

**APPROVED**

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE  
Minutes of Meeting  
January 26, 2018**

The meeting was called to order at 9:10 a.m. in the Hoff Lounge, Debevoise Hall, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Anne Damone, James Dumont, Jean Giddings, Karen McAndrew, Hon. Dennis Pearson, Hon. Helen Toor, and Gregory Weimer (by telephone). Also present were Hon. Harold E. Eaton, Supreme Court liaison; Megan Shafritz, Attorney General's designee; Alan J. Keays, reporter, *Vermont Digger*, and Professor Emeritus L. Kinvin Wroth, Reporter.

1. **Minutes**. The minutes of the meeting of November 17, 2017, were unanimously approved as previously circulated.

2. **Status of recommended, proposed, and pending amendments.**

A. #s12-1/14-10—Event-witness amendment to V.R.C.P. 26(b)(4). Professor Wroth reported that the Committee's revised proposed amendments to V.R.C.P. 16.2, 26(b), and 26(e), clarifying their provisions concerning expert testimony and bringing them more closely in line with comparable provisions of the Federal Rules of Civil Procedure and the realities of current Vermont practice, were sent out for comment on January 24, with comments due on March 23, 2018.

B. Recommended amendments to conform V.R.C.P. 6 and other time provisions of the Civil and other Rules to federal rules amendments ("day is a day" rules), promulgated September 20, 2017, effective January 1, 2018.

(i) The Committee considered proposed further amendments of V.R.C.P. 80.6 and 80.9, sent out for comment on October 18, with comments due on November 27, 2017. Chairman Keyes reported that conflicting comments had been received from the judge of Judicial Bureau who recommended that all time periods be set at 30 days and the clerk who asked that the time periods be retained in present form. After discussion, Justice Eaton agreed to meet with the judge and clerk to work out an agreement on the issue.

(ii) Professor Wroth reported that an emergency amendment to V.R.E.C.P. 4(b), changing the 14-day time period for the Attorney General's motion to vacate an order to 10 days as required by statute, was promulgated on December 5, 2017, effective January 1, 2018.

C. Proposed amendments to V.R.C.P. 45, sent out for comment on October 18, with comments due on December 18, 2017. Chairman Keyes reported that no comments had been received. On motion duly made and seconded, there being no discussion, it was voted

unanimously to recommend the amendments to the Court for promulgation as circulated, with “lawyer” being changed to “attorney” in Rule 45(f)(3)(A) for consistency with other provisions of Rule 45. Chairman Keyes noted that the Criminal Rules Committee was considering a proposed amendment to V.R.Cr.P. 17(a) on the signing of subpoenas that would require further consideration of Rule 45 at a subsequent meeting.

D. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court. Professor Wroth reported that:

(i) The Special Committee’s revised proposed amendments to V.R.C.P. 43(a) et al. and proposed A.O. 47, permitting video and audio conference testimony in certain circumstances, were sent out for comment on January 24, with comments due on March 23, 2018, to Justice Dooley, chair. No Committee action was taken.

(ii) The Special Committee’s recommended replacements of V.R.C.P. 79.2 and V.R.A.P. 35 governing possession and use of recording and transmitting devices in a courthouse or courtroom, as well as Administrative Order No. 46 implementing those rules, were transmitted to the Court on January 2, 2018. The Court will consider the recommended rules and administrative order at its March 8 administrative meeting. It was moved and seconded to recommend that the rule be modified to provide that non-participants are subject to the same provisions as media. In discussion, it was noted that the rule as structured gives the media a preference over non-profit interest groups—for example, an animal rights group that have the same public interest in recording a particular proceeding as the media. The question of how to deal with nonprofits in pooling, and whether the rule was enforceable against them, was raised.

After further discussion, the mover and seconder agreed to substitute the following language in the motion: “The Committee recommends to the Supreme Court that recommended V.R.C.P. 79.2(f) be revised by the addition of the underlined language, to read as follows:

“(f) **Waiver.** The court may waive specific limitations of this rule on request for good cause prior to the proceeding for which waiver is sought. Good cause may include the fact that there is a particularized public interest in the proceeding. If the court grants a participant or nonparticipant a waiver it may impose on that person any of the restrictions applicable to the media, including restrictions on the placement and operation of equipment and personnel.”

The motion passed unanimously.

E. V.R.C.P. 80.11, promulgated June 15, effective August 15, 2016; amended July 11, effective September 12, 2016, with Committee to review and report no later than August 15, 2018, whether the rule should be revised or made permanent. It was agreed that no further data was necessary for the report. Professor Wroth and Mr. Weimer will prepare a summary of the data and a recommendation for Committee action at the next meeting.

F. # 17-1. Allocation of residual class action funds. Request of Chief Justice for Committee review of ABA request concerning adoption of procedures providing for allocation of residual class action funds. Professor Wroth reported that the Committee's proposed amendment adding V.R.C.P. 23(g) to provide for the disbursement of residual funds remaining after satisfaction of all claims under a class action judgment or settlement was sent out for comment on January 24, with comments due on March 23, 2018.

3. #14-7. V.R.C.P. 41(b)(1)(iii). Conform to Rule 3's 60-day service requirement. Deferred at May 12 meeting. Judge Toor distributed the most recent draft of her proposed amendments to V.R.C.P. 41(b). After discussion, she agreed to present a revised draft at the next meeting that would make clear the difference between the judge's signature on a dismissal by stipulation under paragraph (a)(1) and judicial approval required for dismissal under paragraphs (a)(4) and (b)(1).

4. #14-8. V.R.C.P. 69. Executions. The Committee considered Judge Pearson's memorandum of January 24, and Professor Wroth's draft of March 24, 2017, concerning modernization of V.R.C.P. 69, Execution, in light of current practice. In discussion, it was suggested that "before or after judgment" should be deleted from Rules 69(a)(1)-(3) in Professor Wroth's draft and the question was raised whether subdivision (c) should provide for issuance by the clerk or by the judge. Judge Pearson, Ms. Badgewick, and Professor Wroth agreed to work as a subcommittee to present a revised proposal at the next meeting.

5. #s16-7/17-5. Addition of "prisoners' mailbox" provision to Civil Rules. The Committee considered Professor Wroth's draft of proposed amendments to V.R.C.P. 3 and 5 incorporating provisions similar to those of V.R.A.P. 4(f) for complaints and other papers filed by prisoners. It was agreed that V.R.A.P. 25, providing for service of filing of papers in the Supreme Court, should be amended in similar fashion. On motion duly made and seconded, it was voted unanimously that the proposed amendments to V.R.C.P. 3 and 5 and V.R.A.P. 25 should be sent out for comment. Judge Toor will report at the next meeting on the Oversight Committee's position on Emily Tredeau's suggested amendment to simplify service on the Attorney General of prisoners' complaints raising confinement issues.

6. #17-4. Review status of amendments to V.R.A.P. 24 (IFP Proceedings), recommended for promulgation on December 3, 2014. Mr. Avildsen will present drafts of proposed amendments to V.R.A.P. 24(a)(1) and V.R.C.P. 3.1(b)(1) at the next meeting.

7. #17-6. V.R.C.P. 11. Application to self-represented litigants; remedial sanctions. Representative LaLonde had asked whether the Committee would consider an amendment to Rule 11 allowing sanctions that would include compensation to a self-represented litigant for time spent in pursuing a Rule 11 motion. The Committee considered Chairman Keyes' January 25 memorandum reporting that Vermont was one of eight states that had adopted the language of F.R.C.P. 11 as amended in 1993, making clear the deterrent purpose of Rule 11 sanctions; 34 states retained the 1983 version of Rule 11, which the U.S. Supreme Court had interpreted as having a non-compensatory purpose; the remaining states had rules not directly based on the federal models. After discussion, the Committee agreed that Chairman Keyes should advise Representative LaLonde that the sanction provisions reflected the basic deterrent purpose of the

rule, but that a self-represented litigant in a particular case might be able to obtain some relief under the last clause of Rule 11(c)(2), providing for, “if warranted for effective deterrence,... payment to the movant of some or all of the reasonable attorney’s fees and other expenses incurred as a direct result of the violation” (emphasis added).

**8. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct.** The Committee considered Professor Wroth’s request for comment and advice on his January 25 draft of the preliminary sections and Canon 1 and Rule 1.1 of the proposed Vermont Code of Judicial Conduct 2018. He noted that the draft was in the form of an order directly promulgating the Code, rather than promulgating it as Administrative Order No. 10 as was the case with the 1994 Code and its predecessors.—a question of form that the Court would have to consider. He also noted that the Reporter’s Notes to each Canon and Rule would be relatively brief, indicating the purpose of the Canon or Rule and its relation to the 1994 Code. The Notes, however, would not cite or analyze cases decided under the 1994 Code. Accordingly, it would be important to preserve in some way the annotations to those cases as now published with the Code in Vermont Statutes Annotated and Lexis but not in Westlaw. The Committee agreed with Professor Wroth’s approach and urged him to proceed accordingly. .

**9. #14-1. Status of Appendix of Forms.** This item was deferred until the next meeting in light of the unavoidable absence of Ms. Blackwood,

**10. #17-2. Incorporation of V.R.E.F. 4(g) in V.R.C.P. 7(b) or 78(b).** Judge Gerety’s proposal of April 17, 2017. After discussion of Ms. McAndrew’s report on the proposal, it was agreed to remove this item from the agenda .

**11. #17-7. V.R.C.P. 55—Amendments recommended by Civil Division Oversight Committee.** Professor Wroth agreed to prepare a draft proposed order, based on Judge Toor’s draft as circulated, for consideration at the next meeting.

**12. Dates of future meetings.** The next meeting is scheduled for March 30, 2018. It was agreed to hold a further meeting on Friday, May 18.

There being no further business, the meeting was adjourned at 11:55 a.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter