

APPROVED

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
October 29, 2021

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: Eric Avildsen, Bonnie Badgewick, Hon. David Barra, Eileen Blackwood, James Dumont, Hon. Robert Mello. and Navah Spero. Also present were Hon. Harold Eaton, Supreme Court liaison, and Professor Emeritus L. Kinvin Wroth, Reporter.

Chairman Keyes welcomed Hon. Mary Teachout, who was present for the discussion of item 2A, and Emily Wetherell, Supreme Court Deputy Clerk and Staff Attorney, who was present for the discussion of item 2B.

1. Minutes. The draft minutes of the meeting of September 17, 2021, were unanimously approved as previously circulated.

2. Action items.

A. Amendment of A.O. 49, § 21. Professor Wroth called the Committee's attention to his October 28, 2021, alternative drafts of an amendment adding AO49, § 21.d to provide a process for assisting landlords and tenants to apply for Vermont Emergency Rental Assistance (VERAP) funds. The amendment was originally proposed by Vermont Legal Aid (VLA) and recommended by the Committee in July but not adopted by the Supreme Court. A further draft was proposed by a group of trial judges in October. The most recent drafts of the two proposals agreed on basic provisions, but the VLA proposal contained the following additional sentence: "If a tenant applies for VERAP, the court will not enter judgment for rent escrow or possession until VERAP has made a decision on the tenant's application."

Judge Teachout presented the views of the judges' group on the proposals: At the time of the original proposal, trial judges and VLA were providing informal information to tenants about VERAP funds and encouraging settlement of rent escrow disputes. Currently, however, cases seeking eviction as relief were being filed, and there was no established method of notifying the parties of the availability of VERAP funds. The agreed-on language of both the VLA and judges' proposals provide a means of giving notice of the availability of VERAP funding and the time to apply for it. The judges have two problems with VLA's additional sentence, however: As a practical matter, the trial court has no way of knowing when the VERAP decision is made. There is also a legal issue: The phrase "will not enter judgment" in the VLA sentence may be contrary to statute and thus could create issues that might lead to litigation. In response to a question, Judge Teachout noted that AO 49 § 21a.- c., as previously adopted, continued to be necessary because they related to the federal CARES Act, which was still in effect.

Judge Mello, though he had not been part of the judges' group that had formulated the proposal, agreed with its provisions. He had originally also favored the VLA language but now recognized the legal obstacles referred to by Judge Teachout. He proposed instead adoption of a provision giving the court discretion to adjust the timing of entering judgment for rent escrow or possession in light of circumstances pertaining to the VERAP application. Mr. Dumont then suggested that the exercise of discretion was now prohibited by statute, but that granting discretion to judges was a procedural matter that the Supreme Court could address through its rulemaking power with an amendment to AO 49, § 21.

After discussion, there was general agreement that an addition to the agreed-upon language for § 21d. in the following terms would be appropriate to achieve that goal:

When sufficient evidence has been submitted that the tenant has applied for VERAP funds, the court, in its discretion, may take any action that it deems appropriate in determining the fashioning of a rent escrow order or writ of possession, including the timing and amount of payment, the timing of issuance of a rent escrow order, or the timing of issuance of a writ of possession.

There being no further discussion, on motion duly made and seconded, it was voted unanimously to recommend to the Supreme Court an amendment of AO 49 that would explicitly give the trial court discretion in addressing delays in VERAP funding in terms to be specified in the text of the amendment.

Professor Wroth agreed to circulate a draft order, including Appendix D as required by the earlier agreed language and an Explanatory Note, to the Committee for comment before transmitting it to the Supreme Court. Judges Teachout and Mello were specifically asked to comment on the draft, though comments of others would be welcomed.

B. Electronic Service and Filing and Remote Administration of Oaths. Professor Wroth reported that proposed amendments to V.R.C.P. 5 and 11 had been sent out for comment on September 1, with comments due on October 1, 2021. Chairman Keyes reported that the amendments had been reviewed by the Legislative Committee on Judicial Rules (LCJR).on October 21, 2021. The only comment on Rule 5 was a suggestion that the language be simplified for the benefit of self-represented litigants.

Chairman Keyes then proposed for consideration number of suggestions for revision resulting from his continuing review of the issues.

V.R.C.P. 5(e)(4)(A). The proposed rule provides

(A) The filing must be sent as an attachment to the email account for the unit where the filing will be made. The attachment must be a PDF or other readily accessible document type.

In discussion, it was noted that related references in the E-filing and Appellate rules were limited to PDF and that “other readily accessible document type” was ambiguous and vague. Alternatives considered included other formats approved by the court administrator or the court. On motion duly made and seconded, there being no further discussion, it was voted, 5 in favor, 2 opposed, to recommend deletion of “or other readily accessible document type” from proposed V.R.C.P. 5(e)(4)(A).

V.R.C.P. 5(e)(4). It was agreed that proposed V.R.C.P. 5(e)(4) should be revised to read as follows:

(4) *Standards for Email Filing*. Any document filed by email must conform to the following:

(A) The filing must be sent as an attachment to the email account for the ~~unit~~ court where the filing will be made.

(B) The attachment must be a PDF ~~or other readily accessible document type~~.

(C) The subject line must indicate the ~~division~~ court where the document or documents are being filed and the case docket number.

(D) A signature block containing the filer's typed-in name preceded by "/s/," or an electronic facsimile of the filer's signature, a scanned copy of it, or another form of electronic signature as defined in 9 V.S.A. § 271(9), will serve as a party's signature on pleadings, motions, and other documents that must be filed with a signature.

Rule 5(e)(5). The proposed rule provides

(35) Timeliness. Filing by mail or commercial carrier shall not be timely unless the material filed is received within the time fixed for filing. Filing by email is complete upon transmission unless the party making the filing learns that the attempted filing did not reach the court. Filing with a judge may be accomplished by any method permitted by the judge. The time of filing for an electronic filing is as specified in 2020 V.R.E.F. 5(c).

In an October 27, 2021 email, Chairman Keyes proposed that it be revised to read

(5) Timeliness. The time of filing for an electronic filing is as specified in 2020 V.R.E.F. 5(c). Filing by mail or commercial carrier is not timely unless received by the clerk within the time fixed for filing. The time of filing with a judge is as noted by the judge. Filing by email can be made at any time on any day, and -- unless the party making the filing learns that the attempted filing did not reach the court --, is timely filed upon a date if it is transmitted prior to midnight on that date.

In discussion, questions were raised about assuring consistency regarding the timeliness and effectiveness of e-mail filing in proposed V.R.C.P. 5(e), V.R.C.P. 6(e), and planned amendments to V.R.A.P. 25. In view of the time, it was agreed to refer these questions to a subcommittee consisting of Ms. Badgewick, Mr. Dumont, and Chairman Keyes, to be assisted as necessary by Ms. Wetherell, and to report at the next meeting.

3. Remainder of agenda. Consideration of the remaining items on the agenda was deferred until the next meeting.

4. Next meeting. It was agreed to hold the next meeting of the Committee virtually at 9:00 a.m., on Friday, November 19, 2021.

There being no further business, the meeting was adjourned at 12:00 noon.

Respectfully submitted,

L. Kinvin Wroth
Reporter