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 38 is amended to update its provisions regarding the use of remote and 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<sup>1</sup> 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.

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<sup>1</sup> **Defendant’s Presence.** A defendant is “present” after having had the opportunity to consult with counsel and waiver of physical presence on the record with contemporaneous video or audio transmission. V.R.Cr.P. 43(d)(1)(A)-(B). V.R.Cr.P. 43(c)(3) provides: “The defendant’s presence is not required at a conference or argument upon a question of law and is not required at any other proceeding except as provided in subdivision (a) of this rule or otherwise ordered by the court.” For example, V.R.Cr.P. 43(a)(2) allows that “video conferencing may be used to effect the appearance of the defendant at status conferences, calendar calls, and other proceedings where the presence of the defendant is not required by this rule.” By contrast, “[a]rraignments shall be in person and on the record and shall not be performed by video conferencing or other electronic means unless the defendant consents.” *Id.*

Reporters Notes-2022 Amendment, A.O. 38 (emphasis and footnote added).

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

- Arraignment, *see* V.R.Cr.P. 43(a)(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
- With the exception of certain misdemeanors, at the imposition of sentence, *see* V.R.Cr.P. 43(a)(1) and (c)(2)<sup>2</sup>.

Because the Defendant's presence is required at these proceedings, the Court may preside remotely, upon agreement of the parties, and after consideration of the factors in V.R.C.P. 43.1(c)(6) (video) and V.R.C.P. 43.1(d)(3) and (4) (audio). See A.O. 38, § I.(b)(2), (c).

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

- Misdemeanors [specific events undefined by statute], with consent of court per Rule 5, in writing, *see* V.R.Cr.P. 43(c)(2);
- Arraignment, pleas of guilty, nolo contendere, not guilty, trial, imposition of sentence 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)].” V.R.Cr.P. 43(c)(3).

Because the defendant's presence is not required, the court may preside remotely at evidentiary proceedings with 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.

**4. Evidentiary proceedings.**

Generally “evidentiary proceedings” may be conducted remotely, and specifically “including 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 ... upon agreement of the parties,” and upon consideration and determination by the court of the factors in V.R.C.P. 43.1(c)(6) (video) and V.R.C.P. 43.1(d)(3) and (4) (audio). A.O. 38, § I.(b)(2), (c).

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<sup>2</sup> 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, please of guilty, nolo contendere or not guilty, trial, and imposition of sentence in the defendant's absence....”)

5. **Nonevidentiary proceedings:**

Upon reasonable notice, the court may proceed remotely in nonevidentiary proceedings. See A.O. 38, § I.(a)(2). Remote participation is also permitted in evidentiary proceedings upon agreement of the parties. See A.O. 38, §I.(b)(2).

6. **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 7 days before the hearing, unless the court permits them to be served at some other time.”).

Note that prefilings 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. Nonevidentiary proceedings 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 conducting evidentiary hearings and upon consideration of the factors in V.R.C.P. 43.1<sup>3</sup>, the following hearings will not be conducted remotely unless otherwise ordered by the Court in advance of the hearing:
  - Suppression hearings will be conducted in-person;
  - Arraignments will be conducted in person unless there is filed a V.R.Cr.P. 5 waiver.<sup>4</sup>
  - Changes of plea with agreement and permission of Court;
  - Sentencing will be conducted in person where an incarcerative or suspended sentence is imposed.

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<sup>3</sup> V.R.C.P. 43.1(c)(6) provides:

In determining whether to permit, require, or deny participation, the presentation of testimony, or presiding from a remote location by **video conference**, the court will consider the following factors:

- (A) Whether the locations involved in the hearing have technological capabilities that satisfy the standards adopted pursuant to subdivision (e);
- (B) The convenience of the parties and proposed witnesses; the importance, complexity, and nature of the hearing; and the cost of producing a witness in person in relation to the importance of the offered testimony;
- (C) Whether the moving party attempted to procure the physical presence of a witness;
- (D) Whether a witness or other participant is incarcerated;
- (E) Whether satisfactory provision can be made for confidential communications between lawyers and their clients or witnesses;
- (F) That there is assurance satisfactory to the court of the identity of any witness appearing by video conference and the administration of the oath to that witness in a manner consistent with the laws of Vermont;
- (G) Whether the procedure would allow for full and effective examination and cross-examination of witnesses by all parties and the court, including access to any documentary or other tangible evidence necessary to the examination or cross-examination of any witness;
- (H) Whether any undue prejudice would result to a party or witness;
- (I) Whether the use of video conferencing technology diminishes or detracts from the dignity, solemnity, and formality of the hearing or undermines its integrity, fairness, or effectiveness; and
- (J) Any other factors that the court may determine to be relevant. (emphasis added).

See also V.R.C.P.43.1(d) (audio conference factors).


<sup>4</sup> 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.

**Costello Courthouse Criminal Division Remote Proceedings Quick Reference  
10/5/2022**

<b>TYPE OF PROCEEDING</b>	<b>PRESUMED REMOTE</b>	<b>REMOTE WITH EITHER COURT PERMISSION OR UPON AGREEMENT OF PARTIES</b>	<b>PRESUMED IN PERSON</b>	<b>EXCEPTION TO IN PERSON PRESUMPTION</b>
Status conferences	<b>X</b>			
Nonevidentiary proceedings	<b>X</b>			
Evidentiary proceedings			<b>X</b>	<b>X (with waiver and court permission)</b>
Suppression hearings			<b>X</b>	<b>X (with waiver and court permission)</b>
Oral argument on a question of law with no testimony	<b>X</b>			
Arraignments			<b>X</b>	<b>X (with waiver and court permission)</b>
Change of plea		<b>X</b>		
Sentencing with suspended sentence or imposition of a jail term			<b>X</b>	<b>X (with waiver and court permission)</b>

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 5<sup>th</sup> day of October, 2022.



Alison Sheppard Arms  
Superior Court Judge