

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
December 6, 2013

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, Eileen Blackwood, James A. Dumont (by telephone), Jean Giddings, Kathleen Hobart, Allan R. Keyes, and Gregory Weimer. Also present was Professor L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of October 4, 2013, were unanimously approved as previously circulated.

2. Status of proposed and recommended amendments. Professor Wroth reported that the Committee's 2013 annual report had been submitted to the Supreme Court on November 12, 2013. The Committee's recommended amendments to V.R.C.P. 80.1(b)(3) and 80.9 and V.R.E.C.P. 5(h)(1), sent out for comment on June 18 and reviewed by the Legislative Committee on Judicial Rules without comment on August 15, were promulgated with a slight change in V.R.E.C.P. 5(h)(1) on December 2, 2013, effective February 3, 2014. The Committee's proposed amendments to V.R.C.P. 4(b) and 79(b) and (c) were sent out for comment on December 4, 2013, with comments due on February 3, 2014. The promulgated and proposed amendments will be reviewed by the Legislative Committee on December 13, 2013.

3. #s10-1/08-6/11-15/13-8—V.R.S.C.P. forms and proposed rule revisions. Mr. Avildsen reported for the subcommittee (Mr. Avildsen, chair; Mr. Dumont; Ms. Blackwood; and Ms. Hobart) that the answer and disclosure forms were on the Judiciary website but not in VTADS, which most small claims defendants use; that the IFP form has not been replaced on the website; and that work was in progress on a small claims disclosure form for the judges.

The Committee then considered the subcommittee's draft of an amendment adding V.R.C.P. 9(h) to incorporate the recent small claims credit card debt collection amendments of V.R.S.C.P. 3. Mr. Avildsen stated that similar conditions in both small claims and civil actions meant that similar rules could apply. Mr. Keyes noted that the final sentence of both the present draft and V.R.S.C.P. 3(h)(7) stated that the complaint must "allege" that each assignment contained at least the last four digits of the account number and must "clearly show" the debtor's name. He asked what "clearly show" means if an action goes to trial. After discussion, it was agreed that the Small Claims and Civil rules should be parallel as far as possible. Professor Wroth agreed to prepare draft amendments to both the Small Claims and Civil rules for the next meeting that would consider, in light of V.R.S.C.P. 3(e), suggestions made by the Legislative Committee at its August 15 discussion of the small claims amendments (see October 4 minutes), as well as the point raised by Mr. Keyes.

4. #10-5—Proposal to conform V.R.C.P. 6 to Federal Rules amendments. Mr. Keyes and Professor Wroth will prepare drafts of the proposed amendment to V.R.C. P. 6(a) incorporating the "day is a day" provisions of F.R.C.P. 6(a), as well as any necessary conforming amendments to other provisions of the Civil and Appellate.

5. #s10-8/13-1—Adoption of amendments to ABA Model Code of Judicial Conduct. Chairman Griffin reported that the Court had not yet responded to the Committee’s proposal to establish one subcommittee to consider amendment of the provisions of V.C.J.C. 5A and 5B covering elected probate judges and a second larger subcommittee to work with it on the adaptation of the revised ABA Model Code for Vermont. He will follow up with Justice Skoglund.

6. #11-15—Trustee process against banks on certain federal agency direct deposits. See item 3 above.

7. #12-1—Event-witness amendment to V.R.C.P. 26(b)(4). Ms. McAndrew and Professor Wroth will report at the next meeting.

8. #12.6—V.R.P.C. 3.8(g), (h)—Conformity to Model Rules Amendments. Chairman Griffin reported that his survey of various constituencies concerning Professor Wroth’s draft amendments adding V.R.P.C. 3.8(g) and (h) and Comments to adapt 2008 amendments of the ABA Model Rules had resulted in expressions of differing views by prosecuting and defense attorneys. It was agreed that Chairman Griffin would appoint a subcommittee consisting of Judge Pearson, Ms. Blackwood, and Mr. Dumont and representatives of the Attorney General, the Defender General, the state’s attorneys, and the private defense bar to report at the next meeting if possible.

9. #12-7—V.R.C.P. 5—certificate of service and form. Ms. Hobart reported that the Oversight Committee has approved certificate forms and will next meet on December 21. Professor Wroth agreed to put his May 1 drafts on the agenda for the next meeting, together with a memorandum discussing appropriate federal provisions.

10. #12-8—V.R.C.P. 3—Notice of appearance form. See item 9 above.

11. #13-2—Proposed amendments to V.R.C.P. 43(e) concerning appointment and compensation of interpreters. The Committee will consider at the next meeting the comments of the Court’s interpreter subcommittee on Professor Wroth’s draft amendment of V.R.C.P. 43(e) incorporating revisions agreed upon at the October 4 meeting.

12. #13-4—Recent amendments of F.R.C.P. 37 and 45 and various F.R.A.P. Provisions. The Committee reviewed the subcommittee’s proposed amendment attached to Mr. Keyes memorandum of November 25. The amendment would incorporate F.R.C.P. 45(a)(4) as adopted effective December 1, 2013, by adding V.R.C.P. 45(a)(4) with a caption, “**Notice to Other Parties Before Service**” and deleting the existing requirement of notice from V.R.C.P. 45(b)(1). On motion duly made and seconded, it was voted unanimously to propose that the amendment be sent out for comment. Professor Wroth agreed to prepare a proposed promulgation order for review at the next meeting. It was agreed that the December 1 amendments to F.R.C.P. 37, the other December 1 amendment to F.R.C.P. 45, and various

December 1 F.R.A.P. amendments reviewed by the subcommittee were not necessary for the Vermont rules.

13. #13-6—V.R.A.P. 4(c)—question raised in *Coles v. Coles*, 2013 VT 36, note 2. Chairman Griffin and Professor Wroth reported that no response had been received from the Court to the statement in the Committee's 2013 Annual Report that it did not feel that action in response to the Court's question in *Coles* was necessary. Accordingly, it was agreed to remove this item from the agenda.

14. #13-7—Proposed Federal Rules amendments sent out for comment. It was agreed to remove this item from the agenda, to be taken up after promulgation of any or all of the currently proposed Federal Rules amendments.

15. #13-8—V.R.S.C.P. 3(h)—Whether to adapt the Small Claims Rules amendments to the Civil Rules. See item 3 above.

16. # 13-9—V.R.A. P. 1(b), 2, 26(b)—Consider in light of *In re D.D.*, 2013 VT 79, and *In re A.D.T.* 174 Vt. 369 (2002). The Committee reviewed Mr. Dumont's December 5 draft of an amendment to V.R.A.P. 26(b) embodying his view that these cases warranted a rule barring the Court from waiving rules provisions when to do so would enlarge the appeal period. On motion duly made and seconded, it was voted unanimously to ask Professor Wroth to prepare a draft promulgation order with Reporter's Notes for the next meeting.

17. #13-10—V.R.C.P. 80.1(b)(3)—Whether to extend emergency amendment promulgated December 21, 2011. Professor Wroth reported that the most recent extension of the emergency amendment to V.R.C.P. 80.1(b)(3), as further amended on December 2, 2013, effective February 3, 2014 (see item 2 above), was set to expire on December 31, 2013.

Ms. Hobart noted that an amendment of 12 V.S.A. §§ 4361-4367, enacted by Act No. 8 of 2013, effective December 1, 2013, deletes the form of the required notice to defendants in residential foreclosure cases contained in the rule. Under the statute, notice is still required, but two copies of it are to be served on a form approved by the Court Administrator complying with the statute. She reported that a form has been approved and posted on the Judiciary website. See https://www.vermontjudiciary.org/eforms/Foreclosure_NoticetoHomeowner.pdf. After discussion, on motion duly made and seconded, it was voted, unanimously, that the rule as amended on December 2, 2013, be further amended to delete the form, to substitute a requirement that notice be given on a form to be approved by the Court Administrator, and to make any other changes required by statute and that the rule as thus further amended be extended as any emergency amendment until December 31, 2015, with a direction that comments on the amended rule be sent to the Committee by February 21, 2014 and that the Committee recommend to the Court by March 1, 2014, whether the amendment should be made permanent.

18. #13-11—V.R.P.C.—Consideration of ABA Ethics 20/20 revisions to ABA Model Rules. Professor Wroth agreed to prepare for the next meeting a summary of the status of revisions to the ABA Model Rules of Professional Conduct proposed by the ABA Ethics 20/20

Commission that have been adopted or are pending. He will inquire whether the VBA Board of Managers, or any committee or section, is following the ABA revision process.

19. Other business.

A. Forms. Committee members noted the confusion arising from division of responsibility for the preparation of forms among the rules committees, the oversight committees, the Court Administrator, and the Chief Administrative Judge, as illustrated in part by several items considered at this meeting. After discussion, Chairman Griffin agreed to raise the question with the Court Administrator, suggesting the possibility that a committee including representatives from each of the rules and oversight committees, as well as the Court Administrator and Chief Administrative Judge, be formed to develop a coordinated approach to forms. He further agreed to set up a subcommittee of the Civil Rules Committee to review the present official forms in order to determine which forms were so essential that they should be established by rule and whether the present Appendix of Forms should be updated or otherwise revised.

Professor Wroth reported that a revised draft of the proposed Mid-size Case Rule (now entitled the Expedited Actions Rule) has been approved by the VBA working committee and will be cleaned up by VBA committee chair Gary Franklin and Professor Wroth for presentation to the VBA Board of Managers in January.

20. Date of next meeting. Professor Wroth agreed to determine Committee members' availability for meetings in February and March 2014.

There being no further business, the meeting was adjourned at 12:10 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter