

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
May 20, 2022

The meeting was called to order at 9:10 a.m. virtually on Zoom by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Anne Damone, James Dumont, Eileen Blackwood, 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.

The Committee expressed its thanks to Eileen Blackwood, whose term was ending on June 30, 2022, for her years of service as a member of the Committee.

1. Minutes. The draft minutes of the meeting of April 22, 2022, were unanimously approved as previously circulated, with correction of a typographical error in item 2.A.

2. Action Items.

A. #20-13. Proposed amendments of V.R.C.P. 55, 62, regarding service of default judgments. Sent out for comment on December 13, 2021, with comments due February 14, 2022. Three comments were received. Discussion was deferred at the April 22 meeting.

The Committee considered Mr. Dumont's May 19, 2022, draft of proposed amendments adding V.R.C.P. 55(c)(8), carrying forward the December 13 proposed draft of V.R.C.P. 55(d), and adding a reference to proposed Rule 55(d) in V.R.C.P.80.1(f).

In discussion, Chairman Keyes asked if there is a preference for personal service over mail service and, if by mail, a requirement for "with return receipt requested." The reference "or by mail by a method provided in Rule 4(f) for a summons and complaint served outside the state." can be confusing. After discussion, it was agreed that ordinary mail is not sufficient and that Rule 4(f) return receipt methods should be used only where personal service could not be made within or outside the state with due diligence.

On motion duly made and seconded, it was voted unanimously

(1) to recommend to the Supreme Court for promulgation: (a) The proposed draft of V.R.C.P. 55(c)(8) with typographical corrections to the underlining; (b) the proposed draft of V.R.C.P. 55 (d) revised to require exhausting due diligence before the use of mail methods of service provided in Rule 4(f)(1); and (c) the proposed draft of Rule 80.1, including making typographical corrections of the title.

(2) To consider making Rule 62(b) consistent with amended Rule 55(d) by substituting in Rule 62(b) a cross-reference to Rule 55(d), or the language of Rule 55(d), for the present Rule 4 references.

It was agreed that Chairman Keyes, Mr. Dumont, and Professor Wroth would prepare a new draft of the December 13 order containing these changes and recommend it to the Court for promulgation unless they found new issues. Mr. Dumont agreed to prepare the first draft.

B. #22-1. Proposed amendment of V.R.C.P. 26(e), Sent out for comment on March 8, with comments due on May 9, 2022. Consideration of further revision of the proposed amendment was deferred at the April 22 meeting. The Committee considered Mr. Dumont's May 19 revised draft, deleting "that was complete when made," omitted from the comment draft through the Reporter's error, and adding "in a timely manner," a rule of reasonableness that conforms to F.R.C.P. 26(e)(1)(A). On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend the rule to the Supreme Court for promulgation as revised in Mr. Dumont's May 19 draft.

C. #22-2. V.R.C.P. 80.6. Correction of cross-references. Proposed amendment sent out for comment on March 8, with comments due on May 9, 2022. Reviewed by LCJR on April 14, 2022. Chairman Keyes reported that no comments had been received. He noted that now-obsolete references to the district court remained in Rule 86. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend the rule to the Supreme Court for promulgation as proposed, with additional changes to correct the references to the district court.

D. Committee consideration of AO 49 provisions that should be made permanent. Request of the Supreme Court.

(1) Special Eviction and Foreclosure procedures and forms. The Supreme Court had requested that the provisions of AO 49, par 21 and 22 [and the forms], relating to eviction, foreclosure, and mobile home repossession be incorporated, as appropriate, in the Civil Rules. Justice Eaton noted that the Court hoped that as much of AO 49 as possible could be brought into the Rules before AO49 expired on August 31.

The Committee considered Chairman Keyes' May 18 report on behalf of the subcommittee (Mr. Avildsen, Judge Mello, and himself, chair) summarizing the issues and process and containing a draft of proposed rules.

The subcommittee had agreed on the following points:

1. AO 49, par. 21 and 22, should be promulgated as temporary provisions of the Vermont Rules of Civil Procedure.
2. The Cares Act 30-day notice requirement is not limited to eviction for nonpayment and Appendix A should be corrected.
3. Do not change the 60-day automatic stay to some other arbitrary time, but instead clarify an already implied motion practice to allow termination of or extension of the stay.
 - a. Given the availability of motion practice, no need to elaborate a procedure for the court's discretion to schedule a status conference.
 - b. Provide for extension "on such terms and for such reasons as the court deems just" and clarify that the stay will automatically expire in 60 days unless an extension sought by a party *is granted* by the court.

Discussion then followed on the following questions:

4. Should a request for stay late in the case apply to the Order of confirmation? It has been argued that the right of redemption expires when a public sale takes place and, in strict foreclosure, when the Certificate of Nonredemption issues. The discussion is still open on the

question. Why shouldn't the request for stay apply if a sale is not confirmed and a second sale would otherwise be ordered?

5. Is the model request for stay in Form F requiring an oath to specific qualifying facts and a promise to give notice of the result of the application inconsistent with text of the order that a stay is automatic on request stating the defendant has applied for funds and believes they are eligible? Mr. Dumont expressed the view that it is important that defendant be aware of specific eligibility requirements as detailed in the form and that neither the form nor text of the order needed change.

6. Should the current language requiring court action to terminate a stay if the application is denied be changed? And should there be a catcall ground for termination added to the existing list of other grounds for termination. The consensus is that termination of the stay should not be automatic but only on court order after notification of the decision on the application; and that the court should have discretion to terminate the stay on grounds other than those listed.

