

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
May 3, 2013

The meeting was called to order at 9:15 a.m. in Room 101 Debevoise Hall, Vermont Law School, by William E. Griffin, Chair. The following Committee members were present: Eric Avildsen, James A. Dumont, Joseph E. Frank, Jean Giddings (by telephone), Kathleen Hobart, Allan R. Keyes, Karen McAndrew, Hon. Dennis Pearson, and Greg Weimer. Also present were Hon. Marilyn R. Skoglund, Supreme Court liaison; Emily Wetherell, Supreme Court staff attorney; and Professor L. Kinvin Wroth, Reporter.

Chairman Griffin and the Committee welcomed Justice Skoglund to her first meeting as newly designated Supreme Court liaison and expressed their great thanks to the Honorable John A. Dooley for his many years of service in that role.

1. Minutes.

The draft minutes of the meeting of February 8, 2013, were unanimously approved as previously distributed.

2. Review of Comments on Proposed Amendments Sent out for Comment on February 12, with Comments Due April 12, 2013, and Proposed Amendments to V.R.A.P. 28(j) and 30.

A. Vermont Rules of Appellate Procedure. Chairman Griffin reported that no comments had been received on either the proposed restyled Appellate Rules or the proposed related “substantive” amendments to those Rules.

On motion duly made and seconded, after discussion, it was voted unanimously to recommend to the Supreme Court that the restyled Vermont Rules of Appellate Procedure be promulgated as circulated with the addition to the Reporter’s Notes to V.R.A.P. 3 of a statement that the Docketing Statement form had been removed from the Rule and would be available as a form on the Judiciary web site.

On motion duly made and seconded, after discussion, it was voted unanimously to recommend to the Supreme Court that the proposed amendments to Rules 5(b), 6, 10(b)(5), 12(a), 12(b)(1), 12(c), 28(j), 33(a)(1), 34(b), 39(c)(4), 40(a), 40(b)(2), 45.1(a)(3)(C)(iii), and 45.1(b)(2) of the Vermont Rules of Appellate Procedure be promulgated as circulated.

B. In view of the presence of Ms. Wetherell, the Committee agreed to consider the following agenda items out of order:

#13-3—Amendment of V.R.A.P. 28(j) to Conform to 2002 Amendment to Federal Rule 28(j). The Committee considered John A. Serafino’s e-mail of March 26, 2013, proposing that V.R.A.P. 28(j) be amended to conform to F.R.A.P. 28(j) as amended in 2002. The

amendment would provide that a letter informing the Court of additional authorities after the briefs have been filed or oral argument held must be limited to 350 words. In discussion, it appeared that the present rule was infrequently used and the procedure was not abused. The proposed amendment could lead to confusion. It was agreed to take no action on the proposal.

#13-5—Proposed Emergency Amendments to V.R.A.P. 30 to Amend Temporary Provisions Concerning Number of Paper Copies of Printed Case. The Committee considered Ms. Wetherell's April 29 draft of emergency amendments to V.R.A.P. 30 to increase from one to eight the number of paper copies of the printed case required to be filed and to make other minor changes. One paper copy had proved to be insufficient for the needs of the Court. On motion duly made and seconded, after discussion, it was voted unanimously to recommend to the Supreme Court that the proposed amendments be promulgated as drafted.

C. Proposed amendments to V.R.S.C.P. 3, 7, 8, and 13. The Committee considered a letter of April 12, 2013, from Nicole Killoran and five other consumer-credit lawyers commenting on the proposed amendments to V.R.S.C.P. 3. Mr. Avildsen for the Small Claims subcommittee noted that several of the signers had met with the subcommittee and the full Committee by conference call and in person to discuss the issues raised in the letter and that a number of changes addressing their concerns had been made in the final draft before it was sent out for comment. On motion duly made and seconded, after discussion, it was voted unanimously to recommend to the Supreme Court that the proposed amendments be promulgated as circulated.

3. **#s10-1/08-6, 11-10, 11-15—V.R.S.C.P.— Forms and Proposed Rule Revisions.** Mr. Avildsen reported that the Small Claims subcommittee would have a report on additional items at the next meeting,

4. **#10-5—Proposal to Conform V.R.C.P. 6 to Federal Amendments; Restyling the Civil Rules.** The Committee considered the April 30 memorandum of Mr. Keyes and Professor Wroth on adaptation of F.R.C.P. 6(a)—the “day is a day” rule—as V.R.C.P. 6(a), based on Mr. Keyes’ memoranda of January 21, 2010, and July 27, 2012. The April 30 memorandum noted the several necessary steps that would follow adoption of such an amendment: The need to conform other Civil Rules and Forms time provisions, as well as provisions of other Rules within the Committee’s jurisdiction, to the new rule and the need to communicate with the chairs of the other Rules committees about the need to adopt or incorporate by reference in their Rules the new V.R.C.P. 6(a) and to conform other time provisions in their Rules to it. On motion duly made and seconded, after discussion, it was voted unanimously to adopt the process proposed in the April 30 memorandum to complete those steps.

Professor Wroth suggested that it would be highly desirable to accomplish the necessary amendments to the time provisions of the Civil Rules as part of completing the larger Civil Rules restyling project, which already included the following tasks: Review and fine-tuning of the restyled Civil Rules draft produced by his Advanced Civil Procedure class in 2008-2009; incorporating in that draft amendments adopted subsequent to its completion; conforming that draft to changes necessitated by the court restructuring legislation; incorporating in that draft

changes to reflect the development of electronic case filing and case management in the Superior Court. He stated that the Supreme Court was willing to allow Ms. Wetherell to assist the Committee and him in this project. The Committee welcomed this offer. Ms. Wetherell and Professor Wroth agreed to develop a work plan that would enable them to make substantial progress on the project by Fall 2013.

At this point, Ms. Wetherell left the meeting.

5. **#10-8—Adoption of Amendments to ABA Model Code of Judicial Conduct.** The Committee considered Professor Wroth's memorandum of May 1, 2013, outlining the changes in the 2007 ABA Model Code of Judicial Conduct, as amended, that would affect the Vermont Code of Judicial Conduct, which was adopted in 1994 on the basis of the ABA's 1990 Model Code. As of January 10, 2013, 26 states and the District of Columbia had adopted the 2007 ABA Model Code. Professor Wroth noted that he had sent the same memorandum to the Supreme Court pursuant to the Court's request that he update them periodically on the progress of adoption nationwide. After discussion, it was agreed to await the direction of the Court on whether and when to take up the task of conforming the Vermont Code to the 2007 ABA Model Code.
6. **#11-4—Question Regarding Text of V.R.P.C. 4.1 Comment.** Professor Wroth reported that he had been advised that the Court has agreed that the addition of the omitted language from the Comment to V.R.P.C. 4.1 could be handled in the preparation of the 2013 pocket part to the Rules volume with an editorial note explaining the reason for the addition.
7. **#11-15—Trustee Process against Banks on Certain Federal Agency Direct Deposits. Small Claims.** The Small Claims Subcommittee will report per item 3 above.
8. **#12-1—Event-witness Amendment to V.R.C.P. 26(b)(4)—Effect of *Stella*.** Ms. McAndrew reported on behalf of the Rule 26 subcommittee that she had received extensive background material from Professor Wroth and that the subcommittee would have a report and recommendation at the next meeting.
9. **#12-3—Amendment of V.R.E.C.P. 5(h) to Require Transcripts in All On-the-Record Appeals.** The Committee reviewed Professor Wroth's May 2 Draft II of a proposed amendment of V.R.E.C.P. 5(h) that reflected the comments of Judges Durkin and Walsh of the Environmental Division. On motion duly made and seconded, there being no discussion, it was voted unanimously to propose that the amendment be sent out for comment as drafted.
10. **#12-4—Updating References in V.R.C.P. 80.1(b)(3) and 80.9(a).** The Committee reviewed Professor Wroth's May 1 drafts of proposed amendments to update statutory and other references in V.R.C.P. 80.1(b)(3) and 80.9(a). On motion duly made and seconded, there being no discussion, it was voted unanimously to propose that the amendments be sent out for comment as drafted.
11. **#12-5—Consideration of V.R.C.P. 79(b).** Ms. Hobart reported that repeal of 4 V.S.A.

sec. 652(1) requiring the clerk to maintain a book of judgments was provided for in H.1, pending in the House Judiciary Committee.

