

**APPROVED**

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE  
Minutes of Meeting  
December 16, 2016**

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, Eileen Blackwood (by telephone), James Dumont (by telephone), Jean Giddings, Kathleen Hobart (by telephone), Karen McAndrew, Hon. Dennis Pearson, Hon. Helen Toor, and Greg Weimer (by telephone). Also present were Hon. Harold Eaton, Supreme Court liaison; and Professor L. Kinvin Wroth, Reporter.

1. **Minutes.** The minutes of the meeting of November 18, were unanimously approved as previously circulated.

**PRIORITY ITEMS**

2. **Status of promulgated and proposed amendments.**

A. Recommended amendment of V.R.C.P. 51(b), Jury Instructions. The Committee considered Justice Dooley's November 21 draft of suggested changes to the Committee's draft that had been recommended to the Court for promulgation on October 25. In discussion, it was noted that the revised language required the judge to include a copy of the proposed instructions distributed to counsel in order to make clear what language was being discussed. If there is no written copy of the charge as delivered, an objection may be made at a later time. On motion duly made and seconded, there being no further discussion, it was voted unanimously to approve Justice Dooley's changes and advise the Criminal Rules Committee of them. Mr. Keyes will communicate to that Committee. Professor Wroth will provide a clean draft for the next meeting.

B. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct. The Committee considered Professor Wroth's December 15 draft adopting the 2007 ABA Model Code of Judicial Conduct as the Vermont Code of Judicial Conduct 2017, with appropriate variations for Vermont conditions. It was agreed that the list of protected categories in Rule 3.6 should be identical to those proposed for the Vermont Rules of Professional Conduct. It was also agreed that the 30-day requirement for a public report should apply to compensation under Rule 3.12, as well as to gifts under Rule 3.13 and reimbursements under Rule 3.14. Professor Wroth will present a new draft with Reporter's Notes at the next meeting.

C. # 16.1. Proposed amendment adding V.R.A.P. 4(f) to provide a "prisoners' mailbox" rule. The amendment was sent out for comment on October 10, with comments due on December 12, 2016. No comments were received. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend that the rule be promulgated as sent out for comment.

D. #15-7. Recommended emergency amendments to certificate of service provisions of new V.R.C.P. 5(h). Sent out for comment on December 7, 2016, with comments due by

February 6, 2017. Chairman Keyes reported that two favorable comments had been received. Action was deferred until after the comment period had run.

E. Recommended amendment of V.R.C.P. 43(f) concerning appointment of interpreters, sent to Court on October 25, 2016. Professor Wroth reported that the recommendation continued to await review by the Court Administrator.

F. Recommended amendment to V.R.C.P. 5 concerning e-mail service, revised draft sent to the Court on December 2, 2016. Professor Wroth reported that the amendments had been promulgated on December 15, 2016, effective February 20, 2017.

G. #10-5. Federal Rules Subcommittee. Professor Wroth reported that the proposed amendments had been sent to the Court on December 7, 2016

H. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court. Ms. Badgewick reported that the Special Committee had voted to require in its draft V.R.C.P. 43.1 that a witness testifying remotely “will be deemed available” for purposes of V.R.E. 804(a) and V.R.C.P. 32(a)(3) but would seek comment from the Evidence Rules Committee. She further reported that the Special Committee was still working on the updating of V.R.C.P. 79.2 and other similar rules relating to cameras in the court room.

I. Emergency order continuing the emergency amendments to V.R.S.C.P. 3, 7, 10, 12. Amended January 11, effective April 15, 2016, and further amended March 7, 2015, effective April 15, 2016, with Committee to report by April 17, 2017. Justice Eaton reported that the Court was favorably disposed toward the Civil Division Team survey but was waiting for the return of Justice Dooley before proceeding further.

J. Recommended amendments to conform V.R.C.P. 6 and other time provisions of the Civil Rules to federal rules amendments (“day is a day” rules), sent to the Supreme Court on January 1, 2016. Professor Wroth reported that day is a day amendments to all rules except the Family Rules had been sent out for comment and that Family Rules amendments would be circulated shortly. The Court was waiting for legislative action on a bill addressing statutory time limits that was expected to be introduced in the forthcoming session.

### **3. #16-4. Request from Chief Justice for consideration of new ABA Model Rule 8.4.**

The Committee considered Professor Wroth’s December 12 draft amendments of V.R.P.C. 8.4 adapting ABA Model Rules amendments adding non-discrimination provisions. It was agreed that the rule should include HIV condition, veteran status, and genetic information as prohibited grounds. On motion duly made and seconded, there being no further discussion, it was voted unanimously to propose that the amendments, with those additions, be sent out for comment.

**4. #14-11. V.R.C.P. 7.** The Committee considered Professor Wroth’s draft amendment adding V.R.C.P. 7(b)(4) to require that the maker of a non-dispositive motion seek agreement on the requested relief, together with related correspondence. Committee members noted that the Committee had declined to address this issue in 2015 and that a similar provision had been included in V.R.C.P. 80.11 covering expedited actions. After discussion, no motion was made.

