

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
MINUTES OF JANUARY 20, 2023 MEETING**

The meeting was called to order at 9:03 a.m. virtually on Teams by Allan R. Keyes, Chair, with the following Committee members present: Bridget Asay, Bonnie Badgewick, Anne Damone, Jim Dumont, Scott Griffith, David Koeninger, Karen McAndrew, Navah Spero, Gregory Weimer, and Emily Wetherell. Also present were Hon. Harold Eaton, Supreme Court liaison; and Professor Pamela Vesilind, Reporter.

1. Minutes. The draft minutes of the meeting of November 18, 2022 were unanimously approved as previously circulated.

2. Action items.

A. # 22-1 Proposed Order Amending Rule 43.1 of the Vermont Rules of Civil Procedure/Special Committee on Remote Hearings. Ms. Wetherell reported that the Special Advisory Committee on Remote Hearings met on December 2, 2022, and discussed the recommendations from the Civil and Family Rules committees regarding V.R.C.P. 43.1 and V.R.F.P. 17. Following a discussion and some revisions made and approved by email after the meeting, the Remote Hearing committee was in general agreement with the proposed amendments to its original proposal. The committee draft that was recommended to the Court and sent out for comment. The comment period ends on February 13, 2023. [PROPOSED-VRCP43.1--FOR COMMENT](#)

The Committee reviewed the changes made since the version it last considered:

- The proposed rule contains different standards for nonevidentiary and evidentiary proceedings; relaxes the timelines for requesting remote participation; and introduces the concepts of “remote” and “hybrid” proceedings.
- In general, under the amended version of the rule, judges have discretion to schedule remote and hybrid participation for nonevidentiary proceedings. Remote or hybrid evidentiary proceedings require the court’s determination of good cause based on a consideration of one or more factors in subdivision (h).
- Judges may issue standing orders for categories of proceedings or provide for remote or hybrid proceedings on a case-by-case basis, on its own initiative or based on a motion or stipulation of the parties.
- Paragraph (a)(1) is added to set a default of in-person participation.
- Subdivision (b) adds definitions for “evidentiary proceeding,” “hybrid proceeding,” and “remote proceeding.”
- New subdivision (c) addresses remote or hybrid nonevidentiary proceedings.
- Subdivision (d) provides the standards for remote or hybrid evidentiary proceedings.
- Subdivision (e) revises the former (c)(4) regarding the judge presiding from a remote location.
- Subdivision (f) sets out the requirements for the hearing notice.
- Subdivision (g) revises former (c)(5), previously entitled “Emergencies,” to allow a waiver of the rule’s time and notice requirements in certain circumstances.
- Subdivision (h) includes the factors for a court to consider in determining if there is good cause to have an evidentiary remote or hybrid proceeding.

- Subdivision (i) addresses the conduct of the proceedings.
- New subdivision (j) provides that jury selection is governed by the standards for evidentiary proceedings.
- New subdivision (k) applies to civil stalking proceedings under 12 V.S.A. §§ 5131–5138 and sets a default of hybrid proceedings.
- Former subdivision (d), on technical standards, is relabeled as subdivision (l).

The Chair solicited comments from the Committee. There was discussion about:

Subdivision (k). As submitted for comment, the “stalking provision” has parity with the Relief from Abuse provision and Family Rule 17. Ms. Wetherell noted that the Family Rules Committee had recommended the rule omit the option to move for an in-person hearing, but the Remote Hearing Committee had concluded that the court will be able to determine when such a motion is being made for invalid purposes. The Family Rules Committee is scheduled to meet also on January 20, to review the changes.

Subsection (d). The Chair asked for clarification as to the good cause requirement for issuing a standing order under subsection (d)(1)(A). Ms. Wetherell affirmed that good cause is not required under this subsection, and that a court may issue a standing order for evidentiary hearings after due consideration of the relevant factors in subdivision (h). Not all of these factors rise to the level of good cause, or are applicable on a global basis (i.e., airflow in the courtroom; length of proceeding). By comparison, orders in a particular case still require a finding of good cause, (d)(1)(B). Standing orders for nonevidentiary hearings are in the court’s discretion. Mr Griffith observed that the Remote Hearings Committee had extensively considered this provision, informed by the guidance of Judge Tomasi and Judge Toor.

