

APPROVED

VERMONT SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE Minutes of Meeting July 16, 2021

The meeting was called to order at 9:30 a.m. virtually on Zoom by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Eileen Blackwood, James Dumont, Karen McAndrew, Hon. Robert Mello, Navah Spero, and Gregory Weimer.

Also present were Hon. Harold Eaton, Supreme Court liaison, and Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of June 11, 2021, and the special meeting of July 7, 2021, were unanimously approved as previously circulated.

2. Action items

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

Ms. Badgewick and Ms. Spero continued to review their present conclusions regarding the apportionment of the provisions of the existing Rules for Electronic Filing between the Civil or other procedural rules and other media such as administrative orders or directives or handbooks.

V.R.E.F. 6 and 7. Ms. Spero stated that the provisions of these rules governing processing and format would be simplified and placed in an administrative order. V.R.E.F. 6(c)(4) governing the date and time of filing would be placed in appropriate procedural rules with any necessary revisions of content, Mr. Dumont called attention to the revised provisions of V.R.A.P. 25(a) in the emergency amendments to the Appellate Rules promulgated July 13, effective August 17, 2021, as an example. Chairman Keyes noted that V.R.E.F. 7(c) concerning format requirements for nonelectronic documents might be placed in V.R.C.P. 5 or 10, with the certification requirement covered in V.R.P.A.C.R. 7.

V.R.E.F. 8-10. Ms. Badgewick stated that V.R.E.F. 8(a)-(c) concerning exhibits would be combined in a single new subdivision to be included in V.R.C.P. 43 and other rules of procedure as appropriate. Ms. Spero said that V.R.E.F. 9(a)-(c) covering signatures of e-filers would be placed in V.R.C.P. 11. V.R.E.F. 9(d) covering signatures of court personnel would be placed in V.R.C.P. 77(a). These provisions might be integrated into pending amendments to V.R.C.P. 5. Ms. Badgewick stated that V.R.E.F. 10(a) and (c) covering payment and waiver of court fees would be incorporated in a new V.R.C.P. 3(c). V.R.E.F. 10(b) and (d) covering manner of payment and exemptions will be placed in an administrative order.

V.R.E.F. 11-12. Ms. Spero stated that V.R.E.F. 11(a) dealing with personal service would be covered in appropriate provisions of V.R.C.P. 4 and 5. V.R.E.F. 11(b), service in general, would be deleted as superfluous, V.R.E.F. 11(c), discovery, would be placed in a new V.R.C.P. 26(i), or possibly in V.R.C.P. 5. V.R.E.F. 11(d), (e), and (g) covering service between filers and

certificates of compliance and service would be placed in V.R.C.P. 5. V.R.E.F. (11(f) covering notice of court documents would be incorporated in V.R.C.P. 77(d). V.R.E.F. 12 covering official records and certified copies would be deleted and covered in covered in V.R.C.P. 84 and other appropriate definitional rules.

In discussion of next steps, It was suggested that Ms. Badgewick and Ms. Spero should prepare a full conceptual draft with an introduction summarizing the purpose and process and showing the disposition of all affected Civil and 2020 E-filing Rules provisions for consideration by the full Committee at the August or September meeting. After comment, approval, and any necessary revisions, the subcommittee, with the assistance of Judge Morris, Emily Wetherell, and others **as needed**, would prepare proposed drafts of necessary amendments and new provisions to the Rules, administrative orders, and other appropriate media. Professor Wroth stated that he would be glad to be of assistance in either or both stages of the process.

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

Item "0". Remote mediation. The Committee considered the memorandum of Ms. Badgewick, Chairman Keyes, and Mr. Weimer, emailed July 6, 2021, proposing an amendment to V.R.C.P. 16.3 to clarify that mediation in person is the default, with an option for remote mediation if the parties agree, or the court orders it for good cause. Ms. Badgewick noted that surveys by Chairman Keyes and the VBA showed in general that mediators preferred remote mediation but that lawyers, though not opposed to remote mediation as an option, preferred in-person mediation as the default. Among other benefits, it provided an opportunity for the mediator to talk to a party without counsel present

It was moved and seconded to recommend that the proposed rule be sent out for comment with in-person mediation as the default and remote mediation permitted by stipulation or by the court for good cause. **After discussion of the possibility of eliminating the requirement of good cause or of substituting "good reason" for "good cause," it was voted, seven in favor, one opposed, to adopt the motion, unmodified.**

Item 1. Remote Jury Trials. Mr. Dumont reported that he had been appointed to a recently created Supreme Court Special Advisory Committee on Remote Trials that was to have its first meeting later in July. Noting that V.R.C.P. 43.1 providing for testimony or participation by video or audio conference was somewhat outdated, Chairman Keyes stated that any action should await the recommendations of the Special Committee.

Items 2 and 3. E-mail Filing; Remote Administration of Oaths. Professor Wroth reported that proposed amendments to V.R.C.P. 5 and 11 had been sent to the Court on June 25, 2021, and would be acted upon at the Court's August 3 administrative meeting.

Item 4. Eviction Proceedings and Foreclosure Proceedings. Mr. Avildsen reported that he had not yet developed a draft rule for eviction proceedings to replace the present provisions of AO 49, ¶21, requiring compliance with the notice provisions of the federal CARES Act, because **there is a possibility that Congress will sunset this requirement and there is no reason to adopt a permanent separate rule on eviction that is not otherwise needed.** Judge Mello pointed out that the 30-day notice requirement of the CARES Act is inconsistent with the shorter periods of Vermont law, so that this part of AO 49 has to be made permanent either as an administrative order or court rule. Mr. Dumont agreed that clarity was needed for both tenants and landlords. On motion duly made and seconded, there being

no further discussion, it was voted unanimously to ask the Supreme Court to keep AO 49, ¶21, in place because **so long as there is a possibility that Congress will sunset this requirement, there is no need to adopt a permanent separate rule on eviction which is not otherwise needed and would be a larger and perhaps fraught undertaking.**

In response to Chairman Keyes' question, Justice Eaton stated that the Court would be considering the future of AO 49 in early September. It was agreed that there was no need to change the Committee's August 20 meeting date.

Item 5. Committee consideration of other AO 49 provisions that might be made permanent. No Committee concerns were raised.

C. #20-9A. Amendments made necessary to conform the Appellate Rules to the 2020 Vermont Rules on Electronic Filing, promulgated December 10, 2019, effective March 2, 2020

(1) Amendments to the Appellate Rules proposed by special subcommittee of the Electronic Filing Rules Committee. Professor Wroth reported that the amendments reviewed by the Civil Rules Committee and sent to the Special Sub-committee on July 6, were recommended by the latter committee to the Supreme Court on July 9, and were promulgated by the Court as emergency amendments on July 13, effective August 17, 2021.

(2) Abrogation of V.R.C.P. 6(e) and V.R.A.P. 26(c) providing a three-day extension of time At the meeting of May 21, 2021, the Committee had approved the proposal presented in Mr. Weimer's memorandum of May 19, 2021, to eliminate the three-day extension of time provided by V.R.C.P. 6(e) for actions required by certain kinds of service. The Committee had deferred final action in order to consider a package combining the elimination of V.R.C.P. 6(c) and V.R.A.P. 26(c) with any other necessary changes. At the present meeting, Professor Wroth presented s draft, transmitted in his e-mail of July15, 2021, that, like F.R.C.P. 6(d) as amended, would have eliminated only electronic service from the three-day provisions of those rules. After discussion, Committee members noted that the problems addressed by the three-day rule could be addressed case-by case in other rules. It was agreed to take no action at the present meeting but to consider at the next meeting the combination package previously proposed.

D. #20-8. Proposal to clarify V.R.C.P. 56 by providing that the response to a statement of undisputed facts must be paragraph-by-paragraph as opposed to a competing statement of facts. The Committee reviewed Ms. McAndrew's further revised draft amendments to V.R.C.P. 56, transmitted in Professor Wroth's email of July15, 2021. After brief explanation of the further changes, on motion duly made and seconded, there being no further discussion, it was voted unanimously to affirm the decision at the June 11 meeting to recommend to the Court that the draft be sent out for comment.

E.1. #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 draft promulgation order amending V.R.C.P. 3.1(b)(2), sent May21, 2021. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend to the Court that the draft be sent out for comment.

E.2. #19-10. Amendments to V.R.C. P. 7 and 56 and abrogation of V.R.C.P. 78. Professor Wroth reported that these amendments were promulgated June 7, effective August 9, 2021. He agreed to identify existing references to former V.R.C.P.78 in other rules (e.g., V.R.C.P. 43(e)) and advise the

Committee whether those references simply needed to be changed to Rule 7 or required substantive consideration,

F. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. Professor Wroth agreed, with the assistance of Judge Pearson, to present a clean consolidated draft at the Committee's September meeting.

G. #20-7, #19-11. Civil Division proposal to move credit card cases out of small claims court and provide form for credit card complaints. Mr. Avildsen reported that a sponsor of pending legislation had withdrawn and that there was no immediate prospect of legislative action on this matter. The Civil Division Oversight Committee is working on a more comprehensive small claims project. It was agreed to drop this item from the agenda pending a proposal for action from the Oversight Committee.

H. #20-12. Proposed amendment of V.R.C.P. 4 to require service of blank answer form. Memorandum of Civil Division. The Committee considered this item together with item 3.A below, because both were addressed in Mr. Avildsen's memorandum of March 18, 2021. His draft amendment of Rule 4 had been revised to accommodate the amendment of Rule 84 to transfer the publication of forms from the Appendix of Forms now in the Civil Rules to the Judiciary website. On motion duly made and seconded, after brief discussion, it was voted unanimously to adopt the proposals in Mr. Avildsen's March 18 memorandum, adding a provision specifically abrogating the Appendix of Forms and recommend to the Court that the proposed Rule amendments be sent out for comment and the administrative order be adopted. It was agreed that the Reporter's Notes would explain the status of forms that were embedded in specific rules—e.g., V.R.C.P. 80.1.

I. #20-13. Proposed amendments of V.R.C.P. 62, 77, regarding service of default judgments. The Committee considered the revised draft dated March 18, 2021, presented by Mr. Dumont and Professor Wroth. In discussion, a question was raised about the effect of the amended rules on foreclosures. Judge Mello and Mr. Dumont agreed to consider the question and report at the next meeting.

3. Items for discussion and possible action.

A. #14-1. Status of Appendix of Forms. See item 2.H above.

B. #21-1. *Blondin v. Milton Town School District*, 2021 VT 2, 13, n.10. This item was deferred until the next meeting due to the hour.

4. Information items.

A. AO 49 as amended through June 25, 2021. Professor Wroth reported that AO 49 was extended until September 7, 2021, by amendment of June 25, 2021, which contained the following provisions affecting the Committee. These provisions have been addressed in the present meeting as indicated below:

1. Filing and service by email for non-e filers. Paragraph 6 adds ¶ 6(g) of AO 49 requiring the Committee to propose a permanent rule change to authorize non-e filers to file documents with the court by email, and to consider a permanent rule amendment relating to electronic service on or by non-filers. See agenda item 2.B, item 2, above.

2. Continued remote participation in mediations. The amendment continues in effect A.O. 49's provision declaring the judicial emergency to be "good cause" for remote participation in mediation. Paragraph 8 amends ¶ 13 of Administrative Order 49 to require the Committee to consider a permanent change to the rules relating to remote participation in mediation. See agenda item 2.B, item "0", above.

3. Changes to pleading requirements in foreclosure proceedings. Paragraph 13 adds ¶ 21(d) of Administrative Order 49, requiring the Committee to review the current state of state and federal law concerning eviction proceedings and propose any necessary changes to the Civil Rules to take effect upon expiration of the Administrative Order. See agenda item 2.B, item 4, above.

4. General consideration. Paragraph 10 of the Amendment adds ¶ 15(h) of AO 49 to generally direct all court committees, boards, and commissions to advise whether any temporary operational changes should be made permanent, including rule changes about remote proceedings and email filings. See agenda item 2.B, item 5, above.

5. Special Advisory Committee on Remote Hearings. ¶ 5(e) of AO 49 is added to charge the Special Advisory Committee on Remote Hearings, in consultation with divisional oversight committees, to make recommendations to the respective divisional rules committees for permanent rule changes to the rules governing remote participation in court proceedings. See agenda item 2.B, item 1, above.

B. Status of Court's Long Term Planning Committee: Ramp-up Report, May 13, 2020. This item was deferred until the next meeting due to the hour.

3. Other business. There was no other business.

4. Next meetings. The next meeting of the Committee will be held virtually at 9:00 a.m. on Friday, August, 20, 2021. It was agreed to hold a further virtual meeting at 9:00 a.m., on Friday, September 17, 2021.

There being no further business, the meeting was adjourned at 11:59 a.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter