

MEMO

TO: Legislative Committee on Judicial Rules
FROM: Scott Griffith, Chair of Special Advisory Committee on Remote Hearings and
Emily Wetherell, Deputy Clerk, Vermont Supreme Court
RE: V.R.C.P. 43.1, V.R.F.P. 17 and AO 47
DATE: June 15, 2023

The Vermont Supreme Court created the Special Advisory Committee on Remote Hearings to study, advise the Court about, and propose permanent rule changes governing remote participation in court proceedings. The Special Advisory Committee is composed of a broad section of interested groups, including court staff, judges, private attorneys, a member of the media, a deputy state's attorney, an attorney from the Defender General's Office, and an attorney from Vermont Legal Aid. The proposed amendments to V.R.C.P. 43.1 and V.R.F.P. 17 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 Special Advisory Committee discussed and refined its proposals over several months. The committee then invited input on the rule changes from the Advisory Committees on the Rules of Civil Procedure and the Advisory Committee on the Rules for Family Proceedings. Both committees provided extensive feedback on the original proposals. The proposed rules were sent out for comment in December 2022, with comments due by February 13, 2023.

The committee received three comments from individuals and three comments from other rules committees—criminal, civil, and family. The Special Advisory Committee met and discussed the feedback and made some changes in response. The gist of the comments and the committee's response to those comments are as follows:

- Stalking and Relief-from-Abuse Proceedings. Under proposed V.R.C.P. 43.1(k) and V.R.F.P. 17(e), proceedings in stalking and RFA cases default to hybrid and permit other types of hearing participation by order. An attorney commented that these proceedings should default to in person because self-represented parties do not have appropriate technology for WebEx and in person allows a better determination of witness credibility. An advocate from the organization Safeline also commented that stalking proceedings should be in person to allow plaintiffs to face their abusers in person. The committee considered these comments and concluded that a default of hybrid proceedings provided the right balance for these cases. As the Reporter's Notes explain: "Plaintiffs are not required to come physically to the courthouse and face an alleged abuser or stalker. On the other hand, those plaintiffs who do not have adequate access to technology or who prefer to may attend in person."
- Remote and Hybrid Hearings in Criminal Proceedings. The criminal rules committee indicated that given the unique constitutional concerns in criminal proceedings, remote and hybrid criminal proceedings should be governed by different rules. The special advisory committee agreed and is not proposing changes applicable to the criminal

division. Newly adopted V.R.Cr.P. 26.2 controls remote testimony of witnesses in criminal proceedings.

- Public and Media Access to Court Proceedings. The First Amendment Coalition urged that the rules be amended to include provisions related to public access, including notice of how hearings are held, recording and posting of all remote and hybrid hearings, and livestreaming in-person hearings. The Special Advisory Committee discussed the comments and concluded that since the rule was limited in scope to participation in proceedings, it was not intended to address access by the public or media. Therefore, the committee did not make any changes.
- Family Proceedings. The family rules committee provided a comment in support of the proposed changes to V.R.C.P. 43.1 and V.R.F.P. 17. The family rules committee subsequently recommended that new V.R.Cr.P. 26.2 regarding remote testimony of a witness in criminal proceedings be made applicable to delinquency and youthful offender cases given the constitutional rights at stake in those cases.
- Civil Rules Comments. The civil rules committee provided several comments on the proposed rule. The committee recommended that the rule be clarified to specifically allow parties to request fully in-person hearings by motion or stipulation, to require good cause to support remote and hybrid hearings even by standing order, and to refer to the “relevant” factors. The Special Advisory Committee agreed and made amendments to address each issue.

The Special Advisory Committee made a few additional wording changes, including:

- Altering the definition of hybrid proceeding to remove the language “choose to” and explain in the reporter’s notes that hybrid proceedings as noticed allow participants the choice of how to participate but might result from individuals being required to attend in different ways.
- Revising the title of the former “Emergencies” subdivision to “Exception” instead of the proposed language of “Waiver” given the specific legal meaning of waiver.