

## VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 9<sup>th</sup> day of January, 2020.*

It is ordered that the Rules heretofore adopted and promulgated by this Court and now in effect be and they hereby are amended to become effective March 15, 2020.

Add Rule 1:27 as follows:

### **Rule 1:27. Testimony by Audiovisual Means in Circuit Court Civil Cases.**

(a) *Implementation of Statutory Authority; Specification of Conditions.* — In accordance with Code § 17.1-513.2, live (real-time) testimony by any party or witness in a civil action or proceeding in circuit court by any means of audiovisual technology that complies with Code § 19.2-3.1(B) is permitted upon order of the court in accord with the provisions of subparts (b) through (f) of this Rule. Use of remote testimony in Sexually Violent Predator Act cases under Chapter 9 of Title 37.2 of the Code – and other express statutory authorizations or mandates for use of such procedures – are not affected by this Rule 1:27.

(b) *Order for Audiovisual Testimony; Contents.* — The court may grant permission for the testimony of any witness to be presented using audiovisual means under subpart (d) of this Rule by entering an order implementing the oath and consent provisions of subpart (e) of this Rule and the responsibility/cost provisions of subpart (f). The court may consider, among other factors,

- (1) the age of the witness, and whether the witness has any disabilities or special needs that would affect the taking of testimony;
- (2) whether translation of the questions or answers may be required;
- (3) procedures available for the handling of exhibits;
- (4) mechanisms for making and ruling upon objections – both within and outside the hearing of the remote witness;
- (5) procedures for sidebar conferences between counsel and the court;
- (6) mechanisms for the witness to view counsel, the parties, the jury, and the judge;

(7) practical issues, such as the size, number and location of video display screens at the remote location and in the courtroom or facility where the trial or hearing will take place;

(8) whether there should be any requirements for camera angle or point of view, any picture-in-picture requirements, and/or camera movement;

(9) how the statutorily required encryption of signal transmission will be attained;

(10) creation of a record of such testimony; and

(11) any necessary limitations or conditions upon persons who may be present in the location where the witness testifies, and whether those persons must be identified prior to the testimony of the witness.

(c) *Leave of Court.* — The court should enter an order permitting live testimony by means of any audiovisual technology under subpart (b) of this Rule as follows:

(1) *Consent of All Parties.* Upon consent of all parties for live testimony of any party, lay witness, or expert witness by means of any audiovisual technology; or,

(2) *Distant and Other Specific Witnesses.* If (i) a lay witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the testimony, or if (ii) the witness is a superintendent of a hospital for the insane more than 30 miles from the place of trial, or is a physician, surgeon, dentist, chiropractor, registered nurse, physician's assistant or nurse practitioner who, in the regular course of his or her profession, treated or examined any party to the proceeding, or is in any public office or service the duties of which prevent his attending court; provided, however, that if the witness is subject to the jurisdiction of the court, the court may, upon a showing of good cause or sua sponte, order the witness to attend and to testify ore tenus.

(d) *Motion for Leave of Court to Present Testimony by Audiovisual Means.* — Where neither subparts (c)(1) or (c)(2) of this Rule apply, a party may move for leave to present the live testimony of one or more witnesses by audiovisual means. Unless the court in its discretion allows a motion on shorter notice, such motion must be filed at least 60 days in advance of the

trial or hearing. Any party opposing such motion must file any objections in writing 10 days after service of such motion, unless a different schedule is set by the court. In the exercise of its discretion on such motion, the court should consider whether the ability to evaluate the credibility and demeanor of the person who would testify remotely is critical to the outcome of the proceeding and whether the non-moving party has demonstrated that face-to-face cross-examination is necessary because the issue(s) the witness may testify about may be determinative of the outcome. The court may enter an order under subpart (b) of this Rule permitting presentation of live testimony by a witness by audiovisual means as follows:

(1) *Non-Party Lay Witnesses.* Upon a finding that good cause exists for accepting testimony by audiovisual means for each witness who will so testify.

(2) *Party and Expert Witnesses.* Upon a finding that – with due regard for the importance of presenting testimony through witnesses physically present in the courtroom – exceptional circumstances warrant receiving the testimony of a party or expert witness by audiovisual means in the interests of justice.

(e) *Witness Oath; Consent of Nonresidents.* —

(1) *Remote Testimony Given in Virginia.* Any witness testifying from a remote location within Virginia must be placed under oath in the same fashion as any live witness present at the trial or hearing.

(2) *Remote Testimony Given Outside the Commonwealth.* Any witness testifying from a remote location outside the Commonwealth must sign before testifying a written consent:

(A) to provide testimony under an oath administered by court personnel located in the Virginia court or facility;

(B) expressly agreeing to be subject to the penalties of perjury under Virginia law and subject to court orders by the Virginia judge regarding the testimony, such as contempt of court powers, adjournment or rescheduling of testimony, and other orders relating to the testimony entered as though the witness was physically present in the Virginia courtroom;

(C) consenting to personal jurisdiction of the Virginia courts for enforcement of the perjury laws and orders relating to the testimony of the witness entered by the judge presiding over the trial.

The consent of each such witness must be signed before a notary or other person authorized to take oaths or sworn acknowledgments in the jurisdiction where the witness is located, and must be filed – on paper or in court-approved electronic form – among the papers of the Virginia action or proceeding before such testimony may be introduced.

(f) *Provision of Necessary Equipment; Allocation of Costs.* — Unless the courtroom or facility where the testimony will be presented has equipment meeting the standards of Code § 19.2-3.1(B) and complying with the court's order under subpart (b) of this Rule, the party offering testimony of a witness by audiovisual means is responsible for providing the necessary equipment, and all necessary logistical arrangements, at no cost to the court. All costs and arrangements for the location where the witness will give testimony are also the responsibility of the party offering the testimony. Failure to ensure that the courtroom or facility where the trial or hearing is to be held – and the location where the witness would testify – are properly set up for such testimony will preclude the offering of testimony by audiovisual means, and will not constitute grounds for a continuance sought by the party attempting to offer such testimony. Remedies and procedures to address the failure of the arrangements to function properly for some other reason, such as a power outage affecting the Virginia courtroom, are within the sound discretion of the presiding judge.

Amend Rule 4:5 as follows:

**Rule 4:5. Depositions Upon Oral Examination.**

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(b) *Notice of Examination: General Requirements; Special Notice; Production of Documents and Things; Deposition of Organization.* —

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(4) Unless otherwise agreed to by the parties or otherwise provided by court order or by law, only the witness, the parties, their respective counsel including such counsel’s staff, experts identified pursuant to Rule 4:1(b)(4)(A), and those involved with the administration of the deposition (such as court reporters and translators) may attend the deposition, given the private nature of discovery. Counsel of record for the parties and counsel for any non-party deponent must timely confer regarding any other attendees who are requested by a party or by the deponent to be present at the deposition. A party seeking to exclude any person from attending a deposition – or seeking authorization for any person to attend a deposition – must move for an order in the discretion of the circuit court.

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(c) *Examination and Cross Examination; Record of Examination; Oath; Objections.*

— (1) Unless the parties agree otherwise, examination of a witness at deposition is begun by the party noticing the deposition. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. If requested by one of the parties, the testimony shall be transcribed. The preservation or waiver of objections during the deposition is governed by the provisions of Rule 4:7.

Amend Rule 5A:25 as follows:

**Rule 5A:25. Appendix.**

(a) *When Required.* — An appendix shall be filed by the appellant in all cases no later than the time of filing his opening brief.

(b) *Filing.* — If the combined lengths of the appendix and the opening brief of the appellant do not exceed the limitation prescribed in Rule 5A:19, the appendix may be filed as an addendum to the opening brief and within the same cover. If the combined lengths of the appendix and the opening brief exceed the limitation prescribed in Rule 5A:19, the appellant shall file the appendix as a separate volume. The appellant must file 3 printed copies and an electronic version in Portable Document Format (PDF) of the appendix and must serve an electronic copy on counsel for each party separately represented at the time of filing the appendix with the Court. For purposes of this Rule, service by email shall be governed by Rule

1:17, which allows electronic transmission without the need of consent by opposing counsel. This Court may by order require the filing or service of a different number and may, sua sponte or on motion, enter an order dispensing with the appendix and permitting an appeal to proceed on the original record with any copies of the record, or relevant parts, that the Court may order the parties to file. The appendix shall be filed in the manner prescribed by the VACES Guidelines and User's Manual, using the Virginia Appellate Courts eBriefs System (VACES). The Guidelines are located on the Court's website at <http://www.vacourts.gov/online/vaces/resources/guidelines.pdf>.

A Copy,

Teste:

A handwritten signature in black ink, appearing to read "D B R W", written in a cursive style.

Clerk