

Emergency Administrative Rules for Remote Hearings

Part 1: Scope

On March 24, 2020, the Vermont Governor issued an Addendum to an Executive Order, which ordered all businesses and not-for-profit and government entities, to develop strategies, procedures and practices for continuing business functions remotely when possible. The Office of Professional Regulation (“Office” or “OPR”), as an agency required to hold hearings on contested cases, is authorized under Vermont law to adopt rules of procedure governing those hearings. 3 V.S.A. § 831(d). The current Administrative Rules of Practice (“Rules”) governing contested hearings within OPR permit a hearing authority to, upon request, allow all or part of a hearing to be conducted by telephone, video, or other electronic means. Administrative Rules of Practice, Rule 3.19.

Per its authority under 3. V.S.A. § 831(d), OPR is issuing these Emergency Administrative Rules for Remote Hearings (“Emergency Rules”). These Emergency Rules amend Rule 3.19 of the Administrative Rules of Practice to require that all hearings be conducted by telephone, video or other electronic means (“Remote Hearings”), unless the Director orders otherwise, for 180 days. These Emergency Rules also set forth Rules establishing procedures for conducting Remote Hearings.

All provisions of the Administrative Rules of Practice not modified herein continue to apply. In the case where a standard set forth in these Emergency Rules conflicts with a standard set forth in the Rules or the rules applicable to a specific profession, these Emergency Rules shall govern.

Part 2: Pre-Hearing Administration

2-1 Remote Hearings All hearings shall be held remotely by telephone, video or other electronic means for the duration of these Emergency Rules, unless otherwise ordered by the Director of the Office of Professional Regulation.

2-2 Hearing Notice

2-2.1 In addition to the other information required to be included in a notice of a hearing pursuant to 3 V.S.A. § 809, the notice of a remote hearing shall contain instructions and information, including phone numbers and website

links and addresses, for participating in the remote hearing by web-based visual and audio communication or by telephone.

- 2-2.2 The notice of a remote hearing shall contain contact information for the Docket Clerk or another OPR staff member who can be contacted during the hearing if a party encounters any difficulties with remote participation.
- 2-2.3 The notice shall instruct a party how to contact the Docket Clerk if the party is unable to participate in the hearing remotely.
- 2-2.4 A party may request a continuance in accordance with Rule 3.15(B)(1) if the party is unable to participate remotely in the hearing. The hearing authority shall determine whether to grant the motion for a continuance.
- 2-2.5 A party may request a modification or an accommodation to allow the party to participate in the hearing remotely. The non-requesting party shall be notified of a request for an accommodation or modification. If a requested accommodation or modification will substantially adversely affect the rights of the non-requesting party, the hearing authority shall determine whether to permit the accommodation or modification. For requested accommodations and modifications that will not adversely affect the rights on the non-requesting party, the Docket Clerk may approve accommodations or modifications after providing notice of the request to the non-requesting party.

2-3 Filings

2-3.1 Definition. A “filing” (when the term is used as a noun) includes any petition, application, motion, opposition to a motion, exhibit, or any other document or thing of any description which is required or permitted to be filed with a hearing authority, as that term is defined in the Administrative Rules of Practice (“Rules”), in connection with a pending case.

2-3.2 Pre-Hearing Filings

2-3.2.1 Prior to the beginning of a hearing, documents may be filed by sending the filing to the Docket Clerk as an attachment to an email, by regular mail, or by facsimile. Regardless of the method of delivery, documents are only deemed filed upon receipt by the Docket Clerk.

2-3.2.2 Unless a different discovery and hearing schedule is issued by a hearing officer, filings submitted prior to a hearing must be received by the Docket Clerk no later than noon on the last business day prior to the scheduled hearing. Filings not received by the Docket Clerk by noon on the last business day prior to the scheduled hearing must be introduced at the hearing in accordance with Emergency Rule 3-2.2.

2-3.2.3 Notwithstanding Rules 3.17(B) and Rule 3.8, objections to the admissibility of pre-filed exhibits and responses to motions may be made at the scheduled hearing unless a discovery and hearing schedule issued by a hearing officer requires objections and responses to be filed by an earlier date. Objections to the admissibility of the pre-filed exhibit and responses to motions may also be made in writing by submitting a written objection or response to the Docket Clerk by noon on the last business day prior to the scheduled hearing.

2-3.2.4 Filings submitted prior to a hearing shall be served on the other party on the same day the filing is submitted to the Docket Clerk and using the same method of delivery.

2-3.2.5 The procedures regarding electronic introduction of filings at a hearing set forth in Emergency Rule 3-2.2 shall then be followed.

2-3.3 Service.

2-3.3.1 Except for filings that are required to be served by certified mail, filings may be served on the other party via email, rather than by regular mail or personal service. Service by regular mail and personal service remain acceptable means of service. The filing shall be served on the other party using the same method of delivery that is used to submit the filing to the Docket Clerk.

2-3.3.2 Filings that are required by statute or the Rules to be served by certified mail must continue to be served by certified mail.

2-3.4 Form.

- 2-3.4.1 The subject line of the email containing a filing as an attachment shall indicate the name of the respondent.
 - 2-3.4.2 A signature block containing the submitting party's typed-in name preceded by "/s/," or an electronic facsimile of the submitting party's signature, a scanned copy of it, or another form of electronic signature as defined in 9 V.S.A. § 271(9), will serve as a party's signature on pleadings, motions, and other documents that must be filed with a signature. This exception does not apply to affidavits, verified pleadings, or other signatures that must be notarized by statute.
 - 2-3.4.3 Exhibits submitted for use during a hearing shall be marked for identification by the party submitting the exhibit. The respondent shall mark exhibits using letters and the State shall mark exhibits using numbers.
- 2-3.5 Timing.
- 2-3.5.1 Filings sent by email will be considered filed on that date if the email is received before 4:30 p.m.
 - 2-3.5.2 Nothing in these Emergency Rules extends statutes of limitations or other filing deadlines.

Part 3: Hearing Administration
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3-1 Hearing Procedures

3-1.1 Prior to Hearing.

- 3-1.1.1 Prior to the scheduled hearing, the Docket Clerk shall send the parties an email with all the filings in the pending matter attached, including, but not limited to, the specification of charges, the hearing notice, any filings submitted in the case and an agenda for the meeting at which the hearing will be held.
- 3-1.1.2 By noon on the last business day prior to the scheduled hearing, the parties and the members of the hearing authority shall provide the Docket Clerk with a phone number and email address at which

the party can be reached in the event of a malfunction during the remote hearing.

3-1.2 Commencement of Hearing.

- 3-1.2.1 A party is responsible for connecting to the remote hearing via the web-based audio and visual system or telephone number provided in the hearing notice. Parties shall participate in the scheduled hearing using audio communication, either web-based or through the telephone, at a minimum. Unless otherwise ordered by the hearing officer, the use of video communication shall be required only in extraordinary circumstances.
- 3-1.2.2 At the beginning of a scheduled hearing, the hearing officer shall confirm the presence of both parties and their representatives, when applicable.
- 3-1.2.3 Parties shall be present at the time provided in the hearing notice via the web-based audio and visual communication link or by telephone. If there is more than one hearing scheduled, the order of hearings will be decided by the hearing officer. The first hearing shall begin at the time stated on the hearing notice. Subsequent hearings will occur after the conclusion of the previous hearing.

3-1.3 Hearing Conduct.

- 3-1.3.1 Scheduled hearings shall be conducted in accordance 1 V.S.A. Chapter 5, as modified by Act 92 (2020).
- 3-1.3.2 At the beginning of the hearing, upon request from the hearing authority, each party shall state their full name for the record.
- 3-1.3.3 The parties shall keep the audio connection, through which the party is participating in the hearing, muted while not speaking.
- 3-1.3.4 If a party is not able to hear the hearing authority or the other party, the party shall un-mute their audio communication system and notify the hearing authority.

3-1.3.5 The hearing officer shall administer oaths and affirmations, as required by law, using the audio and, if available, visual communication systems.

3-1.4 Hearing Authority Members.

3-1.4.1 When participating in a hearing remotely, hearing authority members shall comply with all requirements of 3 V.S.A. § 129, 3 V.S.A. § 131, and, where applicable, the Rules and these Emergency Rules.

3-1.4.2 By noon on the day prior to the scheduled hearing, each hearing authority member shall provide to the Docket Clerk an email address for a current email account that the member can access during the hearing.

3-1.4.3 During a scheduled hearing, the Docket Clerk shall send all filings and required written communications to the hearing authority members at the email address provided to the Docket Clerk.

3-1.4.4 During a scheduled hearing, hearing authority members shall monitor the email account submitted to the Docket Clerk, and immediately review emails received from the Docket Clerk and other Office staff.

3-2 Record

3-2.1 Recording and Transcript. The hearing shall be recorded. Transcripts will be available after the hearing. Parties may request a transcript from the Docket Clerk. The party requesting a copy of the transcript must pay to the Office the estimated cost of producing a copy of the transcript.

3-2.2 Introduction of Documents During Hearing

3-2.2.1 All filings to be considered by the hearing authority during a hearing shall be filed with the Docket Clerk in advance of the scheduled hearing in accordance with Emergency Rule 2-3.2.1, or during the hearing in accordance with the procedures set forth in this subsection 3-2.2. Filings that are not received by the Docket

Clerk by noon on the last business day prior to the scheduled hearing must be submitted during the hearing.

3-2.2.2 Exhibits

3-2.2.2.1 Exhibits submitted during a hearing shall be emailed as an attachment to the Docket Clerk and the other party. The form of the exhibit shall comply with the form requirements set forth in Emergency Rule 2-3.4.

3-2.2.2.2 Once the exhibit is received by the Docket Clerk, the Docket Clerk shall email the exhibit as an attachment to the hearing officer presiding at the hearing and the other, non-filing party.

3-2.2.2.3 After receipt of the email from the Docket Clerk with the exhibit attached, the hearing officer and the other, non-filing party shall have a reasonable amount of time, as determined by the hearing officer, to review the exhibit.

3-2.2.2.4 The non-filing party shall have the opportunity to oppose the admission of an offered exhibit in accordance with Rule 3.18 and Vermont Rules of Civil Procedure 46 (Exceptions Unnecessary).

3-2.2.2.5 The hearing officer shall rule on whether to admit the exhibit in accordance with Rule 3.16 and 3 V.S.A. § 810.

3-2.2.2.6 If the hearing officer rules that an exhibit is to be admitted into evidence, the Docket Clerk shall send an email with the exhibit attached to all members of the hearing authority.

3-2.2.2.7 Members of the hearing authority shall not retain any copies, including electronic or physical copies, of the exhibit after the conclusion of the hearing.

3-2.2.3 Motions

- 3-2.2.3.1 Motions made during a hearing, if required to be in writing in accordance with Rule 3.8, shall be emailed as an attachment to the Docket Clerk and the non-filing party. Motions may also be made orally during a hearing, in accordance with Rule 3.8.
- 3-2.2.3.2 A written motion shall be signed in accordance with Emergency Rule 2-3.4.2.
- 3-2.2.3.3 Upon receipt of a written motion during a hearing, the Docket Clerk shall send the motion to the hearing authority members.
- 3-2.2.3.4 The non-filing party shall have the opportunity to respond to a motion in accordance with Rule 3.8.
- 3-2.2.3.5 The hearing officer shall decide whether to grant or deny a motion in accordance with Rule 3.16.

3-3 Witnesses

- 3-3.1 Witnesses called by a party shall testify by telephone or via web-based audio or visual communication.
- 3-3.2 The party calling the witness shall be responsible for providing the witness with the necessary information for participating in the scheduled hearing, including all necessary phone numbers, email addresses and website addresses. It is the responsibility of the party calling the witness to ensure that the witness is available when called upon to testify during the scheduled hearing.
- 3-3.3 The party calling the witness shall provide the Docket Clerk with a phone number and email address for the witness. In the event of technical challenges on the part of the Office or a need to dismiss and then recall a witness, the Docket Clerk shall telephone the witness with further instructions or when the witness is recalled to testify.

3-4 Deliberative Session

- 3-4.1 The hearing authority shall have the opportunity to engage in deliberations, as defined in 1 V.S.A. § 310(1), about the contested case presented at the scheduled hearing. Deliberations by the hearing authority may occur in a deliberative session in accordance with 1 V.S.A. § 312(e).
- 3-4.2 Prior to the scheduled hearing, the Docket Clerk shall email to the hearing authority members and the hearing officer a conference call telephone number to be used for the deliberative session.
- 3-4.3 After the hearing authority votes to enter into a deliberative session, the hearing authority members shall exit the audio and visual communication system or end the telephone call through which the hearing authority member is participating in the hearing. The parties shall remain available on the audio and visual communication system or the telephone during the deliberative session. The hearing authority members shall then call the conference call telephone number provided by the Docket Clerk prior to the scheduled hearing. The deliberative session shall be held on the conference call telephone line.
- 3-4.4 At the conclusion of the deliberative session, the hearing authority members shall reconnect to the audio and visual communication system or the telephone line on which the hearing is being held. The hearing officer will notify the Docket Clerk and the parties that the hearing is resuming, and shall provide the parties and the Docket Clerk with a reasonable amount of time to resume.

3-5 Decisions The hearing authority shall issue a written decision in accordance with Rule 3.24. The Docket Clerk shall serve the Notice of Decision on the parties by sending the Notice of Decision as an attachment to an email. The Docket Clerk shall send the Notice of Decision to other parties on request.

3-6 Appeals

- 3-6.1 A party may appeal a decision of a hearing authority in accordance with 3 V.S.A. 130a and Part 4 of the Rules.
- 3-6.2 Parties may submit written notices and filings to an appellate officer, the Docket Clerk, and other parties by email, mail or facsimile.

3-6.3 Appellate hearings, including pre-hearing conferences, shall be held in accordance with the procedures for other schedule hearings set forth in these Emergency Rules.

Part 4: Effective Dates; Expiration

These Emergency Rules shall take effect when filed with the Secretary of State in accordance with the Administrative Procedures Act, 3 V.S.A. § 800 *et seq* and shall remain in effect for 180 days thereafter.