

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE  
MINUTES OF MARCH 3, 2023 MEETING**

The meeting was called to order at 9:05 a.m. virtually on Teams by Allan R. Keyes, Chair, with the following Committee members present: the Hon. David Barra, Anne Damone, Jim Dumont, David Koeninger, and Karen McAndrew. Also present was the Hon. Harold Eaton, Supreme Court liaison; and Professor Pamela Vesilind, Reporter.

The Civil Rules Committee met virtually to consider the following agenda:

1. **Minutes** The draft minutes of the meeting of January 20, 2023 were unanimously approved as previously circulated.
2. **Action items.**

A. # 23-2 Rules 9.1 and 9.2 (Special Pleading in Eviction and Foreclosure).

The promulgation order directs that “the Advisory Committee on the Rules of Civil Procedure is directed 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). Report from Chair Keyes.

The Chair sought a motion to submit for public comment the proposed rule changes as drafted. A motion was made by Ms. McAndrew. Mr. Koeninger commented that action might be premature given the uncertainty about when the funds would be exhausted. He noted that VERAP currently is taking applications for rental assistance until June 30, and that mortgage assistance under VHAP could be covered for some time after the application deadline. Mr. Koeninger outlined the funding sources for both programs.

Mr. Dumont preferred a policy that would delay a proposed change to Rule 9.2 until the funds are expended. The Chair asked what the Committee would do if, by the May meeting, the mortgage funds are already depleted. Justice Eaton remarked that the Court would favor an option that avoids an emergency rulemaking, to the extent that the Committee can return to notice and comment rulemaking,

Mr. Koeninger suggested that the Committee recommend seeking comment on the Rule 9.3 (VHAP) proposed changes, but delay doing so for Rule 9.2 (VERAP). Mr. Dumont agreed. The Committee agreed with the Chair’s suggestion to leave the date blank in the Reporter’s Notes to proposed rule 9.3.

Ms. McAndrew renewed her initial motion, declining to amend it with Mr. Koeninger’s suggestion. Mr. Dumont seconded the motion. After agreeing that a majority of the quorum was necessary for the motion to carry, the motion to submit for public comment the proposed changes to rules 9.2 and 9.3 passed by a vote of 3 – 2.

B. #20-13. Proposed amendments of V.R.C.P. 55, 62, regarding service of default judgments; PROPOSEDVRCPS5 62--FOR COMMENT due February 14, 2022. Draft promulgation order with reporters notes and amendments to Rules 4, 55, 62 and 80.1 considered at last meeting edited and revised for clarity and readability to be sent out for public comment.

Mr. Dumont moved to adopt Option 2. Judge Barra seconded. In discussion, several minor edits were adopted. Reporter's Notes will be revised and Rule 62 will be revisited accordingly. Mr. Dumont also expressed a preference for amending Rule 55 with the Rule 4 revisions, rather than merely incorporating them by reference. Having already voted to send the proposed amendments out for public comment, the Committee agreed they should be sent to the Court with this recommendation.

### **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/Discovery plan; Rule 16.3 Mediation; and/or and amend AO 39 to conform to current mediation practice. Proposed by the Civil Division Oversight Committee.

There was no status report from Ms. Badgewick or Mr. Weimer at this time.

B. # 22-8. Regularize effective dates of promulgated rules. Proposal of Lisa Shelkrot.

Chair Keyes reported on his consultation with the other rules committees. The Chair reported that he had spoken with the chairs or reporters of the following committees: Rules of Criminal Procedure, Rules of Evidence, Rules for Family Proceedings, Rules of Probate Procedure, and Rules for Electronic Filing. All committees were favorable. The Family and Probate committees will meet this month to discuss, but their agreement is anticipated. At Justice Dooley's suggestion, the Chair also contacted the Rules for Public Access to Court Records Committee. All committees anticipated a need to make exceptions on a case-by-case basis. The Chair received authority from the Committee to negotiate with other committees on the language.

There was discussion, prompted by Mr. Dumont, about whether this needed to be in a rule, or an administrative order, or neither. Ms. McAndrew proposed that this be submitted to the Court in the form of a joint recommendation letter from all committees.

C. #23-3 Clean-up of Rule 64 - Replevin. (Judge Toor)

A proposal to eliminate jurisdictional statements (superior court) in V.R.C.P. 64. The Committee no longer had a quorum to vote on this item. The Chair appointed Ms. Badgewick, in absentia, to provide a recommendation on this item at the May meeting.

D. # 23-4 Rule 79.1. Fee for post-judgment motion to withdraw, 32 V.S.A. § 1431(e).  
(Mr. Koeninger)

Mr. Koeninger explained the issue for attorneys representing clients in eviction cases for a limited purpose. Attorneys are being charged a withdrawal fee of \$90 after a motion to dismiss has been granted by the court. The Committee discussed the need for the attorney to file a motion

to withdrawal.

Mr. Koeninger relayed what he had learned from the Odyssey Helpdesk and the Odyssey user's group. Odyssey Helpdesk interprets Rule 79.1 (Appearance and Withdrawal of Attorneys and Self-Represented Parties) to require a \$90 fee to an attorney granted a motion to withdrawal. The Committee discussed possible workaround options, but found none to be satisfactory. There was discussion about whether this issue is best addressed by amending Rule 79.1; by modifying the Odyssey contract; or through legislative action.

It was the sense of the Committee that a rule change is not in order at this time.

Mr. Dumont suggested that there be an agenda item every month to discuss issues involving Odyssey and the proper interpretation and application of the civil rules. As an example, he raised an issue as to how Odyssey records filing and service dates. Currently, Odyssey does not provide definitive notice of the date service is complete, as recorded by the clerk of court. Instead, Odyssey tolls the 14-day period for answering a complaint on the day of filing. This is contrary to Rule 7.

**4. Reports, news, and trailing agenda items.**

A. News from the Civil Oversight, Electronic Filing Rules, Evidence Rules, or Remote Hearings Committees.

Mr. Dumont reported that the Committee on Remote Hearings had agreed with Chair Keyes' memo suggesting that a determination of good cause, in writing, should support all orders requiring remote participation in evidentiary proceedings.

B. "Update from the Rules Committee" webinar. Scheduled for March 29, 2023.

C. #23-1 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." The Committee is 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).

This item was tabled.

**5. New business.** There was no new business discussed.

**6. Dates of next meetings.** May 12; June 2; September 8 (proposed); November 3; January 5.

**7. Adjourn.** The meeting was adjourned at 10:40 a.m.