

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE  
MINUTES OF MAY 12, 2023 MEETING**

The meeting was called to order at 9:06 a.m. virtually on Teams by Allan R. Keyes, Chair, with the following Committee members present: Bridget Asay, Bonnie Badgewick, Anne Damone, the Hon. Samuel Hoar, David Koeninger, Karen McAndrew, Laura Rowntree, Navah Spero, and Gregory Weimer. Also present was the Hon. Harold Eaton, Supreme Court liaison; Emily Wetherell, Deputy Clerk of the Supreme Court; and Professor Pamela Vesilind, Reporter.

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

- 1. Approval of draft minutes of the meeting of March 3, 2023.** Tabled for the September 19, 2023 meeting.
- 2. Action items.**

A. # 23-2 Rules 9.1 and 9.2 (Special Pleading in eviction and foreclosure). The promulgation order states 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). The Committee has proposed to delete Rule 9.2(c) and Rule 9.3(b). The comment period expired on May 8, 2023. [PROPOSED-VRCP9.2-9.3--FORCOMMENT.pdf](#).

Vermont Homeowner Assistance Program (VHAP).

Ms. Wetherell advised the Committee that the current notice, which says that funds *may* be available, is adequate even in the event that the application period is closed. An automatic triggering of a new form based on agency notification that an application period is “closed” would be problematic, as the term “closed” is variable, not binary. It would be better for the Committee to respond to program changes when they occur.

Judge Hoar preferred to leave the current notice as-is. Mr. Koeninger also preferred this option, considering the “moving target” nature of applicant response rates, the waiting list, and the actual fund payout process. Regarding the latter, the timeframe for payout can vary greatly. The funds may not be fully paid out by the end of the calendar year.

Chair Keyes relayed his conversation with George Demas of the Vermont Housing Finance Agency (VHFA). It is the agency’s intent to wait until 90% of the funds have been allocated before issuing a 60-day notice of the program’s termination. Mr. Demas’s outside prediction date was September 30, 2023.

Chair Keyes pointed the Committee to a comment received from Susan Steckel. Ms. Steckel commented that the notice should not be sent to homeowners who have already received VHAP funds, because VHFA will not accept multiple applications for assistance with the same mortgage. The Committee determined that the rule is sufficiently clear at this time.

Ms. Steckel’s comment also urged the Committee to address the matter of “automatic” stays for homeowners that do not meet the VHAP requirements. Ms. Spero wondered how courts handle these motions for stay. Judge Hoar explained that he typically grants a stay, allowing the bank to challenge the

homeowner's right of redemption. Ms. Wetherell noted that the stay automatically terminates under certain conditions, and that the rule has a sunset provision for 2025.

Chair Keyes asked the Committee what it should do if a program closes to new applications before the September meeting. Ms. Spero suggested that the minutes to this meeting reflect the Committee's preference to wait until it is informed that the program has closed. At that point, the Committee could consider an email vote whether to send a recommendation, or it could hold a full meeting to discuss the matter.

The Committee determined not to terminate the notice provision in Rule 9.3(b), and Chair Keyes offered to respond to Ms. Steckel's comment.

Vermont Emergency Rental Assistance Program (VERAP). Chair Keyes reported that the legislature agreed with the Committee's decision not to act to terminate the notice requirement at its March, 2023 meeting. Parts of this program rely on federal congressional action (CARES Act). A question was posed about keeping this as a trailing agenda item. Judge Hoar preferred this option. Chair Keyes agreed to relay the Committee's recommendation to the Court by July 1, 2023.

### **3. Suggested amendments for Committee consideration.**

A. #22-6. Update the "Discovery - Alternate Dispute Resolution Stipulation," Rule 16.2 / Rule 26(f) Scheduling Orders/Discovery plan; Rule 16.3 Mediation; and/or AO 39 to conform to current mediation practice. (Civil Division Oversight Committee; Judge Toor)

Mr. Weimer reported that he had been working on edits to 16.2. He will circulate a specific recommendation to the Committee for discussion at the September meeting.

B. # 22-8. Regularize effective dates of promulgated rules. (Attorney Lisa Shelkrot)

Chair Keyes reported on the letter he delivered to the Chief Justice regarding the Committee's recommendation that the Court standardize effective dates in an administrative order. The matter is now on the Court's agenda.

C. #23-3 Clean-up of Rule 64, Replevin. (Judge Toor) (Badgewick memo, embedded below).

The suggestion was to review Rule 64 and remove obsolete jurisdictional references in sections (b)(2) and (3), and (i). Ms. Badgewick found an additional reference to "superior or District Judge" in (b)(1). Ms. Badgewick recommended deletion of the obsolete language and an amendment to Rule 64(a) clarifying that replevin actions must be filed in the Civil Division of the Superior Court. She raised the following questions for Committee consideration:

- The statute (12 V.S.A. § 5371 below) indicates claims below \$5,000 go to "any court," and those over \$5,000 go to Superior Court. In practice, does anyone seek or attempt to seek replevin in any court other than Superior Court? Replevin is not available in small claims court. 12 V.S.A. § 5531(b).
- Assuming the Committee amends Rule 64, should it also note in Rule 80.3 or the Reporter's Notes that replevin is not available in Small Claims?
- Should Rule 64 indicate the expectation of filing in the Civil Division of the Superior Court? This would be inconsistent with 12 V.S.A. § 5371.

Ms. Spero recommended against language in section (a) to restrict replevin actions to the Civil Division of

Superior Court, because she had filed a writ of replevin in probate court. (Probate Rule 65). Instead she suggested this language: “in the appropriate division of Superior Court.”

Judge Hoar thought this might require a statutory solution, rather than a rules-based solution, noting that § 5371 is a pre-unification statute that has not been amended. Judge Hoar agreed with the proposed changes to section (b), removing references to the District Court. He advised against amending section (a), because family court, probate court, and environmental courts are all superior court divisions.

Ms. Badgewick suggested a clarification be added to the Reporter’s Notes. Ms. Spero suggested the Reporter’s Notes clarify that the revised language does not effect applicable probate rules. A motion was made by Judge Hoar to propose changes to Rule 64 as recommended by Ms. Badgewick and discussed by the Committee (Rule 64(b)(1), (2), and (3); and subsection (i)). Ms. Spero seconded the motion, and the proposal passed by voice vote.

D. #22-10 Amendment of V.R.A.P. 3(e) to provide that docketing statements are optional for appellees [tabled].

Chair Keyes reported that the Criminal Rules Committee is taking up the issue. Ms. Asay will research the issue, reach out to relevant stakeholders and report back to the Committee for discussion at the September meeting.

E. # 23-5 [New] VRCP 79.1 Provide client contact information with motion to withdraw. (Judge Toor)

The request was to recommend amending V.R.C.P. 79.1(f) to require withdrawing attorneys to provide the court with their client’s mailing address and email address, despite the fact that the court is not required to notify the client directly of the hearing.

It was discussed that the Family Rules are elaborate with respect to attorney withdrawal. The Probate and Criminal Rules state that no motion to withdraw may be granted unless the client has been notified by the court. Judge Hoar commented that this issue frequently arises. He requires assurance from the counsel that the client has received notice. Ms. Asay asked for confirmation that, in family court, client addresses would not be made part of the public record. Ms. Spero agreed to review the other rules and suggest options for the Committee.

#### **4. Suggested amendments of possible further review.**

A. # 23-4 Small Claims Date of Service. (William Towle)

Under the Small Claims Rule 3(b)(2), the defendant must answer with the court “within 30 days from the date on which the plaintiff mailed the summons and complaint.” A short discussion followed about whether the wording should be changed to eliminate the “mailbox rule.” The question was asked: is this actually a problem? Judge Hoar and Ms. Spero expressed doubts. The sense of the Committee was that no rule change is needed. Mr. Koeninger agreed to consult the Rules Oversight Committee about whether a change to the form is needed.

#### **5. Reports, news, and trailing agenda items.**

A. Court Staff Review. VRCP 5(e)(7), “Denial for Lack of Form Prohibited. Unless otherwise provided in the 2020 Vermont Rules for Electronic Filing, the clerk shall not refuse to accept for filing any document presented for that purpose solely because it is not presented in proper form as required

by these rules.” Proposed Order Amending Rule 5 of the 2020 Vermont Rules for Electronic Filing (“Court staff may reject a filing that does not comply with these rules or Rule 7(a)(1) of the Rules for Public Access to Court Records. Court staff may also reject a filing that contains an error that cannot be corrected by court staff. The Court Administrator will delineate the permissible reasons for rejecting a filing and provide the list in a prominent place on the Judiciary website.”). See [PROPOSED--VREF-5--FORCOMMENT.pdf](#). Comments on these proposed amendments were due to Hon. John A. Dooley (Ret.), Chair, by June 12, 2023.

Chair Keyes shared his concerns about this issue. Ms. Spero and Ms. Asay agreed that the system needs simplification and consolidation. Ms. Damone observed that the issue is not often raised in her experience. Mr. Koeninger reported that the E-filing Rules Committee had been working on the problem of rejected filings for several months. It is still being determined whether this is an issue with Odyssey.

B. Other news from E-filing Committee, or from Civil Oversight, Special Committee on Remote Hearings, or Evidence Rules Committees. Mr. Koeninger reported on the issue of public access to remote hearings. No changes need to be made to Rule 79.2. Administrative Directive TC-3 was issued on this matter.

C. #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 9/5/2023) 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 permanent 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).

D. #20-13. Proposed amendments of V.R.C.P. 55, 62, regarding service of default judgments; PROPOSEDVRCP55\_62--FOR COMMENT due **February 14, 2022**. Proposed amendments to Rule 4(d), Rule 4(e), Rule 4(f), Rule 55, Rule 62(b), and Rule 80.1(f) to be sent out for public comment. The latest proposed revisions will be distributed to the Committee before the September meeting.

## **6. New business.**

Judge Hoar suggested the Committee visit Rules 54 and 58(d) (entry of judgement and taxation of costs). The rules are unclear, so courts do not apply them uniformly. Ms. Spero agreed. Judge Hoar offered to prepare a recommendation to the Committee. Ms. Asay offered to form a sub-committee with Judge Hoar.

The Committee briefly discussed an issue raised by Mr. Dumont at the March, 2023 meeting, involving how Odyssey records and reports service dates. The Judiciary’s Standard of Practices Committee is currently reviewing the need for the Odyssey portal to create a discovery trail so parties will know dates of filing and service. It was suggested that the Committee track the issue and include it on the September, 2023 agenda.

**7. Date of next meetings.** September 22, November 3, January 5

**8. Adjourn.** The meeting was adjourned at approximately 11:07 a.m.