

STATE OF VERMONT  
VERMONT SUPREME COURT  
JULY TERM, 2023

**Order Promulgating Amendments to Rule 43.1 of the Vermont Rules of Probate Procedure**

Pursuant to the Vermont Constitution, Chapter II, § 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 43.1 of the Vermont Rules of Probate Procedure be amended as follows (new matter underlined; deleted matter struck through):

**RULE 43.1. REMOTE AND HYBRID PROCEEDINGS WITH PARTICIPATION OR TESTIMONY BY VIDEO OR AUDIO CONFERENCE**

**(a) General Provisions.**

(1) Default of Remote Proceedings. All proceedings will be scheduled for remote participation by parties, counsel, witnesses, and other necessary participants unless otherwise ordered pursuant to this rule.

(2) Hybrid and In Person Proceedings. Subject to the requirements of this rule, in any hearing proceeding the court may permit or require participation by some or all witnesses, parties, counsel, the judge, or other necessary participants, or testimony by a witness, to participate or testify in person or remotely using contemporaneous video or audio conference transmission from one or more different remote locations.

~~(A) by agreement of the parties, unless the court finds good cause to require physical presence;~~

~~(B) on motion of a party; or~~

~~(C) on the court's own motion.~~

**(b) Definitions.** In this rule:

(1) "Audio conference" means participation or testimony by interactive audio-only technology, including telephone, that permits two or more individuals or groups to communicate orally with each other contemporaneously and meets the technical requirements established pursuant to subdivision (i) (e).

(2) "Hearing" means a trial or other proceeding before the court held on notice as provided in this rule. "Hybrid" proceeding means one in which participants participate: in-person or by video or audio conference.

(3) "Nonevidentiary hearing" means a proceeding before the court held on notice as provided in this rule in which the Vermont Rules of Evidence do not apply as provided in Rule 43(a).

(4) "Remote location" means a courthouse or other reasonably secure space in which technological capacity exists that meets the technical requirements established pursuant to subdivision (e).

(3) Remote proceeding means one in which all participants participate by audio or video conference.

~~(5)~~ (4) "Video conference" means participation or testimony by the use of an interactive technology that sends and receives video, voice/audio, and data signals so that two or more individuals or groups can communicate with each other contemporaneously using cameras, audio microphones, audio speakers, and computer monitors, and similar technology that meets the

technical requirements established pursuant to subdivision (i) (e).

**(c) In Person or Hybrid Proceedings.**

The court has discretion to conduct in person or hybrid proceedings based on a consideration of any relevant factors in subdivision (g).

(1) On the Court's Own Initiative.

(A) Standing Order. A probate judge may order that particular types of proceedings be scheduled as in-person or hybrid. The court may make exceptions to a standing order.

(B) Order in Particular Case. In its discretion, the court may require or permit some or all parties, counsel, witnesses, or other persons to appear in person or remotely by video or audio conference.

(2) By Motion or Stipulation of the Parties.

(A) A party may move for, or the parties may stipulate to, a hybrid proceeding or that some or all parties, counsel, or other persons be required to participate in person.

(B) A motion filed pursuant to this paragraph must be served on other parties and filed reasonably in advance of the proceeding. The court may specify a date for other parties to respond to the motion other than the date prescribed in Rule 7(b). A stipulation under this paragraph must be filed reasonably in advance of the proceeding.

(C) In its discretion, the court may grant or deny the motion or stipulation in whole or in part. An order granting an in-person or hybrid proceeding may also include a change in the hearing date.

**(e) Video Conference.**

~~(1) By Agreement. Any party or other person may participate, or a witness may be required to testify, by video conference in a hearing by written agreement of all parties and with the approval of the court.~~

~~(A) Except as provided in (B), the party must file the agreement with the register at least 14 days prior to the scheduled date of the trial or other proceeding.~~

~~(B) If the judge with a primary assignment to a particular unit of the probate division of the Superior Court has pre-approved certain uses or categories of use of video conferencing in all or certain categories of hearings, a party wishing to use video conferencing in such a hearing must file the agreement with the register at least 5 days prior to the hearing.~~

~~(C) The court will approve the agreement unless, after consideration of the factors set forth in paragraph (6), the court finds good cause to require physical presence and gives the parties notice and an opportunity to be heard regarding the use of video conferencing.~~

~~(2) On Motion of a Party. In the absence of agreement, any party who wishes to request participation or the participation of others, or to have a witness be required to testify, by video conference in a hearing, shall file and serve a motion, setting forth the grounds for the request.~~

~~(A) A motion for participation or testimony in a hearing in which the Vermont Rules of Evidence apply shall be filed and served at least 14 days prior to the date of the scheduled hearing or any non-evidentiary hearing scheduled more than 14 days in advance. Any other party may file an objection to the motion within seven days of the motion being filed.~~

~~(B) A motion for participation or testimony in a non-evidentiary hearing shall be filed and served at least 7 days prior to the date of the scheduled hearing. Any other party may file an objection to the motion within 5 days of the motion being filed, or, for good cause, up to the date of the hearing.~~

~~(C) In ruling on a motion under this paragraph, the court will consider the factors set forth in paragraph (6).~~

~~(3) On the Court's Own Motion. The court may require parties, witnesses, counsel, or other necessary persons to participate or testify in a hearing by video conference in an order served on all parties or other participants at least 7 days prior to the date of the scheduled hearing. Any~~

party may object to an order requiring video participation or testimony in a hearing by motion filed within 5 days after service of the order. In issuing an order or ruling on a motion under this paragraph, the court will consider the factors set forth in paragraph (6):

~~(4) (d) **Presiding Remotely from a Remote Location.** A judge may preside remotely for a remote or hybrid proceeding without notice to the parties. When a proceeding is scheduled for in-person participation or a motion for an in-person proceeding is granted, a judge may preside from a remote location but must provide the parties with notice reasonably in advance of the hearing unless there are grounds for an exception under (g). A judge may inform the parties that the judge will preside from a remote location by video conference over all or any portion of a hearing in which the Vermont Rules of Evidence apply by notice served on all parties at least 28 days prior to the date of a scheduled hearing or 7 days prior to the scheduled date of a non-evidentiary hearing. Any party may request the judge for good cause to preside personally in the courtroom where the hearing is scheduled by motion filed within 5 days after service of the notice. In acting or ruling on a motion under this paragraph, the court will consider the factors set forth in paragraph (6):~~

(e) **Notice to Parties.** All hearing notices must:

- (1) specify whether the proceeding is in person, remote, or hybrid; and
- (2) provide the process for requesting an alternative means of participation.

~~(5)(f) **Exception. Emergencies.** The court may waive make exceptions to the notice and time requirements of paragraphs (1)-(4) for notice and filing this rule upon a showing by a party or a finding by the court of unanticipated and unintended events, or other good cause, that would prevent timely notice.~~

~~(6)(g) **Factors.** In determining whether to have a hybrid proceeding or to require in-person participation by some or all parties permit, require, or deny participation, the presentation of testimony, or presiding from a remote location by video conference, the court will consider the following factors:~~

~~(1)(A) Whether the locations involved in the hearing proceeding have technological capabilities that satisfy the standards adopted pursuant to subdivision (e) (i), and whether any in-person location has adequate air flow;~~

~~(2)(B) The health, safety, and convenience of the parties, court personnel, counsel and proposed witnesses and the health of persons who may be dependent on or reside with these persons; the importance, complexity, and nature of the proceeding hearing; and the cost of producing a witness in person in relation to the importance of the offered testimony; the time and expense associated with travel; and the expected duration of the proceeding or the witness's testimony;~~

~~(3)(C) Whether the moving party attempted to procure the physical presence of a witness;~~

~~(4)(D) Whether a witness or other participant is incarcerated or otherwise institutionalized;~~

~~(5)(E) Whether satisfactory provision can be made for confidential communications between lawyers and their clients or witnesses;~~

~~(6)(F) That Whether there is assurance satisfactory to the court of the identity of any witness appearing by video or audio conference and whether the administration of the oath can be administered to that witness in a manner consistent with the laws of Vermont;~~

~~(7)(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;~~

~~(8)(H)~~ Whether any undue prejudice would result to a party or witness;

~~(9)(F)~~ Whether the use of video or audio conferencing technology diminishes or detracts from the dignity, solemnity, and formality of the hearing proceeding or undermines its integrity, fairness, or effectiveness; ~~and~~

(10) Whether conditions may be imposed to ensure the fairness of the proceeding and the reliability of the evidence, and to protect public health;

(11) Whether the proceeding involves a matter of public interest and whether public access can be adequately provided either in-person or remotely;

(12) With regard to audio conferences, whether participation or testimony by video is not feasible or cannot be obtained without imposing substantial cost or burden; and

(13) In remote or hybrid proceedings where at least one person is participating by audio conference, whether 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 whether any statements made by audio on the record will be recorded as part of the record of the court proceeding; and

(14)(J) Any other factors that the court may determine to be relevant.

**(d) Audio Conference.**

~~(1) *Presiding from a Remote Location.* In any hearing, the court may participate by audio from a remote location, giving due consideration to the factors set forth in subparagraph (3)(B) and paragraph (4) and subject to the authority of the court under paragraph (5).~~

~~(2) *Nonevidentiary Hearings.* In any nonevidentiary hearing,~~

~~(A) if the parties agree, any party, witness, counsel, or other necessary person may participate by audio conference from a remote location, subject to the authority of the court under paragraph (5);~~

~~(B) if there is no agreement of the parties, on motion of a party or on its own motion, the court may permit audio conference participation by any party, witness, counsel, or other necessary person from a remote location unless the court, after consideration of the factors set out in subparagraph (3)(B) and paragraph (4), finds good cause to require physical presence, and subject to the authority of the court under paragraph (5).~~

~~(3) *Hearings in which the Vermont Rules of Evidence Apply.* In any hearing in which the Vermont Rules of Evidence apply,~~

~~(A) if the parties agree, the court may permit any party, witness, counsel, or other necessary person to participate or testify by audio conference from a remote location, unless the court, after consideration of the factors set out in subparagraph (3)(B) and paragraph (4), finds good cause to require physical presence, and subject to the authority of the court under paragraph (5);~~

~~(B) if there is no agreement of the parties, upon motion of a party granted in advance of hearing, or on its own motion, 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) and subject to the authority of the court under paragraph (5), if the court finds~~

~~(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 and 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.~~

~~(5) *Conduct of Hearings.* In any hearing to be conducted by audio conference under this subdivision, the court may~~

~~(A) terminate the audio connection and conduct the hearing without the appearance of any party who is to appear by audio if the court finds that the connection itself or the circumstances of the call do not allow the court or other parties to clearly hear one another or that the circumstance of the call are otherwise disruptive of the hearing;~~

~~(B) suspend the hearing and reschedule the matter if it believes that the personal appearance of those participating would be more beneficial to the court or the parties;~~

~~(C) apportion the expense of any audio conference call among the parties upon final resolution of the case.~~

**(h) Conduct of Proceedings.** In any remote or hybrid proceeding, the court may:

(1) impose conditions to ensure the fairness of the proceeding and the reliability of the evidence, and to protect public health; or

(2) suspend or modify the proceeding, or reschedule the matter if the court finds that the personal appearance of some or all participants is required or some other change in the manner of proceeding is necessary.

**(e) (i) Technical Standards.** The Supreme Court by Administrative Order will establish technical standards that must be applied in all hearings under this rule.

### **Reporter's Notes—2023 Amendment**

Rule 43.1 was first adopted May 1, 2019, effective August 5, 2019, to provide a uniform process for participation by audio and video conference.

The COVID-19 pandemic reached Vermont less than a year later. The Governor of Vermont declared a state of emergency on March 13, 2020, and by Executive Order, the Governor imposed limits on gatherings of persons to reduce the health risk to the

public and limit the spread of the infection. The Vermont Supreme Court issued Administrative Order No. 49 on March 16, 2020, and declared a judicial emergency. A.O. 49 temporarily modified court rules and operations to meet the Court's constitutional responsibilities while protecting the health and safety of court personnel, court users, and the public at large. The Court subsequently amended A.O. 49 numerous times to respond to the evolving course of the pandemic.

The initial and amended versions of A.O. 49 superseded certain provisions of Rule 43.1, allowing more widespread use of remote and hybrid proceedings. At the same time, the Judiciary obtained the necessary software and technical equipment to support these proceedings. The current amendments incorporate lessons learned regarding remote and hybrid proceedings based on the experience of the bar, judges, court staff, and the public.

Rule 43.1(a) provides a default of remote proceedings with hybrid and in-person proceedings permissible with court permission. In contrast, simultaneously amended V.R.C.P. 43.1 contains a default of in-person participation with the possibility of remote or hybrid proceedings at the court's initiation or a party's request. Under the civil rule, there must be a finding of good cause based on the enumerated factors to conduct a remote or hybrid evidentiary proceeding. The difference in the default process for the probate division stems from the difference in the type and conduct of most probate proceedings. Most probate proceedings are conducted with relaxed evidentiary rules. Contested minor guardianship proceedings are one of the few kinds of hearings that incorporate the rules of evidence. See 14 V.S.A. § 2627(b). Probate proceedings also often involve self-represented parties and individuals from a wide geographic area, including outside Vermont. The experience during the pandemic demonstrated that remote participation provides a good balance between the cost and convenience for the participants and the overall effectiveness of the proceeding which is consistent with the scope of the Rules, set out in V.R.P.P. 1.

Rule 43.1(b) contains new definitions for hybrid and remote proceedings. In remote proceedings, all participants participate through audio or video conference. In a hybrid proceeding, participants may be physically in the courtroom or participating remotely by video or audio conference. When a hearing notice indicates that a proceeding will be hybrid, participants make their own decision about how to participate and are not required to notice the court or other parties in advance of how they will participate, absent an order of the court that may provide certain participants to appear in person. The definitions of "hearing" and

“nonevidentiary hearing” in former (b)(2) and (3) are deleted since the rule now treats all proceedings in the same manner. The definition of “remote location,” in former (b)(4), which required technical requirements to be met to preside remotely, is deleted as unnecessary given the general requirement to have technical standards under subdivision (i). Conduct and attire at hybrid and remote hearings should be no different than what would be expected at in person hearings.

Under 43.1(c)(1), the court has discretion to issue standing orders or case-specific orders for hybrid or in-person participation based on a consideration of any relevant factors provided in (g).

The parties may also move or stipulate to hybrid or in-person participation under (c)(2). In assessing whether to grant or deny a motion or stipulation, the court is guided by a consideration of the factors in subdivision (g). Because a hybrid or in-person hearing requires the availability of a courtroom and additional court staff, when a motion is granted, the court may need to reschedule the proceeding.

New subdivision (c) replaces former paragraphs (c)(1), (2), and (3) and (d)(2), and (3), which detailed the process for requesting and allowing participation through audio or video conference. As amended, the rule does not differentiate the process for audio or video participation, although, as explained below, there may be different relevant factors that apply if a participant appears by audio only.

Rule 43.1(d) replaces former (c)(4) and (d)(1) and allows the judge to preside remotely. The judge must provide the parties with notice reasonably in advance of the hearing if the judge intends to preside remotely for an in-person proceeding. Presiding remotely became much more common during the pandemic and practice indicates that judges can effectively run hearings without being present in the courtroom. Often judges and court staff do not know that a judge will preside remotely until close to the hearing date. The rule seeks to balance the need to provide notice to the parties with the flexibility required for judges and staff.

Rule 43.1(e) addresses the required notice to the parties in advance of the hearing. The notice must specify whether the proceeding is in person, remote, or hybrid and describe the process for requesting an alternate means of participation.

Subdivision (f) allows exceptions to the notice and timing requirements of the rule. It replaces former (c)(5), which was entitled “Emergencies” and allowed waiver of some of the rule’s time requirements based on “unanticipated and unintended events.”

The subdivision is now entitled “Exception,” to signify that not all circumstances warranting an exception may rise to the emergency level. This provision allows the court flexibility to respond to last-minute events such as illness, exposure to illness, or childcare needs.

Rule 43.1(g) incorporates the factors from former (c)(6) and (d)(3) and (4) for the court to consider in evaluating whether to have hybrid or in-person proceedings. The factors are the same as that provided in V.R.C.P. 43.1(h). See the Reporter’s Notes to that rule for an explanation of the added factors.

New 43.1(h) addresses the conduct of the proceedings and contains some provisions from former (d)(5). Under (h)(1), the court may impose conditions to ensure the fairness of the proceeding, ensure reliability of the evidence, or to protect public health. For example, to ensure reliability, in a remote proceeding, the court may require that specified persons or no persons be present with a remote witness or that a witness affirm under oath that the witness is receiving no verbal or nonverbal communications from any persons within or outside of the room. It is essential to the integrity of the proceedings that behavior that would be unacceptable in open court, with all participants present, does not occur during remote or hybrid proceedings. Conditions may also be imposed to allow parties, witnesses, judges, and counsel to be able to participate without jeopardizing their own health or the health of persons who may be dependent on them. Under (h)(2), the court may also suspend, modify, or reschedule the proceeding if the court determines that the personal appearance of some or all participants is required or some other change in the manner of the proceeding is necessary. Former (d)(5)(C), which allowed the court to apportion the expense of an audio conference between the parties is removed. Insofar as the judiciary has the necessary equipment to conduct remote proceedings, no cost to the parties will ordinarily be incurred.

Finally, former 43.1(e), regarding technical standards, is relabeled (i).

2. That these amendments be prescribed and promulgated effective October 2, 2023. The Reporter’s Notes are advisory.

3. That the Chief Justice is authorized to report this rule to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.



Dated in Chambers at Montpelier, Vermont, this 10<sup>th</sup> day of July, 2023.



Signed by the Vermont Supreme Court

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice

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Nancy J. Waples, Associate Justice