

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
January 24, 2020**

The meeting was called to order at 9:10 a.m. in the Moot Court Room (109 Oakes Hall), Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick (by telephone), Eileen Blackwood, James Dumont, Karen McAndrew. Hon. Dennis Pearson (by telephone), Navah Spero, Hon. Helen Toor, and Gregory Weimer. Also present were Hon. Harold Eaton, Supreme Court liaison; Theresa Scott, Chief of Trial Court Operations, Office of Court Administration (sitting in for Ann Damone); and Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of November 8, 2019, were unanimously approved as previously circulated.

2. Status of recommended, proposed, and pending amendments.

A. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court. Professor Wroth reported that the emergency amendments to V.R.C.P. 79.2(c) and V.R.A.P. 3.5(c) promulgated on September 4, 2019, effective immediately, to revise those rules concerning possession and use of recording and transmitting devices in the court room as originally promulgated May 1, effective September 3, 2019, had been presented by Justice Dooley and Emily Wetherell on behalf of the Special Committee at the meeting of the Legislative Committee on Judicial Rules (LCJR) at its meeting on December 6, 2019. LCJR had no comments or objections.

B. #19-3. Vermont Rules for Public Access to Court Records abrogated and replaced by order of May 1, effective July 1, 2019. Judge Toor discussed her concerns about the provisions of the revised Public Access Rules that she had summarized in her October 2019 memorandum: Those Rules do not provide that ex parte motions or in camera filings are inaccessible to opposing lawyers and parties unless the judge so rules. Moreover, the Rules providing for sealed documents do not expressly prohibit public access to them. The Rules also allow court staff, rather than a judge, to change a filer's categorization of a filing as non-public. The Committee agreed that Judge Toor should present these and related concerns to the Public Access Committee at its next meeting, with suggested language for amendment of the Public Access Rules.

C. #19-4. V.R.C.P. 5, 79(a). Proposed Amendments to conform to proposed new V.R.E.F. 11, drafted by Special Committee on Electronic Filing, sent out for comment on June 19, with comments due by August 19, 2019. Professor Wroth reported that the amendments to V.R.C.P. 5 and 79(a), with similar amendments to the comparable Rules of Probate Procedure had been promulgated in an order of December 10, 2019, effective March 2, 2020, together with separate orders promulgating the 2020 Vermont Rules for Electronic Filing, amendments to conform the Vermont Rules of Appellate Procedure to the 2020 E-filing Rules, and amendments making clear that the 2010 E-filing Rules will continue to apply in the Environmental Division until the Court Administrator directs that the 2020 Rules apply and clarifying whether and when the 2010 or 2020 Rules apply under V.R.C.P. 4, 10, 44, 2, 45, 77, and 79.1; V.R.P.P.4 and 79.1; and V.R.F.P. 15.

Ms. Scott advised the Committee that the roll-out of the new Case Management System (CMS) is currently scheduled to occur in the following stages, with completion scheduled for February 1, 2021 (the Judicial Bureau having operated under CMS since July 2019):

- March 2, 2020 -- Orange, Windham, Windsor counties.
- September 1, 2020 – Addison, Bennington, Chittenden, Rutland counties; Environmental Division.
- February 1, 2021 – Caledonia, Essex, Franklin, Grand Isle, Lamoille, Orleans, Washington counties.

D. #19-2. V.R.C.P 62(a)(3)(A). orders for possession. proposed amendment sent out for comment on October 1, with comments due on December 2, 2019. Chairman Keyes reported that he had received no comments. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend that the amendment be promulgated as sent out for comment.

E. #19-6. Small Claims Judgments. proposed amendments to V.R.S.C.P. 3, 7, 9, and 10, sent out for comment on November 6, 2019, with comments due on January 6, 2020. Chairman Keyes reported that he had received no comments. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend that the amendment be promulgated as sent out for comment.

F. Proposed amendments to V.R.C.P. 40(e)4) and V.R.A.P. 27.1(b)(4). updating cross references to reflect promulgation of the Vermont Code of Judicial Conduct 2019, sent out by Deputy Clerk Emily Wetherell for comment on November 6, 2019, with comments due on January 6, 2020. No comments were received. To be recommended by Ms. Wetherell to the Court for promulgation at its February administrative meeting.

3. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. The Committee considered Judge Pearson’s revised draft dated January 22, 2020, of proposed amendments to V.R.C.P. 4.1, 4.2, 69, and 69.1, pertaining to collection and enforcement of judgments. After preliminary discussion, on motion duly made and seconded, there being no further discussion, it was voted unanimously to table this item until the next meeting, with Committee members to be ready to comment on the draft and vote on it.

4. #17-4. Review status of Amendments to V.R.A.P. 24 (IFP Proceedings), recommended for promulgation on December 3, 2014. Proposed order amending V.R.C.P. 3.1(b) and V.R.A.P. 24(a) sent to the Court on December 17, 2018, to be sent out for comment. Professor Wroth reported that consideration of the proposed order by the Court continued to be deferred until a comparable amendment to V.R.P.P. 3.1 is considered by the Probate Rules Committee, which will address the question at its February 12 meeting.

5. #14-1. Status of Appendix of Forms. The Committee considered the Appendix of Forms, Professor Wroth’s suggested draft amendments dated January 23, 2020, and his updated November 7, 2019, list of references to forms in the Civil Rules. It was noted in discussion that, in addition to the Civil Rules Committee, forms were generated by the Civil Division Oversight Committee, the Court Administrator’s Office, and, potentially, the Legislature. Communication on forms issues among these groups was inconsistent to non-existent, with the result that forms

available on the Judiciary website reflected current practice but often differed from forms described in specific Civil Rules or incorporated, per V.R.C.P. 84, in the Appendix of Forms. The forthcoming shift to electronic filing (see item 2.C above) would potentially exacerbate the problem. Discussion followed on the need for a coordinated approach to forms development and approval.

On motion duly made and seconded, after further discussion, it was voted unanimously that the chair should appoint a subcommittee, including a representative of the Court Administrator's Office, to draft and present for action at the Committee's next meeting an administrative order for adoption by the Supreme Court that would outline and require a process coordinated among the organizations and agencies involved for the development, approval, and electronic and print publication of forms to be used in all court proceedings.

Chairman Keyes appointed Eric Avildsen (chair), James Dumont, and Chief of Trial Court Operations Theresa Scott as the subcommittee. Professor Wroth agreed to provide any necessary assistance.

Chairman Keyes agreed to review the consistency of the forms in the Appendix with the provisions of applicable Civil Rules.

6. #19-1. Reconciliation of Juror Qualifications Rules with V.R.C.P. 47(a) and V.R.Cr.P. 24(a). Chairman Keyes reviewed the Public Access Rules Committee's January 2020 draft proposed amendments to the Public Access Rules and the Juror Qualification Rules concerning juror information, as well as V.R.C.P. 47(a) and V.R.Cr.P. 24(a). A question was raised whether the Rules should address post-trial juror contact. Ms. Scott said that she was a member of a Public Access Rules subcommittee that was working on the issues and would report at the Public Access Committee's February 21 meeting.

7. #19-8. Rule regarding preservation depositions. The Committee considered Ms. Spero's January 23, 2020, memorandum summarizing her research on preservation deposition rules in other jurisdictions. She identified one example of such a rule in a state court and one federal District Court Rule. She was prepared to undertake the time-consuming task of examining the federal courts district by district, but first asked that the Committee consider whether the need for such a rule was sufficient to justify the expenditure of further effort on the research. In discussion, Committee members agreed that the issue of preservation depositions after commencement of an action rarely came up, and that, when it did, the need could be met by agreement of the parties or through judicial discretion. After further discussion, it was agreed to drop the item from the agenda, with thanks to Ms. Spero for her research and analysis.

8. #19-10. Recent amendments to the Federal Rules. The Committee considered Professor Wroth's January 19, 2020, draft of proposed amendments to V.R.C.P. 23, 26, 34, and 78 as requested at the November 8, 2019, Committee meeting.

In discussion of proposed V.R.C.P. 23, based on Judge Toor's October 15 draft, it was agreed to add—presumably as Rule 23(i), V.R.C.P.23(g), promulgated June 13, effective August 15, 2019. In discussion, the question was raised whether proposed Rule 23(e)(5)(C), applicable to motions barred by a pending appeal, should apply only to class actions, or should be adopted as a separate rule applicable in any civil action as was F.R.C.P. 62.1 on which it was based. It was agreed that “motion” should be substituted for “permission: in proposed V.R.C.P. 23(f) and that

the rule should be integrated with applicable provisions of the Vermont Rules of Appellate Procedure. Judge Toor agreed to consider these and other issues concerning her draft and to present a new draft at the next meeting.

In discussion of the remaining amendments based on the Committee's decisions at the November 8, 2019, meeting, it was agreed that "disclosure" should remain in the proposed amendment to V.R.C.P. 26(c)(2) even though, unlike the Federal Rule, there were no mandatory disclosures, because a scheduling order could require a disclosure. The proposed amendment to V.R.C.P. 34 was approved as drafted. In the proposed amendment to V.R.C.P. 78, it was agreed that "dispositive" and "such as" should be deleted and that "motion for judgment on the pleadings" should be added. On motion duly made and seconded, there being no further discussion, it was voted unanimously to request that the amendments to V.R.C.P. 26, 34, and 78 be sent out for comment as revised.

9. #20-1. Timing of motion to dismiss less than the whole complaint. Mr. Weimer had raised the question whether a motion to dismiss less than the whole complaint should be considered when made, or as part of consideration of the whole complaint. He reported that he had reviewed the matter further and had concluded, in light of related provisions of V.R.C.P. 7(b), 54(b), and 56(a), (g), that no rule change was needed to address this question.

10. Other business. Judge Toor raised the question whether there should be specific provisions in the Rules dealing with motions to reconsider and sur-replies to replies to memoranda in opposition to motions under V.R.C.P. 78(b). As to motions to reconsider, she noted the provisions of V.R.A.P. 27(b)(3) for reconsideration of decisions on motions for procedural orders or stays and of V.R.A.P. 40 for reconsideration. She suggested that, if an amendment is appropriate, amendments to V.R.C.P. 59 or 78 might be a place to make such an addition and also noted the specific provision of Local Rule 7(c) of the U.S. District Court for Vermont covering motions to reconsider. As to sur-replies, the consensus seemed to be that the opportunity orally to contest the reply at a hearing and the judge's discretion to ask for a written submission in such a case provided adequately for the situation.

11. Next meetings. It was agreed that the next meetings of the Committee will be held at 9:00 a.m. on Friday, April 17, and Friday, June 26, 2020 at Vermont Law School.

There being no further business, the meeting was adjourned at 12:10 p.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter