

## **SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

### **Notice of Proposed Amendments to Rule 43 of the Superior Court Rules of Criminal Procedure**

The District of Columbia Superior Court Rules Committee recently completed review of proposed amendments to Rule 43 of the Superior Court Rules of Criminal Procedure. The Rules Committee will recommend to the Superior Court Board of Judges that the amendments be approved and adopted unless, after consideration of comments from the Bar and the general public, the proposed amendments are withdrawn or modified.

Written comments must be submitted by October 5, 2022. Comments may be emailed to [Pedro.Briones@dccsystem.gov](mailto:Pedro.Briones@dccsystem.gov) or may be mailed to:

Pedro E. Briones  
Associate General Counsel  
District of Columbia Courts  
500 Indiana Avenue, N.W., Room 6715  
Washington, D.C. 20001

All comments submitted in response to this notice will be available to the public. New language is underlined, and deleted language is stricken through.

### **Rule 43. Defendant's Presence**

(a) DEFINITIONS. As used in this rule:

(1) "Misdemeanor" means an offense punishable by fine or by imprisonment for not more than one year, or both.

(2) "Felony" means an offense punishable by imprisonment for more than one year.

(b) WHEN PHYSICAL PRESENCE REQUIRED. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be physically present at:

(1) the initial appearance, ~~the initial arraignment, and the plea;~~

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

~~(bc)~~ WHEN NOT REQUIRED PRESENCE BY VIDEO TELECONFERENCING OR TELEPHONE CONFERENCING PERMITTED. A defendant need not be physically present under any of the following circumstances:

~~(1) *Organizational Defendant.* The defendant is an organization represented by counsel who is present. *Misdemeanor Offense; any Proceeding by Video Teleconferencing or Telephone Conferencing.* The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's consent, the court may permits a defendant charged with a misdemeanor to appear arraignment, plea, trial, and sentencing to occur by video teleconferencing, by or telephone conferencing, or in the defendant's absence. for any proceeding, including arraignment, plea, trial, sentencing, or other hearing, if:~~

~~\_\_\_\_ (A) the defendant consents after consultation with counsel;~~

~~\_\_\_\_ (B) the government consents;~~

~~\_\_\_\_ (C) the court makes an inquiry on the record to ensure that the defendant's consent is knowing, voluntary, and intelligent; and~~

~~\_\_\_\_ (D) the defendant has an adequate opportunity to consult confidentially with counsel immediately before, during, and at the conclusion of the proceeding.~~

~~(2) *Felony; Plea, Sentencing, or Other Nontrial Hearing by Video Teleconferencing.* The court may permit a defendant charged with a felony to appear for a plea, sentencing, or other nontrial hearing by video teleconferencing if:~~

~~\_\_\_\_ (A) the defendant consents after consultation with counsel;~~

~~\_\_\_\_ (B) the government consents;~~

~~\_\_\_\_ (C) the court makes an inquiry on the record to ensure that the defendant's consent is knowing, voluntary, and intelligent; and~~

~~\_\_\_\_ (D) the defendant has an adequate opportunity to consult confidentially with counsel immediately before, during, and at the conclusion of the proceeding.~~

(d) [Deleted].

(e) PRESENCE NOT REQUIRED. A defendant need not be present, physically or otherwise, under any of the following circumstances:

(1) *Organizational Defendant.* The defendant is an organization represented by counsel who is present.

(2) *Defendant's Waiver; Misdemeanor Proceeding other than Plea, Trial, or Sentencing.* The court may permit a misdemeanor proceeding other than a plea, trial, or sentencing to occur in the defendant's absence if:

\_\_\_\_ (A) the defendant, after consultation with counsel, waives the constitutional right to be present; and

(B) the government consents.

(3) *Conference or Hearing on a Legal Question.* The proceeding involves only a conference or hearing on a question of law.

(4) *Sentence Correction.* The proceeding involves the correction or reduction of sentence under Rule 35.

(f) WAIVING CONTINUED PRESENCE.

\*\*\*\*\*

## COMMENT TO 2022 AMENDMENTS

Rule 43 has been amended to expand the Superior Court's authority to permit a defendant to appear by video teleconferencing or telephone conferencing, i.e., remotely. The amended rule also clarifies when a defendant must be physically present, when the defendant may participate remotely, and when a proceeding may occur in a defendant's absence. The amendments largely track, and make permanent, the court's temporary emergency authority to expand the types of proceedings that could occur remotely (former section (d)). The court's experience during COVID-19 has shown that remote proceedings function well.

Subsection (c) (former section (b)(2)) has been divided into two parts. Subsection (c)(1)(A) now permits any misdemeanor proceeding to occur remotely. The former rule, like the federal rule, permitted only a misdemeanor arraignment, plea, trial, or sentencing to occur remotely. New section (c)(2)(B) permits a felony plea, sentencing, or other nontrial hearing to occur remotely, although only by video teleconferencing, unlike the federal rule which does not provide for remote felony proceedings. New section (a) defines the terms misdemeanor and felony, and the remaining sections have been redesignated accordingly.

Finally, the amended rule specifies additional conditions under which the court may permit a proceeding to occur remotely or in the defendant's absence. Minor revisions also have been made for clarity and to conform to the general restyling of the rules.

\*\*\*\*\*