

RULE CHANGE 2021(16)
COLORADO RULES OF CRIMINAL PROCEDURE

Rule 43. Presence of the Defendant

(a) – (d) [NO CHANGE]

(e) Presence of the Defendant by Interactive Audiovisual Device or Interactive Audio Device.

(1) ~~Definitions.~~ As used in this Rule 43:

(I) “Interactive audiovisual device” means a television- or computer-based audiovisual system capable of two-way transmission and of sufficient audio and visual quality that persons using the system can view and converse with each other ~~with a minimum of disruption~~.

(II) “Interactive audio device” means a telephone- or computer-based audio system capable of two-way transmission and of sufficient audio quality that persons using the system can converse with each other.

(2) With the court’s approval, the defendant may be present within the meaning of this Rule 43 by the use of an interactive audiovisual device or an interactive audio device, ~~in lieu of the defendant’s physical presence, for the following hearings:~~ for any proceeding that does not involve a jury.

- ~~(I) First appearances pursuant to Crim.P. 5, for the purpose of advisement and setting of bail, including first appearances on probation or deferred sentence revocation complaints;~~
- ~~(II) Further appearances for the filing of charges or for setting the preliminary hearing;~~
- ~~(III) Hearings to modify bail;~~
- ~~(IV) Entry of pleas and associated sentencing or probation violation hearings in misdemeanor, petty offense, and traffic cases where the offense charged is not included within those offenses enumerated in C.R.S. 24-4.1-302 (I);~~
- ~~(V) Waivers of preliminary hearing;~~
- ~~(VI) Restitution hearings;~~
- ~~(VII) Appeal bond hearings;~~
- ~~(VIII) Crim.P. 35(B) hearings.~~

(3) The consent of the defendant shall be required prior to conducting any of the following types of proceedings by the use of an interactive audiovisual device or an interactive audio device pursuant to this subsection (e):

- (I) Entry of guilty plea;
- (II) Sentencing hearings;
- (III) Probation and deferred sentence revocation hearings;
- (IV) Preliminary hearings;
- (V) Pre-trial motions hearings;
- (VI) Hearings to modify bail;
- (VII) Restitution hearings; and
- (VIII) Crim. P. 35(b) and (c) hearings.

(4) The court shall advise the defendant of the following prior to any proceeding conducted pursuant to subsection (e)(3) of this rule:

(I) The defendant has the right to appear in person;

(II) The defendant has the right to have his or her counsel appear with him or her at the same physical location;

(III) The defendant's decision to appear by use of an interactive audiovisual device or an interactive audio device must be voluntary and must not be the result of undue influence or coercion on the part of anyone; and

(IV) If the defendant is pro se, he or she has the right to request that the identity and role of all individuals with whom he or she may have contact during the proceeding be disclosed.

~~(35) *Minimum Standards.*~~ Every use of an interactive audiovisual device or an interactive audio device must comply with the following minimum standards ~~in addition to those set forth in Crim.P. 43(e)(1):~~

(I) If defense counsel appears, such appearance shall be at the same physical location as the defendant if so requested by the defendant. If defense counsel does not appear in the same location as the defendant, a separate confidential communication line, such as a phone line, shall be provided to allow for private and confidential communication between the defendant and counsel.

~~(II) No defendant shall be compelled to appear by interactive video device at a hearing pursuant to subsection (e)(2)(III), (VI) or (VIII) of this rule.~~

(III) Installation of ~~an~~the interactive audiovisual device or an interactive audio device in the courtroom shall be done in such a manner that members of the public are reasonably able to observe or listen to, and, ~~(where appropriate),~~ participate in, the hearing.

~~(IV) Any hearing held pursuant to Crim.P. 43(e)(2)(IV) shall be conducted with the written consent of the defendant. The court shall advise a defendant of the following prior to obtaining a defendant's written consent and prior to any plea discussions being conducted:~~

~~(a) The rights enumerated in Crim.P. 5(2):~~

~~(b) The defendant has the right to appear in person and will not be prejudiced if he chooses to do so.~~

~~(c) The defendant has the right to have his or her counsel appear with him or her at the same physical location.~~

~~(d) The defendant's decision to appear by use of an interactive audiovisual device must be voluntary on the defendant's part and must not be the result of undue influence or coercion on the part of anyone.~~

~~(e) If the defendant is pro se, the identity and role of all individuals with whom the defendant may have contact through the interactive audiovisual device.~~

~~(IIIIV) Unless the court determines otherwise, An interactive audiovisual system used for hearings pursuant to Crim.P. 43(e)(2)(IV) shall include~~parties must have the ability to electronically transfer documents between the defendant and the court exhibits to the court, a witness, and each other during any proceeding

conducted by an interactive audiovisual device or an interactive audio device pursuant to this subsection (e). and such Any transferred documents exhibits electronically transferred to the court shall be treated as if they had been submitted in person ~~considered the same as originals.~~

~~(4) Nothing in this rule shall require a court to use an interactive audiovisual device.~~

~~(5) In the event of inclement weather or other exceptional circumstances, which would otherwise prevent a hearing from occurring under Crim.P. 5, the court may conduct the hearing by use of an interactive audiovisual procedure which does not comply with the minimum standards set forth in subsection (3).~~

~~**(f) Public Health Crisis Exception.** If the court finds that a public health crisis exists, it may, in its discretion and with the defendant's oral or written consent, allow the defendant and counsel to appear by an interactive audiovisual device or by audio device for any proceeding that does not involve a jury. The defendant's oral or written consent is not necessary for arraignments or for proceedings listed in subsections (e)(2)(I), (II), (III), (V), (VI), (VII), and (VIII) of this rule. During any interactive audiovisual or audio proceeding under this subsection (f), the court must allow counsel the opportunity to confer with the defendant confidentially when necessary. An interactive audiovisual or audio proceeding under this subsection (f) shall be conducted in a courtroom open to the public or in a manner that allows members of the public (including victims) to hear or watch and, where appropriate, participate in the proceeding. Use of an interactive audiovisual device under this subsection (f) must comply with subsection (e)(1) of this rule.~~

COMMENT [NO CHANGE]

Rule 43. Presence of the Defendant

(a) – (d) [NO CHANGE]

(e) Presence of the Defendant by Interactive Audiovisual Device or Interactive Audio Device.

(1) As used in this Rule 43:

- (I) “Interactive audiovisual device” means a television- or computer-based audiovisual system capable of two-way transmission and of sufficient audio and visual quality that persons using the system can view and converse with each other.
- (II) “Interactive audio device” means a telephone- or computer-based audio system capable of two-way transmission and of sufficient audio quality that persons using the system can converse with each other.

(2) With the court’s approval, the defendant may be present within the meaning of this Rule 43 by the use of an interactive audiovisual device or an interactive audio device for any proceeding that does not involve a jury.

(3) The consent of the defendant shall be required prior to conducting any of the following types of proceedings by the use of an interactive audiovisual device or an interactive audio device pursuant to this subsection (e):

- (I) Entry of guilty plea;
- (II) Sentencing hearings;
- (III) Probation and deferred sentence revocation hearings;
- (IV) Preliminary hearings;
- (V) Pre-trial motions hearings;
- (VI) Hearings to modify bail;
- (VII) Restitution hearings; and
- (VIII) Crim. P. 35(b) and (c) hearings.

(4) The court shall advise the defendant of the following prior to any proceeding conducted pursuant to subsection (e)(3) of this rule:

- (I) The defendant has the right to appear in person;
- (II) The defendant has the right to have his or her counsel appear with him or her at the same physical location;
- (III) The defendant’s decision to appear by use of an interactive audiovisual device or an interactive audio device must be voluntary and must not be the result of undue influence or coercion on the part of anyone; and
- (IV) If the defendant is pro se, he or she has the right to request that the identity and role of all individuals with whom he or she may have contact during the proceeding be disclosed.

(5) Every use of an interactive audiovisual device or an interactive audio device must comply with the following minimum standards:

(I) If defense counsel appears, such appearance shall be at the same physical location as the defendant if so requested by the defendant. If defense counsel does not appear in the same location as the defendant, a separate confidential communication line, such as a phone line, shall be provided to allow for private and confidential communication between the defendant and counsel.

(II) Installation of an interactive audiovisual device or an interactive audio device in the courtroom shall be done in such a manner that members of the public are reasonably able to observe or listen to, and (where appropriate) participate in, the hearing.

(III) Unless the court determines otherwise, parties must have the ability to electronically transfer exhibits to the court, a witness, and each other during any proceeding conducted by an interactive audiovisual device or an interactive audio device pursuant to this subsection (e). Any exhibits electronically transferred to the court shall be treated as if they had been submitted in person.

COMMENT [NO CHANGE]

Amended and Adopted by the Court, En Banc, July 15, 2021, effective immediately.

By the Court:

**Carlos A. Samour, Jr.
Justice, Colorado Supreme Court**