

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
September 17, 2021**

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, Hon. David Barra, Eileen Blackwood, James Dumont, Karen McAndrew, Navah Spero, and Gregory Weimer. Also present were Hon. Harold Eaton, Supreme Court liaison. and Professor Emeritus L. Kinvin Wroth, Reporter.

Chairman Keyes welcomed Grace Pazdan, Vermont Legal Aid (VLA)), and Chris D’Elia and Susan Steckel, Vermont Bankers Association (VBA); who were present for the discussion of item 2A, and Professor Pamela Vesilind, Vermont Law School, who was present as an observer.

1. Minutes. The draft minutes of the meeting of August 20, 2021, were unanimously approved as previously circulated.

2. Action items

A. Emergency Foreclosure Pleading Rule. At the request of the Vermont Supreme Court, the Committee considered an amendment of A.O. 49 and adoption of a related form requested by VLA to require a mortgage lender to attest compliance with requirements adopted by the federal Bureau of Consumer Financial Protection (CFPB) in an amendment to Regulation X, 12 CFR § 1021.41, intended to assure that a borrower has a meaningful opportunity to cure a delinquency through loss mitigation before the commencement of foreclosure proceedings that are filed between August 31, and December 21, 2021. Chairman Keyes reported that, at his request, Ms. Pazdan, Mr. D’Elia, and Ms. Steckel had met in an effort to narrow the issues. As a result, disagreement between them remained on only three points. The Committee proceeded to consider those points

(1) VLA proposed that subsection (c) be included in the amended order, providing that dismissal without prejudice would be warranted where plaintiff failed to comply with the rule. The defendant would then not be subject to attorneys’ fees, court costs, or other foreclosure-related fees and costs associated with the action.

In discussion, questions were raised about the need for section (c) in light of the trial court’s inherent discretion as to remedies, the possibility that (c) might be revised to include discretion, or that dismissal could be deferred for a short grace period after compliance was due. It was noted that as an amendment to A.O. 49, rather than to the pleading provisions of the Civil Rules, the rule would be of short duration, subject to periodic reconsideration similar to an emergency rule. A motion to reject subsection (c) was seconded but withdrawn. On motion duly made and seconded, there being no further discussion, it was voted, seven in favor, one opposed, to adopt subsection (c) in the following form:

(c) The action may be subject to dismissal without prejudice for plaintiff’s failure to comply with sections (a) or (b) of this rule.

(2) VLA proposed that plaintiff's certification of compliance with the rule should be filed on a uniform form to promote consistency and clarity for courts attempting to determine compliance. VLA opposed allowing plaintiffs to create their own substantially similar forms as proposed by the VBA.

(3) VLA also proposed that certification be simplified by providing in the emergency pleading rule that it applies only to foreclosures of primary residences where payment default is alleged and thus limiting the number of check boxes on the form. If a uniform form is required, VBA would prefer to spell out each of the exemptions to the CFPB rule as check boxes on the certification, including for foreclosures of non-primary residences and any foreclosure not based on a claim of payment default.

In Committee discussion of these options, it was noted that a uniform form was necessary because of the CFPB guidelines and the need to make compliance with them clear. It was also agreed that, if all specific exemptions were listed, a catch-all "other" clause was not needed because the other exemptions to be listed followed the CFPB rule, which was unlikely to be extended beyond its present end date of December 31, 2021. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend use of a single required form including sections (a) and (b) and the VBA list of exemptions set forth with numbered check boxes.

It was agreed to ask the Court to extend A.O.49 to December 31, 2021, to accommodate incorporation of the recommendation as adopted. Chairman Keyes and Professor Wroth will prepare and send a draft amendment and letter to the Committee for electronic approval before submission to the Court.

B. #21-2, Response to Supreme Court's memorandum of May 12, 2021, and the June 25, 2021, amendment of A0 49.

Item 1. Remote mediation. The Committee considered the proposed amendment of V.R.C.P. 16.3(b), providing for remote mediation, sent out for comment on August 3, with comments due on September 3, 2021, together with Ms. Spero's memorandum of September 10, 2021, proposing that the standard for the court to order remote mediation should be "in its discretion," rather than "for good cause." The Committee also considered the comment from mediator Greg Clayton that the Reporter's Notes should indicate that the stipulation for remote mediation is not part of the "discovery" initial stipulation naming the mediator and setting a mediation date. Thus, the parties may informally agree to remote mediation at any time. It was also noted that Rules 16.2 and 16.3 are inconsistent in some respects. On motion duly made and seconded, there being no further discussion, it was voted unanimously to incorporate Ms. Spero's language and the various Reporter's Notes suggestions in a revised draft to be considered at the next meeting for recommendation for promulgation.

Item 2. Remote Jury Trials. Special Advisory Committee on Remote Hearings. Mr. Dumont reported that the Special Committee continued to meet but that no decisions had been made.

Item 3. Electronic Service and Filing and Remote Administration of Oaths. Proposed amendments to V.R.C.P. 5 and 11 sent out for comment on September 1 with comments due on October 1, 2021. Chairman Keyes reported that the Committee has not seen the final version sent out for comment, which reflected discussions by Professor Wroth and himself and Emily Wetherell. He asked that Committee members review the comment draft before discussion of it at the next meeting. Related issues that needed to be considered included security aspects of PDF

documents, the treatment of consent, clarification that email filing can occur up until midnight, and the issue of clerk rejection of non-conforming filings.

Item 4. Eviction Proceedings and Foreclosure Proceedings. See item 2.A above.

Item 5. September 1 amendments to AO 49. Professor Wroth reported that in its order of September 1, 2021, the Supreme Court had extended the applicability of AO 49 to November 1, 2021, provided that all evidentiary and non-evidentiary were, with certain exceptions, were to be held remotely in “limited entry” court houses as defined by the Court Administrator, amended email filing and service rules in non-electronic filing cases to extend them to the Supreme Court, and amended provisions concerning public access to court buildings and court records.

Item 6. Committee consideration of other AO 49 provisions that might be made permanent. No Committee concerns were raised.

C. #21-3. V.R.A.P. 25(a)(2)(B). Clarification of inconsistent filing deadlines and related procedures. The Committee considered Mr. Weimer’s memorandum of September 15, 2021, recommending the abrogation of V.R.A.P. 25(a)(2)(B) concerning timeliness of briefs and printed cases mailed or sent by carrier as rendered obsolete by the initiation of electronic filing in the Supreme Court. On motion duly made and seconded, there being no discussion, it was voted unanimously to adopt the proposal. Professor Wroth agreed to draft a proposed promulgation order to send forward.

D. #20-13. Proposed amendments of V.R.C.P. 62, 77, regarding service of default judgments. Mr. Dumont will present a further revised draft at the next meeting.

E. #21-1. Blondin v. Milton Town School District, 2021 VT 2, 13, n.10. The Committee considered Professor Wroth’s new draft of an amendment to V.R.C.P. 50(b), limiting the post-verdict motion requirement to cases involving sufficiency of the evidence. After brief discussion, it was moved and seconded to thank the Court for the opportunity to consider the issues but decline to recommend a change in the rule. The motion failed by a vote of three in favor, five opposed. There being no further discussion, on motion duly made and seconded, it was voted, eight in favor, one opposed, to recommend that the Court send the proposed rule as drafted out for comment.

F. V.R.S.C.P. 7 and 8. The Committee considered the proposal of the Civil Division Oversight Committee to amend Rules 7 and 8 of the Vermont Rules of Small Claims Procedure to provide a simpler process. After discussion, on motion duly made and seconded, it was voted unanimously to ask Professor Wroth to review the language of the proposal and prepare Reporter’s Notes for consideration at the next meeting.

G. V.R.C.P. 79.1. The Committee considered the proposal of the Civil Division Oversight Committee to amend V.R.C.P. 79.1 to clarify that an out-of-state lawyer requesting a licensing card from the Court Administrator must provide an affidavit concerning admission records. In discussion, Committee members raised questions about the utility and clarity of the proposal. Mr. Avildsen and Mr. Weimer agreed to review and report on the proposal at the next meeting.

3. Information items.

A. #20-9A. Elimination of papers served electronically from the 3-day extension of time provided by V.R.C.P. 6(e) and V.R.A.P. 26(c). Professor Wroth reported that a proposed promulgation order abrogating V.R.C.P. 6(e) and V.R.A.P. 26(c) and containing amendments to V.R.A.P. 26(d) and 31(a) had been sent out for comment on September 16, with comments due on November 15, 2021.

B. #19-10. Amendments to V.R.C. P. 7 and 56 and abrogation of V.R.C.P. 78. Promulgated June 7, effective August 9, 2021. Professor Wroth reported that a proposed promulgation order correcting references to former V.R.C.P. 78 in V.R.C.P. 43 and 54 had been sent to the Court and the Family Rules Committee on September 2, and to Legislative Counsel on September 3, 2021, and sent out for comment on September 16, with comments due on October 13, 2021.

C. #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. Ms. Badgewick and Ms. Spero reported that they expected to present an assessment of their proposed amendments at the October meeting.

D. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. Professor Wroth reported that Judge Pearson and he hoped to present a consolidated draft at the next meeting.

E. Status of Court's Long Term Planning Committee: Ramp-up Report, May 13, 2020. Justice Eaton reported that progress on other current and long-range initiatives had stalled action on this effort. It was agreed to drop this item from the agenda.

4. Other business. There was no other business

5. Next meeting. Justice Eaton reported that the Chief Justice had convened a meeting of the entire Judiciary for October 22, 2021, the previously scheduled date of the Committee's next meeting. After discussion of alternate dates, it was agreed to hold the next meeting of the Committee virtually at 9:00 a.m., October 29, 2021.

There being no further business, the meeting was adjourned at 11:50 a.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter