

**VERMONT SUPREME COURT**  
**ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE**  
**FINAL MINUTES FOR MEETING OF SEPTEMBER 6, 2024**

The Civil Rules Committee met virtually at 9:00 a.m. on Friday, September 6, 2024.

Attendees: Chair Allan Keyes; Bridget Asay; the Hon. David Barra; Bonnie Badgewick; James Dumont; the Hon. Judge Hoar; Jean Murray; Laura Rowntree; Gregory Weimer. Also in attendance were Therese Corsones; the Hon. Justice Eaton; Lynn Wdowiak; and Pamela Vesilind, Reporter.

1. **Approval of draft minutes of May 3, 2024**, meeting. The minutes were approved without change.

**SPECIAL BUSINESS**

2. **# 23-2.3. Rule 9.2(b) [CARES ACT notice] expires September 30, 2025** (effective July 1, 2024). Discussion re: seeking public comment on making Rule 9.2 permanent.

Section 4024(c)(1) of the Coronavirus Aid, Relief, and Economic Security Act Public Law No. 116-136, 15 U.S.C. § 9058(c)(1) is permanent law. It provides that the lessor of a “covered dwelling” unit “may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate.”

- Mr. Dumont moved to develop a proposed order to make the rule permanent; Judge Barra seconded. The motion passed.
- Ms. Vesilind will write Reporter’s Notes and transmit proposed order to the Court without further committee review at this time.

**ACTION ITEMS**

- 3 **# 24-1. Rule 80.1 - Foreclosure Answer Form**
  - . The proposed amendment to Rule 80.1(b)(3) would require service of a blank verified answer form conforming substantially to the form approved by the Court Administrator for use in foreclosure.

Comments were due by August 3, 2024. The Committee received one comment, which was favorable.

- Judge Hoar moved to recommend to the Court that the amendment be promulgated; Mr. Weimer seconded. The motion passed.
- Ms. Vesilind to submit the recommendation to the Court in advance of the Court’s October meeting, for effect on January 1, 2025.
- Outstanding question as to whether the posted Notice of Appearance form for Self-Represented Litigants is the most recent version.

4. **# 22-6. Rules 16.2 and 26(f) - Scheduling Orders**  
Proposed Amended Rules 16.2 and 26(f).

Under the proposed changes to Rule 16.2, a scheduling order may be issued on stipulation of the parties, without the necessity of a hearing or conference. A date for the close of all discovery is added to the list of contents of a scheduling order. This conforms to the standard form and is the key deadline used by clerks in case-flow management. The proposal includes “other appropriate matters” to the list of contents of a scheduling order. The proposed rule also updates and re-organizes the language of the rule for clarity, without changing the meaning or intent.

The proposed amendment to Rule 26(f) states that the plan and schedule for discovery to be established following a Rule 26(f) discovery conference will be a scheduling order under Rule 16.2 and that, if Rule 16.3 requires mediation, the discovery conference order must include a date for completion of mediation.

- Comments were due by August 3, 2024. Two comments were received: one favorable and one suggesting that mandatory scheduling orders include expert discovery and the timing of Daubert motions (see agenda item 16, #24-4).
- It was agreed to strike the last paragraph of the Reporter’s Notes.
- Mr. Weimer moved to recommend to the Court that the amendment be promulgated; Ms. Badgewick seconded. The motion passed.
- Ms. Vesilind to revise the Reporter’s Notes and submit the recommendation to the Court in advance of its October meeting, for effect January 1, 2025

### **SUGGESTED AMENDMENTS FOR COMMITTEE CONSIDERATION AS PROPOSED RULES**

5. **# 23-8. Rule 11 - Updating Declarations.**

Memo with proposed amendment and reporter’s notes for potential vote as proposed rule for public comment. The proposal deletes V.R.C.P. 11(e) in its entirety; adds new V.R.C.P. 43(h) authorizing declarations in place of affidavit or statement under oath; and amends V.R.C.P. 56 to refer to “declarations” as well as affidavits.

- This was an unaddressed agenda item from the May 2024 meeting.
- Ms. Rowntree moved to recommend to the Court that the amendment be promulgated; Mr. Weimer seconded. The motion passed.
- Ms. Vesilind to submit the proposal to the Court in advance of its October meeting.

6. **# 23-5. Rule 79.1 - Suggested amendment to provide client contact information with motion to withdraw.** (Proposal of Civil Division Oversight)

- The Committee discussed the amendment and reporter’s notes.
- Mr. Dumont suggested that a client might prefer email, considering the increasing unreliability of rural mail service. Mr. Weimer suggested that if both a physical mailing address and email address are known, it might be appropriate to require service to both. Judge Hoar agreed. Ms. Murray commented that text messages are a more reliable method of contacting Legal Aid clients. Chair Keyes observed that this would require the attorney to provide the court with electronic contacts as well. Ms. Murray responded that these days most clients provide their cellular phone number and email address, even though they aren’t required to.
- The Committee agreed to add email address service to 79.1(g).
- Ms. Murray inquired as to whether this email service would be considered good notice if the litigant’s mailing address is no longer valid and they do not receive service at their new mailing address. Chair Keyes suggested it would.
- There was discussion about the recurring problem of litigants changing email addresses and therefore not responding to communications from their attorney – which prompts attorney withdrawal motions. If the attorney makes a good faith effort to keep up with a client’s address, what more process is due, if any?
- Mr. Dumont said he wanted to pose this question to Ms. Damone: When the court generates a notice—whether it’s to a lawyer, or to a self-represented person by mail or by email—what happens if the notice is returned or bounces back as undeliverable? Is a record of this created? It would be useful in cases, for example, of Rule 60(b) motions, to prevent a court from mistakenly concluding that email notice was received.

- Judge Hoar wondered whether Odyssey creates a note for the clerk; he suggested that this be something for consideration by the Civil Division Oversight.
  - The Committee agreed that the changes were sufficiently minor to merit no further review before submitting the amended proposed rule for comment.
  - Mr. Weimer moved that the Committee submit the rule for public comment; Judge Barra seconded. The motion passed.
  - Ms. Vesilind to make the edits, revise the Reporter’s Notes, and submit the proposal to the Court in advance of its October meeting.
7. **# 23-16. Rule 4 - Service by any adult not a party.** (Suggestion of Senator Hasim)  
Alternative suggestion to expedite special appointments discussed at March meeting. Ms. Vesilind’s draft language with Reporter’s Notes amending Rule 4(c) considered for potential vote as proposed rule for public comment.
- Discussion of the issues giving rise to the amendment. Judge Barra noted that service issues can arise when there’s a deadline, as in a rent escrow hearing within 14 days. Ms. Murray said that in her experience, service by the sheriff has been pretty reliable.
  - Discussion of the court’s power to appoint an alternative third-party for service. Mr. Dumont reminded the Committee that these amendments only serve to encourage that practice. Ms. Asay endorsed the language as likely to ensure reliability of service based on the fact that the judge is appointing the third party.
  - Ms. Asay questioned the use of the term “unblemished” in the Reporter’s Note (referring to a private investigator’s record). Ms. Rowntree reported that this information is available on the Secretary of State’s web site, but wondered who would be obligated to determine whether the PI’s record was “unblemished.” Judge Hoar suggested deleting this last phrase in the notes; others agreed.
  - Mr. Dumont moved that the Committee submit the rule for public comment, with the changes to the Reporter’s Note. Judge Hoar seconded. The motion passed.
  - Ms. Vesilind to revise the Reporter’s Notes and submit the proposal to the Court in advance of its October meeting.
8. **#24-8. Technical amendments to Environmental Court Rules.**  
Deleting obsolete references to the 2010 Rules for Electronic Filing. See proposed amendments to V.R.E.C.P. 3; 4(a)(2); 4(d)(6)(A); 4(e)(5); 5(a)(2); 5(b)(1); 5(c); 5(f); 5(h)(1)(A); 5(k)(1).
- Chair Keyes asked the Committee whether these amendments should go out for public comment.
  - Mr. Dumont observed that many parties in environmental cases are self-represented, and how they should be put on notice about electronic appeals. Ms. Murray suggested that the rule allows for appeal by paper.
  - Judge Barra moved that the Committee submit the rule for public comment; Ms. Asay seconded the motion.
  - In discussion, Mr Dumont wondered where is the language that requires the applicant to be served notice of appeal. Chair Keyes responded that this is addressed in #23-17 (V.R.E.C.P. 5(b)(4)(A)), and that the two items will be merged.
  - The motion passed unanimously.
  - Ms. Vesilind to merge this with #23-17 and submit the proposal to the Court in advance of its October meeting.
9. **#23-17. Environmental Rule 5(b)(4)(A) - Appeal from an Appropriate Municipal Panel.** (Suggestion of Atty. LaRosa email of December 7, 2023)

Proposed amendment to require the applicant be served by certified mail at the time of filing an appeal.

- Mr. Dumont reported on his conclusion with Ms. Bent that there was no obviously available avenue in the rules to address: (1) how to determine the “interested parties” required to receive notice; or
- (2) the lack of reliable transcripts from municipal proceedings.
- Chair Keyes reported on his conversations with judges, about their difficulties using environmental hearing recordings, and the general feeling that the burden was on the municipalities to produce a transcript, as the statute requires the appeal be heard on the record.
- Mr. Dumont moved that the Committee submit the rule for public comment; Judge Barra seconded. The motion passed.
- Ms. Vesilind to write the Reporter’s Notes and submit the proposal to the Court in advance of its October meeting.

10. **# 23-7. Rule 54(e) – taxation of costs by the court; and 58(b) – prevailing party to submit form of judgment** (suggestion of Judge Hoar)

Rule 54(e)

- Chair Keyes asked, if costs are awarded, does the judge file an amended judgment? Judge Hoar confirmed this is the practice, but that he has asked the same question.
- Chair Keyes’ memo suggested that the new language approved at the last meeting about how to appeal costs was not needed. The Reporter’s Notes can clarify this point.
- Extensive discussion about how to communicate that an appeal on the court’s amended judgment to reflect costs is separate and has its own 30-day appeals deadline. Judge Hoar recommended guidance on this in the Reporter’s Notes.
- Ms. Asay asked whether the wording in V.R.A.P. 3(a) creates any confusion, with its reference to claims of error as specified in V.R.A.P. 4(b). Chair Keyes compared the procedure to that of appealing an order for attorney’s fees. The Committee discussed how the process works under the federal rules.
- Revisions were made to the draft Rule 54(e) circulated with the agenda to read:

**(e) Taxation of Costs by the Court.**

- (1) A party requesting costs must file, with proof of service, an itemized and verified bill of costs no later than 14 days after entry of judgment.
- (2) Objections must be filed within 7 days after service of the bill of costs, unless the Court orders otherwise.
- (3) The Court will rule on the requested costs and include a statement of approved costs in the judgment or amended judgment.

- The committee discussed the overall reason for the change. The practice that is suggested by the current version of the rule probably has not been followed and has caused confusion and uncertainty for the courts, operationally. The existing rule implies that taxation of costs is a mechanical exercise for the clerk – but frequently it is not.
- Ms. Vesilind to write Reporter’s Notes for review at November meeting to include guidance about the purpose of the change and the burden shift from the clerk to the court.
- The revisions will be considered as a proposed rule once the Committee finalizes proposed Rule 58(b).

Rule 58(b) – The proposal is to make the prevailing party, rather than the clerk or court, responsible for the form of judgment.

- Ms. Murray reported on her experience that proposed judgments are frequently drafted in anticipation of a merits hearing and served along with evidence before the hearing. They are mailed to self-represented plaintiffs the same day.
- It was suggested that if objections must be filed within 7 days, this creates a timing issue.
- Judge Hoar proposed to redraft Rule 58 for review at the November meeting.

11. **#24-9. Rule 79.1. - Substitution of Counsel without notice and motion.** (Suggestion of Judge Hoar. See #23-5)

Discussion and consideration of submitting for public comment.

- Judge Hoar sees tension between 79.1(a) and 79.1(f) as to when a motion is required and when it is not. Amendments to this rule should consider the workload of clerks.
- Mr. Dumont asked whether an automatic substitution circumvents a judge’s ability to have a say about whether substitution is proper, say, on the eve of trial. Judge Hoar responded that perhaps so, but he would discourage substituting attorneys from assuming they will be granted a stay.
- Ms. Asay noted that in the event of substitution counsel, the withdrawing counsel should need only to file a stipulation signed by the withdrawing counsel, the substitution counsel, and the client. The court only needs to order the stipulated change (more commonly used for addition of counsel, as opposed to substitution). Ms. Rowntree observed that the federal rule requires the attorney to file a motion for substitution of appearance, and that this automatically removes the prior counsel from the docket as counsel of record. Ms. Asay expressed a preference for keeping it simple, but only if there’s a safeguard for when the substitution counsel is from a different firm. In that situation, both attorneys must sign.
- Judge Hoar offered examples of when requiring a motion would be overkill, such as when an attorney is assuming the cases of a retiring attorney at the same firm. He compared this to the notice of dismissal option under Rule 41(a), which is admissible before the filing of an answer or a motion for summary judgment. The notice is self-executing, but clerks will often ask the judge first.
- Ms. Murray pointed out that Odyssey does not have a substitution of appearance of counsel option – only a notice of appearance option. (Needs to be raised with Odyssey team)
- Judge Hoar wants the clerks’ perspective on this issue and will ask Ms. Damone to poll the clerks.
- Discussion deferred to next meeting.

**OTHER SUGGESTED AMENDMENTS FOR POSSIBLE FURTHER REVIEW.**

12. **# 23-1. Rule 28(a)(2) - Remote Deposition oaths.**

[Proposed OPR Permanent Rule for Remote Notarization](#) (#24-E07) out for [public comment](#) on August 31, 2024, will allow qualified and credentialed notaries in Vermont to administer oaths to individuals located outside the state.

V.R.C.P. 28(a)(2) requires depositions within another state, or within a territory or insular possession subject to the dominion of the United States be taken before an officer authorized to administer oaths by the laws of the place where the examination is held or of the United States, or before a person appointed by the court in which the action is pending.

For consideration: whether Rule 28(a)(2) should be amended to include Vermont notaries qualified to act remotely.

- Chair Keyes reported that the emergency rules for notaries have been renewed for another six months, allowing them to give the oath to a remote deponent so long as the notary and the deponent are present in the State of Vermont.
- The Committee will revisit this item once #24-E07 is made permanent.

13. **#24-6. Rule 65 (b)(1) - Application for Preliminary Injunction only by motion.**

Judge Toor suggests that a motion be required to request a preliminary injunction and that the Rule 65 provision that a preliminary injunction be requested in the complaint be deleted.

- Judge Hoar asked whether clerks have to read through the complaint to find an embedded motion.
- Mr. Dumont reminded the Committee that plaintiffs are required to seek a hearing date, under Rule 65.
- Ms. Asay observed that the federal practice is to put the motion for preliminary injunction in the complaint. If the rules are supposed to serve as a signal to attorneys, then it should be a motion.
- Judge Hoar will consult with Ms. Damone to get the clerks' perspective.
- Discussion deferred to next meeting.

14. **# 24-3. Rule 4(e) – citation of legal authority for out-of-state service.**

Rule 4(e) allows service outside the state in “any manner in which service may be effected under the laws of the state in which the person is served.” -- and requires an affidavit stating the time, manner, and place of service. Judge Toor suggests Rule 4 or Rule 55 be amended to require citation of the out-of-state rule or statute that permits the type of service used.

- The Committee agreed that of the two rules, Rule 55 would be the proper placement for this requirement, if it is needed.
- Ms. Murray mentioned that default motions often are missing the affidavit that restates the claim, especially in credit card collection cases.
- Discussion to be continued in the November meeting.

15. **#24-5. Rule 56 - Premature Summary Judgment Motions Radeaux?** (suggestion of Atty. Mazzuchi)

Under Rule 56(b), unless a different time is set by stipulation or court order, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery. Under Rule 56(d) (When Facts Are Unavailable to the Nonmovant), the court may defer or deny the motion, or take other appropriate action if a nonmovant shows by affidavit that, for specified reasons, it cannot present essential facts in opposition. The federal rules are substantially identical.

A court, apparently, denied as premature a summary judgment motion not subject to a scheduling order, without a showing of a need for discovery under 56(d). For discussion: Should the rule be clarified or modified to always require the 56(d) affidavit when the court defers ruling to allow time for discovery?

- Due to time constraints, this item was not addressed in the September meeting.

16. **# 24-4. Rule 16.2 - Mandatory Scheduling Orders/ Daubert Motions?**

(Attorney Roisman suggestion)

Under V.R.C.P. 16.2, unlike Fed. R. Civ. P. 16(b), scheduling orders and their contents are permissive. In practice, courts require scheduling orders in most, if not all, cases. The suggestion is that mandatory scheduling orders include deadlines for Rule 702 (Daubert) motions.

- Due to time constraints, this item was not addressed in the September meeting.

### REPORTS, NEWS, AND TRAILING AGENDA ITEMS

17. **# 24-7. Court Rules Subcommittee, Judiciary Committee on Artificial Intelligence and the Courts**

Phase one: *Are current court rules adequate to address generative AI usage?*

- Chair Keyes reported on the subcommittee’s preliminary conclusion that Rule 11 is adequate to handle the problem of fictional citations. Unless there is some change, the subcommittee recommendation will be that no rule change is needed at this time.
- Related: the Federal Evidence rules are under consideration, and the ABA has issued at least one ethics rules opinion about the use of AI.
- If anyone has input on the adequacy of the procedural rules, contact Chair Keyes.

18. **## News from Civil Division Oversight**

- Judge Hoar reported that the task force for post-conviction relief cases will be forwarding to this committee a proposed rule tailored to post-conviction relief cases. No legislative change is being proposed. This may be approved at Civil Division Oversight’s next meeting.

19. **# 24-2. Special Advisory Committee on Remote Hearings (Mr. Dumont)**

- Continued roundtable discussion of remote hearing practice – not addressed at this meeting due to time constraints.

20. **FYI: Rules Promulgated for effect July 1, 2024**

1. V.R.A.P. 28(g)(1). Updating a cross-reference to the word-count limits in Rule 32. Former Rule 32(a)(7) is now (a)(4).
2. V.R.S.C.P. 9(b)(2). Updating a reference to the location of the exemptions that are now in a form approved by the Court Administrator and available on the Judiciary website.
3. V.R.A.P. 3(e) and 27(a)(3). Making appellee’s docketing statement optional and allowing a reply in support of a motion.
4. V.R.C.P. 11(a). Requiring pleadings, written motions, or documents that require a signature to also include the signer’s telephone number.
5. V.R.C.P. 9.2 (c). Deleting as obsolete reference to Vermont Emergency Rental Assistance Program. By January 1, 2024, all pending applications were processed and available funds exhausted.

21. **FYI: Rules Promulgated for effect January 1, 2025**

V.R.C.P. 4 (c)-(f) amendments promulgated for effect January 1, 2025.

22. **FYI: New electronic filing rules re Exhibits**

Rule 8 of the 2020 Vermont Rules for Electronic Filing is amended **effective July 1, 2024** to add new subdivision (d), which addresses the manner for filing exhibits into the electronic filing system. The amended rule requires that each exhibit be submitted as a separate document instead of as one compiled document. This permits individual exhibits to be properly tracked and marked as offered or admitted.

Rules 2(c) and 8(c) of the 2020 Vermont Rules for Electronic Filing, **amended effective January 1, 2025**, to address digital evidence exhibits such as audio and video files that cannot be filed through the electronic filing system. This digital evidence must be submitted through the Vermont Digital Evidence Portal

(VDEP) as provided in Administrative Order 55. However submitted, all exhibits must be listed on the litigant’s exhibit list and the electronic case record must be updated to reflect whether the exhibit was offered and admitted.

23. **# 20-13.2 [TABLED] Proposed Order Amending 55, 62(b), and 80.1(f).**  
Proposed Rule 55, 62(b), and 80.1(f) tabled at March, 2024 meeting

- This agenda item was not discussed.

24. **# 22-6. AO 39. Mediation Panel update** (Proposal of Civil Division Oversight Committee)  
Whether AO 39 (Alternative Dispute Resolution Civil Actions) should be updated -- Ms. Badgewick to report

- This agenda item was not discussed due to time constraints.

#### **NEW BUSINESS**

- 25 Any new legislation that may need our attention?

. - No new legislation was discussed.

- 26 Any new business for next agenda?

. - No new business was discussed.

**DATE OF NEXT MEETINGS:** November 1, January 3, March 7, May 2, September 5

**ADJOURN.** The meeting adjourned at 12:07 p.m.