

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2023

Order Promulgating Amendments to Rule 43.1 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 43.1 of the Vermont Rules of Civil 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) All proceedings will be scheduled for in-person participation by parties, counsel, witnesses, and other necessary participants unless otherwise ordered pursuant to this rule.

(2) Subject to the requirements of this rule, in any ~~trial or other~~ evidentiary or nonevidentiary proceeding the court may permit or require participation by some or all of the parties, counsel, ~~the judge~~, or other necessary participants, or testimony by a witness, using contemporaneous video or audio conference transmission from one or more remote locations, ~~or~~

~~(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) *D*.

(2) “Evidentiary” proceeding means one in which live oral testimony is taken. All other proceedings are nonevidentiary.

(3) “Hybrid” proceeding means one in which participants choose how to participate: in person, or by video or audio conference.

~~(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).~~

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

~~(3 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 1).~~

(c) Video Conference. Remote or Hybrid Nonevidentiary Proceedings.
The court has discretion to conduct remote or hybrid nonevidentiary proceedings. In exercising its discretion under this subdivision, the court may, but is not required to, consider the factors in subdivision (h).

(1) On the Court’s Own Initiative.

(A) Standing Order. A judge assigned to a particular unit or division of the superior court has discretion to order that nonevidentiary proceedings of a particular type be scheduled as remote or hybrid proceedings. The court may require or permit in-person participation even where a standing order would otherwise require participation by audio or video conference.

(B) Order in Particular Case. Where not already directed in a standing order, in its discretion, the court in a particular case may order that:

(i) a nonevidentiary proceeding be a remote or hybrid proceeding; or

(ii) particular parties, counsel, or other persons be required or permitted to participate in a nonevidentiary proceeding by video or audio conference.

(2) By Motion or Stipulation of the Parties.

(A) If the court has not already so ordered, a party may move for, or the parties may stipulate to, a remote or hybrid nonevidentiary proceeding.

(B) If the court has ordered a remote proceeding, a party may move or the parties may stipulate that a nonevidentiary proceeding be hybrid or that particular parties, counsel, or other persons be required to participate in person.

(C) 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.

(D) In its discretion, the court may grant or deny the motion or stipulation in whole or in part.

(d) Remote or Hybrid Evidentiary Proceedings.

(1) On the Court's Own Initiative.

(A) Standing Order. After due consideration of the relevant factors in subdivision (h), a judge assigned to a particular unit or division of the superior court may order that evidentiary proceedings of a particular type be scheduled as remote or hybrid proceedings. The court may require or permit in-person participation even where a standing order would otherwise require participation by audio or video conference.

(B) Order in Particular Case. Where not already directed in a standing order, for good cause, the court in a particular case may order that:

(i) an evidentiary proceeding to be a remote or hybrid proceeding; or

(ii) particular parties, counsel, witnesses, or other persons be required to participate in an evidentiary proceeding by video or audio 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 By Motion or Stipulation of the Parties 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. If the court has not already so ordered, a party may move for, or the parties may stipulate to, a remote or hybrid proceeding.~~

~~(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. If the court has ordered a remote proceeding, a party may move or the parties may stipulate that an evidentiary proceeding be hybrid or that particular parties, counsel, witnesses, or other persons be required or permitted to participate in person.

(C) If the court has ordered a hybrid proceeding, a party may move or the parties may stipulate that particular parties, counsel, witnesses, or other persons be required to participate in a particular manner: in person, or by video or audio conference.

(D) A motion under this paragraph must be served on the other parties and filed reasonably in advance of the proceeding. The motion must state whether the other parties consent to the motion. The court may specify a date for responding 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.

(E) In ruling on a motion under this subdivision paragraph, the court must will consider the factors set forth in paragraph(6) subdivision (h) to determine whether good cause exists to have a remote or hybrid proceeding or permit or require participation for some or all participants by video or audio conference.

(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).

(e 4) 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 a waiver 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 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).

(f) 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 g) **Emergencies Waiver.** The court may waive 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 h) **Factors.** In determining whether to have a remote or hybrid proceeding or to permit, or require, or deny participation by audio or video conference, the presentation of testimony, or presiding from a remote location by video conference, the court will consider the following factors apply:~~

~~(1 A) Whether the locations involved in the trial or proceeding have technological capabilities that satisfy the standards adopted pursuant to subdivision (1 e), and whether any in-person location has adequate air flow or has been designated as a limited-entry courthouse by the Court Administrator;~~

~~(2 B) The health and convenience of the parties, jurors, 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 trial, proceeding or testimony; the expected duration of the proceeding; 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 a 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 I) Whether the use of video or audio conferencing technology diminishes or detracts from the dignity, solemnity, and formality of the trial or 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 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.~~

(i) **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;

(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, some other change in the manner of proceeding is necessary, and for evidentiary proceedings, that there is no longer good cause to allow participation by video or audio conference based on the factors in subdivision (h);

(3) apportion the expense of any video or audio conference among the parties upon final resolution of the case.

(j) **Jury Selection.** Jury selection is governed by the provisions of this rule applicable to evidentiary proceedings.

(k) **Stalking Proceedings.** All proceedings under 12 V.S.A. §§ 5131-5138, will be hybrid unless upon a party's request or on the court's own initiative, the court orders participation by a particular method: in person or by video or audio conference. Requests by a party need not comply with Vermont Rule of Civil Procedure 7 but must be served pursuant to Vermont Rule of Civil Procedure 5.

(l) **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—2023 Amendment

Vermont Rule of Civil Procedure 43.1 was originally promulgated on 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. 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 Supreme Court of Vermont 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. Pursuant to A.O. 49, ¶ 5(e), the Court created the Special Advisory Committee on Remote Hearings to study, advise the Court about, and propose potential permanent rule changes governing remote participation in court proceedings. The 2023 amendments to Rule 43.1 are the result, in large part, of the Special Advisory Committee’s study and analysis of the experience of members of the bar, judges, court staff, and members of the public with fully remote and hybrid proceedings.

The 2019 version of Rule 43.1 had five parts: (a) a general statement authorizing video or audio conference transmission from remote locations by agreement, on motion, or by the court’s own motion, under the standards set forth in the subsequent sections of the rule; (b) definitions; (c) standards related to video conferences; (d) standards related to audio conferences; and (e) technical requirements. The rule differentiated between trials and other proceedings. The amended rule contains different standards for nonevidentiary and evidentiary proceedings, relaxes the timelines for requesting remote participation, and introduces the concept of hybrid proceedings.

The overall structure of the amended rule is as follows.

Paragraph (a)(1) is added to set a default of in-person participation. Subdivision (b) adds definitions for evidentiary proceeding, hybrid proceeding, and remote proceeding. New subdivision (c) addresses remote or hybrid nonevidentiary proceedings. Subdivision (d) provides the standards for remote or hybrid evidentiary proceedings. Subdivision (e) revises the former (c)(4) regarding the judge presiding from a remote location. Subdivision (f) sets out the requirements for the hearing notice. Subdivision (g) revises former (c)(5), previously entitled “Emergencies,” to allow a waiver of the rule’s requirements in certain circumstances. Subdivision (h) includes the factors for a court to consider in determining if there is good cause to have an evidentiary remote or hybrid proceeding.

Subdivision (i) addresses the conduct of the proceedings. New subdivision (j) provides that jury selection is governed by the standards for evidentiary proceedings. New subdivision (k) applies to civil stalking proceedings under 12 V.S.A. §§ 5131-5138 and sets a default of hybrid proceedings. Former subdivision (d), on technical standards, is relabeled as subdivision (l).

In general, under the amended version of the rule, judges have the discretion to schedule remote and hybrid participation for nonevidentiary proceedings while evidentiary proceedings require a determination of good cause based on a consideration of the factors in subdivision (h). Judges may issue standing orders for categories of proceedings or provide for remote or hybrid proceedings on a case-by-case basis. The court can do this on its own initiative or based on a motion or stipulation of the parties. A more detailed discussion of these provisions follows.

Subdivision (a)(1) is added to specify that in-person participation is the default. For testimony in evidentiary proceedings, this mirrors V.R.C.P. 43, which states that the testimony of witnesses will be taken in “open court, unless otherwise provided by Rule 43.1.” Paragraph (a)(2) deletes the reference to trial and instead refers to evidentiary and nonevidentiary proceedings. The amended rule refers to “some or all of the parties,” to emphasize use of hybrid hearings. The amendments delete reference to “the judge” since presiding remotely is covered by subdivision (e). Former (1)(A)-(C) are deleted and the procedures for motions, stipulations, and court-initiated orders are included elsewhere in the rule.

Subdivision (b) provides definitions. Paragraph (b)(2) is added to define an evidentiary proceeding as one in which testimony is taken orally. By extension, all other proceedings are nonevidentiary. A “hybrid proceeding” is defined in (b)(3) as one in which participants choose how to participate: in person or remotely by video or audio conference. Experience over the past two years has demonstrated that, due to technical and financial constraints, some participants lack the resources or reliable internet connection to effectively participate by video or audio conference. To ensure access to the courts, the rule explicitly recognizes the existence of and need for hybrid proceedings. The definition of “remote location,” in former (b)(2) which required technical requirements to be met to preside remotely is deleted as unnecessary given the general requirement to have technical standards under subdivision (l). New (b)(4) adds a definition for

“remote proceeding” as one in which all participants take part by video or audio conference.

New subdivision (c) allows the court to conduct remote or hybrid nonevidentiary proceedings in its discretion. The intent is to allow remote participation when the technology is available and there is no countervailing interest. The court is not required to consider the factors in subdivision (h), but it may consider those factors to determine if a remote or hybrid proceeding is appropriate in a given circumstance. Under (c)(1)(A), the court on its own initiative may issue standing orders directing that certain categories of nonevidentiary proceedings be scheduled for remote or hybrid participation. For example, the court may order that all status conferences and pretrial conferences be scheduled as hybrid proceedings. This allows all participants to choose whether to participate in person or through video and audio conference. When there is no standing order, the court in a particular case may order that a nonevidentiary proceeding be remote or hybrid or that particular parties, counsel, or other persons be required or permitted to participate by video or audio conference. As explained more fully below, under subdivision (f), the hearing notice must alert the participants as to how they are permitted to participate.

Under (c)(2), when there is no order, the parties may stipulate or move for remote or hybrid participation. When a remote proceeding has been scheduled, the parties may move or stipulate that a proceeding be hybrid or that participation by all or some individuals be in person. The formal time requirements of the prior rule are not carried over. Instead, any motion must be served, and stipulation filed “reasonably in advance of the proceeding” to allow sufficient time for other parties to respond and for the court to assess the request.

New subdivision (d) allows the court to conduct remote or hybrid evidentiary proceedings under certain circumstances. Under (c)(1), the court on its own initiative may issue standing orders or orders in a particular case providing for remote or hybrid proceedings. In determining whether to issue a standing order, the court is required to consider any relevant factors in subdivision (h), but is not required to make a finding of good cause. Many of the factors are case-specific and the court will not be able to assess all factors. For case-specific orders, the court must find good cause.

In the absence of an order on the court’s own initiative, the parties may move or stipulate for a remote or hybrid proceeding

under (d)(2). If the court has ordered a remote proceeding, the parties may move or stipulate that the proceeding be hybrid—so parties can choose how to participate—or that some or all participants be in person. When a hybrid proceeding is scheduled, the parties may move or stipulate that certain participants be required to attend or testify in a particular manner: in person or by video or audio conference. For example, if the court orders that a bench trial be remote, the plaintiff could move that the entire proceeding be in person or that a particular witness testify in person. The motion or the stipulation must demonstrate good cause for remote participation applying the factors in (h). The higher standard of good cause is used for evidentiary hearings given the additional concerns around introduction of evidence, testimony of witnesses, communication between clients and lawyers, and assessment of credibility by judges and juries. Based on experience of remote and hybrid hearings conducted during the pandemic, common examples of good cause may include savings of time and money for one or more parties, particularly for testimony of witnesses in other states or countries, and protection of the health of a witness, a party, or counsel, or the health of a person for whom a witness or party or counsel is a caregiver. The advance filing and notice requirements of the prior rule are removed and instead a motion or stipulation must be filed “reasonably in advance of the proceeding.” The court requires sufficient time to determine whether the technology meets the standards and whether there is good cause under the factors. Under subdivision (i), the court may impose conditions to ensure the fairness of the proceedings and the reliability of the evidence, and to protect public health.

Former (c)(4) addressing the court presiding remotely is now subdivision (e). The provision is amended to allow the court to preside remotely for an evidentiary or nonevidentiary 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, the court must provide the parties with notice reasonably in advance of the proceeding that it intends to preside remotely. Presiding remotely became much more common during the pandemic and practice indicates that judges can effectively run hearings without being present in the courtroom. There are multiple reasons that judges may need to preside remotely, including covering proceedings in different counties and needing to isolate after exposure to COVID-19. 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.

New subdivision (f) requires that a hearing notice specify whether a proceeding is in person, remote, or hybrid and describe the process for requesting an alternate means of participation. This is important as not all participants will necessarily be aware of existing standing orders.

Former paragraph (c)(5) was entitled “Emergencies,” and allowed waiver of some of the rule’s time requirements based on “unanticipated and unintended events.” The provision is now subdivision (g) and is entitled “Waiver,” to signify that not all circumstances that meet the standard will be emergencies. As amended, it allows the court to waive the notice and time requirements of the rule and continues to use the standard of “unanticipated and unintended events.” It is expected that there will be circumstances that arise soon before or even at a proceeding that merit remote or hybrid participation and provides the court with the necessary flexibility to consider these late requests.

Former (c)(6) is relabeled subdivision (h) and provides a nonexclusive list of factors to be considered by the court in determining whether to have a remote or hybrid proceeding or to permit or require participation through video or audio conference. As described above, in some instances the factors are a guide and at other times the court must find good cause based on the factors. Previously, there were separate factors for use of audio and video conference and the list has been merged into one. The existing factors are retained, and the list is supplemented with additional considerations.

Factor (1) is amended to also include consideration of whether the in-person location has adequate airflow or is designated a limited-entry courthouse by the Court Administrator as these might impact the suitability and safety of an in-person hearing. Factor (2) is amended to also allow the consideration of health and extends this consideration beyond just parties and witnesses to also include jurors, court personnel, and counsel, and persons who may be dependent on or reside with these persons. Factor (2) also is amended to include the expected duration of the proceeding, the time and expense associated with travel, and the expected duration of a witness’ testimony. Factor (4) is amended to include whether a

witness or participant is institutionalized. Factors (6) and (9) are amended to apply to both video and audio conference.

Factors (3), (5), (7), and (8) are unchanged and simply relabeled from letters to numbers.

New factor (10) requires consideration of whether conditions can be imposed to ensure the fairness of the proceeding and the reliability of the evidence, and to protect public health as allowed under subdivision (*i*). New factor (11) directs that the court should consider whether the proceeding is a matter of public interest and whether public access can be adequately provided. Factors (12) and (13) are intended to make explicit that participation by audio conference is not a first choice and when chosen attention must be paid to the details to ensure full and fair participation by all. Factor (12) is incorporated from the former audio-only factors and requires the court to consider whether participation or testimony by video is feasible instead of by audio conference without imposing substantial cost or burden. New factor (13) applies when at least one person is participating by audio conference and requires the court to consider whether all participants can adequately hear and speak and whether the audio can be recorded for the record. Former factor (J) is retained and relabeled as (14).

New subdivision (*i*) addresses the conduct of the proceedings and contains some provisions from former (d)(5), which pertained to proceedings conducted by audio conference. Under new (*i*)(1), the court may “impose conditions to ensure the fairness of the proceeding and the reliability of the evidence, and to protect public health.” For example, to ensure reliability, 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. Trial judges are in the best position to impose conditions to ensure this outcome. 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 (*i*)(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 necessary. Finally, under (*i*)(3), the court may

apportion the expenses of a video or audio conference among the parties.

New subdivision (j) provides that jury selection is governed by the provisions of the rule applicable to evidentiary proceedings.

New subdivision (k) applies the rule to stalking proceedings under 12 V.S.A. §§ 5131-5138 and sets a default requirement that these proceedings are hybrid. Parties may request a different type of participation and the request need not comply with the formal requirements of Vermont Rule of Civil Procedure 7, governing the content of motions, but must be served pursuant to Vermont Rule of Civil Procedure 5. This modification recognizes the need for flexibility in these proceedings.

Former subdivision (e) regarding technical standards is relabeled as (l) and is unchanged.

2. That these amendments be prescribed and promulgated, effective on _____. 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 _____ day of _____, 2023.

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice