

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
September 7, 2018**

The meeting was called to order at 9:10 a.m. in the Hoff Lounge, Debevoise Hall, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Bonnie Badgewick, Anne Damone, James Dumont, Karen McAndrew, Hon. Dennis Pearson, Nahah Spero, Hon. Helen Toor (by phone), and Gregory Weimer. Also present were Hon. Harold Eaton, Supreme Court liaison; Kate Gallagher, Attorney General's designee (by phone), and Professor Emeritus L. Kinvin Wroth, Reporter.

The Committee welcomed Navah Spero, Esq., of Burlington, newly appointed as a member.

1. Minutes. The draft minutes of the meeting of May 18, 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 May 18 meeting, it was agreed to defer consideration of comments received until after the September 28 VBA meeting. Chairman Keyes reported that an article by Mr. Dumont and himself, "What's New: Expert Witness Disclosure in Vermont—The Advisory Committee on Civil Rules Seeks your Input," was published in *The Vermont Bar Journal*, vol. 44, no. 2, pp. 24-25 (Summer, 2018). He and Mr. Dumont are presenting a CLE on the proposed amendments at 8:45 a.m., at the VBA meeting.

B. Proposed amendments to V.R.C.P. 45, recommended to the Supreme Court on February 5, 2015 for promulgation. Professor Wroth reported that, following the Committee's further recommendation to the Court on May 21, the amendments were promulgated on June 13, effective August 13, 2018.

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 still 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 considered the Court. On September 6, the Court sent out for comment a revised draft that included the Committee's February 5 recommendation. Comments must be submitted by November 5, 2018. It was agreed that the September 6 proposed draft would be considered by the Committee at its October 19 meeting.

D. # 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 considered the State Treasurer's June 19 reply to Chairman Keyes' request for clarification and the concerns expressed by Mr. Avildsen in his September 6 email. It was agreed that Chairman Keyes and Mr. Avildsen would consider the matter and report at the next meeting.

F.. #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, sent out for comment on March 9 with comments due on May 9 and recommended to the Court for promulgation on May 27, were promulgated June 13, effective August 13, 2018.

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 draft proposed order of amendments to V.R.C.P. 41(a) and (b) dated May 17, 2018, and *FNMA v. Johnson*, 2018 VT 51, together with Mr. Dumont's memorandum to the Committee of September 6, 2018. Judge Toor stated that the purposes of the amendments were for clarity and conformity with current practice.

It was agreed that the following editorial corrections should be made in the draft (shown in bold underline): (1) Rule 41(a)(1), line 2—"an action or claim may be voluntarily dismissed by the plaintiff." (2) Rule 41(a)(1), lines 3-4—"by filing a notice of dismissal ~~at any time before service by~~ in any case in which the adverse party ~~of~~ has not yet filed an answer or of a motion for summary judgment." (3) Rule 41(b)(1)(i)—"~~or within three months~~ 90 days of any service deadline if it has been extended by the court."

In discussion, concerns were raised about the addition in Rules 41(a)(1) and (2) of the requirement that the clerk enter dismissal "upon order of the judge." The phrase invoked the provisions of V.R.C.P. 7(b) and 77(d) concerning application for and notice of an "order" and was also inconsistent with the first sentence of what is now paragraph (3). Judge Toor stated that the phrase reflected current practice and that participation by the judge was necessary because of the varying levels of experience in clerk's office staff. She agreed to consider other language such as "after consultation with" or "with the approval of" the judge, and to report at the next meeting.

4. #14-8. V.R.C.P. 69. Executions. In discussion of 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, 2017, draft of previously discussed amendments to Rule 69, the subcommittee

(Judge Pearson, Ms Badgewick, Professor Wroth) agreed to consider the other rules discussed in Judge Pearson's memorandum, as well as the effect on federal court practice, and to report 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 remained on the Civil Division Oversight Committee's agenda.

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). Judge Toor asked why the role of the clerk or designee had been deleted in proposed Rule 3.1(b)(2). In view of Mr. Avildsen's necessary absence, it was agreed to defer this and any other questions about the draft until the next meeting. .

7. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct. Professor Wroth reported that he would present the full draft of a revised Vermont Code of Judicial Conduct with his Reporter's Notes at the next 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.

9. #17-7. V.R.C.P. 55—Amendments recommended by Civil Division Oversight Committee. The Committee considered Professor Wroth's draft proposed order of amendments to V.R.C.P. 55 dated May 17, 2018, together with Mr. Dumont's memorandum to the Committee of September 6, 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. After discussion of the issues raised in Mr. Dumont's memorandum, Judge Toor agreed to provide a memorandum for further discussion at the next meeting.

10. #18-1. V.R.C.P. 4.2(j)(1)(iv). The Committee considered Ms. Damone's e-mail of Mat 30, 2018, reporting Judge Treadwell's concern that V.R.C.P. 4.2(j)(1)(iv) contained a reference to the Vermont Department of Prevention, Assistance, Transition, and Health Access, which is now the Department for Children and Families. After discussion, it was agreed that in any revision of V.R.C.P. 4.2 that would be undertaken pursuant to item 4 above, a generic term should be included that would cover all sources of state assistance.

11. #18-2. V.R.A.P. 9—Statutory inconsistencies. Chairman Keyes reported that the charge of the subcommittee (Rebecca Turner, Kate Gallagher, chair) was 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. The subcommittee will also consider whether there should be a uniform Supreme Court. Rule for all single justice evidentiary hearings.

12. #18-3. Filing and other dates—Delaware Court’s work-life balance order. As requested by Ms. McAndrew, The Committee considered the Delaware Court’s order addressing court dates in the context of work-life balance concerns. Ms. Badgewick reported that the Vermont Supreme Court, responding to an initiative begun by an ABA study of lawyer well-being, by order of January 2, 2018, had created the Vermont Commission on the Well-being of the Legal Profession charged with creating a state-wide action plan by December 31, 2018, with specific proposals including proposed rule changes. The plan is to cover three areas: a confidential intervention policy, a plan for a lawyer assistance program, and an ongoing educational program on mental health, well-being, and substance abuse resources for lawyers, judges, and law students. The VBA is to provide staff and administrative support and grant-seeking assistance. See <https://www.vermontjudiciary.org/about-vermont-judiciary/boards-and-committees/commission-on-well-being-of-legal-profession>. Ms. Badgewick is a member of the Commission’s Legal Employers Committee.

13. Other business. Chairman Keyes noted for possible consideration at the next meeting, the Court’s amendment to V.R.C.P. 79.1(e), promulgated September 5, effective November 5, 2018, for consistency with Administrative Order No. 41. See <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRCP%2079.1%28e%29%2C%20VRFP%2015%28e%29%2C%20VRPP%2079.1%28d%29%20and%20VRAP%2045.1%28d%29.pdf>.

14. Dates of future meetings. The next meeting of the Committee will be held on October 19, 2018 at 9:00 a.m.at Vermont Law School. It was agreed that a further meeting should be held on November 30, 2018 at the same time and place.

There being no further business, the meeting was adjourned at 10:55 a.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter