

STATE OF VERMONT  
VERMONT SUPREME COURT  
\_\_\_\_\_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.**

(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, excuses a person from participation entirely, or authorizes a person 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—2021 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.” A.O. 49, ¶ 13, however, suspended that rule. Paragraph 13 provides that “the judicial emergency” addressed by A.O. 49 and extending until at least September 7, 2021, “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 orders it (or excuses a party) for good cause. In surveys conducted by the Advisory Committee and the Vermont Bar Association, mediators have reported satisfactory, and less costly, results from remote mediations conducted during the period covered by A.O. 49. Lawyers, however, though not opposed to remote mediation as an option, have expressed a preference for in-person mediation as the primary rule. They have expressed the belief that parties generally take the mediation process more seriously if required to attend in person. In addition, they believe that presentations by the parties and interactions with the mediators have a greater impact when experienced in person.

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.

2. That these amendments be prescribed and promulgated effective \_\_\_\_\_. 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 \_\_\_\_\_ 2021.

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate 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