

APPROVED

VERMONT SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE Minutes of Meeting May 21, 2021

The meeting was called to order at 9:10 a.m. virtually on Teams by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Eileen Blackwood, Anne Damone, James Dumont, Karen McAndrew, Hon. Robert Mello, and Navah Spero.

Also present were Hon. Harold Eaton, Supreme Court liaison; Assistant Attorney General Eleanor Spottswood, Chief of the Civil Division; Professor Emeritus L. Kinvin Wroth, Reporter; and Hon. John A Dooley, Chair, and the following members of the Electronic Filing Rules Committee's Subcommittee on Appellate Rules: Bridget Asay, Emily Wetherell, and Hon. Walter Morris, Reporter.

Chairman Keyes welcomed Justice Dooley and the members and Reporter of the Electronic Filing Rules Committee's Subcommittee on Appellate Rules, of which he is also a member, and thanked them for joining the meeting to provide an explanation and discussion of the Subcommittee's draft of proposed amendments to the Vermont Rules of Appellate Procedure and the 2020 Vermont Rules for Electronic Filing designed to effectuate the adoption of Odyssey, the Judiciary's new case management system, and Odyssey File and Serve, the new electronic filing system in the Supreme Court (item 2.A Below).

1. Minutes. The draft minutes of the meeting of March 19, 2021, were unanimously approved as previously circulated.

2. Action items

A. #20-9A. Amendments made necessary to conform the Vermont Rules of Appellate Procedure to the 2020 Vermont Rules on Electronic Filing.

(1) Draft Amendments proposed by the Subcommittee on Appellate Rules.

Justice Dooley presented a brief summary of the process by which the draft amendments to the Vermont Rules of Appellate Procedure and the 2020 Vermont Rules for Electronic Filing were produced. The Electronic Filing Committee's Subcommittee on Appellate Rules, composed of representatives of all of the procedural rules committees, had conducted a preliminary review of the Appellate and Electronic Filing Rules to determine where change was necessary. Presentation of the resulting drafts at the present meeting for comments by the Civil Rules Committee is the initial step in a summary approval process driven by the fact that electronic case management and filing in the Supreme Court are scheduled to begin on August 17, thus necessitating that the amended Appellate Rules be promulgated by July 17 to allow the minimum 30-day period required by the Rules before they become effective. The E-filing Committee wished to avoid promulgation of emergency rules, so even a minimal 30-day comment period would have to begin as soon as next week to allow the Supreme Court to review and assess comments in time for a July 17 promulgation.

Ms. Wetherell then presented a summary of the Appellate Rules amendments, noting that they included changes designed to update various provisions, in addition to those related to E-filing and that they needed to be sent out for comment in time to be considered at a June 8 Bench-Bar meeting. She

described the changes in four principal groups which she had summarized as follows in an overview memo distributed to the Committee:

1. Rules Changes Related to Efiling

- a. New definitions for different types of fees (entry, filing, and efilings)
- b. Clarity about entry fee and when payment is due (for appeals by right, appeals by permission, federal question, and agency appeals)
- c. Filing and Service- incorporating certificate of service requirements
- d. Formatting requirements for electronically filed documents and nonelectronically filed documents
 - i. Motions (Rule 27)
 - ii. Briefs and other documents (Rule 32)

2. Rules Changes Related to Electronic Case Files and NG-CMS

- a. New definitions for Appeal Volume and Record of Actions
- b. Removing language such as “paper” and replacing with “document” and “original” to instead use “official”
- c. Removing requirements to file copies or paper at all (Rules 27, 30, and 31)
- d. Removing provisions requiring transfer of a paper file (except for some agency proceedings) (Rule 11)
- e. Definition of record on appeal (Rule 10) and creation of appeal volume (Rule 12)
- f. References to the record on appeal (Rule 28)
- g. Printed Case and Optional Printed Case (Rule 30)
- h. Records Custodian for electronic case files (Rule 45)

3. Rules Changes Conforming to Current Practice

- a. Clarity about process for appeals by permission (Rules 5, 5.1, and 6)
- b. Removal of provisions around video-recorded proceedings (Rules 10, 12)
- c. Stipulations to Extend Time (Rule 26)
- d. Clarification around cross appeals (Rule 28)

4. Public Access

- a. Clarification of clerk review (Rule 25(a)(4), Rule 45, and V.R.E.F. 5 and 6)
- b. Public Access for Agency files (Rule 13)
- c. Public Access to Oral Arguments (Rule 34)

Ms. Wetherell stated in response to questions that the filing fee on appeal would be paid in the Superior Court, whether or not the party was an e-filer; that the documents contained in the “Appeal Volume” would be only PDFs from the trial court clerk’s office and agreed that proposed VRAP 1(c)(7) should be revised to read “is a court-generated PDF containing a table of contents and all the documents filed and created in the trial court proceeding, ~~and that are~~ contained in the electronic case file; treatment of documents that cannot be presented electronically is considered in the Reporter’s Notes to Rule 12.

Ms. Wetherell then briefly reviewed the E-filing Rules amendments. There were no questions. She will prepare final version of both sets of rules to be sent out for comment, correcting typos and other errors.

Justice Dooley asked that the Committee approve transmittal of the present drafts to the Court, provide a process for detailed review of the drafts during the comment period, and provide a process for timely Committee submission of any proposed changes to the Court.

On motion duly made and seconded, after discussion, it was voted unanimously that

(1) The Committee should, as soon as possible, recommend to the Supreme Court that final versions of both the Appellate Rules and the E-filing Rules, to be prepared by Emily Wetherell, should be sent out for comment.

(2) A joint subcommittee of the E-filing and Civil Rules committees should be established and charged to review both the Appellate and E-filing comment drafts in detail and report any recommended changes to both committees by June 28.

(3) The Civil Rules Committee will review the joint subcommittee's report, as well as external comments received, by exchange of e-mails. If all issues cannot be resolved electronically, then the Committee will meet by Teams no later than July 7 to resolve any remaining issues.

(2) Elimination of papers served electronically from the 3-day extension of time provided by V.R.C.P. 6(e) and V.R.A.P. 26(c).

Justice Dooley noted that the Appellate Rules Subcommittee had voted to end the 3-day rule in V.R.A.P. 26(c) if the Civil Rules Committee voted to remove it from V.R.C.P. 6(e).

In the necessary absence of Mr. Weimer, his memorandum of May 19, 2021. was presented by Judge Mello It was moved and seconded and voted unanimously to amend V.R.C.P. 6 by eliminating Rule 6(e).

In subsequent discussion, concerns were raised about the provision in the draft of Rule 5(b), (e), to be considered under Item 2.B (2) below, that would require filing by 4:30 p.m. on the day of filing, in contrast to the present deadline of midnight. It was also noted that under V.R.E.F. 5(d) and proposed V.R.E.F. 5(e), the dates of filing and service were not the same. Court staff were required to review a filed document for compliance with the rules and to notify the filer that the document has been accepted before service. Justice Dooley noted that various further changes were under consideration, and others noted that, as had been done in the Federal Rules when the three-day rule was eliminated, filing dates could be extended. It was agreed to defer further action on the motion just passed to eliminate Rule 6(e) and to consider at the next meeting a package combining the elimination of V.R.C.P. 6(c) and V.R.A.P. 26(c) with any other necessary changes. The Criminal Rules Committee would be asked to consider comparable action on V.R.Cr.P. 45(e).

B. #21-2, Response to Supreme Court's memorandum of May 12, 2021.

Item 1. Remote Jury Trials. Mr. Keyes reported that this item had been deferred due to the continuing activity of the Court's working group on the subject.

Item 2. E-mail Filing. The Committee considered Ms. Spero's report and draft amendments of 5(b) and (e) addressing the Court's request that the Committee consider incorporating e-mail filing, now permitted under AO 49, as a permanent Civil Rule. The gap between filing and service and concerns about the 4:30 deadline referred in item 2.A(2) above were noted, as well as the present rule that service by e-mail is permitted only with unanimous consent. Ms. Spero agreed to prepare a revised draft for the next meeting, eliminating the 4:30 deadline and responding to other concerns. Mr. Dumont agreed to obtain information about present practice, including the scope and timing of the certificate of service, from the Court Administration staff.

Item 3. Remote Administration of Oaths. The Committee considered Ms. Spero's report and draft of a new V.R.C.P.11(e) responding to the Court's request that the Committee consider providing a permanent rule substituting declarations for affidavits or other sworn statements as now provided in AO 49. Chairman Keyes suggested that the questions were whether to adopt the present AO 49 provision, whether to adopt a general rule or proceed rule by rule, and what language a declaration should employ. In response to the question whether a legislative solution should be sought, he stated that that was a question for the Court. After discussion of these options and the question whether the Court could determine by rule that certain conduct was perjury rather than contempt, the consensus favored a broad general rule with sanctions in the court's discretion., Ms. Spero agreed to look further into those issues, as well as the exceptions to the rule, and report at the next meeting.

Item 4. Eviction Proceedings and Foreclosure Proceedings. Mr. Avildsen reported that he had looked into some of these issues in conjunction with the CARES Act and discussed them with Justice Robison. He will report at the next meeting.

C. #21-3. Conforming V.R.C.P.3.1 and court forms concerning waiver of filing and service fees; Justice Robinson's request. The Committee considered Mr. Avildsen's May 18 memorandum on the issues. He agreed to send Professor Wroth a draft in the form of a proposed amendment to be circulated electronically as soon as possible. It was agreed that Justice Robinson's proposed form amendments were appropriate and could proceed independently of the amendments of the rule.

D. #20-11. Recommended emergency amendment to V.R.C.P. 68 sent to the Court on February 22, 2021. Promulgated March 8, effective March 15, 2021, as A.O. 49, ¶ 24. It was agreed to defer discussion of this item until there was more experience with the practice.

E. #19-10. Revised proposed amendments to V.R.C. P. 7 and 56 and abrogation of V.R.C.P. 78. After discussion of the possibility of eliminating the amendment of Rule 7(b)(7) and leaving the imposition of sanctions to Rule 11, it was agreed that Rule 11 was too cumbersome for the typical situation which Rule 7(b)(7) might cover.

On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend for promulgation the draft as circulated, with correction of a typo in the Reporter's Notes to the abrogation of Rule 78. Professor Wroth agreed to insert language from the Reporter's Notes to the 1979 amendment of Rule 78(b)(2) in the current Reporter's Notes.

In view of the hour, the remainder of the agenda was deferred to the next meeting.

3. Other business. There was no other business.

4. Next meeting. It was agreed that the next meeting of the Committee would be held virtually at 9:00 a.m. on Friday, June 11, 2021.

The meeting was adjourned at 12:05 p.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter