

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
MINUTES FOR MEETING OF NOVEMBER 18, 2022**

The meeting was called to order at 9:05 a.m. virtually on Teams by Allan R. Keyes, Chair, with the following Committee members present: Bridget Asay, Bonnie Badgewick, David Koeninger, Karen McAndrew, Hon. Robert Mello, Navah Spero, and Emily Wetherell. Also present were Hon. Harold Eaton, Supreme Court liaison; Laura Rowntree, Attorney General's designee; and Professor Pamela Vesilind, Reporter.

1. Introductions and Welcomes. The Committee recognized new member David Koeninger, and new reporter Pamela Vesilind.

2. Minutes. The draft minutes of the meeting of September 9, 2022 were unanimously approved as previously circulated.

3. Special Reports.

A. # 22-1 Status of Rule 43.1/Special Advisory Committee on Remote Hearings. Emily Wetherell reported on the ongoing drafting and suggestions of our Subcommittee (Judge Mello, Ms. Asay, and Ms. Spero), and of the Family Rules Committee, to be reported to the Special Committee. Ms. Wetherell noted the following:

- The key distinction is between evidentiary hearings and non-evidentiary hearings.
- Refinements have been made to the definition of a “hybrid hearing.”
- Notice requirements for hearings in which the judge presides remotely:
 - Standing orders: the rule will address standing orders for categories of proceedings, as opposed to case-by-case by scheduling.
 - Hybrid hearings: the judges retain flexibility as to whether they will appear in-person or remotely. If the hearing is scheduled as a hybrid hearing, there should be no need to provide advance notice about whether the judge would be in-person or online.
 - In-person hearings: if the hearing is scheduled as an in-person hearing and a change is made, then advance notice of some kind is appropriate.

Ms. Wetherell raised the issue of notice and comment requirements for proposed rule changes under AO 11. Typically, the announcement is distributed to members of the bar. However, pursuant to AO 11, if the proposed rule change is applicable to members of the public-at-large, more expansive notice and comment efforts may be required. Ms. Spero asked if the comment period should be extended, as the change would affect members of the press and others.

Committee Chair Keyes polled the Committee as to whether it was satisfied with the process and the report from Ms. Wetherell, and the Committee affirmed that it was. Chair Keyes requested that the Subcommittee continue to monitor the ongoing drafting of the rule as ultimately proposed by the Special Committee.

Mr. Koeninger observed that the online court calendar does not indicate whether a scheduled hearing will be in-person or hybrid. Ms. Spero asked whether this is an operational issue for the Civil Oversight Committee. Ms. Wetherell suggested the issue be discussed in the next Remote

Hearing meeting. Mr. Koeninger agreed to report back to the Committee. Chair Keyes thanked the Subcommittee members and Ms. Wetherell.

B. # 22-8. Regularize effective dates of promulgated rules. Proposal by Lisa Shelkrot to standardize promulgation dates for future rule changes. The frequency and number of changes over the last two years has made it difficult for attorneys and judges to stay current. Chair Keyes noted that the federal system is still on an annual basis, with rules taking effect in December, assuming no congressional veto. He suggested that, barring any emergency necessitating earlier promulgation, bi-annual promulgation dates would improve the process.

Ms. Wetherell was sympathetic to Ms. Shelkrot's concerns. She suggested July 1 and January 1 as promulgation dates, unless circumstances required otherwise, given that July 1 is the date most new statutes take effect. She observed that not all attorneys have access to Westlaw, and that the free Lexis site can take a while to update. This question would need to be taken up by the Court, which would want input from the various committees. Ms. Spero and Ms. Asay agreed that standardizing twice-a year promulgation dates would benefit the bar. Judge Mello noted that keeping current with new rules was also a challenge for the trial bench, and suggested the Committee adopt January 1 and July 1 dates even if the other committees chose not to conform to the schedule at this time.

Chair Keyes suggested that, rather than promulgating a rule, the Committee might begin the practice without waiting for consensus from the other committees, through a Local Order of the Chair of the Committee. When reporting a recommended rule to the Court, the Chair would ordinarily recommend a standard promulgation date of either January 1 or July 1. Ms. Asay suggested that a more formalized approach would be more valuable to practitioners. Ms. Wetherell suggested that it could go in AO 11, assuming the other committees and the Court were in agreement.

On motion duly made by Judge Mello and seconded by Ms. Spero, it was voted unanimously that the Committee will implement this procedure and recommend to the other committees for an administrative order covering all divisions. Chair Keyes agreed to circulate suggested language for the Committee's review and comment at the next meeting.

4. Action Items.

A. #20-13. Proposed amendments of V.R.C.P. 55 and V.R.C.P. 62, regarding service of default judgments. This proposal would amend Rule 55(d) to make specific the responsibility of a party who has obtained a default judgment to serve a copy of the judgment on the defaulting party and file proof of such service. Revisions to Rule 4(f), Rule 62, and Rule 80.1, drafted by Mr. Dumont, were distributed June 17, 2022 to be updated and reviewed.

The origin of this proposal was a recommendation by the Civil Oversight Committee. The amendment to Rule 55(d) would require service of a default judgment motion as a matter of routine. Rule 62 would be amended to reflect this change, as Rule 62(b) prohibits execution of a default judgment unless it has been properly served on the defendant. The proposal was released for public comment, with comments due by February 14, 2022. Among the commenters were representatives of creditors, who opposed the change as unnecessary delay and expense that would be borne by the consuming class one way or another.

The Committee held several meetings and considered the comments. It accepted the comment that there should be a mechanism for recovering the cost of service. A subcommittee was formed to consider this issue; it suggested that Rule 55 and Rule 80.1 be amended to allow the court to estimate the additional cost of service. It was further proposed that Rule 55 or Rule 4 be amended to require personal service be attempted before allowing service by mail.

To date, the Committee has voted to recommend to the Supreme Court for promulgation with certain revisions:

- (a) the proposed draft of Rule 55(c)(8), with typographical corrections to the underlining;
- (b) the proposed draft of Rule 55(d), revised to require exhausting due diligence before the use of mail methods of service provided in Rule 4(f)(1);
- (c) the proposed draft of Rule 80.1, including making typographical corrections of the title; and
- (d) the proposed draft of Rule 4(f), clarifying and updating the procedure for restricted mail service.

Mr. Dumont circulated to the Committee draft language for these amendments. On November 15, 2022, Chair Keyes circulated an alternative suggestion that Rule 62 cross-reference Rule 55, rather than repeat language in Rule 55. The choice between these alternative approaches was the sole remaining issue for discussion. Chair Keyes solicited the Committee's feedback on this choice, relaying that Mr. Dumont had indicated to him no strong preference. Judge Mello, Ms. Spero, and Ms. Asay indicated the same. It was asked whether these changes necessitated an additional notice and comment period.

On motion duly made by Judge Mello, and seconded by Ms. Asay, it was voted unanimously to recommend that Rule 62(b) reference Rule 55(d). Chair Keyes noted that all these amendments would require new Reporter's Notes, to be submitted to the Committee for review before the January 20, 2023 meeting.

B. V.R.C.P. 79.1(e), Appearance and Withdrawal of Attorneys Not Admitted to Practice in Vermont. Civil Division Oversight Committee amendment suggestion regarding out-of-state lawyers. The proposed amendment to Rule 79.1(e) was sent out for comment on March 8, with comments due on May 9, 2022. Reviewed by LCJR on April 14, 2022.

Chair Keyes shared that the Criminal Rules Committee (Judge Morris) has agreed to adopt the same language as circulated for comment by our Committee, and asked that we include their rule change in our recommended promulgation order. Other divisions have had sufficient time to review and comment on this proposed amendment, and to consider adopting the same or similar language, but the Committee has received no comments. Because the Criminal Rules Committee did not submit the proposed change for comment, this committee would need to explain this to the Court in its recommendation letter.

Ms. Asay asked whether the use of "shall" was consistent with plain language drafting guidance. The Chair affirmed that it is too late to make the change at this time, but agreed that the Committee should adhere to Bryan Garner's Guidelines for Drafting and Editing Court Rules.

On motion duly made by Ms. Asay, and seconded by Ms. Spero, it was voted unanimously to

recommend adoption of the amendment to Rule 79.1 with parallel amendment to Criminal Rule 44.2. The recommendation to be submitted to the Supreme Court in time for review at its December 2022 meeting.

5. #22-5. Committee consideration of provisions of expired AO 49 that could be made permanent.

A. Remote Oaths and Remote Depositions. AO 49, sec. 17, allowing remote administration of oaths in both depositions and in judicial proceedings expired effective September 6, 2022. Recent amendments to the Uniform Law on Notarial Acts, 26 V.S.A. §§ 5301, et al., allow remote administration of oaths by specially licensed notaries located in Vermont.

Ms. Spero reported for the subcommittee (Ms. Spero and Mr. Dumont) on remote oaths and remote depositions, including how the new legislation affects administration of oaths at remote out-of-state depositions. Ms. Spero reported that the Emergency rules issued by the Secretary of State Office of Professional Regulation remain in effect and explicitly say that both the person being sworn in and the notary must be in Vermont for the notarial act. Without clarification from OPR, there is confusion about whether under the new statute the witness must be physically in Vermont for a Vermont notary to conduct a remote notarial act. Some states prohibit notaries from other states from practicing in their state; some criminalize the conduct. However, Vermont notaries are reportedly regularly working remotely.

There are several possible paths going forward:

- (1) Do nothing and leave it to the parties to figure this out. Most lawyers appear not to be aware of the issue. This could invite mistakes and put the bar in a bad position.
- (2) Amend the civil procedure rule to alert the bar to this issue. The subcommittee is not sure how that would work.
- (3) Lobby the Office of Professional Responsibility for a rulemaking for when the current rule expires in March.

Judge Mello explained that notaries administer: (1) acknowledgements; and (2) oaths (or jurats). He suggested that acknowledgements are best left to the individual notary. As to oaths, prior to AO 49, a party or witness deposed out-of-state was sworn in by a reporter in that state. He questioned why a Vermont reporter would need to be a part of this process now.

Chair Keyes noted that Rule 28 distinguishes in-state deponents from out-of-state deponents. An out-of-state deponent must be sworn in under the laws of the state where the deposition is taken. V.R.C.P. 28(a)(2). However, the uniform act adopted by the Vermont legislature authorizes a Vermont notary, in Vermont, to swear in a person who is out-of-state and appearing remotely, so long as the notary complies with certain requirements. This has prompted reporters and notaries to contact Chair Keyes and the OPR seeking clarification.

Until the OPR rules governing notaries are amended, it may be premature for this Committee to amend the civil procedure rule. Ms. Spero added that the temporary rules, which expire in March, were implemented after the the passing of the Vermont statute, but with a contrary interpretation. Ms. Spero offered to suggest some form of communication with the OPR to obtain

clarification, and the Committee agreed to table the matter. This item is removed from our agenda for now.

B. Juror use of “devices” in Rules 79.2(b)(4), (c)(3), and (d)(5). Chair Keyes reported that this item could be removed from our agenda as any conflict with V.R.C.P. 79.2(d)(5) has been resolved by [AO 52 – Pilot Project for Remote Civil Jury Trials Amendment](#), promulgated on July 11, 2022, to underscore that prospective and seated jurors may use devices for remote trials notwithstanding the prohibition in V.R.C.P. 79.2(d)(5). He noted for the Committee’s information a question, perhaps impacting Rule 79.2, had arising in the LCJR Committee about the recording of remote proceedings in the context of a civil stalking case. Are there restrictions on the recording or use of images of virtual proceedings? The restrictions in Rule 79.2 and parallel rules in other divisions apply only to the physical courthouse and courtroom.

C. Other provisions? There being no suggestions of other provisions of expired AO 49 that could be made permanent, item #22-5 is removed from the agenda.

6. Suggested Amendments for Committee Consideration.

A. #22-6. Amend AO 39 to conform to current mediation practice, and amend V.R.C.P. 16.3 to conform to new Family Rule 18(d)(2). Proposal of Civil Division Oversight Committee.

[Administrative Order 39 – Alternative Dispute Resolution Civil Action](#)

[V.R.C.P. 16.3\(b\)\(3\)](#) - Stipulation for Mediation, promulgated December 13, 2021, effective February 14, 2022.

[V.R.F.P. 18\(d\)\(2\)](#) – Conduct of Mediation, promulgated April 18, 2022, effective June 20, 2022.

Ms. Badgewick updated the Committee on the Civil Oversight Committee’s request, in substance, that we: (1) conform V.R.C.P. 16.3 to be consistent with V.R.F.P. 8(d)(2); and (2) simplify the form Discovery/ADR Stipulation by limiting it to mediation. There was a separate request to update AO 39, governing the county mediation panels.

Ms. Badgewick recommended no change be made in V.R.C.P. 16.3. V.R.F.P. 18 differs in that it uses a “good cause” standard to excuse a party from attending; and that it leaves it to the mediator to determine the format of the mediation (remote or in-person). In discussion, committee members confirmed our original preference that mediators not be resolving disputes, and that the “good cause” distinction was not a significant problem. It was agreed to make no change in the rule.

The subcommittee undertook to further review questions about the mediation panel and consistency of the rules and simplification of the form.

B. #22-9. Amendment to provide that an answer to a complaint must repeat the allegation prior to the response. Suggestion of Lisa Shelkrot.

The Committee concluded that promulgation of a rule does not appear necessary at this time. Ms. Spero reported that no other states have formally adopted this practice, and therefore does not recommend promulgating such a rule. Judge Mello agreed with this recommendation, observing that this procedural change would impact pro se parties and Legal Aid templates. Ms.

Asay concurred. Mr. Koeninger added that it was interesting that even code-pleadings states like Illinois do not require the allegation be repeated in response pleadings.

C. #22-10. Amendment of V.R.A.P. 3(e) to provide that docketing statements are optional for appellees. Proposal of Solicitor General Eleanor Spottswood. Ms. Asay discussed her report and recommendation, as distributed September 8.



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The Committee's sense was that this proposal had merit, but could be better addressed when electronic filing procedures and other changes no longer required attention. The decision was made to revisit the proposal in a more comprehensive fashion in the next year or two.

6. Reports, news, and trailing agenda items

A. The Committee was updated with any news from members also serving on the [Civil Division Oversight Committee](#), the [Advisory Committee on the Rules for Electronic Filing](#), or the [Rules of Evidence Committee](#).

B. Implementation of new Rules 4 and 79.1. Amended Rule 4, effective February 14, 2022, requires an Answer form and a Notice of Appearance form be served with a Summons or a Request for Waiver of Summons. Court administrator forms reflect these changes.

[Instructions for filing a Complaint \(100-00055\) 07/2022.](#)

[Summons with Notice of Appearance \(100-00268\) 09/2022.](#)

[Notice of Lawsuit & Request for Waiver of Service of Summons \(100-00269\) 07/2022.](#)

[Instructions for Filing Answers and Counterclaims \(100-00056\) 07/2019.](#)

[Answer \(100-00051\) 07/2019.](#)

Amended Rule 79.1, effective September 6, requires self-represented litigants to affirm their consent to email service.

[Notice of Appearance for Self-Represented Party \(100-00265\) 09/2022.](#)

Chair Keyes updated the Committee that the reporter's note and rule summary for amended Rule 4 did not address the need for an answer form to be served with the summons. The issue with the forms on the Vermont Judiciary site has been addressed.

C. #22- Electronic transmission of jury questionnaires. [Civil Rule 47\(a\)\(2\), as amended](#) in April, 2021, provide that, "[a] record of the information provided [by a prospective juror] in response to a written questionnaire distributed pursuant to [Rule 27] shall be open to the parties to the proceeding." Criminal Rule 24(a)(2) was amended with identical language.

The Chair has received an inquiry whether a rule change was required to allow clerks to electronically transmit jury questionnaires to parties or attorneys, and the Chair has provisionally determined that the rules in their current form support electronic transmission. Chair Keyes reported his understanding, however, that attorneys and parties may only obtain paper copies of juror questionnaires until a back office issue is resolved.

D. “Update from the Rules Committee” CLE, presented at Vermont Trial Lawyers Association on October 7 at Basin Harbor. Ms. Badgewick reported that the CLE was extremely well received by the members. Ms. Spero suggested contacting the Vermont Bar Association and offering an update on an annual basis.

E. LCJR meeting of November 1, 2022. See Agenda #8. Chair Keyes reported that all the rules listed in item 8 had been promulgated rules at the time of the meeting and that the legislators had questions, but no vetoes. One of the questions, as noted above, (5B), had to do with the privacy of a stalking victim’s video conference testimony.

F. #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.

Chair Keyes proposed, and the Committee agreed, that this item be removed from the agenda.

G. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. Deferred at May 20 meeting.

Chair Keyes proposed, and the Committee agreed, that this item be removed from the agenda.

8. Status of recommended amendments.

A. #22-7. Recommended amendment of V.R.C.P 26(e). Sent out for comment on March 8, with comments due on May 9, 2022. Reviewed by LCJR on April 14, 2022. Sent to Supreme Court on June 2 as revised at May 20 meeting. Chair Keyes reported that the Order promulgating the amendment to V.R.C.P. 26(e) was issued, without objection from the LCJR, on July 11, 2022, effective September 12, 2022. [PROMULGATEDVRCP26\(e\)](#).

B. # 22-Recommended amendments to V.R.S.C.P. 6 and V.R.C.P. 80.6. Chair Keyes reported that the amendments to V.R.S.C.P. 6 (incorporating provisions regarding remote hearings for small claims actions and for judicial bureau proceedings), and the amendments to V.R.C.P. 80.6 (correcting statutory references and updating terminology) were promulgated, without objection, on September 13, 2022, effective October 1, 2022. [PROMULGATEDVRSCP6andVRCP80.6](#).

C. #22-2. Recommended amendments to V.R.C.P. 9.2 and V.R.C.P. 9.3. Chair Keyes reported that the amendments to V.C.R.P. 9.2 and V.R.C.P. 9.3 (special eviction and foreclosure proceedings) were promulgated, without objection, on September 13, 2022, effective October 1, 2022. [PROMULGATEDVRCP 9.2-9.3](#).

The court administrator has posted new eviction and foreclosure special forms:

[Declaration of Compliance CARES ACT \(100-00031\) 10/2022.](#)

[Declaration of Compliance with Vermont Homeowner Assistance Program \(100-00032\) 10/2022.](#)

[Notice to Homeowner about Vermont Homeowner Assistance Program \(VHAP\) \(100-00033\) 10/2022.](#)

D. Recommended amendments to V.R.A.P. 33.1 and V.R.A.P. 33.4. Chair Keyes reported that the Order promulgating V.R.A.P. 33.1, V.R.A.P. 33.4, and V.R.A.P. 9 (updating provisions for remote Supreme Court oral argument) was issued, without objection from the LCJR, on August 9, 2022, effective October 1, 2022. [PROMULGATEDVRAP 9 33.1 34.](#)

9. Other business

A. ##22 -Improving committee operations. Chair Keyes invited the Committee to brainstorm and entertain ideas of how to better organize meetings, communicate, and keep track of its the work. Among ideas discussed was a centralized file-sharing system. There was unanimous approval of the Chair's new practice of embedding files in the meeting agenda.

An annual report on the Committee's activities is due to the Supreme Court on the first Tuesday of October.

B. Announcements. Judge Mello announced that, after fifty years in the law, he had decided to retire effective December 30, making this his last meeting with the civil rules committee. He said that it had been his privilege to work alongside his colleagues and former Reporter Kinvin Wroth. Members congratulated Judge Mello and told him that he would be greatly missed. Chair Keyes shared his appreciation for the judge's valued perspectives and tremendous work ethic.

10. Date of next meetings.

The Committee will meet on January 20, 2023 at 9:00 a.m. and, unless rescheduled, on the first Friday of the months of March, May, June, September, and November.

There being no further business, the meeting was adjourned at 11:38 a.m.

Respectfully submitted,

Pamela A. Vesilind, Reporter