

**APPROVED**

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE  
Minutes of Meeting  
November 30, 2018**

The meeting was called to order at 9:10 a.m. in the Hoff Lounge Hall, Oakes Hall, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Eileen Blackwood (by telephone), Anne Damone, James Dumont (by telephone), Karen McAndrew, 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 (by telephone); and Professor Emeritus L. Kinvin Wroth, Reporter.

**1. Minutes.** The draft minutes of the meeting of October 19, 2018, were unanimously approved as previously circulated, with typographical corrections.

**1.A. New Case Management System (Odyssey).** Hon Katherine Hayes and Chasity Stoots-Fonberg were welcomed to the meeting at 11:00 a.m., as previously scheduled, to discuss the new case management system. Ms. Stoots-Fonberg distributed in hard copy a Powerpoint of the system, "Odyssey eFile VT." Judge Hayes explained that Odyssey was scheduled to be rolled out in the Judicial Bureau in April or May 2019; a pilot would be started in Windsor, Windham, and Orange counties in Fall 2019; the system would be established in Bennington, Addison, and Rutland in Spring 2020. E-filing will be required in the courts where Odyssey is in place. Presently, all cases, open or closed, are being converted to electronic format in all counties. The E-filing Rules will be developed by the Committee on Public Access to Court Records.

Judge Hayes then reviewed the draft amendments of V.R.C.P. 80.6 as distributed to the Committee. The purposes were to prepare for the changeover to Odyssey by making the Judicial Bureau procedure more like those of the other courts through providing a pre-trial conference procedure and adopting similar time periods for filings. In discussion, questions raised included whether dismissal of a proceeding commenced by service was automatic if no complaint were filed, whether the pretrial conference could be waived, and whether a designated officer could appear in place of the arresting officer. Judge Hayes will address these and other issues in a new draft of the amendments that she will present at the Committee's February 1 meeting.

**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, and discussed at a panel at the Vermont Bar Association meeting on September 28, 2018. The Committee considered a draft proposed order dated November 24, 2018, containing amendments to Rule 26(b)(5)(A)(i) initially prepared by

Mr. Dumont to reflect the results of the VBA panel discussion. The amendments allowed interrogatories to experts that may be called under Vermont Rules of Evidence 702, 703, or 705, whether or not they may also testify from personal knowledge of the facts. The order did not contain the other amendments to Rules 26(b) and (e) originally proposed by the Committee.

On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the proposed amendments to Rule 26(b)(5)(A)(i) be recommended to the Supreme Court for promulgation as drafted. Chairman Keyes noted that the present amendments have not been reviewed by the Legislative Committee on Judicial Rules.

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). Chairman Keyes reported that the proposal for the Committee to submit a comment opposing the rule on grounds suggested by Judge Toor did not receive a majority vote in a poll that he had conducted electronically at the direction of the Committee. Professor Wroth noted that the comment period on the proposed rule had been extended by the Court until January 14, 2019.

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, 2018, for promulgation. The Committee considered Mr. Avildsen's memorandum of November 29, 2018, reporting that, subsequent to the April 11 recommendation, the Court (and the Legislature) asked the Committee to consider the opinion of the Attorney General and the State Treasurer on possible impacts on their offices. The Treasurer in June asked the Committee to defer any action on the proposed rule until after the Legislature considered amendments to Vermont's Unclaimed Property Act (UP Act) based on the model Revised Uniform Unclaimed Property Act and addressed possible conflicts between recommended V.R.C.P. 23(g) and potential UP Act jurisdiction over some class action residual funds. Mr. Avildsen noted that the UP Act refers only to unclaimed funds received by the court and that the usual practice, to which Rule 23(g) would apply, was that such funds remained in the parties' hands and would be distributed by the parties pursuant to court order.

On motion duly made and seconded, after discussion, it was voted unanimously, with Mr. Avildsen abstaining, that the Committee, for the reasons set forth in Mr. Avildsen's memorandum, continues to recommend promulgation of the amendment adding V.R.C.P. 23(g)

and that Chairman Keyes should send a letter explaining the Committee's position to the Treasurer.

D. #17-7. V.R.C.P. 55—Amendments recommended by Civil Division Oversight Committee. Professor Wroth reported that the proposed amendments to V.R.C.P. 55 and 80.1, amending the default judgment rule to conform to current practice, had been transmitted to the Court on November 21, 2018, to be sent out for comment. He noted that an e-mail query from Deputy Supreme Court Clerk Emily Wetherell raising questions about the proposal had been received that morning. He will send the questions to Judge Toor to respond to Ms. Wetherell.

**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 further revised draft proposed order of amendments to V.R.C.P. 41(a) and (b) dated November 26, 2018, incorporating changes agreed upon at the last meeting. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend that the revised proposed order be sent out for comment.

**4. #14-8. V.R.C.P. 69. Executions.** The Committee considered Judge Pearson's draft amendments of V.R.C.P. 4.1 and other rules intended to indicate the direction of his revision efforts. He noted that there was little substantive change in his drafts. His basic purpose was to eliminate redundancies. He was also proposing a new Rule 69.1 covering post-judgment trustee process. Professor Wroth agreed to prepare a draft for the subcommittee showing changes from the present rules before Judge Pearson does further rule drafting. Judge Toor suggested consideration of the provisions for attachment and wage garnishment for collection of delinquent taxes in 32 V.S.A. §§ 3207 and 3208.

**5. #17-4. Review status of Amendments to V.R.A.P. 24 (IFP Proceedings),** recommended for promulgation on December 3, 2014. The Committee considered Professor Wroth' revised draft of proposed amendments to V.R.C.P. 3.1(b) and V.R.A.P. 24(a)(1), dated November 25, 2018. In discussion, Ms. Damone noted that it would be necessary to revise the application form to conform to changes in the rule. It was agreed to replace "welfare aid" with "public assistance" in paragraph (b)(1) and to eliminate the term "in forma pauperis" in the title of the rule and wherever it appeared in the text, substituting "waiver of filing fees and service costs" or an appropriate variant. It was agreed that conforming changes should be made in V.R.A.P. 24. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the proposed amendments to V.R.C.P. 3.1 and V.R.A.P. 24 be sent out for comment with these revisions after review by Mr. Avildsen of a revised draft.

**6. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct.** The Committee considered Professor Wroth's Draft 2, dated November 24, 2018, of a proposed order to promulgate a revised Vermont Code of Judicial Conduct. This draft incorporated revisions of the October 19 draft suggested by Chairman Keyes. On motion duly made and seconded, after discussion, it was voted unanimously to send the November 24 draft with the following revisions to the Judicial Conduct Board for its review.

Terminology section, Reporter's Notes. An explanation for the elimination of "court personnel" from the defined terms should be added.

Terminology section, "Judge." The definition should expressly include assistant and probate judges.

Rule 1.2, Comment [6]. It was agreed that the verb should be "should" rather than "may" as suggested in a previous review.

Rule 2.7, Reporter's Notes, line 3. Should be "avoid."

Rule 2.11(A)(4). The question was raised as to the time period for an aggregate of \$150 in contributions to a continuing part-time judge. It was agreed that the rule should provide that no contribution could be made over a five-year period prior to an election.

Rule 2.11(A)(6)(a), (c), Reporter's Notes. Should be "intended." Add "It is also not intended to bar a judge from sitting in closely related cases in different divisions of the trial [superior?] court."

Rule 2.11(D), Insert new (2): "any gift made to a judge by a party or lawyer in a case pending before the judge in the last five years." Former (2) becomes (3).

Rule 2.12(A). The Reporter's Notes should make clear that a judge's responsibility for staff under "the judge's direction and control" is limited to conduct that the judge can control, such as activity in the court room or otherwise in performance of official duties.

Rule 3.6, Comment [2], line 2, Insert "those."

Rule 3.15(A)(2), (3). Change to \$250.

Rule 3.15(C). Should be "annual report as required by statute."

**7. #14-1. Status of Appendix of Forms.** This item was deferred until the next meeting.

**8. Other Business.** There was no other business.

**9. Dates of future meetings.** The next meeting will be held on February 1, 2019, at 9:00 a.m. at Vermont Law School. Professor Wroth will circulate dates for meetings in April and June.

There being no further business, the meeting was adjourned at 12:20 p.m.

Respectfully submitted,

L. Kinvin Wroth  
Reporter