

RULE CHANGE 2006 (08)

Chapter 29

Colorado Rules of Criminal Procedure
IV. Arraignment and Preparation for Trial

Rule 15. Depositions

(a) **Motion and Order.** ~~Upon motion filed by the~~ The prosecutor or ~~a the~~ defendant ~~at may file a motion supported by an affidavit~~ any time after an indictment, information, complaint, or summons and complaint is filed, ~~when supported by an affidavit showing requesting~~ that the deposition of a prospective witness be taken before the court. ~~The court may order that a deposition be taken before the court if~~ a prospective witness may be unable to attend a trial or hearing and ~~that~~ it is necessary to take ~~his~~ that person's deposition to prevent injustice, ~~the court may order that the prospective witness's deposition be taken. The order shall fix the time for taking the deposition before the court where the case is pending and may require that any designated books, papers, documents, photographs, or other tangible objects, not privileged, be produced at that time and place.~~ The court shall identify the witness and fix the date and time for the deposition in the order and shall give every party reasonable notice of the time and place for taking the deposition. For good cause shown, the court may reschedule the date and time for the deposition.

(a.5) Deposition by Stipulation Permitted. The prosecution and defense may take a deposition before a judge by stipulation.

(b) **Presence Subpoena of Witness.** Upon entering an order for the taking of a deposition, the court shall direct that a subpoena issue for each person named in the order and may require that any designated books, papers, documents, photographs, or other tangible objects, not privileged, be produced at the deposition. If it appears, however, that the witness will disregard a subpoena, the court may direct the sheriff to produce the prospective witness in court where the witness may be released upon personal recognizance or upon reasonable bail conditioned upon the witness's appearance at the time and place fixed for the taking of deposition. If the witness fails to give bail, the court shall remand him to custody until the deposition can be taken but in no event for longer than forty-eight

hours. If the deposition be not taken within forty-eight hours, the witness shall be discharged.

(c) ~~Notice~~ Presence of ~~Taking~~ Defendant. The ~~party~~ defendant shall be present at ~~whose~~ the deposition unless the defendant voluntarily fails to appear after receiving notice of the date, time, and place of the deposition.

(d) Taking and Preserving Depositions. Depositions shall be taken and transcribed as the court may direct and upon completion shall be lodged with the clerk of the court.

(e) Use. At the trial, or at any hearing, a part or all of a deposition may be used, so far as otherwise allowed by law or by stipulation.

(f) Copies of Deposition to Defendant. If the deposition is taken at the instance a deposition is to be taken shall give every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party on whom notice is served, or the subpoenaed deponent, the court for good cause shown may extend or shorten the time.

~~(d) Depositions taken Forthwith.~~ If the subpoenaed deponent appears before the judge who ordered his deposition taken and is willing to testify immediately, at the request of the deponent for good cause shown, the judge forthwith shall:

~~(1) Procure the presence of the prosecuting attorney or one of his deputies;~~

~~(2) Procure the presence of each defendant and his counsel;~~

~~(3) Take the deposition; and~~

~~(4) Upon completion of the deposition, discharge the witness.~~

If any defendant is without counsel or his attorney fails to attend, the court shall advise him of his right and, unless he elects to proceed without counsel, shall assign counsel to represent him at that hearing only. Depositions

~~shall be taken and transcribed as the court may direct and upon completion shall be lodged with the clerk of the court.~~

~~(e) Use. At the trial, or at any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if the deposed witness satisfies the definition of unavailability in CRE 804(a), or the witness gives testimony at the trial or hearing inconsistent with his deposition. Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.~~

~~(f) Copies of Deposition to Defendant. If the deposition is taken at the instance of the state prosecution, a transcribed copy of it shall be furnished without cost to the defendant promptly upon his the defendant's request.~~

VIII. Supplementary and Special Proceedings

Rule 43. Presence of the Defendant

(a) Presence Required. The defendant shall be present at the preliminary hearing, at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The trial court in its discretion may complete the trial, and the defendant shall be considered to have waived his right to be present, whenever a defendant, initially present:

(1) Voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to remain during the trial, or

(2) After being warned by the court that disruptive conduct will cause him to be removed from the courtroom,

persists in conduct which is such as to justify his being excluded from the courtroom.

(c) Presence Not Required. A defendant need not be present in the following situations:

- (1) A corporation may appear by counsel for all purposes.
- (2) At a conference or argument upon a question of law.
- (3) At a reduction of sentence under Rule 35.

(d) Waiver. The voluntary failure of the defendant to appear at the preliminary hearing may be construed by the court as an implied waiver of his right to a preliminary hearing.

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

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

(I) "Interactive audiovisual device" means a television 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.

(2) A defendant may be present within the meaning of this Rule 43 by the use of an interactive audiovisual device, in lieu of the defendant's physical presence, for the following hearings:

(I) First appearances pursuant to Crim.P. 5, for the purpose of advisement and setting of bail;

(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 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(1).

(3) Minimum standards. Every use of an interactive audiovisual 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) of this rule.

(III) Installation of the interactive audiovisual device in the courtroom shall be done in such a manner that members of the public are reasonably able to observe, 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 is voluntary on the defendant's part and is not 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 with through the interactive audio visual device.

(V) An interactive audio visual system used for hearings pursuant to Crim.P. 43(e)(2)(IV) shall include the ability to electronically transfer documents between the defendant and the court and such transferred documents shall be 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).

Comment

The court recommends that defendants be informed of their rights pursuant to this rule by showing such defendants a pre-recorded video containing the judicial advisement contained in this rule. The video should be shown prior to any jail authorities asking whether a defendant planned to elect to participate by audiovisual device. The court recognized that such audiovisual devices will be used to conduct plea discussions. Accordingly, the pre-recorded video should also explain the plea discussion process.

Rule 15 Amended and Adopted by the Court, En Banc, May 25, 2006, effective July 1, 2006.

Rule 43 Amended and Adopted by the Court, En Banc, May 11, 2006, effective July 1, 2006. JUSTICE BENDER and JUSTICE EID would not adopt Rule 43.

BY THE COURT:

Alex J. Martinez
Justice, Colorado Supreme Court