

IN THE SUPREME COURT OF THE STATE OF ALASKA
ORDER NO. 1789

Adding new Criminal Rule 38.3
and a Note to implement direct
court rule amendments made by
chapter 1 TSSLA 2012 (HB 359).

IT IS ORDERED:

1. The Alaska Rules of Criminal Procedure are amended by adding a new Rule 38.3 to read as follows:

Rule 38.3. Video Conference Testimony

(a) **In General.** In every trial, the testimony of witnesses shall be taken in open court, unless otherwise provided by statute or rule.

(b) **Testimony by Video Conference.** The parties may agree to take testimony from a witness by contemporaneous two-way video conference presented in open court. Absent the parties' agreement, the court may, at the court's discretion, authorize the contemporaneous two-way conference testimony at trial of a witness only if

(1) the requesting party establishes that testimony by two-way video conference is necessary to further an important public policy;

(2) the requesting party establishes that the witness is unavailable; and

(3) the testimony given is under oath and subject to cross-examination.

(c) **Procedures for Taking Video Conference Testimony.** If the trial court authorizes video conference testimony under (b) of this rule, it shall determine the procedures for taking the contemporaneous two-way video conference testimony. The parties, the court, the trier of fact, and the public must be able to see and hear the witness; and the witness must see and hear the courtroom proceedings, including the defendant, as if the witness were sitting in the courtroom's witness stand. The video conference technician shall be the only person in the presence of the witness unless the court, at the court's discretion, determines that another person may be present. Any person present with the witness must be identified.

(d) **Definitions.**

(1) **Contemporaneous Two-Way Video Conference.** Contemporaneous two-way video conference means a conference among people at different places by means of transmitted audio and video signals. It includes all communication technologies that allow two or more places to interact by two-way video and audio transmissions simultaneously.

(2) **Unavailable.** In this rule, a witness is unavailable if (A) by clear and convincing evidence the court finds under Rule 804(a)(4) or (5), Alaska Rules of Evidence, or Rule 15(e)(4), Alaska Rule of Criminal Procedure, that the witness is unavailable;

(B) by clear and convincing evidence the court finds that under the circumstances the witness is unavailable; or

(C) the parties agree that the witness is unavailable.

2. The following Note is added to the end of Criminal Rule 38.3:

Note: Chapter 1, section 26, TSSLA 2012 (HB 359), effective July 1, 2012, added Criminal Rule 38.3 relating to testimony by video conference, as reflected in section 1 of this Order. Criminal Rule 38.3 is adopted for the sole reason that the legislature has mandated the new rule.

DATED: July 12, 2012

EFFECTIVE DATE: *nunc pro tunc* July 1, 2012

/s/
Chief Justice Fabe

/s/
Justice Carpeneti

/s/
Justice Winfree

/s/
Justice Stowers