7. Should the Forms include substantive requirements that are not mentioned in the order? The consensus appears to be that, if possible, substantive requirements -- such as that in the model form request for stay that the party must give notice of the decision on the application—should be included in the proposed draft rule.

8. The Order makes certain forms mandatory, others “substantially” mandatory. Should the forms be “sufficient”, consistent with Rule 84, and be developed by the Court Administrator in plain English that embodies the restated Rule requirements? The committee consensus is that the forms should be mandatory [or substantially mandatory] but also should be approved and published by, and can be amended from time to time, by the Court Administrator consistent with the Rules and the CA’s form drafting practices.

Chairman Keyes’ preliminary draft of proposed temporary Rules 9.2 and 9.3, implementing responses to the questions above, were attached to the subcommittee’s report.

Chairman Keyes stated that the subcommittee would take all Committee comments into account in preparing revised rules and suggested forms to be considered at the June meeting for recommendation to the Court to send out for public comment over the summer for possible promulgation in early Fall.

Following up on point 2 above, on motion duly made and seconded, it was voted unanimously to recommend to the Court that it adopt proposed revisions of Appendix A now to eliminate the discrepancy between it and AO 49, sec. 21, concerning its scope.

(2) Remote oral argument in Supreme Court. The Committee considered the Supreme Court’s proposed amendments of V.R.A.P. 33.1 and V.R.A.P.33.4 sent out for comment on April 18, with comments to be sent to Emily Wetherell by June 20, 2022, together with recent email comments from Mr. Weimer and Ms. Badgewick supporting the order and from Ms. Rowntree with editorial comments and suggesting a later deadline for requesting remote oral argument. In discussion, Committee members raised concerns about failure of the Court’s or the parties’ equipment. Chairman Keyes asked that Committee members send him any further comments by May 27 and stated that he will transmit all specific comments to Ms. Wetherell as well as the general consensus of the Committee the rule was on the right track.

(3) Remote Judicial Bureau proceedings under Rule 80.6. Chairman Keyes reported that he had no new information on this item.

(4) Remote deposition oaths: (a) AO 49, sec. 17a, allowing remote administration (including possible influence on witness not apparent on camera); (b) remote notarization, including out-of-state; (c) pending legislation concerning oaths in interstate real estate transactions. Chairman Keyes reported that the legislation concerning notaries had passed but was not yet signed. His efforts to communicate with Legislative Counsel regarding possible clarification had not been successful. Mr. Dumont agreed to review the bill and consider what effect it might have on the oath provisions of the discovery rules after AO 49 expires, particularly as affecting out-of-state depositions. Chairman Keyes noted that he had learned from Ms. Spero's work that the Federal Rule on depositions does not allow a declaration in lieu of oath, thus raising another question for the Vermont rule.

(5) Remote trials and hearings. Mr. Dumont reported that the Remote Trials and Hearings Committee had not met since the Civil Rules Committee's last meeting. The VBA is conducting a new survey on the issue. The Remote Trials Committee intends to hear from stakeholders before sending recommendations to the Civil Rules Committee. Chairman Keyes noted that AO 49, sec. 17b raises the problem of who administers the oath in a remote hearing, which should be addressed when any proposed rule is considered.

(6) Other. Chairman Keyes noted that the Committee will have to consider the Remote Trials and Hearings Committee report (no. (5) above) when sent to the Committee.

3. Status of recommended amendments.

Professor Wroth reported that the proposed orders amending V.R.A.P. 25 and deleting V.R.A.P. 25(a)(2); #20-9A eliminating papers served electronically from the 3-day extension of time provided by V.R.C.P. 6(e); V.R.A.P. 26(c); amending V.R.A.P. 26(d)(1) and 31(a). recommended for promulgation at meeting of November 19, 2021; .and #22.3 V.R.C.P. 80.11, order to make permanent recommended for promulgation at April 22 meeting, were promulgated May 9, effective July 10, 2022.

4. Status of proposed amendments.

A. V.R.C.P. 79.1. Civil Division Oversight Committee amendment proposal regarding out-of-state lawyers. Proposed amendment sent out for comment on March 8, with comments due on May 9, 2022. Reviewed by LCJR on April 14, 2022. Chairman Keyes reported that the Criminal Rules Committee had agreed to the amendment and that the Probate and Family Rules committees would act on it at meetings in June and July.

B. V.R.A.P. 33.1 and 33.4. Updating provisions for remote oral argument. See item 2.D(2) above.

5. Reports

A. #20-9B. Amendments made necessary to conform the Civil Rules to the 2020 Vermont Rules on Electronic Filing, promulgated December 10, 2019, effective March 2, 2020, as amended, Subcommittee (Ms. Badgewick, Chairman Keyes, and Ms. Spero) to report. No report.

B. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. Deferred at April 22 meeting. No report.

6. Other business.

A. Discussion of process for replacing members whose term expires. The Committee considered possible criteria, including demography, practice field, and geography. Chairman Keyes asked members to send him suggested names by May27.

B. Suggestions for future projects. Correspondence will be circulated for the next meeting suggesting (1) making the answer a call and response format and (2) making appellee docketing statements optional.

7. Date of next meeting. It was agreed that the next meeting should be held virtually at 9:00 a.m., Friday, June 17, 2022.

There being no further business, the meeting was adjourned at 11:45 a.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter