

STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: C. Robert Manby Jr.
PRB File No. 2019-089

MOTION FOR IN PERSON HEARING

Respondent, under A.O. 49 and V.R.C.P. 43(a), moves the Notice of Hearing (Notice), utilizing Cisco Webex Meeting software (Webex), be revised to an in-person hearing. There is no reason for an awkward Webex hearing making it more difficult for Respondent to effectively defend the allegations of misconduct against him. The May 12th Amendment to AO 49, allowed remote hearings only until July 5th and authorizes in-person hearings beginning June 14th. As of June 15th, Governor Scott ended all remaining COVID-19 restrictions previously imposed.

The Notice is contrary to the requirements of V.R.C.P. 43(a) and the Hearing Panel has not addressed or allowed counsel to address the factors allowing a Webex evidentiary hearing set forth in V.R.C.P. 43.1 included below.

Though Respondent has the right to present evidence and confront witnesses,¹ in person Respondent will be precluded from effectively examining and cross-examining witnesses if the hearing is by Webex. The ability to subpoena witnesses will, as a practical matter, be unavailable. Where will witnesses be required to go and testify? If the witness is required to bring documents, the process will be slowed so that the documents can be distributed. The presentation might be so disjointed that the purpose of the proffer is lost altogether.

The Hearing Panel will not be able to assess the credulity of a witness as easily or as well if the witness is not personally present before the Hearing Panel. Respondent believes the

¹ The Notice informs Respondent that: Respondent is entitled to be represented by a lawyer, to cross-examine witnesses, and to present evidence at the hearing. The Notice requires the parties, and their witnesses, utilize a computer connection to ensure full functionality of the Webex software. The parties are advised by the Notice that they may consult with a Judicial Branch operations assistant to ensure that the parties are able to access the software and that the software is functioning properly.

Hearing Panel will not be able to assess his credulity if he is not allowed to be personally present before the Hearing Panel.

V.R.C.P. 43(a) requires: ... “the testimony of witnesses shall be taken orally in open court, unless otherwise provided by Rule 43.1...”. A.O. 49 authorizes in-person hearings beginning June 14th and allows remote hearings only until July 5th.

V.R.C.P. 43.1(c)(6) lists considerations, copied below, which this Hearing Panel must consider before ordering a Webex hearing. Respondent asserts all apply except D.

- (A) Whether the locations involved in the trial or proceeding have **technological capabilities that satisfy the standards adopted**² pursuant to subdivision (e);
- (B) **The convenience of the parties and proposed witnesses**; the importance, complexity, and nature of the trial or proceeding; and **the cost of producing a witness in person in relation to the importance of the offered testimony**;
- (C) Whether the moving party attempted to procure the physical presence of a witness;
- (D) Whether a witness or other participant is incarcerated;
- (E) Whether satisfactory provision can be made for **confidential communications between lawyers and their clients or witnesses**;
- (F) That there is assurance satisfactory to the court of the identity of any witness appearing by video conference and the administration of the oath to that witness in a manner consistent with the laws of Vermont;
- (G) **Whether the procedure would allow for full and effective examination and cross-examination of witnesses by all parties and the court, including access to any documentary or other tangible evidence necessary to the examination or cross-examination of any witness**;
- (H) **Whether any undue prejudice would result to a party or witness**;
- (I) Whether the use of video conferencing technology diminishes or detracts from the dignity, solemnity, and formality of the trial or proceeding or undermines its integrity, **fairness, or effectiveness**; and
- (J) Any other factors that the court may determine to be relevant.

² Emphasis added as **bold** in quoted rules.

V.R.C.P. 43.1(d)(3)(B) lists additional considerations, copied below, for evidentiary hearings such as this hearing on the merits.

..... the court may permit or require any party, witness, counsel, or other necessary person to participate or testify by audio conference from a remote location, **after consideration of the factors set out in paragraph (4)** [copied below] and subject to the authority of the court under paragraph (5), if the court finds [sic]

(i) that the individual is either physically unable to be present or cannot be produced without imposing substantial cost or burden;

(ii) that there is assurance satisfactory to the court of the identity of any witness appearing by audio conference and the administration of the oath to that witness;

(iii) **that all parties arid [sic] the judge have adequate opportunity to examine or cross-examine all witnesses, including access to any documentary or other tangible evidence necessary to the examination or cross-examination of any witness;**

(iv) that the audio connections and equipment employed are adequate to enable all participants to hear the proceedings and to speak at all appropriate times during the hearing; and that any statements made by audio will be recorded as part of the record of the court proceeding; and

(v) that under all the circumstances, **there are no substantial obstacles to a full and fair presentation of the testimony and other evidence, including assessment of the credibility of any witness,** and that no substantial prejudice will result to the witness or any party.

(4) *Additional Factors.* In determining whether to participate by audio conference under paragraph (1) or to allow audio participation or testimony under paragraph (2) or (3), the court may also consider

(A) whether a witness or other participant is incarcerated;

(B) whether satisfactory provision can be made for confidential communications between lawyers and their clients or witnesses;

(C) whether the use of audio technology diminishes or detracts from the dignity, solemnity, and formality of the trial or proceeding or undermines its integrity, fairness, or **effectiveness**;

(D) whether video conference transmission is available and its use would not require significant additional expense for the parties or the court or significant delays in scheduling and concluding a proceeding; and

(E) any other factors that the court may determine to be relevant.

An in-person hearing would eliminate the problems and considerations associated with an awkward Webex hearing. An in-person hearing would allow both parties to present and share evidence more easily and address the Hearing Panel directly without the confusion and awkwardness of a Webex hearing. Respondent believes it is essential that he be allowed to testify in person so that the Hearing Panel can assess his credibility and so that Respondent can better understand the inquiries of the Hearing Panel and Disciplinary Counsel.

WHEREFORE, Respondent requests that the scheduled evidentiary hearing be held in person and not by Webex for the reasons identified in this motion and implied in V.R.C.P. 43.1.

Dated: June 14, 2021.

C. ROBERT MANBY JR.

By:


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CERTIFICATE OF SERVICE

The filing attorney certifies that a complete copy of this filing has on this date been served by email upon every other party to the case required to be served under V.R.C.P. 5(a) and in compliance with V.R.C.P. 5(h)(2). Any nonpublic data has been separated and filed under seal in compliance Rules Pub. Acc. to Ct. Rec. Rule 7.