

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
December 11, 2015**

The meeting was called to order at 9:05 a.m. in Room 216 Debevoise Hall, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Eileen Blackwood, Jean Giddings, William Griffin, Kathleen Hobart, Hon. Dennis Pearson, and Hon. Helen Toor. Also present were Honorable Harold E. Eaton, Jr., Supreme Court liaison, and Professor L. Kinvin Wroth, Reporter.

1. Minutes. On motion duly made and seconded, the draft minutes of the meeting of October 30, 2015, were unanimously approved as previously circulated.

PRIORITY ITEMS

2. Status of promulgated and proposed amendments.

A. The Committee considered Professor Wroth's revised proposed order continuing the emergency amendments to V.R.S.C.P. 3, 7, 10, 12, promulgated April 28, 2015, effective May 4, 2015, and further amending those and other Small Claims Rules provisions as emergency amendments. On motion duly made and seconded, after discussion, it was voted unanimously to recommend to the Supreme Court that

(1) the emergency amendments to V.R.S.C.P. 3, 7, 10, 12, promulgated April 28, 2015, effective May 4, 2015, should be continued as emergency amendments;

(2) those emergency amendments should be further amended and V.R.S.C.P. 8(b) and 9 should be amended as emergency amendments effective April 15, 2016; and

(3) the Advisory Committee should be directed to continue to review the operation of these emergency rules as continued and amended and to advise the Court not later than April 16, 2017, whether the rules should be further revised, continued as emergency rules, or made permanent.

The Committee then reviewed Judge Toor's memorandum of December 7, 2015, proposing an amendment to V.R.S.C.P. 2(a) eliminating credit card collection cases from the category of actions that may be brought under the small claims rules. It was agreed that Professor Wroth would prepare a draft promulgation order with Reporter's Notes for the next meeting.

B. The Committee then reviewed Professor Wroth's new draft of V.R.C.P. 6(a) and (e) originally sent out for comment on August 6, with comments due on October 5, 2015, as part of the proposed "day is a day" amendments intended to conform the Civil, Criminal, and Appellate Rules to the time periods of the federal rules. The new draft added "applicable" to modify

statutes to which the “day as a day” rules would apply, as suggested by the Legislative Committee on Rules, and restored Rule 6(e), in the language of the federal rule, adding three days to any time period when service was accomplished by postal mail, leaving with the clerk, or electronic means, as suggested in several comments from members of the bar. The Legislative Committee had also suggested that the “day is a day” amendments to all rules be made effective July 1, 2016, to allow time for the Legislature to make any necessary conforming statutory changes and for other sets of procedural rules to be brought into conformity with the “day is a day” approach. On motion duly made and seconded, after discussion, it was voted unanimously to recommend to the Supreme Court that the “day as a day” amendments to the Vermont Rules of Civil Procedure and the Vermont Rules of Appellate Procedure be promulgated as sent out for comment with the suggested changes in V.R.C.P. 6(a) and (e) and any necessary conforming changes in V.R.A.P. 26, and that all “day as a day” amendments to the Civil and Appellate rules, as well as all other procedural rules, be promulgated with an effective date of July 1, 2016.

3. #15-9. Proposed emergency amendments to V.R.C.P. 80.6. The Committee reviewed Professor Wroth’s draft of a proposed emergency amendment intended to bring Rule 80.6 into compliance with statutory changes in time to assure federal National Highway Traffic Safety funding for the pilot phase of an e-citation project in the Judicial Bureau scheduled to begin on April 1, 2016, preparation for which must commence on March 1, 2016. On motion duly made and seconded, after discussion, it was voted unanimously to recommend the amendments to the Court for promulgation with necessary changes to reflect the recodification of the Servicemembers Civil Relief Act that took effect December 1, 2015.

4. #15-1. Consider revisions to V.R.C.P.16.1 concerning complex action designation. Judge Toor reported that the subcommittee (Mr. Dumont, Ms. McAndrew, Justice Eaton *ex officio*, and herself) would report at the next meeting.

5. #14-1. Status of Appendix of Forms. The Committee reviewed Ms. Blackwood’s memorandum identifying Rules provisions and Reporter’s Notes that referred to Official Forms in the Appendix of Forms. It was agreed that V.R.C.P. 84 should be amended similarly to V.R.P.P. 84 to read substantially as follows: “The forms that the Chief Superior Judge may approve and post on the Judiciary web site are sufficient under the rules. They or forms substantially conforming to them may be used for the purposes for which they are designated, unless a rule requires that a specific form be used for a particular purpose.” [Note that F.R.C.P. 84 was abrogated, rather than amended, along with the abrogation of the Appendix of Forms, effective December 1, 2015.]

References to the Official Forms in the Rules and Reporter’s Notes should be replaced by language such as “a form substantially conforming to the appropriate form on the Judiciary website,” provided that if a specific form is mandated in a rule, language such as “shall be on a form approved by the Chief Superior Judge and posted on the Judiciary website” should be used. In a preliminary review, the Committee identified the following provisions as mandating a specific form: V.R.C.P. 3.1(a), 4(l)(3)(D), 4.2(j)(3), 80.1(b)(3), 80.1(f), 80.5(c), 80.6(c)(1),

80.6(l)(1), 80.9(b)(1). The present mandatory language of the following provisions was deemed adequate: V.R.C.P. 80.6(c)(4), 80.6(m)(2), 80.7(b), 80.7(c)(2). Professor Wroth and Ms. Blackwood agreed to work together in developing the necessary changes and in addressing the question of how to deal with fillable forms found on the website.

6. # 14.2—Proposed revised draft of V.R.C.P. 80.11 providing for expedited actions.

It was agreed to defer action on Mr. Weimer’s draft in view of his necessary absence.

7. #15-6. Amendments to implement legislative adoption of the False Claims Act.

The Committee reviewed Mr. Griffin’s December 1 draft of an amendment to V.R.C.P. 4 providing for registered mail service on the attorney general of copies of the complaint and disclosure required by 32 V.S.A. §632(b)(3). It was suggested that “any method of delivery requiring the signature of an addressee or an agent of an addressee” should be substituted for registered mail, and that the Reporter’s Notes should state that those methods could include commercial carrier or in-hand delivery. Professor Wroth agreed to prepare a draft promulgation order for the next meeting.

OTHER ACTION ITEMS

8. #s10-1/08-6/11-15/V.R.S.C.P. Forms, possible rules amendments, Small Claims booklet; trustee process against banks on certain federal agency direct deposits. Mr.

Avildsen reported for the Small Claims Subcommittee that it had accomplished its various charges and that new forms would overtake the rule-making process. On motion duly made and seconded, there being no discussion, it was voted unanimously that the subcommittee be discharged with the thanks for the Committee for its many years of service.

9. #10-5. Federal Rules Subcommittee. In the absence of Mr. Dumont, there was no report.

10. #14-6. V.R.C.P. 16.3. Alternative Dispute Resolution. After discussion, Professor Wroth agreed to present side-by side drafts of the proposed amendments of V.R.C.P. 16.3 and V.R.F.P. 18, promulgated effective September 21, 2015, with draft Rule 16.3(a)(1) and (2) reversed and (a)(1)(E) deleted.

11. #15-6. Proposal to review “tack and mail” provisions of V.R.C.P. 4. After discussion of the need to define “due diligence” and the applicability of the provisions to waiver of service, Judge Toor agreed to prepare a draft for the next meeting.

12. #15-7. Proposal to reconsider certificate of service provisions of new V.R.C.P. 5(h). The Committee considered Judge Toor’s December 7 draft of a proposed revision of Rule 5(h). Professor Wroth agreed to prepare a draft promulgation order for the next meeting, changing (3) to (c) in Judge Toor’s draft,

TRAILING DOCKET

13. **#10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct and amendments to sections 5A, 5B, of present Code.** Professor Wroth had no report.

14. **#12-6—V.R.P.C. 3.8(g), (h). Conformity to Model Rules amendments concerning duties of prosecutors.** The subcommittee (Ms. Blackwood (chair), Judge Pearson, Mr. Dumont, Dan Maguire, Anna Saxman, Tracy Shriver, and John Treadwell) had no report.

15. **#s12-1/14-10—Event-witness amendment to V.R.C.P. 26(b)(4) and mandatory disclosure.** It was agreed to defer consideration of this item in the absence of Ms. McAndrew.

16. **#13-11—V.R.P.C. Consideration of ABA Ethics 20/20 revisions to ABA Model Rules.** Professor Wroth had no report.

17. **#14-7. V.R.C.P. 41(b)(1)(iii). Conform to Rule 3's 60-day service requirement (Judge Toor).** Professor Wroth had no report.

18. **#14-8. V.R.C.P. 69. Executions. Consider practical effect (Judge Toor).** In the absence of a report by Professor Wroth, Judge Pearson agreed to review the role of execution in post-judgment trustee process and trustee process against earnings for the next meeting.

19. **#14-9. V.R.C.P. 74-75. Revise to clarify along lines of federal APA (Judge Toor).** Professor Wroth agreed to resend the materials in Mr. Griffin's January 29 e-mail to the Committee for discussion at the next meeting.

20. **#14-11. V.R.C.P. 7. Consider rule similar to federal Local Rule 7(a)(7) requiring agreement on motions.** After discussion of the motion provision in draft Rule 80.11, item 6 above, Professor Wroth agreed to prepare an appropriate draft amendment of Rule 7 or 78.

21. **#15-5. V.R.C.P. 45(f)(2).** Judge Toor agreed to address the questions regarding interpretation distributed in Professor Wroth's June 9 e-mail.

INFORMATION ITEMS

22. **#15-8. Special ad hoc committee on video/audio appearances and courtroom electronics.** Chairman Keyes reported that he had designated Judge Pearson and Mr. Wiemer to serve on this joint ad hoc committee made up of members of all Rules committees. Professor Wroth reported that the ad hoc committee had met on November 24 and would proceed to address issues of video/audio appearances before turning to issues presented by the presence of electronic devices, including cameras, in the courtroom.

23. Amendment of V.R.E.F. 1(a)(1) proposed by the Electronic Filing Rules Committee. Professor Wroth reported that this amendment as reviewed by the Committee had been promulgated November 25, 2015, effective January 25, 2016.

24. Proposed amendment to V.R.C.P. 43(f) concerning appointment of interpreters. Professor Wroth reported that this amendment, recommended for promulgation at the Committee's October 30 meeting, had been sent to Court on November 9, 2015, and was awaiting consideration with parallel recommendations from other Rules committees.

25. # 15.3. Proposed amendments to Vermont Rules of Professional Conduct. Professor Wroth reported that these amendments, sent out for comment on October 22, with comments due December 22, 2015, would be on the agenda for the next meeting.

26. #15-4. Proposed amendment of V.R.C.P. 5 concerning e-mail service. Professor Wroth reported that this amendment, sent out for comment on October 22, with comments due December 22, 2015, would be on the agenda for the next meeting.

27. #14-5. V.R.C.P. 51. Jury Instructions. Professor Wroth reported that these amendments, sent out for comment on November 25, 2015, with comments due on January 25, 2016, would be on the agenda for the next meeting.

28. Date of next meetings. It was agreed that the next meetings would be held at 9:00 a.m. on Friday, January 29, February 26, and April 29, 2016, at Vermont Law School.

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

Respectfully submitted,

L. Kinvin Wroth, Reporter