

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE
MINUTES OF JANUARY 3, 2025 MEETING**

The Civil Rules Committee met virtually at approximately 9:00 a.m. on Friday, January 3, 2025.

Attendees: Chair Allan Keyes; Bridget Asay; the Hon. David Barra; Merrill Bent; James Dumont; the Hon. Judge Hoar; Jean Murray; and Gregory Weimer. Also in attendance were Therese Corsones; Anne Damone; the Hon. Justice Eaton; and Lynn Wdowiak

Chair Keyes began the meeting by proposing a resolution of appreciation to Bonnie Badgewick and Laura Rowntree for their service on the committee and of congratulations on their appointments to the bench. The proposal was cheerfully met with unanimous acclamation.

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

2 PROPOSED RULES OUT FOR COMMENT

Comments on these proposed amendments closed on December 9, 2024:

A. # 23-8. Proposed Order Deleting Rule 11(e) and Amending Rule 43 and Rule 56 of the Vermont Rules of Civil Procedure

- Deletes V.R.C.P. 11(e) in its entirety;
- Adds new V.R.C.P. 43(h), broadening the authorization for declarations in place of affidavit or statement under oath; and
- Amends V.R.C.P. 56 to refer to “declarations” as well as affidavits.

No comments received.

The following technical edits to proposed Rule 43 were discussed and agreed upon: Rule 43(d) and 43(h) -- substitute “require” for “requires”

No suggestions were made regarding the deletion of Rule 11(e) or the amendments to Rule 56. Judge Hoar moved to recommend to the Court that the deletion and amendments be promulgated; Judge Barra seconded. The motion passed. Chair Keyes to submit the recommendation to the Court.

B. # 23-16. Proposed Order Amending Rule 4(c) of the Vermont Rules of Civil Procedure

- Emphasizes the existing option to seek court approval for service by an “indifferent person.”
- Adds “good cause” as a reason for using alternative service, which may include service delays in a county, or when time is of the essence.

Chair Keyes presented his memo to the committee and reported on the meeting with the Legislative Committee on Judicial Rules (LCJR). The LCJR suggested that the rule or the reporter’s note indicate that the judge would be exercising discretion in choosing an indifferent third person for service. Chair Keyes further proposed:

- adding "suitable" to describe the substitute appointee;
- replacing "good cause" with language that conforms to the process statute 12 V.S.A. § 731, in that the judge "may appoint an indifferent person to serve the process if it appears that service by that person will be more economical or efficient than service by an officer."

Mr. Dumont reported that the Department of State's Attorneys and Sheriffs intends to seek a bill in the next legislative session to expand the service jurisdiction of sheriffs and deputy sheriffs in civil proceedings. Judge Hoar noted that applicable statutes limit service jurisdiction by county for writs of possession in ejectment proceedings (see 12 V.S.A. §§ 4853a; 4853b; and 4854). Reportedly, applicable statutes give sheriffs and deputy sheriffs statewide service jurisdiction in criminal matters.

- Ms. Murray wondered whether "indifferent" is sufficient to prevent service by third parties with an interest in the case (12 V.S.A. § 731). Ms. Bent suggested "disinterested" might be clearer than "indifferent." Ms. Murray responded that "disinterested" seemed narrower than "indifferent." Mr. Dumont noted that Black's Law Dictionary defines disinterested as indifferent, and that the word indifferent is in the statute.

- Judge Barra returned to the suggestion that the appointed person be required to also serve a copy of the appointment order.

- Judge Hoar observed that more recently appointed judges are looking to the rules for guidance when exercising discretion in "gray areas."

- There was general support for using the reporter's notes to explain the judge's role in appointing alternative servers.

Mr. Dumont moved to approve the amended Rule 4(c) language with an additional sentence that would say the order of appointment shall be served with the process. Ms. Bent seconded the motion. The motion passed unopposed. Chair Keyes to prepare for next meeting the agreed recommended text and a new reporter's note with guidance about the selection of alternative servers.

C. #24-8. Proposed Order Amending Vermont Rules for Environmental Court Proceedings - Rule 3; 4(a)(2), (d)(6)(A), and (e)(5); 5(a)(2), (b)(1), (c), (f), (h)(1)(A) and (k)(1).

- Deletes references to the 2010 Vermont Rules for Electronic Filing, which were replaced with the 2020 Vermont Rules for Electronic Filing.

No comments received.

The committee discussed draft language proposed by Ms. Wetherall to eliminate obsolete references to the former Environment e-Filing rules. Ms. Bent moved to recommend the Court promulgate the amendments in the proposed order; Ms. Asay seconded the motion. The motion passed unopposed. Chair Keyes to submit the recommendation to the Court.

D. #23-17. Proposed Order Amending Rule 5(b)(4)(A) of the Vermont Rules for Environmental Court Proceedings

- Requires service of the notice of appeal on the applicant immediately after the appellant files the notice of appeal.
- The purpose of this proposed amendment is to provide sufficient notice to applicants and mitigate delays while appellants are in the process of identifying other interested persons to notify.

Two comments received:

- Attorney LaRosa commented: “I think it is well phrased. It is clear and directive and achieves the primary goal - to provide notice to the applicant as soon as possible of an appeal being filed.”
- Judge Walsh acknowledged the change with a “thank you.”

Judge Barra moved to recommend promulgation by the Court; Ms. Bent seconded the motion. The motion passed unopposed. Chair Keyes to merge this recommendation with #23- 8 and submit the recommendation to the Court.

E. # 23-2.3. Proposed Order to Make Permanent Amendments to Rule 9.2 of the Vermont Rules of Civil Procedure

- Makes Rule 9.2, as amended July 1, 2024, permanent.
- Rule 9.2, adopted September 13, 2022, and effective October 1, 2022, implements the requirements of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law No. 116-136, 15 U.S.C. § 9058(c)(1).

Judge Spero submitted a comment as to whether Rule 9.2(c), authorizing dismissal for failure to file a declaration, was appropriate. Judge Hoar and Judge Barra agreed that they generally view this as a curable defect. It was agreed that some inexperienced attorneys fail to follow the current form. Ms. Murray expressed preference nevertheless for keeping the form. Ms. Bent suggested that, given the volume of these cases, civil judges may find it helpful for this to be standardized. Ms. Murray suggested that the language in Rule 9.2(c) supports the argument for making the rule permanent.

Additional discussion:

- Whether 9.2(b)(2) should include the option for declarations that are “substantially similar” to the form approved by the State Court Administrator.
- Whether the requirements stated in the form should also be stated in the rule.

Chair Keyes reported that comments had been solicited from Legal Aid and the Landlords Association. The Landlords Association responded that most members are familiar with the form and do not report troubles using it; but that it is common practice to give 30 days notice even when the state law allows for a shorter notice period.

Mr. Dumont moved that the committee recommend to the Court that it make Rule 9.2 permanent; Judge Hoar seconded. The motion passed unopposed. Chair Keyes to submit the recommendation to the Court.

SUGGESTED AMENDMENTS FOR CONSIDERATION AS PROPOSED RULES

A. #24-15. V.R.A.P. 30 Requirement of Printed Case; Filing Deadlines.

3. - Amends new subdivision “(e) Filing Deadlines” to state:
- (1) the appellant must file any required or optional printed cases when the appellant files their principal brief; and
 - (2) the appellee must file any supplemental printed cases when the appellee files their principal brief.
- Renames former (e) to (f).

Ms. Asay updated the committee on the proposed amendment. After a brief discussion, minor edits were made to subdivision (e) and corresponding language in the Reporter’s Notes. Ms. Asay moved to accept the proposed language as changed. The motion carried without objection.

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

- Eliminates the option in Rule 65(b) that an application for a preliminary injunction be included in the complaint.
- Requires that a motion be made to request a preliminary injunction.

The committee agreed to a minor edit to the proposed language. Judge Hoar moved that the proposed rule be submitted for public comment; Judge Barra seconded the motion. The motion passed without objection.

4. # 23-7. Rule 54(e) – Taxation of costs by the court; and Rule 58(b)&(d) –Form of judgment.

- Shifts the burden from the clerk to the court to tax costs.
- Sets forth procedure for requesting or objecting to attorney’s fees and costs.

The committee reviewed Chair Keyes’ memo proposing amended language and reporter’s notes.

Rule 54

Discussion centered on draft Rule 54(e)(3) (“The court will rule on the requested costs and include a statement of approved costs *in the judgment or an amended judgment*”) and how to reconcile statements in the existing rule requiring that costs be included in a money judgment and that the entry of judgment shall not be delayed for taxation of costs. Ms. Murray noted the eviction statute also requires costs be included in a judgment for possession.

Judge Hoar explained that the existing rule is silent about amending the judgment. This has been a subject of discussion among judges that practice is not uniform, and clarity is needed. Some judges are holding off on issuing the judgment until costs have been determined, even though the rule says otherwise, while other judges are issuing a judgment and then an amended judgment after taxation of costs. It is Judge Hoar’s preference to enter an immediate judgment and then later amend the judgment to include costs.

Mr. Dumont and Ms. Asay expressed concern that the draft language “amended judgment” would create uncertainty as to when a judgment is final.

It was noted that under the existing rules it is clear that an award of attorney's fees is to be entered as a "separate judgment," separately appealable. The existing rule says the appeal time is not extended for the award of costs or attorney fees. If the award of costs is to be included in an "amended judgment," as drafted, it may be wrongly inferred that the appeal time is extended on the original judgment.

Other issues considered:

- Substituting "court" in place of "presiding judge."
- Striking "with proof of service" from proposed Rule 54(e)(1), based on the wording of the appellate costs rule. Explaining in the Reporter's Note that service is required under Rule 5
- Amending Rule 54(c) to say that, when a party has moved for attorney's fees, the court should defer issuing an order on costs until ruling on attorney's fees.

It was decided that these issues required further consideration. Mr. Dumont to present recommendations for discussion at the March meeting. Judge Hoar and Ms. Asay are available to assist.

Rule 58

Edits considered to draft Rule 58(b) and (d):

- Changing "attorney" or "attorneys" to "party" or "parties." (Rule 58(b)(1) and 58(d)). The committee agreed to Ms. Asay's suggestion that the party rather than the "attorney" submits forms of judgments. The change will be noted at the end of paragraph two in the Reporter's Notes.
- Striking "with proof of service" from proposed Rule 54(e)(1). Mention in the Reporter's Note that service is required under Rule 5.
- The proposed judgment to be "filed" rather than "submitted."
- Substituting "court" in place of "presiding judge."
- Reporter's Notes: possibly referencing amended Rule 54's separate judgments issue, as it is addressed in Rule 54.

5. # 23-5. Rule 79.1 - Suggested amendment to provide client contact information with motion to withdraw.

Discussed in conjunction with #24-9, agenda item 6.

6. #24-9. Rule 79.1. - Substitution of Counsel without notice and motion.

- redefines procedure for providing notice to a party when their attorney has filed a motion to withdraw as counsel

Mr. Dumont presented his memo for discussion and a possible decision to submit the proposed rule for public comment.

Summary of recommendations:

- Requires the attorney to serve all parties a copy of the motion to withdraw, pursuant to Rule 5; the attorney's client must also be served information about their client's rights and responsibilities.
- Directs the attorney to file a certificate of service with the court.

- Intends that the clerk will use the certificate of service's address or other contact information to provide notice of hearing or court order.
- Allows the client's address to be kept under seal, for good cause.
- If the court grants the motion to withdraw, whether the clerk should send to the party the notice of appearance form for self-represented litigants. It was agreed that the communication should include a hard copy of the form and how the party may download the form online. Rule 79.1(g)

- Edits:

(g) Same: Notification of Party. When an attorney has been granted leave to withdraw the attorney's appearance, the clerk ~~shall~~ will notify the party ~~promptly forthwith by mail, of such withdrawal,~~ and inform ~~said~~ the party that unless the party enters a notice of appearance to be self-represented or appears by attorney within thirty days after receipt of such notification, the action will be subject to dismissal or default. ~~dismissed or defaulted, as the case may be.~~

The committee also addressed a number of questions about automatic substitution of counsel. The suggested language for Rule 79.1(f)(2)(B) would be modified to:

(B)The court will not consider a motion to withdraw until the clerk has given notice to the party of the motion with the date and time of hearing, unless (i) the attorney includes with the motion an affidavit or declaration showing that after diligent search the attorney cannot determine the current address of the party, or (ii) other counsel has entered an appearance for the party or the party has entered a notice to be self-represented.

Mr. Dumont requested the minutes reflect the committee's desire for the judiciary to develop standard practices for documenting how clerks have complied with the notification requirement of subdivision (g), including the creation of a docket entry with information about how the notice was sent, or whether the mail was returned.

For the March meeting:

Chair Keyes will circulate a revised combined draft of #23-5 and #24-9 with new reporter's notes for discussion at the meeting. Question: whether V.R.A.P 45.1 should be amended for consistency.

7. # 24-3. Rule 4(e) – citation of legal authority for out-of-state service.

- Would require citation to the out-of-state rule or statute permitting the method of service used for default judgment proceedings.

Previously, the committee decided that Rule 55 would be the proper placement for this amendment, if it is needed. The sense of the committee was that a rule change was unnecessary, pending further comment from judges to be polled by Judge Hoar.

Judge Hoar reported that although some judges preferred for this to be a matter left to their discretion, a majority of judges polled supported the proposal to amend the rule.

Judge Hoar to assist Chair Keyes in drafting language under Rule 4(e) requiring citations to foreign rules under which service is made. For further consideration: how this impacts Rule 55 default judgment service.

8. #24-11. Rule 4 (d)(1)(ii). Service on an incompetent person.

The Probate Rules Committee seeks feedback on possible amendments under consideration to V.R.P.P. 4.4 (6) (service on incompetent person), which allows service on a guardian, to possibly be restricted to a “court-appointed” guardian and to add as an alternative “an agent under a power of attorney”. Current Civil and Probate rules are now substantially identical.

Chair Keyes to report.
For any discussion and comment

Due to time constraints, this agenda item was deferred to the March meeting.

9. #24-10. Rule 80.12. Post-conviction relief. (Pending proposal from Civil Division Oversight)

Due to time constraints, this agenda item was deferred to the March meeting.

10. #24-12. Rules 5(a) and 77(d). Service and notification of parties who have not appeared. (Inquiry of Judge Spero)

- Under Rule 5(a) and 77(d) a party need not serve, and the clerk need not notify any party “in default for failure to appear.” Is clarification needed? See Memo Re #24-12 Inquiry from Judge Spero

Due to time constraints, this agenda item was deferred to the March meeting.

11. #24-14. Rule 5(h) / 2020 V.R.E.F. 11(g). Electronic certificate of service.

- Would abandon the electronic certificate of service and require an individually created certificate of service with each electronic filing.

The Efiling Committee decided at its December 2024 meeting not to amend 2020 V.R.E.F. 11(g). Chair Keyes circulated a memo explaining the committee’s decision.

Due to time constraints, this agenda item was deferred to the March meeting.

12. # 22-6. AO 39. Mediation Panel update

- Whether to update AO 39 (Alternative Dispute Resolution Civil Actions).

Due to time constraints, this agenda item was deferred to the March meeting.

13. **#24-13. News from The Landlord-Tenant Law Study Committee** created by 2024, Act 181 (H.687), Sec. 113 to review and consider modernizing the landlord-tenant laws and evictions processes in Vermont. [Link](#).

Ms. Murray to report.

Due to time constraints, this agenda item was deferred to the March meeting.

14. **News from Civil Division Oversight**

Judge Hoar / Anne Damone to report.

Due to time constraints, this agenda item was deferred to the March meeting.

15. **# 24-2. Special Advisory Committee on Remote Hearings** Mr. Dumont to report

Due to time constraints, this agenda item was deferred to the March meeting.

16. **FYI: Rules Promulgated for effect July 1, 2025**

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

Promulgated on December 16, 2024, effective July 1, 2025.

17. **# 24-7. News from Court Rules Subcommittee, Judiciary Committee on Artificial Intelligence -Are current court rules adequate to address generative AI usage?** Chair Keyes to report.

Due to time constraints, this agenda item was deferred to the March meeting.

18. **# 23-1. Rule 28(a)(2) - Remote Deposition oaths.**

[Proposed OPR Permanent Rule for Remote Notarization](#) (#24-P01) 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 -- once #24-P01 is made permanent -- whether Rule 28(a)(2) should be amended to include Vermont notaries qualified to act remotely.

Due to time constraints, this agenda item was deferred to the March meeting.

19. **# 20-13.2 Service of Default Judgments: Proposed Order Amending Rules 55, 62(b), and 80.1(f).**

[Proposed Rule 55, 62\(b\), and 80.1\(f\)](#) tabled at March 2024 meeting

New business for next agenda?

No new business was discussed.

Two Committee Vacancies

Chair Keyes reported that he had submitted replacement recommendations to the Court.

Committee adjourned at approximately 12:00 p.m.