12. #12-6—V.R.P.C. 3.8(g), (h)—Conformity to Model Rules Amendments. The Committee considered Rule 3.8(g), (h), of the ABA Model Rules of Professional Conduct, adopted in 2008, that would require prosecutors to act on evidence creating a reasonable likelihood, or establishing, that a defendant had been wrongly convicted. Committee members questioned whether amended Comment [9] set too low a standard for the prosecutor's obligation. Professor Wroth agreed to review the action of other states on the amendments and to prepare a draft for the next meeting that he would also send to the Criminal Rules Committee for comment.

13. #12-7—V.R.C.P. 5—Certificate of Service and Form. The Committee reviewed Professor Wroth's May 1 draft of an amendment of V.R.C.P. 5(h) and a new Form 29 responding to the proposal of the Civil Division Oversight Committee that Rule 5 be amended to require that lawyers and self-represented litigants file certificates of service with documents filed with the court. Professor Wroth reported that Justice Robinson had expressed no concern about this provision from the standpoint of the Court's Self-represented Litigants Committee. Committee members noted that application of such a rule to lawyers seemed unnecessary but that the Oversight Committee had clearly intended that effect. Mr. Keyes suggested that the result could be achieved more simply by deleting everything in the draft after the first sentence. Members of the Oversight Committee who were present indicated that the Oversight Committee would reconsider the proposal at a subsequent meeting. It was agreed to defer action on the proposal pending that reconsideration.

14. #12-8 V.R.C.P. 3—Notice of Appearance Form. The Committee considered Professor Wroth's May 1 draft of an amendment of V.R.C.P. 4(b) and a new Form 28 responding to the proposal of the Civil Division Oversight Committee for an amendment of V.R.C.P. 3 to require inclusion of a blank notice of appearance form with the summons for use by self-represented defendants. Professor Wroth reported that Justice Robinson had expressed no concern about this provision from the standpoint of the Court's Self-represented Litigants Committee. Members of the Oversight Committee who were present stated that the Oversight committee has adapted the Family Division's notice form as an unofficial form for inclusion in a Clerks' Best Practices Manual that is in preparation. A question was raised whether a rule and new form were needed, particularly in foreclosure cases where there is already a significant amount of paper required. It was agreed to defer action on the proposal pending further consideration of the question by the Oversight Committee.

15. #13-1—V.C.J.C. Sections 5A and 5B. It was agreed to defer review of the Supreme Court's concerns about proposed amendments transmitted to the Court on December 13, 2011, and not yet circulated for comment, pending preparation of a new draft by Professor Wroth for the next meeting.

16. #13-2—Proposed Amendments to V.R.C.P. 43(e) Concerning Appointment and Compensation of Interpreters. It was agreed that Professor Wroth should clean up the draft

proposed by the Interpreter's subcommittee, send it to the other affected Rules Committees, and present the draft at the next meeting.

17. #13-3—Amendment of V.R.A.P. 28(j) to conform to 2002 amendment to Federal Rule 28(j). See Item 2.A above.

18. #13-4—Recent amendments of F.R.C.P. 37 and 45. The Federal Rules amendments were referred to the Federal Rules subcommittee chaired by Mr. Keyes.

19. #13-5—Proposed Amendment to V.R.A.P. 30 to make amendments concerning number of paper copies of printed case permanent. See Item 2.A above.

20. Other business. There was no other business.

21. Date of next meeting. Professor Wroth agreed to circulate possible dates for a meeting in July.

The meeting was adjourned at 12:00 noon.

Respectfully submitted,

L. Kinvin Wroth, Reporter