

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
June 21, 2019**

The meeting was called to order at 9:10 a.m. in Room 216 Debevoise Hall, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Elizabeth Blackwood, Anne Damone, James Dumont, Karen McAndrew, Hon. Dennis Pearson, Navah Spero, Hon. Helen Toor, and Gregory Weimer. Also present were Hon. Harold Eaton, Supreme Court liaison; Assistant Attorney General David McLane, representing Kate Gallagher; and Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of April 12, 2019, 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)(5)(A). Professor Wroth reported that the Committee's recommended revised amendments had been sent out for comment by the Court on December 17, 2018, with comments due on February 19, 2019. After review of comments received, the amendments were recommended on April 12, for promulgation as circulated and were promulgated May 1, effective July 1, 2019. Chairman Keyes reported that the Legislative Committee on Judicial Rules (LCJR) at its meeting on June 6, 2019, had no comments on the amendments. It was agreed to remove this item from the agenda.

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

(1) Proposed amendments to V.R.C.P. 43(a) et al., V.R.F.P. 17, and proposed A.O. 47, had been recommended to the Supreme Court for promulgation by the Special Committee on January 28, 2019, as sent out for comment, with the substitution of amendments to V.R.P.P. 43 and new V.R.P.P. 43.1 proposed by the Probate Rules Advisory Committee for the originally proposed amendment to V.R.P.P. 43(b). The Rules were promulgated on May 1, effective August 3, 2019. LCJR considered the Rules as presented by Justice Dooley at its meeting on June 6, 2019, and after discussion agreed that they should be further considered at the Committee's next meeting..

(2) The Supreme Court's revised proposed draft of V.R.C.P. 79.2 et al., sent out for comment on September 6, with the comment period extended by the Court until January 31, 2019, and the Court's revised proposed draft of V.R.A.P. 35 and A.O. 46, with comment period extended to January 14, 2019, had been promulgated on May 1, effective September 3, 2019. LCJR considered the Rules as presented by Justice Dooley at its meeting on June 6, 2019, and had no comments.

C. # 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 had been recommended to the Court on April 11, 2018, for promulgation. On November 30, 2018, the Committee had renewed that recommendation, subject to discussions with the State Treasurer's office requested by LCJR and the Court, concerning the relation of the recommended rule to pending amendments to the Unclaimed Property Act (UPA), 27 V.S.A., ch.14. Following discussions with the State Treasurer's office, the amendment as circulated was recommended by the Committee on April 23, 2019, for promulgation with language added to the Reporter's Notes reflecting that the rule did not change the present provisions of the UPA concerning reporting unclaimed property to the Treasurer's Office. Chairman Keyes reported that LCJR, at its meeting on June 6, 2019, had discussed the relation of the rule to pending legislation amending the UPA but did not object to the amendment. Professor Wroth reported that the amendment had been promulgated on June 13, effective August 15, 2019.

D. #17-7. V.R.C.P. 55—Amendments recommended by Civil Division Oversight Committee. Proposed amendments to V.R.C.P. 55 and 80.1 sent out for comment on December 17, 2018, with comments due on February 19, 2019. Chairman Keyes reported that LCJR, at its meeting on June 6, 2019, did not object to the amendment, though a member had suggested using a more modern term than "infant." Judge Toor summarized her April comments on, and suggested revisions to, her draft of proposed V.R.C.P. 55 and proposed further verbal changes: substituting "minor" for "infant" and "opposing party" or "moving party" for "defendant" as appropriate. On motion duly made and seconded, it was voted unanimously to recommend the rules for promulgation, with these final edits to be incorporated by Judge Toor and Professor Wroth.

E. #14-7. V.R.C.P. 41(b)(1)(iii). Conform to Rule 3's 60-day service requirement. Proposed amendments to V.R.C.P. 41 sent out for comment on December 17, 2018, with comments due on February 19, 2019. Chairman Keyes reported that LCJR, at its meeting on June 6, 2019, did not object to the amendments to V.R.C.P. 41, though a member had asked why "motion to dismiss" was not included as a limit on the availability of voluntary dismissal without court order. Judge Toor summarized her April comments on, and suggested revisions to, her draft of the proposed amendments. Discussion focused on the omission of "motion to dismiss" in both F.R.C.P. 41 and Rule 41(a)(1) of the present draft, as well as other potentially dispositive motions. The general sense seemed to be that the intent was to prevent plaintiff from a free look at defendant's case that would be provided by an answer or summary judgment motion. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the amended rules be promulgated in the form sent out for comment.

F. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct. Professor Wroth reported that the proposed draft of the Vermont Code of Judicial Conduct 2019, approved by the Committee on November 30, 2018, and by the Judicial Conduct Board and sent to the Court as the joint proposal of the Committee and Board on February 26, 2019, had been sent out for comment on April 9, with comments due on June 10, 2019. Chairman Keyes reported that there had been no comments and that the Chair of the Judicial Conduct Board had agreed that the Code should be recommended for promulgation as sent out for comment. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend that the Vermont Code of Judicial Conduct 2019 be promulgated as sent out for comment.

G. #19-3. Vermont Rules for Public Access To Court Records. Professor Wroth reported that the Rules for Public Access to Court Records as adopted October 27, 2000, effective May 1, 2001, and amended, and the Rules Governing Dissemination of Electronic Case Records as adopted March 6, effective June 1, 2002, and amended, had been abrogated and replaced by the Vermont Rules for Public Access to Court Records adopted by Supreme Court order of May 1, effective July 1, 2019. LCJR considered the Rules as presented by Justice Dooley at its meeting on June 6, 2019, and, after extensive questioning and responses by Justice Dooley, had no objections to the Rules. In brief discussion, Judge Toor noted that there were problems with electronic access to in camera documents and that she would provide a memorandum on the issues for the next meeting.

H. #19-4. V.R.C.P. 5, 79(a). Proposed Amendments to conform to proposed new V.R.E.F. 11, drafted by Special Committee on Electronic Filing, sent out for comment on June 19, with comments due by August 19, 2019. Judge Toor raised a number of matters, including the following;

Rule 2(j). Insert actual delivery of “hard copy.”

Rule 3. Add paragraph (c)(3) to require personal service when party hasn’t appeared

Rule 5(b)(3). Also require telephone number—for late-arising change.

Rule 5(d)(4). To provision that date and time of filing is the original filing date, add unless the judge finds that the original filing was inadequate deliberately to stop the running of the time.

Rule 6(c)(3). Clarify how and when a case number is assigned.

Rule 7(c). The format provisions are too burdensome for self-represented litigants.

Rule 11(f). Is it proper usage to refer to a document “filed by the court.?”

Judge Toor and Mr. Avildsen agreed to send these and other questions to Committee members with the request that they respond to Chairman Keyes by July 31 so that he can formulate a consensus to provide to the E-filing Committee by the August 19 comment deadline.

3. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. The subcommittee (Judge Pearson, Ms Badgewick, Professor Wroth) will report at the

September meeting.

4. #17-4. Review status of Amendments to V.R.A.P. 24 (IFP Proceedings), recommended for promulgation on December 3, 2014. Proposed order amending V.R.C.P. 3.1(b) and V.R.A.P. 24(a) sent to the Court on December 17, 2018, to be sent out for comment. Professor Wroth reported that consideration of the proposed order by the Court continues to be deferred until the question of a comparable amendment to V.R.P.P. 3.1 is resolved by the Probate Rules Committee, presumably at its September meeting.

5. #14-1. Status of Appendix of Forms; new E-Filing. Rules. Judge Toor reported that the Civil Division Oversight Committee has recommended that simple forms, adaptable for e-filing, be put on the Judiciary website. Ms. Blackwood and Professor Wroth will review and update her original memorandum covering form provisions that are required by particular rules for the next meeting.

6. #19-1. Reconciliation of Juror Qualifications Rules with V.R.C.P. 47(a) and V.R.Cr.P. 24(a). Chairman Keyes and Professor Wroth reported that at a joint meeting with the Chair and Reporter of the Criminal Rules Committee, it was agreed that the identical first sentences of V.R.C.P. 47(a)(2) and V.R.Cr.P. 24(a)(2), providing that juror questionnaire responses should be open to the parties, should be retained. The two remaining sentences referring to public inspection should be deleted, however, if the Public Access Committee agrees to take on responsibility for those matters. Chairman Keyes agreed to communicate this proposal to the Public Access Committee.

7. #19-2. V.R.C.P. 62(a)(3)(A). Orders for possession. Clarification. Chairman Keyes reported that an ambiguity in the scope of V.R.C.P. 62(a)(3)(A), orders for possession, had been called to his attention. It was agreed that revised comma placement would address the issue. Professor Wroth agreed to explore the possibility that the change could be addressed administratively, rather than by amendment.

8. #19-5. V.R.C.P. 16, 16.1. Incorporation of provisions of previously proposed amendments of V.R.C.P. 26(b). The Committee considered Mr. Dumont's June 19 draft of a proposed amendment to V.R.C.P. 16.2 that would provide that a scheduling order may set disclosure dates for impeachment and rebuttal evidence and certain exhibits, supplementation of discovery responses, and expert witnesses and their depositions. After discussion in which concerns were expressed about various aspects of the proposal, including disclosure of rebuttal evidence, Mr. Dumont withdrew the proposal.

9. #19-6. Small Claims Judgments. The Committee considered amendments to the Small Claims Rules presented by Judge Toor on behalf of the Civil Division Oversight Committee that would address the problem under the present Rules of notice of the judgment to the defendant. Professor Wroth agreed to prepare the proposals in the form of a proposed promulgation order for consideration at the next meeting.

10. #19-7. Procedure for motions to seal. The Committee considered a proposal for a rule on the procedure for motions to deal and the treatment of sealed documents that was presented by Judge Toor on behalf of the Civil Division Oversight Committee. Professor Wroth agreed to prepare the proposal in the form of a proposed promulgation order for consideration at the next meeting.

11. Other business. Ms. Spero proposed that the Committee consider a rule regarding preservation depositions and agreed to provide a memorandum on the topic for the next meeting.

12. Next meetings. The next meeting of the Committee is scheduled for September 20, 2019. It was agreed to hold a further meeting on Friday, November 8.

There being no further business, the meeting was adjourned at 11:25 a.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter