

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
May 18, 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, Anne Damone, James Dumont, Jean Giddings (by phone), Karen McAndrew, Hon. Dennis Pearson, Hon. Helen Toor, and Gregory Weimer. Also present were Kate Gallagher, Attorney General's designee, and Professor Emeritus L. Kinvin Wroth, Reporter.

The Committee welcomed Kate Gallagher, Civil Division Chief of the Attorney General's Office, who replaced Megan Shafritz as the Attorney General's designee.

Professor Wroth advised the Committee that Administrative Order No. 17, constituting the Committee, had been amended effective April 30, 2018, primarily to provide that the chair of the VBA committee was not bound by the term limits provision and to update the compensation language. See

<https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATED%20Amendment%20to%20A.O.%2017%20Advisory%20Committee%20on%20Rules%20for%20Civil%20Procedure.pdf>.

1. Minutes. The draft minutes of the meeting of March 30, 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). Sent out for comment on January 11, with comments due on March 13, 2017. Proposed amendments to V.R.C.P. 16.2, 26(b), and 26(e), as revised at November 17 meeting, sent out for comment on January 24, with comments due on March 23, 2018. At the March 30 meeting it had been agreed to defer action on the comments received until after publication of a VBA *Journal* article and consideration of the issues at the VBA Fall Meeting. The Committee provided comments to Mr. Dumont on his draft of the VBA article. Mr. Weimer confirmed that the VBA had agreed to both publication of the article and consideration of the amendments at a Fall Meeting session.

Chairman Keyes reported on the following questions on the proposed amendments raised by members of the Legislative Committee on Judicial Rules (LCJR) at a meeting on May 16, 2018: Should disclosure of an expert's final report be automatic, rather than on request as in proposed Rule 26(b)(5)(A)(v)? Do proposed Rule 26(b)(5)(A)(i) and the

scheduling order provision of sub-sub paragraph (b)(5)(A)(iii) provide sufficiently timely information as to whether an expert is to be used at trial?

The Committee considered Professor Wroth's April 19 correspondence with Scott McGee, who had noted cross-reference errors in V.R.C.P. 26(b)(4) and (5) as amended effective September 18, 2017. The errors have been corrected in the January 24 proposed amendments.

It was agreed to defer consideration of the comments of the LCJR and Mr. McGee until after the VBA meeting.

B. Proposed amendment to V.R.C.P. 45, recommended to the Supreme Court on February 5, 2015 for promulgation and deferred by the Court pending LCJR consideration. Chairman Keyes reported that there had been no comments at the May 16 LCJR meeting. It was agreed that he should report that fact to the Court and renew the Committee's recommendation.

C. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court. Professor Wroth reported that the Special Committee's proposed amendments to V.R.C.P. 43(a) et al. and proposed A.O. 47, sent out for comment on January 24 by the Special Committee, with comments due on March 23, 2018, were pending before that committee.

The Special Committee's recommended replacement of V.R.C.P. 79.2 transmitted to the Court on January 2, 2018, and this Committee's February 5 recommended revision of V.R.C.P. 79.2(f) were pending before the Court. The Court had reviewed the proposed rule with Justice Dooley and intends to send a revised draft out for comment

D. 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. Professor Wroth reported that the Court had approved the Committee's recommendation to extend the effective date of the rule until August 31, 2022, with the Committee to report by August 31, 2021. See <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATED%20VRCP%2080.11.pdf>. Chairman Keyes reported that there had been no comments at the May 16 LCJR meeting..

E. # 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. 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 recommended to the Court on April 11 for promulgation. The Court has raised questions about the effect on the rule of the requirement of 27 V.S.A. § 1242(a)(10) that unclaimed class-action proceeds be sent to the State Treasurer. Chairman Keyes reported that, at the May 16 LCJR meeting, members had asked that action on

the rule be deferred until there was more information on this issue. He had written to the State Treasurer seeking clarification, and Mr. Avildsen would discuss the matter with the Treasury attorney.

F.. #16-7. Addition of “prisoners’ mailbox” provision to Civil Rules. 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. Chairman Keyes reported that no comments had been received from the bar and that there had been no comments at the May 16 LCJR meeting. On motion duly made and seconded, it was voted unanimously to recommend the amendments to the Court for promulgation as circulated.

3. #14-7. V.R.C.P. 41(b)(1)(iii). Conform to Rule 3’s 60-day service requirement. Professor Wroth’s draft proposed order dated May 17, 2018, and *FNMA v. Johnson*, 2018 VT 51, will be considered at the next meeting.

4. #14-8. V.R.C.P. 69. Executions. The subcommittee (Judge Pearson, Ms Badgewick, Professor Wroth) will present a revised draft at the next meeting.

5. #17-5. Proposal for service of prisoners’ mailbox complaints on Attorney General. Judge Toor reported that a suggested amendment to simplify service on the Attorney General of prisoners’ complaints raising confinement issues was on the Civil Division Oversight Committee’s agenda and would be presented at this Committee’s next meeting.

6. #17-4. Review status of to V.R.A.P. 24 (IFP Proceedings), recommended for promulgation on December 3, 2014. The Committee considered Mr. Avildsen’s report. On motion duly made and seconded, it was voted unanimously to accept Mr. Avildsen’s draft, striking the language, “that constitutes a major part” and consolidating the second and third paragraphs. Mr. Avildsen will prepare a new draft for the next meeting.

7. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct. Professor Wroth reported that he was on track to have a full draft of the Code amendments for the Committee’s first meeting in the fall, as agreed at the March 30 meeting

8. #14-1. Status of Appendix of Forms. Ms. Blackwood and Professor Wroth will provide a report and proposed draft at the next meeting. Professor Wroth will discuss the issues with the Trial Court Operations Administrator.

9. #17-7. V.R.C.P. 55—Amendments recommended by Civil Division Oversight Committee. Professor Wroth’s draft proposed order dated May 17, 2018, will be considered at the next meeting.

10. Other business. Ms. Damone will invite Judge Hays to discuss the Committee’s role in the new case management system at the next meeting.

11. Dates of future meetings. It was agreed that the next meetings of the Committee will be held on September 7, and October 19, 2018 at Vermont Law School.

There being no further business, the meeting was adjourned at 10:15 a.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter