

**STATE OF VERMONT  
VERMONT SUPREME COURT  
AUGUST TERM, 2022**

**Order Promulgating Amendments to Rules 9, 33.1, and 34  
of the Vermont Rules of Appellate Procedure**

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

1. That Rule 33.1 of the Vermont Rules of Appellate Procedure be amended as follows (deleted matter struck through; new matter underlined):

**RULE 33.1. SUMMARY PROCEDURES ON APPEAL**

**(a) Orders.**

(1) If all members not disqualified agree, the Court may order that any case be set for consideration before a panel of three justices.

(2) If no party requests oral argument by the date set by the clerk ~~letter addressed to the clerk reasonably in advance of the date set for consideration~~, the matter will be considered ~~deemed to have been submitted for decision~~ on the briefs unless the Court directs otherwise.

**(b) Oral Argument.**

(1) *Generally.* Unless otherwise ordered by the Court, the allotted time for oral argument will be five minutes per side, including any time reserved by the appellant for rebuttal.

(2) *Remote Argument.* Unless otherwise ordered under (b)(3), all arguments before a panel will be scheduled for remote audio or video participation by all parties.

(3) *In-Person Argument.* In-person argument is not available when one party is incarcerated and self-represented. In all other cases, oral argument will be held in person if the Court grants a motion for an in-person argument for good cause. The motion must be filed as soon as possible and no later than 7 days prior to the scheduled argument date.

~~(2) *Argument by Video Conference.* Parties may present oral argument either in person or by video conference. Parties intending to present oral argument by video conference must notify the Court no later than 7 days before the scheduled argument date.~~

~~(A) Parties participating by video conference must arrange the conference through a Court-approved service and pay any associated fees.~~

~~(B) Unless the Court orders otherwise, a video conference may be held in accordance with this rule only if the equipment to be used satisfies any safeguards that the Court may require by administrative order.~~

~~(3) *Argument by Telephone.* Incarcerated parties may present oral argument by telephone as long as the telephone conference can be arranged at the place of incarceration. Incarcerated parties must notify the Court no later than three business days before the scheduled argument date. Other parties may present oral argument by telephone with the Court's permission, which must be requested at least 7 days before the scheduled argument date.~~

~~(4) *Equipment.* The Court assumes no responsibility for any failed connections in a video or telephone conference, and in those cases the Court may direct that the case will be considered without oral argument. Technology Failure. In the event of a technology failure during a remote hearing, the Court may reschedule the oral argument, consider the case without oral argument, or take other appropriate action.~~

**(c) Disposition.**

- (1) Any case considered by a three-justice panel must be decided by a unanimous opinion.
- (2) The panel may direct that the case be reargued before the full Court and must do so if the panel cannot reach a unanimous decision on the merits.
- (3) Before determining that it cannot reach a unanimous decision, the panel may retain the case and order additional briefing.
- (4) If the panel orders argument before the full Court, the Court may identify matters to be reargued or rebriefed.

**(d) Nonprecedential Status of Decisions.**

- (1) An unpublished decision by a three-justice panel may be cited as persuasive authority but is not controlling precedent, except as provided below.
- (2) The decision may be controlling with respect to issues of:
  - (A) claim preclusion;
  - (B) issue preclusion;
  - (C) the law of the case; and
  - (D) similar issues involving the parties or facts of the case in which the decision was issued.

### **Reporter's Notes—2022 Amendment**

Rule 33.1 is amended to update its provisions regarding remote oral argument. Because of the health concerns posed by the COVID-19 pandemic, the Vermont Supreme Court began holding remote oral arguments in April 2020. The arguments were conducted using Webex with Justices, attorneys, and self-represented parties appearing remotely by video or audio. Public access to the remote oral arguments was provided by a live stream. The Court conducted a survey of members of the bar on attorneys' experiences with remote oral argument. Many respondents reported that remote argument was an efficient use of time and was effective. Other respondents preferred argument in the courtroom and missed the formality of in-person argument. The majority of respondents indicated they would choose in-person for full-Court arguments and remote for oral argument before a three-Justice panel.

Rule 33.1(a)(2) is amended to clarify when a request for oral argument must be made. The rule previously indicated that a request should be made "reasonably in advance of the date set for consideration." Supreme Court practice is for the Supreme Court docket clerk's office to send a letter to the parties setting a date by which the parties should request argument. This allows the case to be properly scheduled on the calendar.

Rule 33.1(b)(2) is added to provide that oral argument before a three-Justice panel will be conducted remotely absent an order. An in-person oral argument is available under (b)(3) if a party files a motion and demonstrates good cause. The motion must be filed as soon as possible but no later than 7 days prior to the scheduled argument date. An in-person argument is not available when one party is incarcerated and self-represented.

Rule 33.1(b)(4) is amended to provide that if there is a technology failure during a remote hearing, the Court may reschedule the argument, consider the case on the briefs, or take other appropriate action.

2. That Rule 34 of the Vermont Rules of Appellate Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

### **RULE 34. ORAL ARGUMENT**

(a) **Cases Ready to Schedule Ripe for Argument**. A case is ~~ripe for argument~~ ready to be placed on the calendar after the appellee's principal brief is filed or the time for filing the appellee's principal brief has expired ~~reply brief is filed or the time for filing the reply brief has expired~~. After a case is ready to be scheduled ~~ripe~~, it will be heard or considered on the briefs at the next available term; ~~unless otherwise ordered upon motion filed at least 14 days before the opening of the term. If good cause is shown, a case that becomes ripe after the calendar for a term has been distributed may be put on the calendar and heard at that term. If no party requests oral argument by the date set by the clerk, the matter will be considered on the briefs unless the Court orders otherwise.~~

(b) **Time Allowed for Argument**. Each side has the opportunity for oral argument. The Court determines the amount of time allowed each side. Counsel may request additional time, which will be liberally granted if necessary for the adequate presentation of argument. Requests for additional time may be made by motion reasonably in advance of argument. A party need not use all of the time allowed, and the Court may terminate the argument when it decides further argument is unnecessary.

(c) **In-Person Argument**. Unless otherwise ordered under (d), all full-Court arguments will be scheduled for in-person participation by all parties.

(d) **Remote Argument**. When a party is incarcerated and self-represented, the argument will be scheduled for remote audio or video participation by all parties. In all other cases, the Court may grant a motion for one or more parties to participate remotely for good cause. The motion must be filed as soon as possible but no later than 7 days prior to the scheduled argument date. In the event of a technology failure during a remote argument, the Court may reschedule the oral argument, consider the case without oral argument, or take other appropriate action.

(e) **Order and Contents of Argument**. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities, but may read any parts of the evidence that may be necessary to show the points relied on.

(f) **Cross-Appeals and Separate Appeals**. If there is a cross-appeal, Rule 28(g) determines which party is the appellant and which is the appellee for purposes of oral argument. A cross-appeal or separate appeal must be argued when the initial appeal is argued unless the Court directs otherwise. Separate appellants who support the same argument should avoid duplicative argument.

(g) **Number of Counsel To Be Heard**. Only one counsel will be heard for each party on the argument of a case, except by leave of the Court.

(h) **Amicus Curiae**. By leave of the Court, counsel for an amicus curiae whose brief has been filed under Rule 29 may, with the consent of a party, argue orally on the side of that party. The

consent of the party must specify how much the time will be allocated to amicus curiae counsel. In the absence of consent, amicus curiae counsel may argue orally only by leave of the Court, which will be granted only in extraordinary circumstances. If the motion is granted, counsel for the opposing party will be granted an equal amount of additional time for oral argument.

(g i) **Nonappearance of a Party.** If the appellee fails to appear for argument, the Court will hear appellant’s argument. If the appellant fails to appear for argument, the Court may hear the appellee’s argument. If neither party appears, the case will be decided on the briefs, unless the Court orders otherwise.

(h j) **Submission on Briefs.** The parties may agree to submit a case for decision on the briefs, but the Court may direct that the case be argued. All small claims appeals will be submitted for decision on the briefs unless the Court orders otherwise. A request for oral argument by a small claims party may be made at any time up to 30 days after the deadline for filing the appellee’s brief.

(i k) **Use of Physical Exhibits at Argument; Removal.** Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the Court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the Court directs otherwise. The clerk may destroy or dispose of exhibits that are not reclaimed within a reasonable time after the clerk gives notice to remove them.

(j l) **Public Access to Oral Arguments.** Unless otherwise ordered by the Court for a specific case, all oral arguments are open to the public. In a case in which the public did not have access to proceedings in the trial court or administrative board or agency, oral advocates must reference all parties, witnesses, or other persons involved in the case by initials and not by full names.

### **Reporter’s Notes—2022 Amendment**

Rule 34 is amended to update its provisions regarding remote oral argument. Because of the health concerns posed by the COVID-19 pandemic, the Vermont Supreme Court began holding remote oral arguments in April 2020. The arguments were conducted using Webex with Justices, attorneys, and self-represented parties appearing by video or audio. Public access to the remote oral arguments was provided by a live stream. The Court conducted a survey of members of the bar on attorneys’ experiences with remote oral argument. Many respondents reported that remote argument was an efficient use of time and was effective. Other respondents preferred argument in the courtroom and missed the formality of in-person argument. The majority of respondents indicated they would choose in-person for full-Court arguments and remote for hearings before a three-Justice panel.

Rule 34(a) is amended to clarify when a case is ready to be scheduled and when a request for argument must be filed. Under the amendment, a case is ready to be scheduled when the appellee’s brief has been filed or is past due. At that time, the docket clerk’s office will send a letter to the parties setting a date by which to reply if oral argument is requested. The amended rule

provides that if no party requests argument that date, the matter will be considered on the briefs unless the Court orders otherwise.

Under new Rule 34(c), the default is that oral arguments before the full Court are scheduled for in-person participation. Under (d), the Court may grant a motion for one or more parties to participate remotely for good cause. The motion must be filed as soon as possible but at the latest 7 days before the scheduled argument date. An in-person hearing is not available when one party is incarcerated and self-represented. The revised rule also provides that if there is a technology failure during a remote hearing, the Court may reschedule the argument, consider the case on the briefs, or take other appropriate action.

Former 34(c)-(j) are redesignated (e)-(l).

3. That Rule 9 of the Vermont Rules of Appellate Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

### **RULE 9. RELEASE IN CRIMINAL CASES**

#### **(a) Appeals from Conditions of Release.**

(1) After reasonable notice to the appellee, the Court must promptly hear and determine an appeal authorized by 13 V.S.A. § 7556(b) or (c) or by V.R.Cr.P. 46(c) from an order imposing, refusing to impose, amending, or refusing to amend, conditions of release. The argument will be scheduled for remote audio or video participation by all parties.

(2) The appeal will be determined on the record without the necessity of briefing.

(3) The Supreme Court or a single justice may order a defendant's release pending the disposition of the appeal.

#### **(b) Reviewing Denial of Release.**

(1) *Denial of Release under 13 V.S.A. § 7553a.*

(A) Review authorized by 13 V.S.A. § 7556(d) of a denial of release under 13 V.S.A. § 7553a will be by a single justice of the Supreme Court.

(B) A person seeking this review must file a notice of appeal in the superior court, provide a copy to the Supreme Court, and give reasonable notice to the State.

(C) Transcript preparation takes precedence over all matters except older matters of the same character.

(D) The reviewing justice must set the time and place of the hearing, which may be conducted by remote audio or video.

(E) The reviewing justice will conduct a de novo review based on the record and any additional evidence authorized by the justice for good cause shown. A party must present the reviewing justice with a memorandum describing any proposed additional evidence at least 24 hours before the hearing.

(F) After a hearing, the reviewing justice must either affirm or vacate the order denying release, and remand to the superior court with instructions to enter an order or take further proceedings consistent with the justice's decision.

(2) *Denial of Release Under Rule 9(b)(1) or 13 V.S.A. § 7553.*

(A) Review authorized by 13 V.S.A. § 7556(e) of a denial of release under Rule 9(b)(1) or 13 V.S.A. § 7553 will be by a panel of three Supreme Court justices.

(B) A person seeking this review must file a notice of appeal in the superior court, provide a copy to the Supreme Court, and give reasonable notice to the State.

(C) Transcript preparation takes precedence over all matters except older matters of the same character.

(D) The argument may be conducted by remote audio or video.

(~~D~~ E) After the hearing, the panel must either affirm or vacate the order denying release, and remand to the superior court with instructions to enter an order or take further proceedings consistent with the panel’s decision.

(c) **The Record.** For purposes of any appeal or review to be conducted in accordance with Rule 9(a) or (b), the record consists of the charging document, the record of actions, affidavits, all pertinent parts of the transcript of the proceeding of which appeal or review is sought, and any order or orders entered therein.

**Reporter’s Notes—2022 Amendment**

Rule 9 is amended to incorporate provisions regarding remote oral argument. Rule 9(a)(1) is amended to specify that in appeals from conditions of release, the oral argument will be scheduled for remote audio or video hearing. Rule 9(b)(1)(D) already provides that in de novo appeals under 13 V.S.A. § 7553a, the hearing may be conducted by remote audio or video. Rule 9(b)(2)(D) is added to provide that oral argument before a three-Justice panel may also be conducted by remote audio or video.

4. That these rules, as amended, are prescribed and promulgated to become effective October 1, 2022. The Reporter’s Notes are advisory.

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

Dated in Chambers at Montpelier, Vermont, this 9<sup>th</sup> day of August, 2022.

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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



Signed by the Vermont Supreme Court