Mr. Dumont and the Chair discussed whether the reporter’s notes should include a general statement explaining the difference between standing orders and orders in a particular case. Ms. Wetherell asked for recommended language for this. The Chair and Mr. Dumont agreed to discuss the language after the meeting.

Ms. Asay asked whether another standard was considered in place of good cause. Ms. Wetherell explained that the Remote Hearings Committee considered (d)(1)(A) a compromise. The Chair and Ms. McAndrews questioned whether subdivision (h) clearly indicates that the court is not required to make a ruling on every factor.

Ms. Spero asked whether there is a mechanism for challenging a standing order (i.e., to convert an evidentiary hearing from hybrid to in-person). She suggested that subsections (c)(2)(B), (d)(2)(B), and (d)(2)(C) include a provision that a party may move for an order that a hearing be conducted entirely in-person. Mr. Dumont agreed.

The proposed draft currently reads:

(c)(2)(B) If the court has ordered a remote proceeding, a party may move or the parties may stipulate that a nonevidentiary proceeding be hybrid or that particular parties, counsel, or other persons be required to participate in person.

(d)(2)(B) If the court has ordered a remote proceeding, a party may move or the parties may

stipulate that an evidentiary proceeding be hybrid or that particular parties, counsel, witnesses, or other persons be required or permitted to participate in person.

(d)(2)(C) If the court has ordered a hybrid proceeding, a party may move or the parties may stipulate that particular parties, counsel, witnesses, or other persons be required to participate in a particular manner: in person, or by video or audio conference.

The Chair asked if the standing order exceptions at the end of (c)(1)(A) and (d)(1)(A) should be moved to another subsection to avoid confusion.

Ms. McAndrew suggested striking the “to” in (d)(1)(B)(i).

Subsection (h). Mr. Dumont and Ms. Spero suggested that standing orders include the court’s reasoning, citing subsection (h) factors considered. This would provide a party a basis for filing a motion to challenge the standing order. It was further discussed whether subsection (h) could be misinterpreted to require a ruling on each factor. Mr. Koeninger suggested amending the reporter’s notes rather than amending the proposed language.

Subsection (b)(3). There were questions about whether the definition of a “hybrid” proceeding is sufficiently clear. Ms. Wetherell explained that in a hybrid proceeding, the parties may decide to appear in-person or remotely, unless the court has issued an order in a particular case that that a party or witness appear in-person.

Subsection (f). The Chair asked whether notice to parties includes a plain English explanation of a hybrid hearing (if scheduled as such), and a Webex link to the hearing. Ms. Damone confirmed this is the case.

By unanimous vote the Committee voted to recommend to the Remote Hearing Committee the following changes.

i. On motion by Ms. Spero, seconded by Mr. Dumont, and passed by unanimous vote, that:

(c)(2)(B), (d)(2)(B), and (d)(2)(C) include language permitting a party to move that a hearing be conducted entirely in-person.

ii. On motion by Ms. Spero, seconded by Ms. Asay, and passed by unanimous vote, that:

(d)(1)(A) reinstate the good cause requirement in issuing standing orders for evidentiary hearings; and

clarify that a court need not consider every factor in subsection (h); and

standing orders issued under (d)(1)(A) provide the court’s reasoning of the relevant subsection (h) factors.

iii. On motion by Mr. Dumont, seconded by Ms. McAndrews, and passed by unanimous vote, that:

(d)(2)(E) be amended with “relevant,” for parity with subsection (h).

(E) In ruling on a motion under this subdivision paragraph, the court must will consider the **relevant** factors set forth in paragraph(6) subdivision (h) to determine whether good cause exists to have a remote or hybrid proceeding or permit or require participation for some or all participants by video or audio conference.

B. #20-13. Proposed amendments of V.R.C.P. 55, 62, regarding service of default judgments; PROPOSEDVRCP55_62--FOR COMMENT due February 14, 2022.

The Committee has approved revisions to Proposed Rules 55 and 62 and revision to draft new changes to Rule 4 and 80.1, all to require service of default judgment; to allow recovery of costs of service; and to include updated and clarified restricted mail delivery requirements.

The Committee decided it was appropriate to distribute the revised proposed rules for comments. Since the Committee’s last review, a minor change was made to Rule 55(c)(6); the reference to Rule 55(c) is changed to 55(d). The Chair also updated the reporter’s notes for Rules 55 and 62. Rule 4(f)(1)(B) requires editing for clarity. A motion was made and seconded that the Committee send the revised Rules 4, 55, 62, and 80.1 out for comment subject to the Committee’s approval of Rule 4 edits. The motion passed by unanimous vote.

3. Suggested amendments for Committee consideration.

A. #22-6. Update the so-called “Discovery - Alternate Dispute Resolution Stipulation”, Rule 16.2. Rule 26(f) Scheduling Orders, Rule 16.3 Mediation and/ or and Amend AO 39 to conform to current mediation practice. Proposal of Civil Division Oversight Committee. Ms. Badgewick and Mr. Weimer reported on the status of their review of the Discovery / Alternative Dispute Resolution Stipulation form, V.R.C.P. 16.2 (Scheduling Orders), and 16.3 (Mediation).

Preliminary recommendations include substituting “ADR” and “Alternative Dispute Resolution” with “Mediation”; and changing the name of the form to *Stipulated Scheduling and Mediation Order*. There was a brief discussion about the chronology of the form when a party moves for summary judgment. Ms. Damone said that, when a motion for summary judgment is pending, her staff awaits a decision on the motion before setting the status for when to go to trial. She was unsure if this is how all clerks operate.

Mr. Weimer and Ms. Badgewick briefly discussed whether V.R.C.P. 16.2(iii) and (iv) should be reflected in an amended form. Mr. Wiemer agreed to compile his observations and recommendations into a Word document for circulation to the Committee before the next meeting. Ms. Damone agreed to review the document prior to distribution.

B. # 22-8. Regularize effective dates of promulgated rules. Proposal by Lisa Shelkrot. The Committee previously agreed on January 1 and July 1 as the logical effective dates for most promulgated rules. Ms. Wetherell had suggested that a provision be carried out under AO 11. In discussion about next steps, Ms. Asay suggested that the application of the AO 11 provision be limited to the committees that promulgate court rules, and not to all committees subject to AO 11.

The Chair offered to contact the chairs of the Criminal Procedure Rules, Evidence Rules, Family Rules, and Probate Rules, to gauge interest in creating a joint proposal to recommend for an amendment to

Administrative Order 11 covering all divisions, formalizing January and July effective dates for all rules.

§ 9. Ordinarily, the Court will promulgate rules, on at least 60 days' notice, for effect on January 1 or July 1 of each year.

§ 9. § 10. The Court may, where the public interest so requires, dispense with some or all requirements of this administrative order, but the order promulgating a rule or change in existing rule under such circumstances shall specifically state the reasons for so dispensing with those requirements.

4. Promulgated Rules.

A. Promulgation of Correction to V.R.C.P 56(b) effective January 1, 2023. Rule 56(b) is amended without notice and comment to restore language consistent with the federal rule allowing a party to file for summary judgment “at any time until” 30 days after the close of all discovery that was changed in the 2022 amendment to require a party to file “within” the 30-day period. The amendment clarifies that a party may file a motion for summary judgment before as well as after the close of discovery. [PROMULGATED - Emergency Order Amending VRCP56\(b\)](#). Chair Keyes reported that the Court promulgated the correction on January 1, 2023.

B. Rule 79.2. Possession and Use of Recording and Transmitting Devices in the Courtroom and Courthouse, effective December 12, 2022. Order Permanently Adopting Amendments to Rule 79.2 of the Vermont Rules of Civil Procedure, Rule 53 of the Vermont Rules of Criminal Procedure, Rule 79.2 of the Vermont Rules of Probate Procedure, Rule 35 of the Vermont Rules of Appellate Procedure and Administrative Order 46. [PROMULGATED Extending VRCP79.2 VRCP53 VRPP79.2 AO46--STAMPED.pdf](#). These rules contained a sunset provision and a requirement that the advisory rules committees report back to the Court on whether the amendments should be made permanent. The rules committees have not reported any objection to the current state of the rules or proposed any further revision. Therefore, the 2019 amendments are now made permanent.

5. Reports, news, and trailing agenda items.

A. # 23-2 Rules 9.1 and 9.2 (Special Pleading in eviction and foreclosure). The promulgation order directs “the Advisory Committee on the Rules of Civil Procedure . . . to review the operation of these rules and to advise the Court when appropriate, but in any event, not later than July 1, 2023, whether these rules should be terminated in whole or in part, extended, revised, or made permanent. In the absence of further order, these rules will be void and of no further effect in any civil action commenced after September 30, 2025.” (Emphasis added).

Chair Keyes reported that mortgage funds were estimated to run out in spring, 2023. Mr. Dumont agreed to assist in monitoring the availability of these funds so the Committee will need to amend the rule to no longer require banks to refer people to apply for these funds. This item remains on the trailing agenda for review in May.

B. News from committee members serving on the Civil Oversight Committee, the Electronic Filing Rules Committee, or the Evidence Rules Committee.

Mr. Koeninger reported that the Electronic Filing Rules Committee is focusing on sections of Rule 5 dealing with rejected filings, and how the Odyssey filing system works. Some pleadings are rejected by the clerk, while others are rejected by Odyssey. The committee intends to set a process for appealing a rejection, when appropriate. The item is on the agenda for the February meeting.

C. “Update from the Rules Committee” to be presented at April VBA meeting? Ms. Spero to report. [Not discussed.]

D. #23-1 [Tabled] Remote Deposition oaths. 2022 legislation allows remote administration of oaths by specially licensed notaries located in Vermont. OPR Emergency Administrative Rules for Notaries Public and Remote Notarization (Eff. 9/9/2022; Expires 3/9/2023) define “Remotely Located Individual” to mean an individual or individuals located in Vermont who is/are not in the physical presence of the notary public who perform(s) a notarial act.” We are awaiting clarification whether OPR will issue new rules allowing notaries in Vermont to administer oaths to individuals located outside the state. See V.R.C.P 28(a) (persons before whom depositions may be taken)

E. 22- Electronic transmission of jury questionnaires. Civil Rule 47(a)(2) and Criminal Rule 24(a)(2). Chair Keyes reported that clerks are still unable to electronically transmit jury questionnaires to attorneys. The matter is being addressed in the Court Administrator’s office. Ms. Damone confirmed that electronic transmission is desired by the managers. She agreed to update the Committee on this matter.

6. Status of recommended amendments.

A. Rule 79.1(e) amended effective February 13, 2023, to make clear that admission pro hac vice is a matter of course on motion supported by the pro hac vice licensing card issued by the Court Administrator pursuant to A.O. 41, § 16. This amendment is made with contemporaneous amendment of parallel provisions of V.R.Cr.P. 44.2(b), V.R.P.P. 79.1(d) and V.R.F.P. 15(a). PROMULGATED - Order Amending VRCP79.1(e), VRCrP44.2(b), VRPP79.1(d), VRFPP15(a).

7. New business. No new business.

8. Date of next meetings. March 3; May 5; June 2; September 1; November 3.

Ms. Asay will be unable to attend on March 3. Three members are unable to attend the May 5 meeting; the new date is May 12.

9. Adjourn. The meeting was adjourned at 11:04 a.m.