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RULE 43
DEFENDANT'S PRESENCE

§ 43-1 Text of Rule

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

(1) *Organizational Defendant.* The defendant is an organization represented by counsel who is present.

(2) *Misdemeanor Offense.* The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

(3) *Conference or Hearing on a Legal Question.* The proceeding involves only a conference or hearing on a question of law.

(4) *Sentence Correction.* The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Waiving Continued Presence.

(1) *In General.* A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a non-capital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) *Waiver's Effect.* If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

§ 43-2 Commentary

[A] When Must a Defendant Be Present?

Rule 43(a) requires that—with certain exceptions—a defendant must be present at the following critical stages:

1. Initial appearance, initial arraignment (but not arraignment on superseding indictment or information), and plea;
2. Every trial stage, including jury impanelment and return of the verdict; and
3. Sentencing.

Although the Rule does not refer to waiver of the right to be present, a defendant's right to be present at a critical stage is not absolute and can be knowingly and intelligently waived.

Practice Tip

At every critical stage of a criminal proceeding, counsel and the court should ensure that the record reflects that a non-organizational defendant is present or that the defendant waived the right to be present in writing or orally on the record. It is a mistake to rely on a purported waiver of a defendant's right to be present made by defense counsel not in the presence of the defendant.

[B] When Is a Defendant's Presence Not Required?

A defendant need not be present if:

1. The defendant is an organizational defendant represented by counsel who is present;
2. The defendant faces a misdemeanor, has consented, and the court permits arraignment, plea, trial, and/or sentencing to occur by video teleconferencing (added by amendment in 2011) or in the defendant's absence;
3. The proceeding is only a conference or hearing on a question of law; or
4. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

Practice Tip

Although Rule 43 states that an organizational defendant can appear through counsel, a court may require that a representative of the organization, who was empowered by corporate resolution to enter into a plea agreement and to enter a plea of guilty or nolo contendere on behalf of the organization, be present at the plea and sentencing. Counsel should check the local rules and practice.