

APPROVED

VERMONT SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE Minutes of Meeting June 11, 2021

The meeting was called to order at 9:00 a.m. virtually on Teams by Allan R. Keyes, Chair, with the following Committee members present: Bonnie Badgewick, Eileen Blackwood, James Dumont, Karen McAndrew (by telephone), Hon. Robert Mello, Hon. Dennis R. Pearson, and Navah Spero.

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.

Chairman Keyes made two announcements:

(1) Hon. Dennis Pearson had resigned from the Committee in view of his other commitments. Those members present honored Judge Pearson's years of service and many contributions to the Committee's work with a rising vote of thanks. Judge Pearson stated that he would continue to be available to consult on pending matters with which he had been involved.

(2) The Supreme Court had sought the Committee's opinion on a recent request that the Court establish a separate Advisory Committee on Appellate Rules. Committee members suggested that appellate practice affected all members of the bar so that the broadly representative Civil Rules Committee, rather than a committee composed of appellate practitioners, continued to be appropriate for oversight of the Appellate Rules. Chairman Keyes agreed to transmit this view to the Court.

1. Minutes. The draft minutes of the meeting of May 21, 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 on behalf of the subcommittee (Ms. Spero and herself) reported that their work was still at a largely conceptual stage and that they sought the Committee's guidance on their preliminary conclusions rather than approval of specific language. Their basic approach was to apportion 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.

The Committee agreed to go through the subcommittee's present drafts rule by rule, offering comments and asking questions. In subsequent discussion, the following points were raised:

- Draft V.R.C.P. 1.1 might more appropriately be included in V.R.C.P. 3(a).

- The definitions in V.R.E.F. 2 would be incorporated in V.R.C.P. 83, probably with further revision to be finalized when other amendments are complete, including definitions in the Appellate Rules.
- V.R.E.F. 3 would be incorporated in V.R.C.P. 5.
- V.R.E.F. 4 would be incorporated in V.R.C.P. 11(a) and an administrative order.
- The provision of V.R.E.F. 4(b)(1) regarding notice of filing, now in draft V.R.C.P. 11(a)(1)(C)(i) could be incorporated in V.R.C.P. 5.
- Most of V.R.E.F. 5 would be incorporated in an administrative order, the remainder in V.R.C.P. 11.
- The amended Rules should avoid excessive clerk discretion to reject filings (as in the Second Circuit).
- The subcommittee will explore the treatment of electronic issues in other states

For the next meeting, the subcommittee will present a revised draft of amendments to V.R.C.P. 1-5, and discussion will continue on the remaining items in their report.

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

Item 1. Remote Jury Trials. This item was deferred pending Supreme Court task force action.

Item 2. E-mail Filing. The Committee considered revised draft 2 of Ms. Spero’s proposed amendments to V.R.C.P. 5, dated June 7, 2021.

Rule 5(b)(2). After discussion, the changes shown in bold were agreed upon:

(2) Service made by or upon a self-represented party **or an attorney** who is not registered in the electronic filing system shall be made by e-mail. The document(s) to be served shall be sent as an attachment to **the all** e-mail addresses on record for the other parties in the case. The subject line of the e-mail must, at a minimum, indicate the unit and division where the action is pending and the docket number. Each attorney or self-represented party may provide every other party with no more than three e-mail addresses to be used for service under this rule. All attorneys and parties must immediately notify other attorneys and parties of any e-mail address change during the pendency of the action or proceeding. Service by **electronic means e-mail** is complete upon transmission, provided that such service is not effective if the party making service learns that the attempted service did not reach the party to be served.

Rule 5(b)(3). After discussion, it was agreed not to add “or an attorney” after “self-represented party” in the first line.

Rule 5(b)(4). After discussion, it was agreed to delete former paragraphs (4) and (5) and to revise Rule 5(b)(1) as follows to include relevant portions of paragraphs (4) and (5).

(1) Whenever under Rule 5(a) or 77(d) service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. For units and divisions in which the Court Administrator has directed that electronic filing be implemented under 2020 Vermont Rule for Electronic Filing 1(d):

(A) If the 2020 Vermont Rules of Electronic Filing require a method of service for the document being filed, the filer must use that method of service. If the 2020 Vermont Rules of Electronic Filing do not require a method of service for the document being filed, such as a discovery document, the filer may use a method of service described below in subparagraph (b)(1)-(3).

(B) Service made by one attorney upon another attorney or upon a self-represented party who is registered as an electronic filer in the electronic filing system shall be made by electronic means except as provided in paragraphs (2) and (3) below by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney or party's last known address or, if no address is known, by leaving it with the clerk of the court.

(C) Service by electronic means is complete upon transmission by the Court's electronic file and serve system, provided that such service is not effective if the party making service learns that the attempted service did not reach the party to be served.

It was agreed to circulate a new draft to the Committee by e-mail as soon as possible in order to send it to the Court in time to be effective by the August 17 date of the Supreme Court's transition to Odyssey.

Item 3. Remote Administration of Oaths. The Committee considered revised draft 2 of Ms. Spero's proposed amendment adding V.R.C.P. 11(e), dated June 7, 2021. In discussion, it was agreed that there be a comma after "perjury" in the indented statement in paragraph (1). After consideration of the rationale for the list of exceptions in paragraph (3) and the broader provisions of 28 U.S.C. § 1746, on motion duly made and seconded, there being no further discussion, it was voted unanimously to place a period after "statute" in paragraph (3), deleting the list of exceptions.

Item 4. Eviction Proceedings and Foreclosure Proceedings. This item was deferred in the necessary absence of Mr. Avildsen.

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. Status of review by joint subcommittee (Chairman Keyes, Ms. Badgewick, Mr. Dumont; Therese Corsones, Hon. Thomas Durkin, Hon. John Dooley). Chairman Keyes reported that the proposed amendment had been sent out for comment on May 24, with comments due by July 2, 2021, that the subcommittee was continuing to meet and expected to have its final report to the Rules committees before the end of the comment period to be reviewed by e-mail exchanges, and that the meeting scheduled for July 7 would be held only if issues remained unresolved by e-mail.

H. #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 revised draft amendments to V.R.C.P. 56 dated June 10, 2021, intended to separate out any statement of often immaterial additional facts, to discourage the not-

uncommon practice of throwing into a reply a host of additional facts, and to persuade the trial court that it is too confusing to grant summary judgment. After brief discussion, on motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend to the Court that the draft be sent for comment.

In view of the hour, the remainder of the agenda was deferred for consideration at 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 on July 7, 2021, if needed to resolve issues arising under agenda item 2.C. The next regular meeting would be held at 9:00 a.m., Friday, July 16, 2021.

There being no further business, the meeting was adjourned at 12:10 p.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter