

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
October 19, 2018**

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, Eileen Blackwood, Bonnie Badgewick (by phone), Anne Damone, James Dumont, Hon. Dennis Pearson, Navah Spero, Hon. Helen Toor, 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 September 7, 2018, were unanimously approved as previously circulated.

2. Status of recommended, proposed, and pending amendments.

A (1). Amendments to V.R.C.P. 26(b)(4) and (5) to correct internal references to other provisions of the rule not amended when the rule was amended effective September 18, 2017. Professor Wroth reported that these corrections, proposed in the Committee's January 24 proposal to amend Rule 26(b) generally, had been separately proposed to the Court on Chairman Keyes's behalf and promulgated October 9, effective December 8, 2018.

(2). #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. Chairman Keyes reported on the panel on these proposed amendments presented by Mr. Dumont, Mr. Weimer, and himself at the Vermont Bar Association meeting on September 28. The Committee reviewed Mr. Weimer's notes of the panel discussion. The Committee then considered Mr. Dumont's draft of an amendment of Rule 26(b)(5)(A)(1) allowing interrogatories only to experts that may be called under Vermont Rules of Evidence 702, 703, or 705 and eliminating other amendments to Rules 26(b) and (e) originally proposed by the Committee. In discussion, Ms. Andrews' e-mailed objection to the elimination of required reports was noted.

On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that Mr. Dumont's proposed amendment be sent out for comment. Mr. Dumont and Professor Wroth will present a proposed promulgation order with Reporter's Notes at the next meeting. The Reporter's Notes will point out the use of the Rule 16.2 scheduling order to set up a mandatory discovery schedule. Chairman Keyes and Mr. Dumont will prepare a list of outstanding Rule 26 issues for consideration at the next meeting.

B (1). #15-8. Special ad hoc committee on video/audio appearances and cameras in the court. Professor Wroth reported that the Special Committee had not yet acted on

comments received on proposed amendments to V.R.C.P. 43(a) et al. and proposed A.O. 47, sent out for comment on January 24, with comments due on March 23, 2018. He agreed to speak to Justice Dooley, Chair of the Special Committee about the matter.

(2). Committee to review 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, (See also revised proposed V.R.A.P. 35 and A.O. 46). Ms. Badgewick reviewed her report dated October 15, 2018, updating the status of proposed V.R.C.P. 79.2 and related provisions.. She recommended that the Committee support the proposal. Judge Toor stated that the proposed rule was unnecessarily complicated. Judge Pearson noted that the present rule was clear and had worked well. On motion duly made and seconded, there being no further discussion, it was voted, nine in favor with one abstention, that Committee members should consider Judge Toor's comments by e-mail and vote electronically whether or not to oppose the rule by Friday, November 1 so that any comments approved by a majority could be submitted by November 5.

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. 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 recommended to the Court on April 11 for promulgation. Mr. Avildsen will draft a response to the State Treasurer's objection to the rule for review by Chairman Keyes and Mr. Weimer for transmission to the Treasurer.

D. #18.4-Supreme Court's amendment of V.R.C.P. 79.1(e) for consistency with Administrative Order No. 41, promulgated September 5, effective November 5, 2018, Professor Wroth reported that these amendments were made by the Court to reflect a changed citation resulting from a revision of A.O. No. 41, Licensing of Attorneys.

3. #14-7. V.R.C.P. 41(b)(1)(iii). Conform to Rule 3's 60-day service requirement.

The Committee considered Professor Wroth's revised draft proposed order of amendments to V.R.C.P. 41(a) and (b) dated October 15, 2018, and Judge Toor's October 2018 memorandum responding to Mr. Dumont's memorandum of September 6, 2018. Judge Toor noted the editorial corrections in the revised draft and proposed to change her adaptation of the rule to current practice by substituting "Such a voluntary dismissal shall be entered by the clerk after review and approval by the judge" for "upon order of the judge," in Rule 41(a)(1) and (2). Judge Pearson suggested that the rule could read "upon certification by the judge that the dismissal complies with the rule. A motion to adopt Judge Toor's proposed language failed for want of a second. On motion duly made and seconded, there being no further discussion, it was voted unanimously to adopt Professor Wroth's October 15 draft of the Rule 41 amendments, restoring "without order of the court" to the text of (a)(1) and deleting the proposed sentences requiring an order of the court from (a)(1) and (2). Professor Wroth agreed to prepare a revised draft order with Reporter's Notes for the next meeting.

4. #14-8. V.R.C.P. 69. Executions. See Judge Pearson's memorandum of January 24, 2017, on necessary changes in V.R.C.P. 69 and other rules and Professor Wroth's September 3, 2018, draft of previously discussed amendments to Rule 69. The subcommittee (Judge Pearson,

Ms Badgewick, Professor Wroth) will report at the next meeting on other rules discussed in Judge Pearson's memorandum and the effect on federal court practice.

5. #17-5. Proposal for service of prisoners' mailbox complaints on Attorney

General. Judge Toor reported that the Civil Division Oversight Committee did not support a suggested amendment to simplify service on the Attorney General of prisoners' complaints raising confinement issues. It was agreed to remove this item from the agenda. Judge Toor agreed to report this action to Emily Tredeau of the Prisoners' Rights Office.

6. #17-4. Review status of Amendments to V.R.A.P. 24 (IFP Proceedings), recommended for promulgation on December 3, 2014. The Committee considered Mr. Avildsen's memorandum of September 6, 2017, containing proposed amendments to V.R.C.P. 3.1(b) and V.R.A.P. 24(a)(1). In discussion, it was noted that the deletions in paragraphs (b)(1) of "major portion of assistance" and "cohabiting family members" and the inclusion of household income in paragraph (b)(2) had been approved at the May meeting; that the responsibility of the clerk or designee to determine eligibility was set forth in the introductory sentence of subdivision (b); and that Rule 3.1(a) set forth the matter required in the affidavit. It was agreed that the reference to cohabiting family member should be deleted from subdivision (a). On motion duly made and seconded, there being no further discussion, it was voted unanimously that Professor Wroth should work with Mr. Avildsen to prepare a draft proposed promulgation order for consideration at the next meeting.

7. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct. The Committee considered Professor Wroth's draft dated October 19, 2018, of a proposed promulgation order containing the full text of a revised Vermont Code of Judicial Conduct with Reporter's Notes. After discussion, it was agreed that Professor Wroth would send Chairman Keyes a chronology of the development of the draft text; that Chairman Keyes and Andrews Maas, Chair of the Judicial Conduct Board, would review the Code text and Reporter's Notes and call any concerns to Professor Wroth's attention; and that the draft with any necessary revisions would be voted upon at the next meetings of the Board and the Committee.

8. #14-1. Status of Appendix of Forms. Ms. Blackwood and Professor Wroth will provide a report and proposed draft at the next meeting. It was noted that Rule 4(b) as set out in Professor Wroth's January 21, 2018, preliminary draft of proposed amendments concerning forms, should be revised by the deletion of the words "or a judge" following the words "any Superior Judge or" and that the same amendment should be made in Rule 4(c), in light of the fact that all judges to which these rules apply are Superior Judges.

9. #17-7. V.R.C.P. 55—Amendments recommended by Civil Division Oversight Committee. The Committee considered Professor Wroth's draft proposed order containing amendments to V.R.C.P. 55 dated May 17, 2018; Mr. Dumont's memorandum to the Committee of September 6, 2018; and Judge Toor's memorandum of October 17, 2018. Judge Toor stated that the purpose of the amendments was to eliminate an unnecessary step that many clerks were

unwilling to take on their own and to conform to current practice. Mr. Dumont argued that it was desirable to retain the two-step process that followed the Federal Rule with its large body of interpretive decisions and the greater flexibility that its good-cause standard allowed. In discussion, it was agreed that, to preserve the distinction presently noted in the Vermont cases between setting aside the Judge's ruling on a motion for default and setting aside a final judgment of default, proposed Rule 55(c) as drafted should be revised to read,

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

On motion duly made and seconded, there being no further discussion, it was voted, nine in favor, one opposed, to recommend for circulation to the bar, the May 17, 2018, proposed draft amendments to V.R.C.P. 55, with the agreed-upon revision of Rule 55(c).

10. #18-2. V.R.A.P. 9—Statutory inconsistencies. Ms. Gallagher, chair of the subcommittee appointed to consider discrepancies between V.R.A.P. 9(b) and 13 V.S.A. § 7556(d) concerning de novo review of a denial of release, reported as follows: In 1994, the Vermont Constitution was amended to require a de novo hearing and both V.R.A.P. 9(b) and the statute were amended accordingly. In *State v. Madison*, 163 Vt. 360, 658 A.2d 536 (1995), defendant argued that he should have an evidentiary hearing, but the Court held that the legislation did not require it. In 1996, §7556(d) was amended to require an evidentiary hearing, but V.R.A.P. 9(b) was not changed. The issue arises very infrequently, but is a source of concern for victim advocates. V.R.A.P. 9 is currently on the agenda of the Criminal Rules Committee, so the Civil Rules Committee should take no action on the question now. The Committee agreed with the subcommittee's recommendation, and, with thanks to the subcommittee, it was agreed to remove this item from the agenda.

11. Other Business. There was no other business.

12. Dates of future meetings. The next meeting of the Committee will be held on November 30, 2018. at 9:00 a.m.at Vermont Law School. It was agreed that a further meeting should be held on February 1, 2019 at the same time and place.

There being no further business, the meeting was adjourned at 11:50 a.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter