

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
March 30, 2018**

The meeting was called to order at 9:00 a.m. in the Hoff Lounge, Debevoise Hall, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Eileen Blackwood, Bonnie Badgewick, James Dumont, Hon. Helen Toor, and Gregory Weimer. Also present were Hon. Harold E. Eaton, Supreme Court liaison, and Professor Emeritus L. Kinvin Wroth, Reporter.

Mr. Dumont agreed to take notes of the meeting to assist Professor Wroth, whose hand injury prevented him from writing, in preparing minutes

1. Minutes. The draft minutes of the meeting of January 26, 2018, 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), were sent out for comment on January 24, with comments due on March 23, 2018. Chairman Keyes summarized 18 comments received on the proposal. He and Mr. Dumont explained that the purposes of the amendments were to clarify the rules for expert disclosures and to increase conformity to the Federal Rule. The present proposal is the most recent of Committee efforts to achieve these goals, dating back at least to the adoption of the present Federal Rule provisions in 2010.

In discussion, Committee members raised questions about the need for the changes and their effect on smaller cases. It was suggested that it would be desirable to address concerns expressed in the comments with a CLE that would review the federal cases—particularly those addressing causation opinions—as well as the Vermont decisions in *Greene v. Bell*, 171 Vt. 280 (2000), and *Stella v. Spaulding*, 2013 VT 8, and low-cost ways of meeting both the federal and the Vermont standards. After further discussion, on motion duly made and seconded, it was voted unanimously to postpone further consideration of the proposed amendments until after a discussion of the issues at the annual VBA meeting that would provide further feedback from the bar. Chairman Keyes and Mr. Dumont agreed to draft a VBA *Journal* reviewing the history and rationale of the proposed amendments. Mr. Weimer will make appropriate arrangements with the VBA.

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. Justice Eaton reported that the request for further day-is-a-

day amendments to V.R.C.P. 80.6 and 80.9, sent out for comment on October 18, with comments due on November 27, 2017, has been withdrawn.

C. Proposed amendments to V.R.C.P. 45, sent out for comment on October 18, with comments due on December 18, 2017, recommended to the Supreme Court on February 5, 2018 for promulgation. Professor Wroth reported that the Court had deferred action on the proposal pending comment from the Legislative Committee on Judicial Rules and consideration of proposed amendments to V.R.Cr.P. 17.

D. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court. Professor Wroth reported that Special Committee's 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, and that the Civil Rules Committee's February 5 recommended revision of the Special Committee's recommended replacement of V.R.C.P. 79.2 governing possession and use of recording and transmitting devices in a courthouse or courtroom, transmitted to the Court on January 2, would be considered by the Court on April 3, 2018. He had not seen comments on the proposed rule.

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 17, 2018, whether the rule should be revised or made permanent. The Committee considered the report of Mr. Weimer and Professor Wroth summarizing the May 2017 VBA survey data and recommending that the rule be continued in operation for a further three years. Professor Wroth suggested that it would be useful to know why the rule was not used extensively. On motion duly made and seconded, it was voted unanimously to submit the report to the Court with additional language to say that the Committee awaits more data before making a further recommendation.

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 fund. 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. Chairman Keyes reported that no comments had been received. On motion duly made and seconded, it was voted, six in favor, with Mr. Avildsen abstaining, to recommend to the Court that the rule be promulgated as circulated.

G. #16-7. Addition of "prisoners' mailbox" provision to Civil Rules. Professor Wroth reported that the Committee's proposed amendments to V.R.C.P. 3 and 5 and V.R.A.P. 25 were sent out for comment on March 9, with comments due on May 9, 2018.

3. #14-7. V.R.C.P. 41(b)(1)(iii). Conform to Rule 3's 60-day service requirement. The Committee considered Judge Toor's revised redline draft of amendments to V.R.C.P. 41. distributed on March 29. Justice Eaton reported that the requirement of paragraph (a)(1) that the clerk enter a voluntary dismissal after the court had ordered it was the usual practice. It was

agreed that the language should be “shall be entered by the clerk upon order of the judge.” .All agreed that subparagraph (b)(i) should be entirely deleted since elimination of the two-year requirement made it overbroad, and that, in subparagraph (b)(iii), “three months” should be changed to “90 days” for consistency with other provisions of the rule. The Committee agreed with the other changes that the draft would make in the rule. Professor Wroth agreed to prepare a proposed order incorporating Judge Toor’s and other agreed changes for the next meeting.

4. #14-8. V.R.C.P. 69. Executions. In the absence of Judge Pearson, it was agreed that the subcommittee would present a revised proposal at the next meeting.

5. #s16-7/17-5. Addition of “prisoners’ mailbox” provision to Civil Rules. This item was deferred to the next meeting to obtain comments of The Civil Division Oversight Committee after its May 4 meeting on an amendment to simplify service on the Attorney General of prisoners’ complaints raising confinement issue, being drafted by the Attorney General’s and Prisoners’ Rights offices. .

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. Chairman Keyes reported that Representative LaLonde accepted the Committee’s conclusion that no amendment to Rule 11 was appropriate because the sanction provisions reflected the basic deterrent purpose of the rule, but 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. Professor Wroth reported that he expected to have a full draft of the Code amendments for the Committee’s first meeting in the fall.

9. #14-1. Status of Appendix of Forms. The Committee considered Professor Wroth’s January 25 draft order abrogating the Appendix of Forms and amending V.R.C.P. 84 and other rules intended to implement Ms. Blackwood’s extensive Fall 2015 memorandum identifying the forms in the rules and the issues. Discussion centered on the relationship between the forms on the Judiciary website and those required by the Rules or now carried in the Appendix of Forms as “sufficient.” Issues raised included the relationship between the Rules and the website, the need for making clear that *Iqbal* doesn’t trump V.R.C.P. 8, and whether forms had to substantially comply with those on the website. Ms. Blackwood and Professor Wroth will provide a report and draft for the next meeting.

10. #17-7. V.R.C.P. 55—Amendments recommended by Civil Division Oversight Committee. The Committee considered Professor Wroth’s draft proposed order for amendments to V.R.C.P. 55 and 80.1(c), based on Judge Toor’s draft Civil Division Oversight Committee proposal as circulated on January 25. The following changes in the draft were agreed on:

Rule 55(a):

- Track F.R.C.P. 55(a) by removing “as provided by these rules” so that an indication of intent to defend even if not in compliance with the rules does not trigger the rule.
- Retain “party seeking” relief as in the draft
- Include the bracketed language “by complaint, cross-claim, counterclaim, or other pleading” in the rule text.

Rule 55(b)(4): Change 3 days’ written notice to 7 days to allow for slowness of mail.

Rule 55(b)(6): Revise as shown, to make clear that there must be a motion and hearing under paragraph (b)(4):

(6) *Failure to Appear at Trial.* In those cases in which a defendant has appeared in the action but has failed to appear at a duly noticed trial on the merits, the plaintiff may either waive trial and move for default judgment or proceed to trial. If plaintiff obtains judgment based on evidence submitted at trial, that judgment shall be deemed a default judgment solely for the purposes of Rule 55(c), Rule 62(b) and Vermont Rule of Appellate Procedure 4. If plaintiff chooses to file a motion for default judgment, a hearing shall be scheduled on the motion pursuant to paragraph (4).

Rule 55(c): Revise as shown, consistent with Rule 55(a):

(c) **Setting Aside ~~Default or a Default Judgment~~.** The court may set aside ~~an entry of default for good cause, and it may set aside~~ a final default judgment under Rule 60(b).

Rule 55(d): Retain despite 2007 elimination of F.R.C.P. 56(d), but change “entitled to” to “seeking.”

Rule 80.1(c): adopt as in proposed draft.

On motion duly made and seconded, it was voted unanimously to ask Professor Wroth to prepare a final draft order incorporating the preceding changes for review at the next meeting.

11. Dates of future meetings. The next meeting is scheduled for Friday, May 18, 2018. Professor Wroth will prepare a list of suggested meeting dates for fall 2018 and spring 2019 for consideration at that meeting.

There being no further business, the meeting was adjourned at 11:35 a.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter