

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE  
MINUTES FOR MEETING OF NOVEMBER 1, 2024**

The Civil Rules Committee met virtually at 9:00 a.m. on Friday, November 1, 2024.

Attendees: Chair Allan Keyes; Bridget Asay; Bonnie Badgewick; Hon. David Barra; Merrill Bent, James Dumont; Hon. Samuel Hoar; Jean Murray; Laura Rowntree; Gregory Weimer. Also in attendance were Hon. Harold Eaton; Lynn Wdowiak; Laurie Canty and Emily Wetherell

1. The committee approved the draft minutes of September 4, 2024, with corrections suggested by Ms. Corsones in an earlier email.

**2. # 22-6. Rules 16.2 and 26(f) - Scheduling Orders**

The Committee voted to reconsider its September recommended promulgation of amendments to Rule 16.2 and 26(f) as proposed.

Motion made, seconded and voted to recommend promulgation of the proposed amendments to Rule 16.2 and 26(f) as proposed--but with deletion of the sentence in Rule 26(f) that reads "An order may be altered or amended whenever justice so requires." Reporter's notes to be revised, and the recommended Rules transmitted to the Court for its December meeting.

**3. # 23-5. Rule 79.1 - Suggested amendment to provide client contact information with motion to withdraw. (Proposal of Civil Division Oversight)**

Chair Keyes circulated a memo with several issues regarding the to-be-proposed Rule 79.1 amended to affirmatively state, like the family rule, that a motion to withdraw must include the party's last known mailing address.

The first question was whether to ask for the "present" address rather than the "last known" address. After discussion the committee agreed "last known" is appropriate.

The second question was whether the clerk should be directed to mail the motion to withdraw to the party with notice of motion and the date and time of the hearing. This would be a slight additional burden on clerks. It was agreed that, instead, notification could be more efficiently done by the attorney - by adding a requirement to the rule that motion to withdraw be accompanied by a certificate of service of a copy of the motion on the client that specifies the method of service.

The third question was whether and how the clerk would use any email address provided as a means of notice. Email notifications by clerks raise operational issues that need further discussion.

Ms. Wetherell explained that mail is now the exclusive method of notifying self-represented litigants -- even if they are registered Efilers. Only people with bar numbers are notified by email. To require email -- or both mail and email --service is a new process that would be confusing for staff who are otherwise using mail only. She strongly requests not requiring email notification.

Ms. Murray said unrepresented people should not be notified by email only-- Always by paper mail. Sometime text messages can be reliable. But if you ask for a telephone number and then do not use it, that can be a problem.

Ms. Canty said that clerks have no ability to text people at this time.

This subject raises broader issues, perhaps for another agenda, regarding notice to unrepresented litigants. We need more information.

Mr. Dumont noted Efiling Rule 11(f) says the court will communicate electronically with Efilers; this may also be a new agenda item for the Efiling Rule Committee (Ms. Wetherell, Reporter).

Judge Hoar noted that a good portion of motions to withdraw involve the situation where the lawyer has lost contact with the client. Also, clerks are using email outside the regular process, and that clerks can provide better service if they have email addresses.

Chair Keyes referred to option one in his memo for the lawyer to provide the email address, but that mail remained the formal method of notice. There was no consensus or motion, however, to go forward with a proposal that lawyers will serve the motion and include both mail and email addresses, with the clerk using only mail for the notice of hearing.

Ms. Wetherell noted that when an unrepresented person files a notice of appearance it must include phone, email and mailing address.

Mr. Dumont suggested rethinking the process and having the motion to withdraw accompanied by instructions to the client in plain English telling them among other things that they must enter an appearance, how to do that, and what contact information to provide.

It was noted the local federal rules do not allow an attorney to withdraw unless there is another counsel, or the party has formally appeared pro se.

It was confirmed that the problem we are trying to solve is that clerks do not have adequate contact information to give notices of hearing on the motion to withdraw.

Mr. Dumont formed a working group to further study these issues and come back with a proposal. Ms. Murray, Laurie Canty or Anne Damone, and others to participate.

#### **4. Proposed Rules out for Comment**

These rules will be reviewed at the January meeting:

- a) # 23-8. *Proposed Order Deleting Rule 11(e), Amending Rules 43 and 56 of the Vermont Rules of Civil Procedure;*
- b) # 23-16. *Proposed Order Amending Rule 4(c) of the Vermont Rules of Civil Procedure;*
- c) #24-8. *Proposed Order Amending Rules 3, 4(a)(2), (d)(6)(A), and (e)(5), 5(a)(2), (b)(1), (c), (f), (h)(1)(A) and (k)(1) of the Vermont Rules for Environmental Court Proceedings;*
- d) #23-17. *Proposed Order Amending Rule 5(b)(4)(A) of the Vermont Rules for Environmental Court Proceedings;*
- e) # 23-2.3. *Proposed Order to Make Permanent Amendments to Rule 9.2 of the Vermont Rules of Civil Procedure.*

Chair Keyes alerted the committee of a comment by the LCJR on # 23-16 (Proposed Order

Amending Rule 4(c)) suggesting the court should vet the special process server; and a comment by Judge Spero on # 23-2.3. (Proposed Order to Make Permanent Amendments to Rule 9.2) concerning difficulties experienced by unrepresented landlords.

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

Continued discussion of whether - to relieve a burden on clerks - to allow all or some substitutions of counsel to be self-executing. Motion made and seconded to amend Rule 79.1 to allow substitution of counsel without need for motion at any time up to the point that the case has been noticed for trial. The motion contemplates that a notice of substitution within same firm requires only one signature, but if different firms there must be signatures of both outgoing and incoming attorneys. Ms. Wetherell reads V.R.A.P. 45.1 as already allowing substitution without motion. The motion is limited to V.R.C.P 79.1.

Motion passed. There will be a draft at the next meeting.

**6. # 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)

Preparation of judgment under Rule 58(b) is not a routine task and clerks do not have the experience to bear this responsibility. As a result of our discussion last meeting about shifting this burden to counsel, Judge Hoar has suggested alternative amendments to Rule 58 to shift burden of preparing the form of judgment from the clerk to the court. From practitioners' point of view, regardless of who is preparing the judgment, the problem is one of delays. In foreclosure cases the prevailing practice is for counsel to prepare the form of judgment. Motion by Judge Hoar seconded and voted to amend the rule to provide that the court, except in foreclosure cases, will promptly prepare and sign the judgment, or promptly request a party prepare the judgment, subject to the existing opportunity of other parties to object. There will be a draft at the next meeting combining proposals for both Rule 54 and 58 with draft Reporter's Notes.

**7. #24-6. Rule 65 (b)(1) - Application for Preliminary Injunction only by motion.** (Suggestion of Judge Toor to delete the provision of Rule 65 that a preliminary injunction may be requested in the complaint).

Continued discussion whether to require a motion to request a preliminary injunction— It appears better practice is to move for preliminary injunction. Requests in a complaint are sometimes unclear or are overlooked. Currently, if a request for a complaint is noticed by a judicial assistant the complaint is booked twice in Odyssey – once as a complaint and also as a motion. As part of motion practice, Rule 7 contains requirements for requesting an evidentiary hearing.

Motion by Judge Hoar seconded and voted to amend Rule 65(b (1) and require that all applications for preliminary injunction be made by separate motion whether filed with the complaint or later. There will be a draft at the next meeting.

**8. # 24-3. Rule 4(e) – citation of legal authority for out-of-state service.** (Suggestion of Judge Toor to require citation of the out-of-state or statute that permits the type of out of state service used).

The Committee has agreed that Rule 55 would be the proper placement for this requirement, if it is needed. Continued discussion whether an amendment is needed.

It is implicit in the rule that effective service is a precondition for default. Judge Hoar indicated this is something that could be on a checklist for judges. Mr. Dumont questions whether people move for default without showing proper out-of-state service. Judge Hoar said it may not happen often but sometimes a motion is inadequate. In that case the judge must research if out of state service was proper or put it back in the hands of the attorneys to affirmatively state the legal authority on which service was made. The question is whether to leave the rule as is with judges occasionally asking for more information. It was agreed no rule change is needed, subject to any further comment from judges to be polled by Judge Hoar.

**9. #24-5. Rule 56 - Premature Summary Judgment Motions Reditaux?** (Suggestion of Atty. Mazzuchi)

The question is whether Rule 56 should be reviewed for clarification or modification to always require the 56(d) affidavit when the court defers ruling to allow time for discovery. Ms. Asay recommended, and the committee agreed to take no action. Sometime a court makes rulings that does not implement a rule. The remedy is a motion to reconsider. The rule says what it says. However, as a practical matter, it may be expecting too much to seek summary judgment with the complaint. The Chair will write the attorney.

**10. , # 24-4. Rule 16.2 - Mandatory Scheduling Orders/ Daubert Motions?** (Suggestion of Attorney Roisman)

The suggestion is that scheduling orders be mandatory and include deadlines for Rule 702 (*Daubert*) motions. For various reasons no committee member felt the need to consider this idea. *Daubert* hearings are not common in every case and can be accommodated by individual scheduling order as needed. The Chair will write the attorney.

**11. #24-10 Rule 80.4 Post-conviction relief** (Pending proposal from Civil Division Oversight)

**12. # 24-7. Court Rules Subcommittee, Judiciary Committee on Artificial Intelligence and the Courts-*Are current court rules adequate to address generative AI usage?***

Chair Keyes reported that the AI Court Rules Subcommittee will not be recommending any changes to any division procedural rules or to the evidence rules – although proposals for change to the *federal* evidence rules are under consideration.

**13. News from Civil Division Oversight**

Judge Hoar reported the new Scheduling Order form has been approved with one change to identify the nature of the case. Mr. Weimer raised a question about inadequate number of signature lines; this will be tracked down.

**14. # 24-2. Special Advisory Committee on Remote Hearings**

Mr. Dumont reported the results of a survey that the fully remote hearings only accounted for 12%, hybrid 27% and 51% of hearings were fully in person. There were questions about the nature of hearings covered by the survey. There is a new survey going out in the next few weeks.

By prompt supplemental email Mr. Dumont reported that the survey did indeed include all courts and all hearings. More than half of all hearings in all courts are now in person. While the environmental and civil dockets may be dominated by virtual and hybrid proceedings, the criminal docket is not. The new survey is expected to differentiate civil from environmental from criminal and will ask questions of the lawyers that differ from those of the self-represented litigants.

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

- a) V.R.C.P. 4 (c)-(f) amendments promulgated for effect January 1, 2025, to update its provisions to current practice and terminology. [PROMULGATED-VRCP4\(c\)\(d\)\(e\)\(f\)--STAMPED.pdf](#)
- b) Rule 80.1(b)(3) amendments promulgated for effect January 1, 2025, to require service of a blank verified answer form conforming substantially to the form approved by the Court Administrator for use in a foreclosure case. [PROMULGATED--VRCP80.1\(b\)\(3\)--STAMPED.pdf](#)

**16. # 23-1. Rule 28(a)(2) - Remote Deposition oaths.**

Chair Keyes reported that Proposed OPR Permanent Rule for Remote Notarization (#24-P01) out for public comment (deadline October 31, 2024), will allow qualified and credentialed notaries in Vermont to administer oaths to individuals located outside the state. The final rule probably will come out in March 2025, and we will continue to monitor its progress.

**17. # 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.

**18.7. # 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 reported she is continuing to review. One of the suggested changes is to limit the AO to mediation.

**19. New Business.** Rule 77 states the superior courts shall be deemed always open for the purpose of filing any pleading or other proper paper, The Rule also states the clerk's office shall be open during business hours on all days except Saturdays, Sundays, and legal holidays and shall be open for electronic filing at all times provided the 2020 Vermont Rules for Electronic Filing. Court operations people have some new protocols about after-hour filing (in particular by the self-represented?) Ms. Canty will provide additional information so we can review whether a rule change is needed.

**NEXT MEETING DATES:** January 3, 2025; March 7, May 2, September 5, November 7

**ADJOURN. At 11:40**