

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
November 18, 2016**

The meeting was called to order at 9:10 a.m. in the Hoff Lounge, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen (by telephone); Bonnie Badgewick, Eileen Blackwood, James Dumont, Kathleen Hobart, Karen McAndrew, Hon. Dennis Pearson, and Hon. Helen Toor. Also present were Megan Shafritz, Office of the Attorney General liaison, and Professor L. Kinvin Wroth, Reporter.

1. Minutes. The minutes of the meeting of September 23, 2016, were approved as previously circulated, with the change that in paragraph 2.B the agreement was that “color, ancestry, gender identity, place of birth” should be added as proposed in the Judicial Conduct Board draft for consistency with the Vermont Fair Employment Practices Act, 21 V.S.A. § 495(a)(1).

2. Status of promulgated and proposed amendments.

A. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court room. Professor Wroth reported that the final version of proposed V.R.C.P. 43.1 and other affected rules would be sent to the appropriate rules committees for review and recommendation to the Supreme Court. He also reported that the Special Committee had accepted the Civil Rules Committee’s suggestions for additions to draft V.R.C.P. 43.1(c)(2)(A) and (B).

In answer to the Civil Rules Committee’s questions, the Special Committee had concluded that the Reporter’s Notes should state that the judge could take appropriate action under Rule 43.1(c)(6)(J) if coaching was suspected at the remote location and that Rule 43.1 should be revised to provide that appearance pursuant to the rule would be deemed “availability” for purposes of V.R.E. 804(a)(5) and V.R.C.P. 32(a)(3). Professor Wroth stated that he had agreed to clarify the Reporter’s Notes to Rule 43.1 and recommend any necessary rule changes concerning administration of the oath and subpoenas to out-of-state witnesses. The Civil Rules Committee was asked by the Special Committee to address any questions concerning the length of time periods and their conformity with the pending day is a day amendments to the Civil Rules in making its final recommendation to the Court concerning Rule 43.1.

In discussion of the question of “availability,” Committee members expressed concern that allowing remote appearance to constitute “availability” for purposes of V.R.E. 804(a)(5) and V.R.C.P. 32(a)(3) would necessarily preclude use of depositions at trial and that remote appearance should be a supplemental, but not a required, method for presenting the testimony of an absent witness. On motion duly made and seconded, after discussion, it was voted unanimously to recommend that Rule 43.1 should expressly

provide that remote appearance does not constitute “availability” for purposes of V.R.E. 804(a)(5) and V.R.C.P. 32(a)(3).

B. #s10-8/13.1. Adoption of 2007 amendments to ABA Model Code of Judicial Conduct. Chairman Keyes and Professor Wroth will present a proposed promulgation order for the next meeting, with the expectation of sending it to the Supreme Court by the beginning of January.

C. Recommended amendment of V.R.C.P. 51(b), Jury Instructions. Professor Wroth reported that a revised recommendation, with a parallel amendment to V.R.Cr.P. 30 had been sent to the Court on October 25, 2016.

D. Recommended amendment of V.R.C.P. 43(f) concerning appointment of interpreters. Professor Wroth reported that a revised recommendation, with parallel amendments to V.R.P.P. 43(e) and V.R.Cr.P. 28 had been sent to the Court on October 25, 2016.

E. Recommended amendment to V.R.C.P. 5 concerning e-mail service. The Committee considered Professor Wroth’s November 17 draft of a revised order recommending promulgation of amendments to V.R.C.P. 5 as sent to the Court on February 24, 2016. The revised order contained additions to the Reporter’s Notes explaining its applicability under V.R.Cr.P. 49, which incorporates the Civil Rule by reference.

A motion was duly made and seconded to approve the revised order and recommend it to the Court for promulgation. In discussion, concerns were raised that the requirement of filing the agreement to file electronically, designed for the benefit of pro se litigants, would unduly burden the clerks’ offices. A motion duly made and seconded to amend paragraph (4)(B) of the proposed rule to require only that the parties agree among themselves in writing to file electronically failed by a vote of four in favor, five opposed. It was then voted unanimously to adopt the main motion.

F. Emergency order continuing the emergency amendments to V.R.S.C.P. 3, 7, 10, 12. The order had been amended January 11, effective April 15, 2016, and further amended March 7, 2015, effective April 15, 2016, with the Committee to report to the Court on it by April 17, 2017. Judge Toor, Ms. Hobart, and Chairman Keyes reported that their draft survey of Civil Division court staff was being considered by the Court Administrator.

G. 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 Court on January 1, 2016. Professor Wroth reported that seven sets of “day is a day” amendments for different courts had been recommended or proposed and would be made uniform before promulgation when the Legislature’s intent regarding statutory time periods was known. Chairman Keyes reported that at his presentation during the October

VBA meeting there was significant support for retaining the provision of V.R.C.P. 6 for an additional three days after mailing.

H. #15-7. Recommended emergency amendments to certificate of service provisions of new V.R.C.P. 5(h). Professor Wroth reported that the Committee's recommendation had been sent to the Court on October 26, 2016.

I. # 16.1. Proposed amendment adding V.R.A.P. 4(f) to provide a "prisoners' mailbox" rule. Professor Wroth reported that the Committee's proposed amendment was sent out for comment on October 10, with comments due on December 12, 2016.

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

At the request of the Chief Justice, the Committee considered correspondence from the ABA Center for Professional Responsibility asking that Vermont consider a recent amendment to Model Rule of Professional Conduct 8.4 adding paragraph (g) and its Comments to prohibit discrimination and harassment in the practice of law. The Committee also had before it correspondence from Michael Kennedy, Bar Counsel, describing the impact of the proposal but expressing no opinion on its adoption for Vermont.

On motion duly made and seconded, after discussion, it was voted unanimously to recommend that Vermont should adopt the amended rule in some form. On further motion duly made and seconded, after discussion, it was voted unanimously to add language incorporating terms used in the Vermont Fair Employment Practices and Public Accommodations acts. On further motion duly made and seconded, after discussion, it was voted unanimously to move the phrase "in conduct related to the practice of law" to the first line of the rule, following "engage," and to clarify the meaning of the final sentence, "This paragraph does not preclude legitimate advice or advocacy consistent with these rules," in the Comments or Reporter's Notes. Professor Wroth will provide a proposed draft order for the next meeting.

4. #s12-1/14-10—Event-witness amendment to V.R.C.P. 26(b)(4) and mandatory disclosure. The Committee considered the further revised draft of amendments to V.R.C.P. 26(b)(4) prepared by Ms. McAndrew and Professor Wroth. In discussion, such further revisions as putting the third bullet in subparagraph (4)(A)(ii) first and providing the treating physician and garage mechanic as examples in the Reporter's Notes, and limiting subparagraph (iii) to "any other expert as defined in subparagraph (i)," were considered. Ms. McAndrew and Professor Wroth agreed to provide a further revised draft for the next meeting.

5. #10-5. Federal Rules Subcommittee. The Committee considered a consolidated draft of all previous amendments considered, prepared by the subcommittee (Mr. Dumont, Ms. Blackwood, Mr. Weimer). After discussion, it was voted unanimously to recommend that the proposed amendments be sent out for comment.

6. #14-1. Status of Appendix of Forms. Ms. Blackwood and Professor Wroth will report at the next meeting.

7. **#15-6. Proposal to review “tack and mail” provisions of V.R.C.P. 4.** This item was deferred to the next meeting.

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 stated that she will present proposals from the Civil Division Oversight Committee on this issue at the next meeting.

(B) Questions regarding service of copies of subpoenaed documents. Consideration of Professor Wroth’s November 16 draft amendment of Rule 45(a)(4)(B) was deferred to the next meeting

9. **#16-5. V.R.A.P. 41. Consistency of rule with practice concerning mandate.** It was agreed to defer consideration of this item to the next meeting and to place it among priority items on the agenda for that meeting

10. **#16-6. Consideration of Uniform Enforcement of Foreign Judgments Act.** Judge Toor agreed to review Richard Cassidy’s correspondence on this issue, embedded in Greg Weimer’s October 12 e-mail to Mr. Cassidy with copy to Chairman Keyes, and report at the next meeting.

16. **#14-11. V.R.C.P. 7. Consider rule similar to federal Local Rule 7(a)(7) requiring agreement on motions.** It was agreed to place this item higher on the agenda for the next meeting. Professor Wroth will provide a draft amendment.

In view of the hour, the remainder of the agenda was deferred to the next meeting

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

18. **Date of next meetings.** The next meeting will be held on Friday, December 16, 2016, at Vermont Law School. It was agreed to hold a further meeting on January 27, 2017, at the Law School.

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

Respectfully submitted,

L. Kinvin Wroth, Reporter