

**APPROVED**

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE  
Minutes of Meeting  
January 30, 2015**

The meeting was called to order at 9:15 a.m. in Room 216 Debevoise Hall, Vermont Law School, by William E. Griffin, Chair, with the following Committee members present: Eric Avildsen (by phone), Eileen Blackwood (by phone), James Dumont (by phone), Jean Giddings, R. Allen Keyes (by phone), Karen McAndrew (by phone), Hon. Dennis Pearson, and Gregory Weimer. Also present were Hon. Harold E. Eaton, Jr, Supreme Court Liaison, and Professor L. Kinvin Wroth, Reporter.

**1. Minutes.** On motion duly made and seconded, the corrected draft minutes of the meeting of October 3, 2014, and the draft minutes of the meeting of November 14, 2014, were unanimously approved as previously circulated.

**2. Status of proposed and recommended amendments.** Professor Wroth reported that

- **Proposed V.R.C.P. 4(b), 4(l)(3)(H), 5(h), and Forms 1, 1B, 1C, 28, 29.** After the Committee recommended revisions to Rule 5(h) and a complementary amendment to Rule 5(d) for promulgation, the Court, on the advice of Professor Wroth, decided to send those provisions out for comment, with comments due on February 17. No promulgation recommendation has been made to the Court on the other proposed rules amendments in this order originally sent out for comment on June 13, 2014. The proposed amendments have not been considered by the Legislative Committee on Judicial Rules (LCJR). Comments received will be on the agenda for the next meeting.
- **Proposed V.R.C.P. 9.1, 55(b)(7), and V.R.S.C.P. 3(e), (h)(7).** No promulgation recommendation has been made to the Court, and these proposed amendments have not been considered by LCJR. Professor Wroth reported that three comments had been received on proposed new V.R.C.P. 9.1 and 55(b)(7) and the amendments to V.R.S.C.P. 3(e), (h)(7), sent out for comment on June 13, 2014. Two of the comments supported the amendments. The third objected to the statement in the Reporter's Notes to V.R.C.P. 9.1 that in the Civil Division plaintiffs "do not always" follow the required small claims procedure," stating that the commenter filed all required information whether the action was a civil or a small claims action. The commenter also suggested that proposed V.R.C.P. 55(b)(7) requiring documents to be filed with a default motion was redundant, because the documents must be filed with the complaint and that an affidavit to that effect with the motion would suffice. Committee members noted that proposed V.R.C.P. 9.1 and 55(b)(7) adopted virtually verbatim the provisions of V.R.S.C.P. 3(e) and (h)(7) in effect since 2013. The commenter followed best practices, but the Committee had been advised by a practitioner that not all Civil Division plaintiffs complied.

On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend the proposed amendments to the Court for promulgation as circulated. Professor Wroth agreed to state in the Reporter's Notes that the purpose of the amendments was to conform the rules to best practices.

- **Proposed V.R.C.P. 43(f), 45, and V.R.A.P. 24(a)(1)(B)(iii).** The Committee had previously deferred recommending promulgation of these amendments sent out for comment on June 13, 2014, until consideration by LCJR on December 2, 2014. Professor Wroth reported that members of LCJR raised issues about the scope of proposed V.R.C.P. 43(f) and the procedure in other states, as well as a statement as to the manner of service in the Reporter's Notes to V.R.C.P. 45. Rule 43(f) is being reviewed on these issues and will be brought forward at a later meeting. V.R.C.P. 45, with the Reporter's Notes omission, and V.R.A.P. 24 were recommended to the Court for promulgation on December 3, 2014. The amendments to V.R.C.P. 45 were promulgated on December 11, 2014, effective February 13, 2015. The amendment to V.R.A.P. 24 was held by the Court for further consideration of an issue raised during consideration of the amendment.
- **Proposed V.R.C.P. 80.11.** The proposed rule was sent out for comment on June 13, 2014. After review of comments on October 3, 2014, the proposed rule and comments were sent by the Committee to the VBA Board for further consideration. Consideration was under way but no further proposal had yet been received.
- **Proposed emergency amendments to V.R.S.C.P. 3. Cost-saving legislation.** The Committee considered Professor Wroth's January 27 draft of emergency amendments to V.R.S.P.C. 3 prepared at the Court's request as part of current cost-saving efforts. Professor Wroth noted that the amendments, originally prepared by Justice Dooley, were intended to eliminate postal costs and save clerk time by eliminating requirements that the clerk mail various notices on behalf of the parties. He further noted that, with Justice Dooley's concurrence, he had taken the opportunity to put the proposed changes in a simplified, more accessible format. The Court will consider comments by the Committee but intends to promulgate the amendments as emergency amendments within the next two weeks, to be effective 30 days thereafter. Comments may be made to the Court Administrator for an additional 60 days.

In review of the draft, Committee members suggested that the time periods in draft Rules 3(b)(4)(A) and (5) for filing the return of in-hand service be extended to 60 days from the filing of the complaint to accommodate the 30 days allowed for defendant to answer a mailed complaint. It was agreed that, for simplicity, the 60 days should apply even if the summons and complaint are served in hand at the outset, and that the Reporter's Notes should emphasize that the new rule puts a significant burden on the plaintiff to follow up on the time periods of the rule. It was also suggested that references in the rule and Reporter's Notes to process servers other than the sheriff should be clarified. Professor Wroth agreed to send the revised rule and Reporter's Notes to the Court in time for action at its February 9 administrative meeting.

The Committee then considered the following list of matters in the Court's draft cost-saving bill that would have some effect on the Rules of Civil Procedure or civil practice:

**P. 9**—4 V.S.A. § 1107(a)—eliminate optional de novo jury trial in traffic appeals—VRCP 80.6(1).

**Pp. 9-10**—12 V.S.A. §§ 2551-2555 (probate appeals)—direct appeal to Supreme Court—VRCP 72.

**Pp. 11-12**—21 V.S.A. §§ 670-673 (workers compensation)—direct appeal to Supreme Court.

**Pp. 12-15**—32 V.S.A. § 4461-4468 (property tax appeals)—eliminate superior court appeals.

**Pp. 15-16**—3 V.S.A. § 130a (licensing boards)—direct appeal to Supreme Court from appellate officer.

**P. 16**—19 V.S.A. § 5 (Transportation Board Appeals)—direct appeal to Supreme Court.

**Pp. 16-17**—New 32 V.S.A. § 3116 (Commissioner of Taxes appeals)—direct appeal to Supreme Court—OTR.

**Pp. 17-21**—Amendments to 32 V.S.A. §§ 5404a, 5408, 5936, 6072, 9617, 10110, and repeal of 32 V.S.A. §§ 5885(b), 7489(b), 9617e, 10109(b), 10404(c)—to provide for Supreme Court review.

It was agreed that Committee members should send any comments on these matters to Professor Wroth by Thursday, February 5, so that he could consolidate them and send them to the Court in time for its February 9 meeting.

**3. #s10-1, 11-15—V.R.S.C.P. forms and proposed rule revisions.** The Committee considered Mr. Avildsen's working draft of the subcommittee's proposed changes to the list of exemptions from attachment, trustee process, or other seizure in V.R.C.P. Form 34 and on-line Civil Division Form 511. It will be considered by the Civil Division Oversight Committee on February 6. Committee members thanked the subcommittee for its good work on the list and suggested that in questions 3a and 3b, the statutory cite for the amount be used, because the actual dollar amount could change. Mr. Avildsen reported that had prepared a third draft of the subcommittee's revision of the Small Claims booklet that would also be considered by the Oversight Committee on February 6. Rules Committee members advised Mr. Avildsen that the Committee would be glad to review another draft of the booklet if asked.

**4. #10-5—Proposal to conform V.R.C.P. 6 to Federal Rules amendments.** Mr. Keyes reported that he had made substantial progress in his review of the day-is-a-day changes made necessary in other rules by adoption of the substance of F.R.C.P. 6 and had found only a few minor glitches in addition to the two noted at the October meeting: the extension of time provision not in the federal rule—as to which he would recommend following the federal model—and the three-day rule. He and Mr. Dumont will complete the review and make a report with recommendations at the next meeting.

**5. #s10-8, 13-1—Adoption of amendments to ABA Model Code of Judicial Conduct.** This item was deferred until the next meeting in view of Judge Toor's necessary absence.

**6. #11-15—Trustee process against banks on certain federal agency direct deposits.** To be considered by the small claims subcommittee. See item 3 above.

**7. #12-1—Event-witness amendment to V.R.C.P. 26(b)(4) and mandatory disclosure.** The Committee considered the February 2012 draft of a proposed amendment, Ms. McAndrew's July 2013 subcommittee report, and the language of F.R.C.P. 26(a)(2) circulated in Professor Wroth's January 29 e-mail. In discussion, it appeared that questions about the appropriateness of responses to interrogatories under present Rule 26(b)(4) arose with some frequency in trials. It was noted that the difficulty faced in past efforts to amend the rule to adopt the mandatory disclosure provisions of the federal rule had arisen particularly with concerns for medical malpractice cases. The treating physician was an event witness but might also be called as an expert on issues such as causation, which under the federal rule would require preparation of a written report. It was agreed to consider a rule in which there was mandatory disclosure of any expert as defined in F.R.C.P. 26(a)(2)(A) and that the disclosure should address the six factors set out in F.R.C.P. 26(a)(2)(B), but that no written report would be required. The party offering the witness would be bound by the disclosures. If a written report was prepared, the existing protections of V.R.C.P. 26(b)(4)(B)-(D) would apply. Professor Wroth and Ms. McAndrew agreed to present a draft incorporating these elements at the next meeting.

**8. #12-6—V.R.P.C. 3.8(g), (h)—Conformity to Model Rules Amendments.** Ms. Blackwood reported for the subcommittee (Judge Pearson; Ms. Blackwood, chair; Mr. Dumont; and representatives of the Attorney General, the Defender General, the state's attorneys, and the private defense bar) that it would report at the next meeting..

**9. #13-11—V.R.P.C.—Consideration of ABA Ethics 20/20 revisions to ABA Model Rules.** The Committee considered the January 14 comments of the Professional Responsibility Board on the ABA Ethics 20/20 Model Rules revisions, as well as the proposed amendments to the Vermont Rules of Professional Conduct in items 19 and 20 below. Professor Wroth and Ms. Giddings agreed to develop recommendations regarding all of these items for a meeting to be scheduled after the March 27 meeting, provided that if an earlier response to the PRB amendment proposals in item 20 was necessary, they would make recommendations to the Committee by e-mail.

**10. #14-1. Forms.** Chairman Griffin reported that the question of the elimination of the Appendix of Forms would be placed on a future administrative agenda of the Court. Professor Wroth noted that a similar effort was well advanced with regard to the Federal Rules and agreed to send an update on that effort to the Committee.

**11. #14-5. V.R.C.P. 51. Consider in light of *Straw v. VNA*, 2013 VT 102.** This item was deferred until the next meeting in view of Judge Toor's necessary absence.

**12. #14-6. V.R.C.P. 16.3. Consider simplification.** This item was deferred until the next meeting in view of Judge Toor's necessary absence.

**13. #14-7. V.R.C.P. 41(b)(1)(iii). Conform to Rule 3's 60-day service requirement.** Professor Wroth will report at the next meeting on his research in the files concerning the 1981 amendments that created both provisions.

**14. #14-8. V.R.C.P. 69. Consider practical effect.** Professor Wroth will report at the next meeting on his review of the issues and the statutory basis of V.R.C.P. 69.

**15. #14-9. V.R.C.P. 74-75. Revise to clarify along lines of federal APA.** The Committee considered the material provided by Chairman Griffin on the interplay of V.R.C.P. 74 and 75. It was agreed to defer further discussion of both rules until the next meeting.

**16. #14-10. V.R.C.P. 26. Reconsider mandatory disclosure provisions.** See item 7 above.

**17. #14-11. V.R.C.P. 7. Consider rule similar to federal Local Rule 7(a)(7) requiring agreement on motions.** The Committee discussed Jerry O'Neill's letter of August 18, 2014, proposing a rule similar to U.S.D.VT.R. 7(a)(7) requiring counsel to confer on all motions. The Committee considered the kinds of matters to which such a rule would apply and the possibility of adopting only the first sentence of the federal local rule. Chairman Griffin agreed to advise Mr. O'Neil that the Committee did not deem action on the proposal to be necessary.

**18. #15-1. Consider revisions to V.R.C.P.16.1 concerning complex action designation.** In view of the hour, it was agreed to table this item until the next meeting.

**19. #15-2. V.R.P.C. 1.15, 1.15A. Consider amendment to allow small or insolvent estate funds held by lawyer to be deposited in IOLTA account.** See item 9 above.

**20. #15-3. V.R.P.C. 1.5, 1.8, 1.15, 1.15A, 8.3. Consider amendments proposed by Professional Responsibility Board.** See item 9 above.

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

**22. Date of next meetings.** The next meeting of the Committee is scheduled to be held at Vermont Law School on Friday, March 27, 2015. Professor Wroth agreed to circulate possible dates for a further meeting to be scheduled after June 1.

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

Respectfully submitted,

L. Kinvin Wroth, Reporter