

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
September 11, 2020

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, Navah Spero, and Gregory Weimer. Also present were Hon. Harold Eaton, Supreme Court liaison; Assistant Attorney General Eleanor Spottswood, Chief of the Civil Division; and Professor Emeritus L. Kinvin Wroth, Reporter.

The Committee welcomed Hon. Robert Mello, newly appointed as a judicial member of the Committee, and Eleanor Spottswood, newly designated liaison from the Office of the Attorney General.

1. Minutes. The draft minutes of the meeting of June 26, 2020, were unanimously approved as previously circulated.

2. Action items

A. #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.

(1) The Committee considered Professor Wroth's September 10, 2020, draft of an amendment to V.R.C.P. 34(b) intended to address Representative LaLonde's suggestion at the August 3 meeting of the Legislative Committee on Judicial Rules that inspection of the actual documents be allowed for good cause. In discussion, Judge Mello suggested that the last sentence of the draft could be deleted as superfluous. On motion duly made and seconded, there being no further discussion, it was voted unanimously to delete the last sentence. On further motion duly made and seconded, it was voted unanimously to recommend the draft as so revised to the Supreme Court for promulgation, together with the previously proposed amendment to V.R.C.P. 26, as agreed on at the June 26 meeting.

(2) The Committee considered Professor Wroth's September 11 draft proposing an amendment of V.R.C.P. 7 and the abrogation of V.R.C.P. 78 as agreed at the June 26 meeting. Ms. McAndrew said that any amendment should clarify the difference between oral argument on motions and evidentiary hearings. In further discussion, it was noted that there was confusion regarding the applicability of the times in former V.R.C.P. 78 and the present draft V.R.C.P. 7 to motions under V.R.C.P. 56. Mr. Dumont and Professor Wroth agreed to provide alternate drafts of amendments to Rules 7 and 56 that would either provide all time periods in Rule 7, except for original Rule 56 filing times, or would provide independent time periods for all purposes in Rule 56, with an "except as otherwise provided" clause in Rule 7. They would also consider any problems with motion or hearing times in other rules.

B. #20-6. Use of "presiding judge" in Civil Rules. Professor Wroth reported that his initial survey of usage in the Civil Rules revealed both inconsistency in the use and meaning of "presiding judge" and the use of a variety of other terms, including "superior judge," "judge," and "court." He agreed to continue his survey and report with a recommendation at the next meeting.

C. #20-5. Requirement for current attorney and litigant addresses. The Committee considered Professor Wroth's drafts of proposed amendments to V.R.C.P. 11(a) and 79.1. It was agreed that in both rules, the phrase "e-mail and postal address" should be used throughout, and the requirements of notification of change of address to the Court Administrator, counsel and self-represented litigants should apply to attorneys and to self-represented litigants. Professor Wroth agreed to check the Electronic Filing Rules for consistency and to provide a new draft for the next meeting.

D. #20-2. Proposed amendment to conform V.R.C.P. 80.5(e) to amended 23 V.S.A. § 1203(k). The Committee considered Professor Wroth's draft of a proposed amendment that would substitute for the fee amount in the rule the current statutory fee of \$45.00 for a videotape of the offense and subsequent proceedings leading to license suspension. On motion duly made and seconded, there being no discussion, it was voted unanimously to propose that the amended rule be sent out for comment.

E. #20-9. 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>. Chairman Keyes reported that the subcommittee (Ms. Badgewick, Ms. Spero, and himself) had two charges. Initially, it was to address problems that were arising in the initial application of the E-filing Rules. It would then consider how best to incorporate relevant provisions of those Rules in the Civil Rules, noting that Minnesota provided one example. In discussion, it was noted that conformity worked two ways—the E-filing Rules also needed to conform to the Civil Rules. The Public/Access Rules also needed to be made consistent. Adequate provision needs to be made for larger documents—for example in PUC cases. Ms. Naveh urged Committee members to e-mail other comments to the subcommittee.

3. Items for discussion and possible action.

A. #19-4. V.R.C.P. 5, 79(a). Amendments promulgated December 19, 2019, effective March 1, 2020, to conform Civil and Appellate Rules to 2020 Vermont Rules for Electronic Filing. This item was referred to the subcommittee reporting under item 2.E.

B. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. Professor Wroth reported that Judge Pearson had submitted a draft promulgation order dated March 30, 2020, and had proposed that it be reviewed at length by the Committee. It was agreed that the draft would be on the agenda for the next meeting.

C. #14-1. Status of Appendix of Forms. Subcommittee (Mr. Avildsen, chair, Mr. Dumont, and Chief of Trial Court Operations Theresa Scott) to propose administrative order concerning cooperation regarding development and adoption of forms. This item was deferred to the next meeting.

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 considered Judge Toor's memorandum of July 6, 2020, proposing a new

provision requiring admission or denial of each fact asserted as undisputed by the moving party. In discussion, Judge Mello agreed with the need to address the problem and noted that there is a further problem about how to challenge facts that are undisputed but not material. Ms. McAndrew agreed to work with Judge Mello to prepare a new draft addressing this problem for the next meeting.

E. # 20-10. Reconsider previous action declining to amend V.R.C.P. 4(c) to allow service by anyone over 18. Request of Harry Ryan. The Committee considered the question whether to revisit the question of service by any person over 18. A similar proposal by Mr. Ryan had been rejected at the meeting of October 4, 2019, after review of an extensive survey of the background and terms of the current rule and the experience with private servers in New York. The Committee had concluded that service of summons and complaint as provided in V.R.C.P. 4 was appropriate for Vermont and was working well. It was agreed not to reconsider the matter.

F. #20-11. Consider amendment of V.R.C.P. 48 to provide for six-member juries. Request of Harry Ryan. The Committee considered Mr. Ryan's request to amend V.R.C.P. 48 to permit trial by a jury of six. A subcommittee of Mr. Dumont and Mr. Weimer reported that such a rule would be unconstitutional under Vermont Constitution, Chapter 1, Article 12. In discussion, it was noted that in current practice the judges routinely ask clients to consider a jury of less than 12. See also item 4.E. below. It was agreed to take no action on the proposal at this time. Mr. Dumont and Mr. Weimer agreed to serve as a subcommittee to explore ways to expedite civil trials.

4. Information items.

A. Report on AO 49 as amended through August 20, 2020. Mr. Avildsen reported that the amended AO 49 pleading requirements address some issues that the Legislature has not addressed. It will be important through the present moratorium. The CDC moratorium is too narrow for Vermont clients. Judge Mello noted that the moratorium puts pressure on landlords to meet the notice requirements. Vermont Legal Aid is taking steps to reduce evictions through use of \$25,000,000 in CARES Act funds appropriated by the Legislature, but AO 49 is necessary for this purpose because it makes relevant documents available.

B. #20-7, #19-11. Civil Division proposal to move credit card cases out of small claims court and provide form for credit card complaints. Proposed amendments to V.R.C.P. 9.1, 55(c)(7), and V.R.S.C.P. 2(a), 3, and 8(c) sent out for comment on August 18, with comments due on October 19, 2020. Chairman Keyes reported that he had not yet received any comments.

C. #19-3. Vermont Rules for Public Access to Court Records. Abrogated and replaced by order of May 1, effective July 1, 2019. Professor Wroth reported that no action had been taken on Judge Toor's October 1, 2019, memorandum raising issues concerning access to *in camera*, sealed, and *ex parte* filings. Judge Mello and Ms. Damone noted specific problems that had arisen with these matters. Judge Mello agreed to contact Judge Toor about the issues. Professor Wroth will send to him her memorandum and references to related meetings of the Public Access Rules Committee.

D. #19-1. Reconciliation of juror qualifications rules with V.R.C.P. 47(a) and V.R.Cr.P. 24(a). Chairman Keyes and Professor Wroth reported that The Civil Rules Committee's proposed changes to the Juror Qualification Rules had been sent to the Public Access Rules Committee, and that Hon. Walter Morris, Reporter to that Committee, had advised them that most of the proposed changes were included in a proposed amendment order that would be presented to the Supreme Court on September 14 with a request that it be sent out for comment. Suggested changes not included in the proposed order could be considered during the comment period.

E. Effect of Court's Long Term Planning Committee: Ramp-up Report, My 13, 2020, Chairman Keyes reported that there was no action to be reported concerning the report, <https://www.vermontjudiciary.org/news/vermont-judiciary-issues-blueprint-expansion-court-operations>. He noted that the report, at p. 12, recommended that that judges, especially in civil cases, should ask the parties to consider trial by a jury smaller than 12. See also item 3.F above.

F. #19-2. V.R.C.P 62(a)(3)(A). Orders for possession. Promulgated February 10, effective April 13, 2020. Professor Wroth reported that at its meeting on August 3, 2020, the Legislative Committee on Judicial Rules had no objection to the amendment. .

G. #19-6. Small Claims Judgments. Amendments to V.R.S.C.P. 3, 7, 9, 10, promulgated February 10, effective April 13, 2020. Professor Wroth reported that at its meeting on August 3, 2020, the Legislative Committee on Judicial Rules had no objection to the amendments

H. Amendments to V.R.C.P. 40(e)4 and V.R.A.P. 27.1(b)(4), updating cross references to reflect promulgation of the Vermont Code of Judicial Conduct 2019, promulgated February 10, effective April 13, 2020. Professor Wroth reported that these amendments were not considered at the August 3, 2020, meeting of the Legislative Committee on Judicial Rules., presumably because they involved the Vermont Code of Judicial Conduct.

I. Amendments to V.R.C.P. 3.1 and V.R.A.P. 24, recommended to the Court for promulgation on May 22, 2020, promulgated June 12, effective August 18, 2020. Professor Wroth reported that at its meeting on August 3, 2020, the Legislative Committee on Judicial Rules had no objection to the amendments.

5. Other business. There was no other business.

6. Next meeting. It was agreed that the next meeting of the Committee would be held virtually at 9:00 a.m., Friday, November 6, 2020.

There being no further business, the meeting was adjourned at 11:40 a.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter