

APPROVED AS CORRECTED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
February 1, 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 (by telephone), Bonnie Badgewick, Eileen Blackwood, Anne Damone, James Dumont, Karen McAndrew (by telephone), Hon. Dennis Pearson, Navah Spero (by telephone), Hon. Helen Toor (by telephone), and Gregory Weimer. Also present were Hon. Harold Eaton, Supreme Court liaison; Kate Gallagher, Attorney General's designee; and Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of November 30, 2018, were unanimously approved as previously circulated.

1.A. V.R.C.P. 80.6. Hon Katherine Hayes; Hon. Howard Kalfus, Judicial Bureau Hearing Officer; Jenn Morse, Judicial Bureau Court Operations Manager; and Joanne Charbonneau, Clerk of the Judicial Bureau were welcomed to the meeting at 9:30 a.m., as previously scheduled, to discuss the January 4, 2019, revised draft of V.R.C.P. 80.6 presented by Judge Hayes on the basis of discussion at the November 30, 2018, meeting of the Committee. Judge Hayes explained that the Next Generation Court Management System (NGCMS), also known as Odyssey, was scheduled to be rolled out in the Judicial Bureau in April 2019. The revisions to V.R.C.P.80.6 were in part necessary to be consistent with the needs of NGCMS and in part to incorporate pre-trial conference provisions in the rule.

Judge Kalfus described the current Judicial Bureau process with 93,000 complaints filed annually, of which 1,100-2,000 were contested. 100 hearings were scheduled per court day, but most were concluded by default, and at most ten were held in a day. The proposed pre-trial conference procedure, a more flexible version of a New Hampshire rule, would benefit both sides. An agency with pre-trial conferences scheduled for a particular day could agree to delegate full settlement authority for all its cases to a single agent who could also serve as agent for other agencies. There would be more opportunities for officers to settle. Defendants, who would be required to attend, would be motivated to settle in order to avoid returning to court a second time. The Judicial Bureau staff was developing a notice form that would provide defendants with information about the conference procedure and settlement opportunities.

In response to Justice Eaton's question whether defendants could appear by telephone, Judge Kalfus stated that telephone appearance was permitted now in particular cases on a hardship basis. Committee members noted that a uniform audio appearance procedure for Civil, Family, and Probate cases, to be provided by new V.R.C.P. 43.1(d), amendments to V.R.F.P. 17, and new V.R.P.P. 43.1(d), had recently been recommended to the Supreme Court for promulgation (see item 2.B(1) below).. In response to Judge Toor's suggestion that the rule limit

the number of cases that could be delegated to a single agent in order to reduce waiting time for defendants, Judge Kalfus stated that, even in the unlikely worst case of all 100 cases scheduled for a day being delegated to a single agent, past experience indicated that the entire process would take no more than four hours.

After further discussion, Committee members agreed that the Committee would approve sending the proposed amendments to V.R.C.P. 80.6 out for comment if they were revised to include an audio conference provision similar to V.R.C.P. 43.1(d) as currently recommended. Judge Hayes agreed to provide a revised draft of the amendments for consideration by the Committee at its meeting scheduled for April 12, 2019.

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). Recommended amendment sent out for comment on December 17, 2018, with comments due on February 19, 2019. Chairman Keyes reported that one comment has been received. It would be considered at the Committee's April 12, 2019, meeting with other comments that may be received.

B #15-8. Special ad hoc committee on video/audio appearances and cameras in the court. (1) Proposed amendments to V.R.C.P. 43(a) et al., V.R.F.P. 17, and proposed A.O. 47, sent out for comment on January 24, with comments due on March 23, 2018. Professor Wroth reported that no comments had been received on those rules and form as sent out for comment, and that the Special Committee on January 28, 2019, had recommended to the Supreme Court that it promulgate those rules as sent for comment, with the substitution of amendments to V.R.P.P. 43 and new V.R.F.P. 43.1 proposed by the Probate Rules Advisory Committee for the originally proposed amendment to V.R.P.P. 43(b).

(2) Supreme Court's revised proposed draft of V.R.C.P. 79.2 et al., sent out for comment on September 6, with comments due on November 5, 2018. Professor Wroth reported that the comment period on the proposed rule had been extended by the Court until January 31, 2019.

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 noted that the Committee had recommended to the Court on April 11, 2018, the promulgation of 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. At its meeting of November 30, 2018, the Committee had renewed that recommendation, subject to Chairman Keyes' correspondence with the State Treasurer explaining the Committee's position.

Chairman Keyes reported that the Treasurer's position was that, as a matter of consumer protection, it was the State's responsibility under the unclaimed property law, 27 V.S.A., ch. 14, to track down the owner of an unclaimed check. He and Mr. Avildsen had met with the Treasurer's representative, who was prepared to accept the rule with language in the Reporter's

Notes regarding the unclaimed property law. The Treasurer's Office was drafting a bill that would amend that law to clarify the situation. Mr. Avildsen noted that in every other state that had considered the issue, unclaimed property was part of Rule 23 funds except where a statute specifically provided otherwise. It was agreed that Chairman Keyes and Mr. Avildsen should continue discussions with the Treasurer's representative with a view to working out mutually satisfactory statutory language.

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 he had received drafting suggestions from Judge Hoar that he would send to Judge Toor for review.

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 Judge Hoar had asked the Committee to consider adding motions to dismiss under V.R.C.P. 12 to answers and motions for summary judgment as actions by defendant which would terminate plaintiff's right to dismiss voluntarily under proposed V.R.C.P. 41(a)(1), Mr. Dumont suggested that treatment of the question in Wright and Miller, [9 *Federal Practice and Procedure: Federal Rules of Civil Procedure* § 2363 (3d edn.2018)] be reviewed. Chairman Keyes agreed to send Judge Hoar's comment and another received from Mark Werle, Esq., to Judge Toor for review.

3. #14-8. V.R.C.P. 69. Executions. The Committee considered Professor Wroth's January 28, 2019, draft of proposed amendments to V.R.C.P. 4.1, 4.2, and 69 and proposed new V.R.C.P. 69.1 incorporating Judge Pearson's November 29, 2018, drafts considered at the November 30 meeting.

Judge Toor offered the following suggestions:

1. Cross-references should be conformed throughout.
2. Rule 4.1(c)(1)(B). Add "and appearance by the defendant" after "commencement of the action."
3. Rule 4.1(c)(1)(C). Delete after "preceding sentence" the words "and the court may modify or substitute any necessary findings in its order. The court may modify or substitute a different amount in the proposed order for the approved amount of the attachment consistent with the evidence presented, at hearing or in the supporting affidavit(s) or verified complaint, or with the defendant's agreement to the attachment." This language is not needed, because it describes current practice and carries a negative implication as to other discretion the court may have. The Reporter's Notes should say something like, "Of course, the court can always reduce the amount as in current practice."
4. Rules 4.1 and 4.2. Make sure that the rules comply with the constitutional hearing requirements of *Connecticut v. Doeher*, 501 U.S. 1 (1991).

5. Rule 4.1(f)(4)(A), (B). Three days for service after attachment may be too short, given possible difficulties in finding the defendant.

Judge Pearson agreed to consider these suggestions in his next draft.

The Committee then considered Ms. Badgewick's marginal comments on the January 28 draft as distributed.

1. Rule 4.1(b)(1). "Because we say [motion to approve may be filed at] 'any time' do we need the further specificity here of when those times might come?" Judge Pearson agreed to consider substituting the language of existing (g) here and in proposed (h) ["at any time before judgment, and, notwithstanding the pendency of any appeal, at any time after judgment and before execution may issue."]. Judge Pearson will also consider defining "final judgment" in the Reporter's Notes.
2. Present Rule 4.2(f). "Would it be helpful to offer a definition somewhere (rptrs notes) as to what a "disclosure" is, often the person/entity receiving it is not involved in the suit or has no knowledge of the process. Maybe also defined in 69.1(5) definitions." Judge Pearson agreed to consider this comment.

In further discussion, Committee members made the following suggestions concerning the draft amendments of Rule 69:

1. Rule 69(a)(5). Delete the final sentence concerning capias executions for money damages, substituting a reference to contempt sanctions in the rule or Reporter's Notes.
2. Rule 69(c). Revise as follows: "(c) In the writ of execution issuing any process under this rule, the clerk shall set forth the amount of post-judgment interest due per day, calculated on the full amount of **unpaid** principal **included in the judgment** at the **maximum** rate allowed by law. In levying execution, the officer shall collect. The judgment creditor shall be entitled to per diem interest in the daily amount from the date of entry of judgment to and including the date of satisfaction and, with the approval of the court, post-judgment costs and fees incident upon collection and enforcement of the judgment.:
3. Rule 69(d). Revise as follows: "(d) Within 30 days after the completion of any process under this rule, the judgment creditor must prepare and serve on all parties an accounting of all proceeds received and the amount of the judgment remaining unsatisfied. If an execution is returned the judgment is partially satisfied, the return shall show the date of partial satisfaction. T **unless the parties agree otherwise** the amount collected shall be first applied to interest and approved costs and fees accrued to ~~that~~ the date of partial satisfaction. Interest, and any further approved costs and fees, on the portion of the judgment remaining unsatisfied shall be computed from the date of partial satisfaction and collected ~~in the same manner on any subsequent levy of execution by any appropriate process~~

under this rule.

Judge Pearson, with the subcommittee (himself, Ms. Badgewick, and Professor Wroth), will prepare a draft for the next meeting embracing the foregoing comments and suggestions and incorporating any other provisions of the rules that should be amended for consistency.

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 will be deferred until the question of a comparable amendment to V.R.P.P. 3.1 could be resolved by the Probate Rules Committee.

5. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct. Chairman Keyes reported that he had sent the final version of the Code of Judicial Conduct to Andrew Maass, chair of the Judicial Conduct Board, on January 23 for review by the Board at its February meeting.

6. #14-1. Status of Appendix of Forms. Professor Wroth reported for the subcommittee (Ms. Blackwood and himself) that the Supreme Court in an order of January 7, 2019, had reconstituted its Special Advisory Committee on Rules for Electronic Filing and charged it to develop amendments to those Rules in time for the roll-out of NGCMS (see item 1A above) and new Rules for Public Access to Court Records. The Special Committee is chaired by Hon. John Dooley. Hon. Walter Morris serves as Reporter, and Mr. Avildsen is one of two practitioner members.

Based on his communication with Justice Dooley and Judge Morris, Professor Wroth reported that, at this early stage, they generally expect to consider, with advice from the existing rules committees, procedural questions such as the form and content of pleadings and other papers as specifically set forth in particular rules and generally in V.R.C.P. 8, as well as modes of service and acceptance of service. They would expect to develop, with the Court Administrator's Office, fillable forms that would be consistent with requirements of existing statutes and court rules and would be located on the Judiciary website and available on NGCMS. They suggested that the January 25, 2018, draft amendments to V.R.C.P. 84 and other rules previously prepared by Professor Wroth should not be pursued at this point pending a clearer idea of what the Special Committee considers to be the principal issues to be addressed in integrating the existing rules of procedure and forms with E-filing.

After discussion, it was agreed that the Committee should defer any action on amendments to the Rules affecting forms and that Professor Wroth should communicate the following concerns of the Committee to the Special Committee:

- (1) That the content of specific forms required by particular rules should be maintained in

any electronic forms that are developed. See, *e.g.*, V.R.C.P. 3.1(a), 4(b), 4(l)(3)(D), 4.1(c), 4.2(j)(3)(b), 9.1, 10, 45(a)(1), 69, 80.1(g)(2)(A), 80.5(c), 80.7(c)(2).

(2) That in developing or revising forms the general requirements of V.R.C.P. 8 should be honored.

(3) That if amendments to existing provisions of the Civil Rules, or new forms, are necessary, they should be developed in conjunction with the Civil Rules Committee.

(4) That filers should continue to have discretion to vary the forms so long as basic requirements of the system and the Rules are met.

7. Other Business. There was no other business.

8. Dates of future meetings. The Committee confirmed that its next meetings will be held at Vermont Law School at 9:00 a.m. on April 12, and June 21, 2019.

There being no further business, the meeting was adjourned at 11:45 a.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter