

STATE OF VERMONT
VERMONT SUPREME COURT
MAY TERM, 2019

Order Promulgating Amendments to the Vermont Rules of Civil Procedure, the Vermont Rules for Family Proceedings, and 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(a) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined):

RULE 43. EVIDENCE

(a) **Form.** In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by Rule 43.1, other provisions of these rules, the Vermont Rules of Evidence, or other rules adopted by the Supreme Court.

Reporter's Notes—2019 Amendment

Rule 43(a) is amended to reflect the fact that new Rule 43.1 and amendments to the Family and Probate rules, promulgated simultaneously, permit testimony to be presented by video or audio conference in appropriate circumstances. The amendment provides expressly that proceedings under Rule 43.1 are an exception to the existing requirement that “testimony . . . shall be taken orally in open court” unless otherwise provided by specific rules. That provision has been held to prohibit testimony by telephone or other means except by agreement of the parties. Simpson v. Rood, 2003 VT 39, ¶ 8, 175 Vt. 546, 830 A.2d 4 (mem.).

2. That Rule 43.1 of the Vermont Rules of Civil Procedure be added to read as follows:

**RULE 43.1. PARTICIPATION OR TESTIMONY BY VIDEO OR AUDIO
CONFERENCE**

(a) **General Provisions.**

(1) Subject to the requirements of this rule, in any trial or other proceeding the court may permit or require participation by parties, counsel, the judge, or other necessary participants, or testimony by a witness, 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 (e).

(2) "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) "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 (e).

(c) 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 trial or other proceeding 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 clerk at least 14 days prior to the scheduled date of the trial or other proceeding.

(B) If a judge assigned to a particular unit or division of the Superior Court has preapproved certain uses or categories of use of video conferencing in all or certain categories of actions, a party wishing to use video conferencing in such an action must file the agreement with the clerk at least 5 days prior to the proceeding.

(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 trial or other proceeding, shall file and serve a motion, setting forth the grounds for the request.

(A) A motion for participation or testimony in a trial shall be filed and served at least 28 days prior to the date of the scheduled trial or any other proceeding scheduled more than 28 days in advance. Any other party may file an objection to the motion within 14 days of the motion being filed.

(B) A motion for participation or testimony in any other proceeding shall be filed and served at least 7 days prior to the date of the scheduled proceeding. 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 trial or other proceeding by video conference in an order served on all parties or other participants at least 28 days prior to the date of the scheduled trial or 7 days prior to the date of the scheduled proceeding. Any party may object to an order requiring video participation or testimony in a trial by motion filed within 14 days after service of the order and may object to an order requiring video participation or testimony in any other proceeding 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) *Presiding from a Remote Location.* 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 trial or other proceeding by notice served on all parties at least 28 days prior to the date of a scheduled trial or 7 days prior to the scheduled date of any other proceeding. Any party may request the judge for good cause to preside personally in the courtroom where the trial or other proceeding 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).

(5) *Emergencies.* The court may waive the time requirements of paragraphs (1)-(4) for notice and filing 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) *Factors.* In determining whether to 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:

(A) Whether the locations involved in the trial or proceeding have technological capabilities that satisfy the standards adopted 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.

(d) Audio Conference.

(1) *Presiding from a Remote Location.* In any proceeding, 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 Proceedings.* In any nonevidentiary proceeding,

(A) if the parties agree, any party, 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, 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) *Evidentiary Proceedings.* In any evidentiary proceeding,

(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 Proceedings.* In any proceeding to be conducted by audio conference under this subdivision, the court may

(A) terminate the audio connection and conduct the proceeding 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 proceeding;

(B) suspend the proceeding 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.

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

Reporter's Notes

Rule 43.1 is added to provide a uniform procedure and standards for video or audio conference participation of parties and other necessary persons, as well as testimony of witnesses, in civil actions in the civil division of the superior court. In its title and throughout, Rule 43.1 uses the term "audio" conference.

Telephone participation is the longstanding and still most common form of remote audio participation in all types of Vermont proceedings where authorized. The broader term, which includes telephone, is used in the new rule to make clear that evolving technologies that provide web-based audio communication may be used if the procedural and technical requirements of the rule and any administrative order adopted under subdivision (e) are met.

A simultaneous amendment of V.R.C.P. 43(a) provides expressly that proceedings under this rule are an exception to the existing requirement that “testimony . . . shall be taken orally in open court.” See Reporter’s Notes to that amendment. Rule 43.1 also applies so far as applicable in small claims actions by virtue of V.R.S.C.P. 6(a) and 13 and in the Environmental Division to the extent provided in V.R.E.C.P. 3, 4(a), and 5(a)(2). A simultaneous amendment to V.R.F.P. 17 makes the rule applicable in proceedings in the family division with appropriate variations. The probate division will have a similar procedure set forth in simultaneously amended V.R.P.P. 43 and newly adopted V.R.P.P. 43.1.

The rapid development of technology and the increasing availability and use of video and audio equipment in Vermont courtrooms provide both the opportunity and the necessity for a uniform rule. Existing rules and administrative orders contain incomplete and inconsistent provisions. See V.R.C.P. 43(a) (discussed above); V.R.S.C.P. 6(a) (testimony or participation by telephone in court’s discretion, applicable also under V.R.C.P. 80.6(d)(4)—Judicial Bureau, 80.7(e)(3)—vehicle forfeiture, 80.9(c)—parking violations); former V.R.F.P. 17 (court may require or allow testimony or participation by telephone if conditions met); V.R.A.P. 33.1(b) (oral argument in summary proceedings by video or telephone conference); V.R.E. 611(a) (authority “to exercise reasonable control over” the manner of interrogating witnesses not exception to V.R.C.P. 43(a), per Simpson v. Rood, 2003 VT 39, 175 Vt. 546, 830 A.2d 4 (mem.)); V.R.E. 807(e) (two-way closed circuit television testimony by a child or person with psychiatric or similar disability); A.O. 38 (video and telephonic appearances by incarcerated parties and “certain witnesses” in criminal and family cases, currently used in Chittenden County arraignment pilot project funded by Legislature).

Experience in other states shows that once the technology is installed in courtrooms for one purpose such as arraignment, it rapidly becomes used for other purposes, including a variety of civil proceedings. See, e.g., Mich. Ct. R. 2.407(a); Minn. R. 131.02.

Accordingly, it is important to be prepared with uniform rules defining the purposes for which video and audio conferences can be used in the Vermont courts and the standards governing that use. Although the rules of other states and experience under V.R.F.P. 17 were a starting point, the present rule is more generally based on Vermont circumstances and experience under the various Vermont provisions cited in the preceding paragraph.

Rule 43.1(a) gives the rule a broad scope. The court has discretion to permit or require testimony or participation in “any trial or other proceeding” to which the rule is applicable by all “necessary participants,” using video or audio conferencing from one or more remote locations, subject only to specific requirements and conditions detailed in the rule. The intent is to favor the use of video or audio when it will advance disposition of a proceeding as long as technical standards are satisfied and there is no countervailing circumstance in the particular situation.

Rule 43.1(b) defines, also in broad terms, “audio conference” (including telephone), “remote location,” and “video conference,” — the basic terms that the rule employs. The definitions do not specify the exact technology required but emphasize the capacity for contemporaneous communication and that the technology employed must meet the standards provided in any administrative order adopted under subdivision (e).

Rule 43.1(c) sets forth the terms on which video conferencing may be employed in a trial as well as in any other proceeding. Under paragraph (1), the parties may agree in writing, with court approval, on video participation or testimony. Approval will only be withheld for good cause and may be granted on a blanket basis by a sitting judge for certain specific situations in which there is no basis for withholding approval. Paragraph (2) provides for use of video on motion of a party on specific grounds such as cost savings, limited scope of the testimony, or availability and importance of a witness. The court, pursuant to paragraph (3), may order participation or testimony by video on its own motion. In issuing such an order, the court should be mindful of the basic purposes of the rule emphasized by subdivision (a) and the criteria of paragraph (c)(6) and should apply those criteria in ruling on an objection to the order.

Rule 43.1(c)(4) permits a judge to preside by video from a location other than the courtroom where the proceeding is scheduled, regardless of whether others are participating or testifying in the courtroom or remotely. Again, the criteria of

paragraph (c)(6) are the basis for ruling on a party's request showing cause why the judge should preside personally. Paragraph (c)(5) permits the court to waive the time requirements of paragraphs (1)-(4) for filing and objecting if there are unanticipated reasons making timely notice impossible.

Rule 43.1(c)(6)(A)-(J) set forth 10 factors to be considered by the court in issuing orders or ruling on requests or motions under paragraphs (1)-(4) or acting under paragraph (5). The factors cover a range of considerations designed to allow the court to fine-tune a decision in specific circumstances. Sufficiency of the technology is fundamental (Factor A). Factors (B), (C), and (D) call for a balance of the convenience of and cost to the parties and witnesses of physical participation against the importance of physical presence to a determination of the issues. Factors (E), (F), (G), (H), and (I) address the effect of video appearance on the conduct of the proceeding—the possibility of prejudice, the effectiveness of cross-examination, the effect of video appearance on the dignity or integrity of the proceeding, the importance and complexity of the proceeding or testimony, the adequacy of opportunities for confidential lawyer-client communication, and assurance of the identity of a witness and administration of the oath. Factor (J) is a catchall permitting consideration of any other relevant factor. For example, if the judge believes that coaching of the witness or other improper activity is occurring at a remote location, the judge could take appropriate action under this provision.

Rule 43.1(d) provides procedures and standards for audio conferencing (defined in Rule 43.1(b)) in both nonevidentiary and evidentiary proceedings. It replaces the procedure for telephone participation in the family division previously provided by V.R.F.P. 17.

Rule 43.1(d)(1) makes clear that the judge has discretion to participate remotely by audio conference in any proceeding. In exercising that discretion, the judge should be guided by relevant factors provided in subparagraph (d)(3)(B) and paragraph (d)(4) and retains the authority provided by paragraph (d)(5) to terminate or suspend the proceedings and to apportion their costs.

Rule 43.1(d)(2)(A) provides that in nonevidentiary proceedings, the parties may agree on audio participation by one or more participants from appropriate remote locations, subject to the authority of the court under paragraph (d)(5). Under subparagraph (d)(2)(B), in the absence of agreement, on the motion of a party or on its own initiative, the court may permit audio participation

unless, after considering the factors in subparagraph (d)(3)(B) and paragraph (d)(4), it finds good cause to require participation in person.

For evidentiary proceedings, under Rule 43.1(d)(3)(A), if the parties agree, the court may permit audio participation or testimony, again subject to paragraph (d)(5), unless it finds good cause to require personal participation on the basis of the factors in subparagraph (d)(3)(B) and paragraph (d)(4).

Under subparagraph (d)(3)(B), if there is no agreement on audio participation or testimony, the burden is reversed. The court may permit or require audio only if it makes affirmative findings on factors (3)(B)(i)-(v), which address both the need for and appropriateness of remote audio participation. The issues are preliminary questions under Vermont Rule of Evidence 104(a), so that in making these findings, the court is not bound by the rules of evidence, with the exception of the rules of privilege. The court is also to consider the factors set forth in paragraph (4) and may exercise the authority provided in paragraph (5).

Rule 43.1(e) provides that the technical requirements that must be satisfied for video or telephone conferencing to proceed will be established by Administrative Order of the Supreme Court.

3. That Rule 17 of the Vermont Rules for Family Proceedings be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 17. TESTIMONY AND PARTICIPATION BY TELEPHONE VIDEO OR AUDIO CONFERENCE

~~(a) Required Findings. In any action or proceeding under these rules, except as otherwise provided by statute:~~

~~(1) The court may require any witness or party to testify or participate in a hearing by telephone if the court finds~~

~~(A) that the testimony or participation of the witness or party is necessary to the fair determination of the issues, and~~

~~(B) that the witness or party is either physically unable to be present or cannot be produced without imposing substantial administrative burdens or costs on the state.~~

~~(2) Upon motion of a party granted in advance of hearing, or upon the court's own motion, the court may permit any witness or party to testify or participate in a hearing by telephone.~~

~~(b) **Necessary Conditions.** Except as otherwise provided by statute, testimony or participation by telephone shall be required or permitted only if~~

~~(1) there is assurance satisfactory to the court of the identity of any witness appearing by telephone and the administration of the oath to that witness;~~

~~(2) all parties and the judge or magistrate 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;~~

~~(3) the telephone 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~~

~~(4) the court finds that, in 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.~~

(a) **Divorce, Annulment, and Legal Separation.** Rule 43.1 of the Vermont Rules of Civil Procedure applies in all proceedings under Rules 4, 8, and 9 of these Rules.

(b) **Children in Need of Care or Supervision; Termination of Parental Rights.** Rule 43.1 of the Vermont Rules of Civil Procedure applies in proceedings under Rules 2 and 3 of these Rules.

(c) **Mental-Health Proceedings.** Rule 43.1 of the Vermont Rules of Civil Procedure applies in hearings for involuntary treatment under 18 V.S.A. § 7615, for continued treatment under 18 V.S.A. § 7621, and for involuntary medication under 18 V.S.A. § 7625.

(d) **Guardianship Proceedings.** Rule 43.1 of the Vermont Rules of Civil Procedure applies in all minor guardianship proceedings transferred from the Probate to the Family Division under 4 V.S.A. § 455 and 14 V.S.A. § 2624(b).

Reporter's Notes—2019 Amendment

V.R.F.P. 17, providing for telephonic testimony and participation in the Family Division, is amended by deleting the present text of the rule and promulgating new subdivisions (a)-(d) providing that V.R.C.P. 43.1 applies in family division proceedings other than juvenile proceedings under V.R.F.P. 1, subject to specific provisions for certain statutory mental-health and guardianship proceedings.

4. That Rule 43(b) of the Vermont Rules of Probate Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 43. EVIDENCE

(a) **Application of Vermont Rules of Evidence.** Except as otherwise provided in this subdivision, the Vermont Rules of Evidence shall apply in probate ~~proceedings~~ hearings in which issues of fact are to be adjudicated. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. When a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form. This subdivision shall not be construed to permit the admission of evidence made inadmissible by the rules with respect to privilege or by the deadman's statutes, 12 V.S.A. §§ 1602-1603.

(b) **Form.** In all proceedings, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by Rule 43(a); Rule 43.1, other provisions of these rules, the Vermont Rules of Evidence, or other rules promulgated by the Supreme Court.

Reporter's Notes—2019 Amendment

Rule 43 is amended to reflect the simultaneous addition of Rule 43.1 covering video and audio participation and testimony. See Reporter's Notes to that rule. A specific reference to Rule 43(a) is added to Rule 43(b) to make clear that its provisions for relaxing the rules of admissibility in specific situations apply.

5. That Rule 43.1 of the Vermont Rules of Probate Procedure be added to read as follows:

RULE 43.1. PARTICIPATION OR TESTIMONY BY VIDEO OR AUDIO CONFERENCE

(a) General Provisions.

(1) Subject to the requirements of this rule, in any hearing the court may permit or require participation by parties, counsel, the judge, or other necessary participants, or testimony by a witness, 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 (e).

(2) “Hearing” means a trial or other proceeding before the court held on notice as provided in this rule.

(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).

(5) “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 (e).

(c) 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 nonevidentiary 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) *Presiding from a Remote Location.* 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).

(5) *Emergencies.* The court may waive the time requirements of paragraphs (1)-(4) for notice and filing 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) *Factors.* In determining whether to 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:

(A) Whether the locations involved in the hearing have technological capabilities that satisfy the standards adopted pursuant to subdivision (e);

(B) The convenience of the parties and proposed witnesses; the importance, complexity, and nature of the hearing; 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 hearing or undermines its integrity, fairness, or effectiveness; and
- (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.

(e) **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

V.R.P.P. 43.1 is added to adapt the procedure of new V.R.C.P. 43.1, covering video and audio participation and testimony, to the circumstances of Probate Court proceedings. See generally Reporter's Notes to V.R.C.P. 43.1.

Definitions of "hearing" and "nonevidentiary hearing" in V.R.P.P. 43.1(b)(2) and (3) replace "trial" and "nonevidentiary

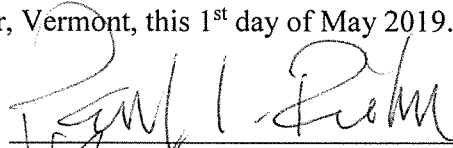
proceeding” found in V.R.C.P. 43.1(c). These changes reflect the fact that evidentiary probate proceedings are generally denominated “hearings” and most are relatively informal. The appropriate distinction is between the relatively few hearings that require application of the Vermont Rules of Evidence and those hearings in which the lesser standard of V.R.P.P. 43(a) is applied. Accordingly, the distinction in V.R.C.P. 43.1 between “trial” or “evidentiary proceeding” on the one hand and “other proceedings” or “nonevidentiary proceedings” on the other hand is not adopted.

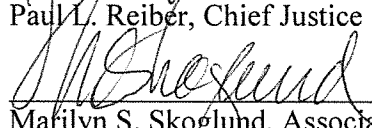
Because probate hearings generally do not involve or require as much lead time as proceedings in other divisions, the times for filing motions and court orders, and objections to them in V.R.P.P. 43.1(c)(2)(A) and (c)(3) are reduced from those provided in V.R.C.P. 43.1(c)(2)(A) and (c)(3). Other changes reflect the different structure and terminology of the probate courts. See, e.g., V.R.P.P. 43.1(c)(1)(B).

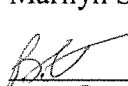
6. That these rules as amended or added are prescribed and promulgated effective August 5, 2019.

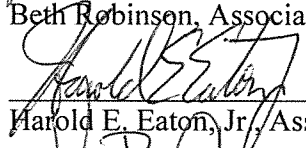
7. That the Chief Justice is authorized to report these rules as amended or added to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

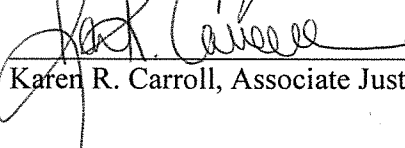
Dated in Chambers at Montpelier, Vermont, this 1st day of May 2019.



Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice