

**STATE OF VERMONT  
VERMONT SUPREME COURT  
DECEMBER TERM, 2021**

**Order Promulgating Amendments to Rule 16.3(b)(3) of the Vermont Rules of Civil Procedure**

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

1. That Rule 16.3(b)(3) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined, deleted matter struck through):

**RULE 16.3. MEDIATION**

**(b) Stipulation for Mediation.**

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(3) *Participation.* All parties and their counsel must attend a scheduled mediation in person unless the parties stipulate ~~otherwise~~ that the mediation may be conducted remotely by video or by telephone, or the court, for good cause in its discretion, excuses a person from participation entirely, or authorizes a person, party, or all parties to participate remotely by video or telephone. A corporation, partnership, or other entity that is a party, and a liability insurer that is defending the action or that sues in the name of its insured, must each be represented by a person (other than outside counsel) who has settlement authority and authority to enter stipulations. With the agreement of all parties and the mediator, any nonparty having an interest that may be materially affected by the outcome of the proceeding, or whose presence is essential to its resolution, may be invited to attend the session in person or by counsel.

**Reporter’s Notes—2022 Amendment**

Rule 16.3(b)(3) is amended, pursuant to the Supreme Court’s directive under Administrative Order 49, ¶ 13, that the Civil Rules Advisory Committee “consider whether a permanent change to the rules relating to participation in remote mediation is advisable.”

Prior to these amendments, Rule 16.3(b)(3) required parties and counsel to attend a mediation unless they stipulate otherwise or the court, for good cause, excuses participation or authorizes telephone participation. AO 49, ¶ 13, however, suspended that rule. Paragraph 13 provides that “the judicial emergency” addressed by AO 49 “constitutes ‘good cause’ authorizing remote participation in mediation, by video or telephone, without a stipulation or further court order.”

The present amendments retain the basic structure of Rule 16.3(b) that in-person attendance is the default position, with an option for remote mediation if the parties so stipulate or the court,

in its discretion, so orders or excuses a party. In the amendment the court’s discretion is substituted for “good cause” as the standard by which the court may determine whether to order remote mediation or excuse a party from it. For example, in a financial disparity between parties, where the disadvantaged party is out of state, absence may not be sufficient to meet a good cause standard, but it may be a fact that could convince a judge to use his/her discretion regarding remote mediation if it made sense to the court to do so, in striking a balance between the benefits of remote and in-person mediation in the circumstances of a particular case. For examples of the use of “in its discretion” see V.R.C.P. 3(a), 4(j), 23(f) (as it relates to the Supreme Court), 39(b), 55(c) and (d). The “in its discretion” language is also well litigated. This process would make it a bit easier to have remote mediation where the parties do not agree.

To clarify best practice, the present amendments specify that the default requirement of the rule is for “in person” attendance by parties and counsel, and that the alternative, whether by stipulation or court order, is remote attendance by either video or telephone. It should also be noted that the stipulation provided by Rule 16.3 occurs in connection with the pleading process. The parties may informally agree to remote mediation at any time.

2. That these amendments be prescribed and promulgated effective February 14, 2022. The Reporter’s Notes are advisory.

3. 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 13<sup>th</sup> day of December 2021.



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