

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
February 25, 2022**

The meeting was called to order at 9:00 a.m. virtually on Zoom by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Hon. David Barra, Bonnie Badgewick, Anne Damone, James Dumont, Karen McAndrew, Hon. Robert Mello, Navah Spero, and Gregory Weimer. Also present were Hon. Harold Eaton, Supreme Court liaison; Emily Wetherell, Deputy Clerk of the Supreme Court, and Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of January 7, 2022, were unanimously approved with the addition of the note that one comment in support of the amendment to V.R.C.P. 68 had been received in December 2021. The draft minutes of the special meeting of January 28, 2022, were unanimously approved as previously circulated.

2. Proposed amendments to be considered for promulgation.

A. Proposed amendments to 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 February 14, 2022. The Committee reviewed the draft as sent out and considered the following changes to that draft (shown in ***bold italics***) as more recently proposed by the subcommittee (Chairman Keyes, Ms. Badgewick, Mr. Dumont, Ms. Wetherell) or proposed in the present meeting).

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(b) **Same: How Made.** 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.

(1) *Methods of Service of Documents Defined.* Within this rule, the following definitions apply.

(A) *Using the Electronic Filing System.* Using the electronic filing system means using the Judiciary's electronic filing system to transmit documents by choosing File and Serve or Serve and selecting the party's contact from the Public List to serve other registered users with public service contacts as required or permitted by the 2020 Vermont Rules for Electronic Filing. Service is complete upon transmission by the electronic filing system to the other party unless the sender learns that it did not reach the person to be served.

(4 B) *Delivery.* Delivery ~~of a copy~~ within this rule means: handing to the attorney or to the party; or leaving ~~it~~ at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving ~~it~~ in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving ~~it~~ at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

~~(2 C) Mailing. Mailing of a copy within this rule means: sending by ordinary first-class mail; or sending by third-party commercial carrier; or, if required or permitted by paragraph 4, sending by electronic means. Service by mail or by commercial carrier is complete upon mailing or delivery to the carrier.~~

~~(3) Leaving with the Clerk. Leaving a copy with the clerk of the court within this rule means delivering or mailing the copy to the clerk by any means permitted or required for the filing of papers with the clerk under subdivision (e) of this rule.~~

(4 D) Email Sending by Electronic Means. Email means sending an attachment to the email address or addresses of the person to be served with the case title and number in the subject line. Service is complete upon sending unless the sender learns that it did not reach the person to be served.

(E) Leaving with the Clerk. Leaving with the clerk means filing the document with the clerk using a method allowed by subdivision (e) along with a statement that the filer is prevented by rule or court order from contacting the party or knowing the party's contact information.

(2) Service Requirements. The methods of service to be used are as follows:

(B) Non-electronic filers (Self-represented party or other participant who is not required and has not elected to electronically file in the case).

(i) Service by or on non-e filers may be made by delivery or mailing.

(ii) Service by or on non-e filers may be made by email if (a) a non-e filer has filed a notice of appearance that provides an email address and consent to receive service by email at that address, (b) the parties agreed to service by email in a signed writing filed with the court, or (c) no valid physical or postal address is known and there is no consent or agreement to service by email, but the non-e filer has provided an email address on a court filing.

(iii) If the filer is prevented by rule or court order from contacting the other party or receiving the other party's contact information, the filer may serve by leaving with the clerk.

(e) Filing With the Court Defined.

(3) Filing by Non-Electronic Filers. Self-represented parties and other participants in the proceeding, who are not required and have not elected to electronically file, and attorneys who are permitted to use a method other than electronic filing may file with the court by delivery, by mailing or commercial carrier addressed to the clerk, or by email.

RULE 79.1 APPEARANCE AND WITHDRAWAL OF ATTORNEYS AND SELF-REPRESENTED PARTIES

(d) **Appearance by Self-Represented Parties Appearing Pro Se.** When a party *who is* not an attorney *of the court prosecutes or defends in the party's own proper person, is self-represented*, the party must complete and sign a notice of appearance form for self-represented parties, providing a telephone number, street address, and mailing address if different shall comply with subdivision (b) of this rule. The party must provide an email address if the party has one and indicate if the party consents to receive service by email at that address. In the event that the self-represented party has not provided a valid physical or postal address, the self-represented party may be served by email at any email address that the party has provided in a court filing, even if consent is not provided in a notice of appearance.

On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend to the Supreme Court the promulgation of the amendments to V.R.C.P. 5, 6(a)(4), 29, and 79.1. Electronic Service and Filing, as sent out for comment on December 13, 2021, with comments due February 14, 2022, and as revised by the subcommittee and further revised at the present meeting.

Ms. Wetherell suggested that the recommended amendments be sent to the Chair and Reporter of the Family Rules Committee for their information.

B. Proposed amendment of V.R.A.P. 25 and deletion of V.R.A.P. 25(a)(2). Sent out for comment on January 10, with comments due on February 14, 2022. Chairman Keyes reported that no comments had been received. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend the amendments for promulgation as circulated.

Ms. Wetherell left the meeting at this point.

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. Chairman Keyes reported that one comment had been received, suggesting that the amendment state that renewal is not necessary “if the issue is a pure question of law,” and that at the January 7 meeting, Ms. McAndrew had agreed to explore the options further. She reported that she disagreed with the “pure question of law” language as vague and would recommend the sufficiency of the evidence approach of the proposed amendment if it was limited to motions under V.R.C.P. 50(a)(1). In further discussion, it was agreed that merely inserting “ordinarily” would create further vagueness. On motion duly made and seconded, after further discussion, it was voted unanimously to recommend the following amendment to V.R.C.P. 50(b) for promulgation: “Renewal of a the motion based upon sufficiency of the evidence under paragraph (a)(1) is necessary to appeal from a denial of or a failure to grant a motion for judgment as a matter of law on that issue.”

D. #20-13. Proposed amendments of V.R.C.P. 55, 62, regarding service of default judgments. Sent out for comment on December 13, 2021, with comments due February 14, 2022. Chairman Keyes report that three comments had been received noting that the amendments provided no mechanism for assessing the costs of serving an execution. A motion was made and seconded to adopt the amendments as circulated. The motion was withdrawn after discussion of the alternatives. Mr. Dumont suggested that V.R.C.P. 54(d)(1)

could be amended to include costs under Rule 55 for service of a default judgment, including a reasonable estimate of the costs of such service. It was agreed to defer further action on the pending amendment of Rules 55 and 62 until after consideration of amendments to Rule 54 to be drafted by Mr. Dumont in consultation with Mr. Avildsen and Judge Mello.

E. Amendments of V.R.S.C.P. 7 and 8 proposed by Civil Division Oversight Committee. Sent out for comment on December 13, 2021, with comments due February 14, 2022. Chairman Keyes reported that Vermont Legal Aid and the American Civil Liberties Union supported the amendments and had suggested the following revisions:

- Rule 8(a) Availability. If a debtor fails to appear for a financial disclosure hearing and the court does not issue a payment order, the court ~~will~~ may schedule a contempt hearing based upon the failure to appear.
- Rule 8(b)(2) Within seven days after receipt of the summons, the judgment creditor must send the summons, the list of exemptions appearing in the form approved by the Court Administrator and available on the Judiciary website, and the financial disclosure affidavit to a sheriff (or other person authorized to serve process) for service on the judgment debtor at the creditor's expense, but no attendance or mileage fee need be paid to the debtor. The return of service must be filed by the creditor with the court clerk before the hearing or at the start of the hearing.

On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend proposed V.R.S.C.P. 7 and 8 for promulgation with the revisions proposed by VLA and ACLU.

F. #20-11. Methods of expediting civil trials. Proposed amendment of V.R.C.P. 68 allowing either party to serve an offer of judgment. Sent out for comment on December 13, 2021, with comments due February 14, 2022. Chairman Keyes reported that one comment had been received supporting the amendment and noting that as an emergency amendment under AO 49, it had served "to level the playing field" in the pandemic. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend proposed Rule 68 for promulgation as circulated,

G. #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 meeting of November 19, 2021. It was agreed to defer any further action pending the Supreme Court's action on a proposed parallel amendment to V.R.Cr.P. 45, for which comments were due on February 14, 2022.

3. Amendment proposals to be considered for circulation for comment

A. V.R.C.P. 79.1(e). Civil Division Oversight Committee amendment proposal regarding out-of-state lawyers. Chairman Keyes reported that he had sent the draft approved by the Committee at its January 7 meeting to the Chairs and Reporters of the Criminal, Family, and Probate Rules Committees, advising them that the Committee expected to approve it in final form as a proposed rule to go out for comment at its February 25 meeting. The Criminal Rules Committee had approved a similar proposed amendment to V.R.Cr.P. 44(e). The Probate Rules Committee had deferred action on V.R.P.P. 79.1(d). The Committee considered the final draft with Reporter's Notes sent out by Professor Wroth on February 24. On motion duly made and seconded, there being no discussion, it was voted unanimously to send the February 24 draft to the Supreme Court to be sent out for comment.

B. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. It was agreed to defer consideration of this item pending a report by Chairman Keyes and Mr. Avildsen.

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, as amended. The subcommittee (Ms. Badgewick, Chairman Keyes, and Ms. Spero) had no report.

D. #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 meeting of November 19, 2021. Professor Wroth reported that a proposed parallel amendment of V.R.Cr.P. 45(e) had been sent out for comment with comments due on February 14.

E. #22-1. Proposed amendment of V.R.C.P. 26(e). The Committee considered Mr. Dumont's draft of a proposed amendment adding V.R.C.P. 26(e)(4) to eliminate the argument that there was no duty to supplement for error. The rule is similar to F.R.C.P. 26 except for differences resulting from the automatic disclosure provisions of the Federal Rule. It was agreed that the relationship with V.R.C.P. 80.11 would be addressed in consideration of that rule. On motion duly made and seconded, there being no further discussion, it was voted unanimously to send the present draft to the Supreme Court to be sent out for comment.

F. #22-2. V.R.C.P. 80.6. Correction of cross-references. The Committee considered Professor Wroth's draft amendment correcting a statutory reference in V.R.C.P. 80.6(c)(4). On motion duly made and seconded, there being no discussion, it was voted unanimously to send the draft to the Supreme Court to be sent out for comment.

G. #22-4. V.R.C.P. 80.11. Issues raised by expiration date. Mr. Weimer reported on the results of a VBA survey on the use of the rule. 54 of 63 responses said that the rule should be continued. Chairman Keyes agreed to present a proposal at the next meeting

4. Order recently promulgated

#22-3. Addition of § 22g to A.O. 49 re homeowner foreclosure assistance. Professor Wroth reported that this provision, approved at Committee's special meeting of January 28, and recommended to the Court on February 2, had been promulgated on February 7, effective February 22, 2022.

5. Reports

A. Remote Jury Trials. Special Advisory Committee on Remote Hearings. Mr. Dumont had no report.

B. Committee consideration of other A.O. 49 provisions that might be made permanent. See item 4 above. No other issues were presented.

6. Other business.

Inconsistency between Rules and Forms. Chairman Keyes stated that he would review a question of consistency between a Rule and a Court Administrator's Form that had been called to his attention and will report at the next meeting. On the basic question regarding the appropriate degree of Committee

consideration of form issues, Ms. Damone noted that the forms were in a continuing state of development that regular Committee review might delay.

Thanks to Ms. Damone. Ms. Damone then left the meeting. At Mr. Keyes suggestion, the Committee voted to thank her for her helpful review of current practice that assisted the Rule 5 subcommittee on the issue of “leaving with the clerk” in V.R.C.P. 5(b)(1)(E), approved under item 2.A above.

7. Date of next meeting. It was agreed that the next meeting would be held virtually at 9:00 a.m. on Friday, April 22, 2022

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

Respectfully submitted,

L. Kinvin Wroth
Reporter