

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
June 26, 2020

The meeting was called to order at 9:15 a.m. virtually on Teams by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Eileen Blackwood, James Dumont, Karen McAndrew, Hon. Dennis Pearson, Navah Spero, Hon. Helen Toor, and Gregory Weimer. Also present was Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of January 24, 2020, were unanimously approved as previously circulated, with corrections that will be e-mailed to the Reporter.

2. Action items

A. Issues concerning AO 49 as amended through May 13, 2020. The Committee discussed Justice Robinson's requests in her letters to Chairman Keyes of June 9 and 10, 2020, that the Committee consider and advise the Supreme Court on the requests of Vermont Legal Aid in letters of May 13 and June 9, 2020, for emergency amendments to modify the pleading rules governing eviction and foreclosure cases in light of the effect of the federal CARES Act. The VLA letters proposed that eviction and foreclosure plaintiffs be required to attach to their pleadings documents readily accessible to them that would establish whether or not the tenants or homeowners subject to their actions were protected respectively by CARES Act moratorium or payment forbearance provisions.

In Judge Toor's memorandum of June 19, 2020, the Civil Division Oversight Committee argued that the provision for evictions was unnecessary because the CARES Act moratorium expires on July 25, and just-passed Vermont legislation stays evictions until at least mid-August. Mr. Avildsen, however, summarizing his memorandum of June 24, 2020, noted that the Vermont law did not prevent notice of termination or filing by landlords but only stayed proceedings, and that the CARES Act requirement of a 30-day notice-of- termination did not expire with the moratorium. Therefore, it was imperative that the courts know which evictions were covered by the CARES Act.

Mr. Dumont suggested that the Committee approve the VLA proposals with any revisions that Mr. Avildsen should submit by the end of business on June 29, with the Committee to vote on them by e-mail by the end of business on June 30. After further discussion, it was agreed that Professor Wroth would work with Chairman Keyes to refine Professor Wroth's June 25 draft of a proposed amendment to AO 49, incorporating the requirements for both eviction and foreclosure with appropriate forms and coordinating it with Mr. Avildsen before circulating it to the Committee with a short review deadline. The final draft would be sent to Justice Robinson as soon as possible.

B. #20-4. Conflict between Code of Judicial Conduct, Rule 2.11, and V.R.C.P. 40(e)(4). The Committee considered Justice Eaton's e-mail of February 12, 2020, requesting on behalf of the Supreme Court that the Committee consider whether it is appropriate to revise V.R.C.P. 40(e)(4) to conform to the language of Rule 2.11 of the Code of Judicial Conduct. If the Committee proposes a revision to the Civil Rule, the Court requests that the committee work with the

Probate and Criminal Rules committees to bring a joint proposal to the Court. Judge Toor noted that the Code includes “court personnel” in the equivalent of the first sentence of the Rule and that the first and third sentences of the Rule include procedural provisions that may not be appropriate in the Code. It was moved and seconded to incorporate in the Rule language consistent with the Code. The motion was tabled, and Chairman Keyes, Mr. Dumont, and Professor Wroth agreed to draft a proposed amendment to V.R.C.P. 40(e)(4) for consideration at the next meeting after preliminary discussion with the Probate and Criminal Rules committees.

C. #20-7. Civil Division proposal to move credit card cases out of small claims court. The Committee considered Judge Toor’s memorandum of April 10, 2020, on behalf of the Civil Division Oversight Committee and concurred in by Judge Grearson, requesting that V.R.S.C.P. 2, 3, and 8 be amended to eliminate credit card collection cases and any other debt-buyer cases from Small Claims jurisdiction and to delete related provisions of the Small Claims Rules. She noted that Judge Grearson had obtained an internal legal opinion concluding that these changes could be made by rule. Mr. Avildsen supported the amendments, noting that such claims were presently a major part of the Small Claims docket. Mr. Dumont supported the change but suggested that it should be made by legislation because it was jurisdictional. It was agreed that if the amendments were proposed for comment, the jurisdictional issue should be flagged to be considered during the comment period. On motion duly made and seconded, it was voted unanimously that the amendments should be sent out for comment, together with any necessary amendments to V.R.C.P. 9.1. Judge Toor agreed to prepare a draft of the V.R.C.P. 9.1 amendments. Professor Wroth agreed to prepare a proposed promulgation order including both the Small Claims Rules and the V.R.C.P. 9.1 amendments with Reporter’s Notes that would be sent to the Committee for brief review before being proposed to the Court to be sent out for comment.

D. #19-11. Proposed rule providing form for credit-card complaints. Judge Toor presented the December 2019 proposal of the Civil Division Oversight Committee that all complaints in credit card collections cases, including small claims cases, shall be verified complaints and shall be on forms approved by the Court Administrator. The proposal included a proposed form to be provided as an example to the Court Administrator. It was agreed that, in view of the motion approved in item 2.C above, “including in small claims cases” should be deleted from the proposed Rule language. On motion duly made and seconded, it was voted unanimously to propose that the amendment be sent out for comment with that change. Professor Wroth agreed to coordinate the drafting of the rule with Judge Toor’s draft of amendments to V.R.C.P. 9.1 approved in item 2.C.

E. #19-10. Proposed amendments to V.R.C.P. 26, 34, 78, conforming to recent amendments to the Federal Rules. Sent out for comment on February 11, with comments due by April 13, 2020. The Committee considered Mr. Dumont’s e-mail of June 2, 2020, reviewing comments received. The Committee concurred in his recommendation to add “or disclosure” to Rule 26(c)(2) governing protective orders. Unlike the Federal Rule, the Vermont Rule does not provide for automatic disclosure, but the change may be useful because some pretrial orders contain disclosure deadlines even in the absence of discovery. The Committee further concurred in his recommendation that the amendment to Rule 34 allowing answering parties to produce copies unless requested not be adopted because of the frequent unreliability of copies and the inherent ability to request copies.

In discussion of Mr. Dumont's recommendations in support of the proposed amendment to V.R.C.P. 78(b)(1), it was suggested that

- Rule 78 be abrogated;
- present Rule 78(a). "Motion Days to Be Established," not be carried forward because it does not reflect present practice;
- present Rule 78(b)(1) and (2) be moved to Rule 7;
- "Form of" be deleted from the title of Rule 7;
- present Rule 7(c) be deleted as no longer needed; and
- the proposed amendment of present Rule 78(b)(1) and the present text of Rule 78(b)(2) be incorporated in Rule 7, either as a new paragraph (b)(5)(A) and (B) or as a new subdivision (c), with any necessary conforming changes to present paragraph (b)(4).

Mr. Dumont agreed to work with Professor Wroth to prepare a proposed promulgation order encompassing these changes for presentation at the next meeting.

F. #20-6. Use of "presiding judge" in Civil Rules. The Committee considered Judge Toor's May 15 e-mail proposing elimination of the adjective "presiding" wherever in the Rules it describes the trial judge conducting a proceeding because of confusion with the current use of "presiding judge" to refer to the judge appointed to exercise administrative authority in each county. The Committee also considered the subsequent e-mail correspondence of that date between Judge Toor and Mr. Dumont, who noted the bearing of V.R.C.P. 83 on the question. Judge Toor suggested using the term "superior court judge" in referring to a sitting trial judge. At Chairman Keyes' suggestion, Professor Wroth agreed to prepare a report for the next meeting on the use of "presiding judge" in statutes or administrative orders.

G. # 20-3. Need for rule to implement newly enacted 14 V.S.A. § 118 providing for direct reference from the Probate to the Civil Division of matters involving wills. After discussion of Professor Wroth's November 30, 2019, draft of proposed V.R.P.P. 73 providing a process for seeking consent of the presiding judge administering the appropriate unit of the Civil Division, it was the consensus of the Committee that a Civil Rules amendment was not necessary to implement the statute and proposed Probate Rule.

H. #20-5. Requirement for current attorney and litigant addresses. The Committee considered the question of Judge Tomasi, forwarded in Judge Toor's e-mail of May 4, 2020, concerning requirement that lawyers and litigants maintain a current address on file. Professor Wroth noted that the requirement to maintain a current address is found in AO 41, § 4(c). It was agreed that the requirement should be made clear in appropriate provisions of the Rules, including V.R.C.P. 11(a) and 79.1(b) and (i). Professor Wroth agreed to draft proposed amendments to appropriate Rule provisions for consideration at the next meeting.

I. #20-2. Proposed amendment to conform V.R.C.P. 80.5(e) to amended 23 V.S.A. § 1203(k). The committee considered the January 30, 2020, letter of Sergeant Eric Shepard asking that Rule 80.5(e) be amended to reflect that the amount of the fee for a videotape of a DUI offense has been raised from \$15 to \$45 by a recent amendment of 23 V.S.A §1203(k). After discussion it was agreed that Professor Wroth should prepare a draft amendment making that change for the next meeting.

3. Items for discussion and possible action.

A (1). Amendments made necessary to conform Civil Rules to the 2020 Vermont Rules on Electronic Filing, promulgated December 10, 2019, effective March 2, 2020, <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATED%2012-10-19%20VREF%202020.pdf>.

The Committee reviewed Chairman Keyes' e-mail of June 23, 2020, summarizing requests made by Justice Dooley in a meeting with Chairman Keyes and Professor Wroth that the Committee identify problem areas in the effect of electronic filing in civil cases and consider a process by which the Electronic Filing Rules could be made part of the Civil Rules and brought under the jurisdiction of the Civil Rules Committee. In discussion, Committee members noted that there had not yet been sufficient experience with electronic filing to identify problems and that many of the problems that might emerge would be administrative rather than procedural. It was agreed that Chairman Keyes, Ms. Badgewick, and Ms. Spero should be a subcommittee, assisted by Professor Wroth, to develop Civil Rules provisions that would incorporate the provisions of the Electronic Filing Rules.

In view of the hour, the remaining agenda items under items 3 and 4 were deferred until the next meeting.

5. Other Business. Judge Toor announced that her appointment would expire on June 30 and that she had declined to be reappointed but would continue to be available to the Committee as a resource on issues that she had raised. The Committee unanimously expressed its regret at her departure and its thanks for the energy, insight, wisdom, and good humor that she had brought to its proceedings throughout her service.

6. Next Meeting. It was agreed that the next meeting should be held at 9:00 a.m. on Friday, September 11, 2020, in a manner to be determined, and that any necessary issues would be determined by e-mail in the meantime.

There being no further business, the meeting was adjourned at 12:00 noon.

Respectfully submitted,

L. Kinvin Wroth
Reporter