

TO: THE BAR AND THE BENCH OF VIRGINIA

**FROM: Advisory Committee on Rules of Court
Judicial Council of Virginia**

**RULE PROPOSAL PENDING ON LIVE TESTIMONY FROM REMOTE
LOCATIONS USING VIDEO TECHNOLOGY IN CIVIL CASES**

The Advisory Committee on Rules of Court in Virginia asks for comment by the Bench, the Bar, and members of the public on a pending draft Rule of Court that, in limited circumstances and with a number of protections, would authorize a circuit judge to approve – in a civil case only – a plan to have a witness testify live from a remote location, using video technology. While Virginia Code § 19.2-3.1(B) prescribes baseline requirements that (1) in any two-way electronic video and audio communication system used in proceedings in Virginia courts the persons communicating must simultaneously see and speak to one another; (2) the signal transmission must be live, real time; and (3) that the signal transmission must be secure from interception through lawful means by anyone other than the persons communicating, the statute concludes by indicating that such arrangements are subject to additional specifications to be promulgated by the Supreme Court of Virginia. The draft Rule of Court below responds to that legislative invitation.

Subpart (a) of the draft notes the statutory underpinnings for use of such a procedure.

Subpart (b) identifies a non-exhaustive list of considerations that bear on the wisdom of allowing live testimony from a remote location, both practical and policy-driven, and is included to aid the parties in addressing the concerns that must be weighed by the judge in considering a deviation from the norm of face-to-face testimony in the Virginia courtroom.

Subpart (c) identifies two categories of situations where the circuit court judge “should enter” such an order (less than a mandatory obligation to issue the order, but clearly a suggestion that approval should usually be given on a proper application, unless specific difficulties are identified). The first is where all parties consent. The second group of situations follows the distant or unavailable witness specifications in existing Rule 4:7(a)(4).

Subpart (d) covers regular situations where one party seeks permission to present a witness by remote video means (not on consent or under the distance or other factors identified in subpart (c)). This subpart (d) sets a requirement of “good cause” for granting permission for live-remote audiovisual testimony for lay witnesses. For party or expert testimony, the standard is much higher, requiring a showing of “exceptional circumstances” demonstrating that remote video testimony is needed to serve the interests of justice.

Subpart (e) specifies the mechanics of obtaining a consent from the remote witness who will be subject to perjury, contempt powers and scheduling authority of the Virginia

circuit judge. The appropriate consent must be filed with the Virginia court before the testimony is given. While the consent requirement may limit the number of remote witnesses willing to provide distance-testimony using this procedure, since it highlights the witness's exposure to perjury, contempt or other orders of the Virginia trial judge, the Advisory Committee concluded that having such safeguards will be needed to assure the integrity of the testimonial process for our courts. The hope is that enough situations will arise where the remote witness procedure is used that – over the coming years – Virginia litigators and judges will gain experience such that the rules governing this process can be adjusted to increase convenience and reduce burdens on all parties and the court.

Subpart (f) indicates that the responsibility (and cost burden) for making any necessary arrangements for such remote testimony rest with the party seeking to present part of its case this way. The responsibility covers both the remote location where the testimony will be given, and the Virginia courtroom where the trial is to be conducted. If there is a failure of the process due to the requesting party's not properly making the needed arrangements, no continuance of the proceedings will be granted. If there is a power failure in the Virginia courthouse or other similar malfunction the circuit judge may, but is not required, to authorize a continuance or other relief.

TEXT OF DRAFT RULE 1:27 PUBLISHED FOR COMMENT

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.

(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 the hospital for the insane more than 30 miles from the place trial, or is a physician, surgeon, dentist, chiropractor, or registered nurse who, in the regular course of his 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.

The Advisory Committee on Rules of Court invites comments on the draft revisions to the Virginia Rules being published herewith.

Send comments by August 25, 2019 to:

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