**5. #16-5. V.R.A.P. 41. Consistency of rule with practice concerning mandate.** The Committee considered previously distributed correspondence from Jerome O’Neill, and an e-mail from Emily Wetherell, Supreme Court Staff Attorney, noting that the mandate was sent only to the trial court, often later than 21 days after judgment when V.R.A.P. 41 required it to issue and that V.R.A.P.36 required only preparation and entry of the judgment on the docket by

the clerk. The problem evidently was that there was no requirement that the mandate or judgment be sent to the parties. Justice Eaton agreed to ask Ms. Wetherell whether it would be possible to send the mandate and judgment electronically to the trial court and the parties when issued.

**6. #15-6. Proposal to review “tack and mail” provisions of V.R.C.P. 4.** Judge Toor stated that she would to present a proposal at the next meeting.

**7. #s12-1/14-10—Event-witness amendment to V.R.C.P. 26(b)(4) and mandatory disclosure.** The Committee considered Draft 3 of amendments to V.R.C.P. 26(b), dated December 14, 2016, prepared by Ms. McAndrew and Professor Wroth. In discussion, it was agreed that Rule 26(b)(4)(A)(ii) should continue to specify a “written” report, that in Rule 26(b)(4)(A)(vi), “written” should be substituted for “final” in modifying “report” and that the Reporter’s Notes should make clear that drafts are not discoverable. On motion duly made and seconded, there being no further discussion, it was voted unanimously to propose that the amendments, with those changes, be sent out for comment.

**8. #15-5/16-3. V.R.C.P. 45.**

(A) Questions regarding out-of-state subpoenas in Vermont—Max Taylor’s May 19 and September 19 emails. Judge Toor will present a draft proposed by the Oversight Committee at the next meeting.

(B) Questions regarding service of copies of subpoenaed documents—William Towle’s letter of May 5, 2016. The Committee considered Professor Wroth’s November 16 draft amendment adding V.R.C.P. 45(a)(4)(B) to require that a party receiving documents pursuant to a subpoena should serve them on all other parties. After discussion, it was agreed that an amendment was not necessary. Other parties would receive copies of the subpoena pursuant to present Rule 45(a)(4) and could request the documents from the recipient..

**9. #16-6. Consideration of Uniform Enforcement of Foreign Judgments Act.** Judge Toor reported on her review of Richard Cassidy’s October 12 e-mail concerning the Uniform Enforcement of Foreign Judgments Act, which allows enforcement of a foreign judgment by the same process as a Vermont judgment after filing in a Vermont court and notice to the judgment debtor. The judgment debtor may then assert any defenses to the judgment that would be available against a Vermont judgment. The Uniform Act, adopted in 1964, has been enacted in 47 states and the District of Columbia. In discussion, questions were raised as to the effect of a foreign small claims judgment and the extent to which provisions of the Vermont Civil Rules concerning judgments would be affected by enactment of the Uniform Act. Legislation would be required to adopt the Act to avoid inconsistency with existing statutory provisions. See, *e.g.*, 12 V.S.A. § 1698 (certified copy filed in Vermont Court is *prima facie* evidence of out-of-state or foreign judgment); 14 V.S.A. §§ 3181-3183 (registration and enforcement of out-of-state guardianship and protective orders in Probate Division); 15B V.S.A. §§ 1601-1616 (registration and enforcement of out-of-state or foreign support order). It was agreed that Chairman Keyes should advise Mr. Cassidy that the Committee supported the adoption of the Uniform Act and awaited further developments.

**10. #14-1. Status of Appendix of Forms.** Ms. Blackwood and Professor Wroth will report at the next meeting.

**11. Proposed revisions of USDC VT Local Rule 26.** Chairman Keyes reported on the proposed revisions for the information of the Committee..

## **TRAILING DOCKET**

**12. #12-6—V.R.P.C. 3.8(g), (h). Conformity to Model Rules amendments concerning duties of prosecutors.** The subcommittee (Ms. Blackwood (chair), Judge Pearson, Mr. Dumont, Dan Maguire, Anna Saxman, Tracy Shriver, and John Treadwell) will report at the next meeting.

**13. #13-11—V.R.P.C. Consideration of ABA Ethics 20/20 revisions to ABA Model Rules.** Ms. Badgewick and Professor Wroth will report on the revisions at the next meeting. It was agreed that the item should be placed higher on the agenda for that meeting.

**14. #14-7. V.R.C.P. 41(b)(1)(iii). Conform to Rule 3's 60-day service requirement.** Judge Toor will present the Oversight Committee's proposal at the next meeting. It was agreed that the item should be placed higher on the agenda for that meeting.

**15. #14-8. V.R.C.P. 69. Executions. Consider practical effect.** Judge Pearson will report on this item at the next meeting and will consider the effect on it, if any, of the Uniform Enforcement of Foreign Judgments Act (item 9 above).

**16. #14-9. V.R.C.P. 74-75. Revise to clarify along lines of federal APA.** After discussion, it was agreed that this item should be removed from the agenda.

**17. Other business.** There was no other business.

**18. Dates of next meetings:** The next meeting is scheduled for January 27, 2017. It was agreed that a further meeting should be held on March 24, 2017.

There being no further business, the meeting was adjourned at 12:00 noon..

Respectfully submitted,

L. Kinvin Wroth, Reporter