

**VERMONT SUPREME COURT**  
**ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE**  
**Minutes of Meeting**  
**January 7, 2022**

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: Eric Avildsen, Hon. David Barra, Eileen Blackwood, Bonnie Badgewick, Anne Damone, James Dumont, Karen McAndrew, Hon. Robert Mello, Navah Spero, and Gregory Weimer. Also present were Emily Wetherell, Deputy Clerk of the Supreme Court, and Professor Emeritus L. Kinvin Wroth, Reporter.

**1. Minutes.** The draft minutes of the meeting of November 19, 2021, as corrected, were unanimously approved.

**2. Action items**

2.A. V.R.C.P. 79.1(e). Civil Division Oversight Committee amendment proposal regarding out-of-state lawyers. The Committee considered Mr. Weimer's draft amendment to V.R.C.P. 79.1(e) circulated at the meeting. The draft required admission of an out-of-state lawyer in a particular action on motion of an actively associated Vermont lawyer accompanied by the pro hac vice licensing card issued by the Court Administrator. The present authority of the trial court to revoke the admission for good cause was retained. Chairman Keyes noted that the Oversight Committee proposal required an affidavit of the non-resident lawyer attesting to admission and current good standing in the state of record and any past disciplinary actions—a practice that some judges were presently following. A question was raised whether the motion is based on the need for out-of-state counsel or the qualifications of the particular lawyer. On motion duly made and seconded, there being no further discussion, it was voted unanimously to adopt Mr. Weimer's draft, subject to review at the next meeting with Reporter's Notes and Chairman Keyes' report of consultation with the Oversight Committee on its draft.

3.D. Proposed order amending V.R.C.P. 5, 6(a)(4), 29, and 79.1. Electronic Service and Filing, sent out for comment on December 13, 2021, with comments due on February 14, 2022. Discussion of further amendments of V.R.A.P. 25(a), including November 19 agenda Item 21-3B (as renumbered)—deletion of V.R.A.P. 25(a)(2)(B).

At Chairman Keyes' request, the Committee considered agenda item 3.D. out of order in order to take advantage of Ms. Wetherell's presence. Ms. Wetherell explained that she had simplified her proposed amendments of V.R.A.P. 25(a) by incorporating in it by reference the email filing provisions of the proposed amendments of V.R.C.P. 5 currently out for public comment, with comments due on February 14, 2022. The amendments would also delete V.R.A.P. 25(a)(2)(B) as proposed by the Committee at its November 19 meeting and sent to the Supreme Court on September 23. Committee members expressed concern for the effect of extensive incorporation by reference on self-represented litigants (SRLs) but agreed that it was permissible in a proposed draft being sent out for comment. On motion duly made and seconded, there being no further discussion, it was voted unanimously to propose to the Court that the present draft amendments of V.R.A.P. 25(a) be sent out for comment with comments due on February 14 to coincide with the date for the proposed amendments of V.R.C.P. 5 et al. that would be incorporated.

The Committee then considered the proposed order amending V.R.C.P. 5, 6(a)(4), 29, and 79.1.

Judge Toor, in a December 23 comment, had questioned the provision in proposed V.R.C.P. 5(e)(3) that would allow filing by an “email addressed to the clerk,” which she felt was ambiguous and could lead to harmful docketing delays. Ms. Wetherell suggested that the problem was one primarily affecting SRLs, and that there are general email inboxes for each county. Ms. Damone confirmed that those boxes are checked throughout the day and that no problems have surfaced. Ms. Wetherell suggested that inclusion on the Judiciary website of a chart showing the appropriate email addresses would remedy any problem going forward.

At Chairman Keyes’ request, Ms. Badgewick, for the Rule 5 subcommittee, provided a general overview of the filing changes in the proposed amendments of V.R.C.P. 5 et al., which, she noted, are intended to simplify the requirements for various manners of service. The Rule 5 amendments are the core of the proposal. The amendments to Rules 6, 29, and 79.1 are intended to conform their provisions regarding filing times, discovery service, and appearances by self-represented litigants. The basic change is that attorney filing is now through the Odyssey File and Serve system and will now occur automatically without staff review. The provisions will eventually have to conform to changes resulting from the Committee’s parallel project to combine the resenting E-filing rules with the Civil and other procedural rules of court (agenda item 2.D. below). The continued utility of the provision for leaving with the clerk—now limited to a case where no valid address of any kind is known—was questioned. Judge Toor’s comment that it should be deleted because it was rarely used and did not provide notice to the affected party was noted. Ms. Damone agreed to survey the clerks on use of the practice, which had been for the clerks to serve such papers on other known parties. The subcommittee will consider the question in its review of comments after February 14, including possible input from the Family Rules Committee.

2.D. #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. Chairman Keyes reported that he had referred the draft report of the subcommittee (Ms. Badgewick, Ms. Spero, and himself) to Justice Dooley and Judge Morris (Criminal Rules Reporter) for comment. Ms. Wetherell agreed to follow up on that request. Ms. Badgewick noted that, ultimately, conforming changes in the Criminal and Probate Rules would be necessary.

2.E. #20-9A. Order eliminating 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) and amending V.R.A.P. 26(d)(1) and 31(a). Recommended for promulgation at the meeting of November 19, 2021. Chairman Keyes noted that a proposed parallel Criminal Rules amendment would be presented to the Court on January 10 to be sent out for comment. Promulgation of the recommended Civil Rules order would be deferred until both could be adopted simultaneously.

At this point, Ms. Wetherell left the meeting.

2.C. #21-1. Proposed amendment to V.R.C.P. 50(b) (See *Blondin v. Milton Town School District*, 2021 VT 2, 13, n.10). Sent out for comment on October 15, with comments due on December 15, 2021. The Committee considered Judge Toor’s comment that the language making renewal of a Rule 50(b) motion necessary “that raises a question of the sufficiency of the evidence” was confusing, and that it would be preferable to say that renewal is not necessary “if the issue is a pure question of law.” Members of the Committee suggested that regardless of the language of the rule, the careful lawyer would renew the motion. Mr. Dumont noted that the Vermont Supreme Court would reach a question of law on appeal even if it had not been briefed if the Court thought that the question was important, citing

*In re Handy v. Town of Shelburne*, 171 Vt. 336, 343, 764 A.2d 1226, 2234 (2000) (Dooley, J.). He suggested that the Rule 50(b) amendment is intended to provide the trial court the same flexibility that the Supreme Court exercises. In discussion, alternative amendments suggested included incorporating an exception for the trial court's discretion in Rule 50(b), applying the approach of V.R.C.P. 51(b) for objections to the jury charge, or expanding the flexibility contained in V.R.A.P. 2 or 26(b) for departing from the Rules. Ms. McAndrew agreed to explore the question further and report at the next meeting. Professor Wroth agreed to send her a summary of previous Committee action on the issue.

2.F. #22-1. Proposed amendment to V.R.C.P. 26(e). The Committee considered Mr. Dumont's draft proposed amendment of V.R.C.P. 26(e) extending the duty to supplement responses to depositions as provided in Federal Rule 26(e). He agreed to prepare a formal proposed draft with Reporter's Notes for the next meeting, with the assistance of Ms. Blackwood. Chairman Keyes noted the need to examine other Rule provisions that may be affected.

2.B. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. The Committee considered Professor Wroth's January email proposing action on this item and attaching a clean draft of Judge Pierson's 2020 proposed amendments and 2017 background memorandum. Chairman Keyes and Mr. Avildsen agreed to review the draft and memo, discuss it with Judge Toor as Civil Division Oversight Committee chair, and report at the next meeting on further steps.

2.G. #22-2. V.R.C.P. 80.6. Correction of cross-references. Chairman Keyes will review the statutory issues and consult Judge Kalfus of the Judicial Bureau concerning them.

2.H. #22-3. Proposed addition to AO 49 re homeowner foreclosure assistance. The Committee considered the Vermont Bankers Association (VTBA) proposed amendment of AO 49 to address a forthcoming Vermont Housing Finance Agency homeowner mortgage assistance program. Chairman Keyes informed the Committee that he had just received a copy of a similar proposal that Vermont Legal Aid had sent to the Civil Division Oversight Committee and that the Oversight Committee had asked to consult on the matter. The Supreme Court will address the issues at its administrative meeting on January 10 and determine whether the matter should initially be reviewed by the Rules Committee or the Oversight Committee.

### **3. Proposed rules sent out for comment.**

The following proposed rules were sent out for comment on December 13, 2021, with comments due on February 14, 2022.

A. #20-13. Proposed amendments of V.R.C.P. 55, 62, regarding service of default judgments. Chairman Keyes reported that he had received a comment on this proposal. Mr. Dumont agreed to review the comment and report at the next meeting.

B. V.R.S.C.P. 7 and 8. Civil Division Oversight Committee amendment proposal. Chairman Keyes reported that no comments had yet been received.

C. #20-11. Methods of expediting civil trials. Proposed amendment of V.R.C.P. 68 allowing either party to serve an offer of judgment. Chairman Keyes reported that one comment in support of the rule had been received in December.

D. Proposed order amending V.R.C.P. 5, 6(a)(4), 29, and 79.1. Electronic Service and Filing. Discussion of further amendments of V.R.A.P. 25, including November 19 agenda 1tem 21-3B (as renumbered)—deletion of V.R.A.P. 25(a)(2)(B). See discussion following agenda item 2.A. above.

#### **4. Promulgated Rules**

Professor Wroth reported that the following Rules had been promulgated December 13, 2021, effective February 14, 2022:

A. #21-2(1). Remote Mediation. Amendment of V.R.C.P. 16.3(b).

B. #21-3A.(as renumbered) Clarifying V.R.C.P. 3.1, 4, 56, 84, concerning waiver of filing and service fees and summary judgment motion response, and abrogating the Appendix of Forms

C. Remote Administration of Oaths. Amendments adding V.R.C.P. 11(e) to permit use of remote means to attain attestations of parties.

D. #19-10. Amendments to V.R.C.P. 43 and 54 correcting references to former V.R.C.P. 78.

#### **5. Reports**

A. Remote Jury Trials. Special Advisory Committee on Remote Hearings. Mr. Dumont reported that the Special Committee had had several meetings focused on Criminal and Family cases. V.R.C.P. 43.1 (remote video or audio participation) will be discussed when civil trials are considered. He also noted the pendency in the current Legislature of S.178 providing for majority verdicts in civil trials.

B. Committee consideration of other AO 49 provisions that might be made permanent. Request of Supreme Court. See agenda item 2.H. above.

#### **6. New business.**

Chairman Keyes noted that V.R.C.P. 80.11, Procedure in Expedited Actions, is set to expire on August 31, 2022, unless the Civil Rules Committee, after continuing review, advises that the Rule be further revised or made permanent. He will develop and report to the Committee a plan to address the matter.

#### **7. Date of next meetings.**

It was agreed that the Committee will meet on January 28, 2022, if necessary to address immediate issues and will meet in any event on February 25, 2022, to consider the full pending agenda.

There being no further business, the meeting was adjourned at 11:30 a.m.

Respectfully submitted,

L. Kinvin Wroth  
Reporter