

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
January 29, 2016**

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, Jim Dumont, Jean Giddings (by phone), William Griffin, Kathleen Hobart, Karen McAndrew, Hon. Dennis Pearson, Hon. Helen Toor, and Greg Weimer. Also present were Honorable Harold E. Eaton, Jr., Supreme Court liaison, and Professor L. Kinvin Wroth, Reporter (by phone).

1. Minutes. On motion duly made and seconded, the draft minutes of the meeting of December 11, 2015, were unanimously approved as previously circulated.

PRIORITY ITEMS

2. Status of promulgated and proposed amendments

A. Small Claims Rules Emergency Amendments. The Committee considered the Supreme Court's order promulgated January 11, effective April 15, 2016, continuing the May 4 emergency amendments to V.R.S.C.P. 3, 7, 10, 12, and further amending those and other Small Claims Rules provisions, with the Committee to report on their status by April 16, 2017.

Judge Toor on behalf of the Civil Division Oversight Committee, noted that the requirement of amended Rule 3(d) that plaintiffs file the initial complaint with the court before serving the defendant with it, because they need to get the docket number and summons from the court, was carried forward in parts (2) and (3) of Rules 3(g), 7(a), 8(b), and 9(b). In fact, there is no corresponding necessity under those rules, and imposing the requirement is unnecessary and unnecessarily burdensome to court staff and to the parties. Accordingly, it was agreed to recommend that the January 11 promulgation order be amended before its April 15 effective date by deleting new paragraphs (2) and (3) of amended Rules 3(g), 7(a), 8(b), and 9(b) and by renumbering new paragraph (4) of Rules 3(g), 7(a) and 8(b) as paragraph (2). Professor Wroth agreed to send a draft of the recommended amendment to Judge Toor, Ms. Hobart, and Teri Corsones for review and to the full Committee in time for approval at the next meeting.

In discussion of the requirement that the Committee monitor the amended Rules in operation and report to the Court by April 16, 2017, it was agreed that the Committee should solicit comments before that date as a basis for the report.

It was agreed that Judge Toor's December 7 proposal to remove credit-card debt collection cases from the small claims jurisdiction should be addressed as a new agenda item at the next meeting.

B. #15-9. Recommended emergency amendments to V.R.C.P. 80.6 to bring the rule into compliance with statutory changes, promulgated January 11, effective April 11, 2016. Professor Wroth reported that the Judicial Bureau administrator had expressed thanks to the Committee for prompt action on the matter.

C. Recommended amendments to conform V.R.C.P. 6 and other time provisions of the Civil and Appellate Rules to federal rules amendments ("day is a day" rules), sent to the Supreme Court on January 1, 2016. The Committee considered the pending legislation to conform statutes to the day is a day approach. Chairman Keyes and Professor Wroth agreed to review and report on the bill at the next meeting.

D. #15-1. Proposed amendment to V.R.C.P. 43(f) concerning appointment of interpreters, recommended for promulgation at October 30 meeting, sent to the Court on November 9, 2015. Professor Wroth reported that a parallel amendment to the Probate Rules was ready to be sent to the Court and that the status of the Criminal Rule was uncertain.

E. # 15.3. Proposed amendments to Vermont Rules of Professional Conduct, sent out for comment on October 22, with comments due December 22, 2015. The Committee considered Joe Frank's comment and Professor Wroth's response noting that New York had adopted a modified version of the ABA Model Rule concerning sexual relations with clients. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend the amendments to the Court for promulgation as previously circulated.

F. #15-4. Proposed amendment of V.R.C.P. 5 concerning e-mail service, sent out for comment on October 22, with comments due December 22, 2015. The Committee considered Scott McGee's letter of December 14, 2015, and the appended extract of the Criminal Rules Committee's November 20 meeting minutes proposing that e-mail service be required unless one party opts out. In discussion, Committee members noted that the different Rules proposed reflected differences between civil and criminal practice. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend the amendments to the Court for promulgation as previously circulated. Chairman Keyes agreed to explain the Committee's reasoning to Chairman McGee.

G. #14-5. V.R.C.P. 51. Jury Instructions. Consider in light of *Straw v. VNA*, 2013 VT 102. Sent out for comment on November 25, 2015, with comments due on January 25, 2016. In discussion, it was noted that two Superior judges had expressed support for the amendment, that the Legislative Committee on Judicial Rules had

suggested that the Civil and Criminal rules should be consistent, and that the Criminal Rules Committee, as stated in Scott McGee's December 17 e-mail, was recommending a different form of amendment for promulgation. In discussion, it was noted that the Criminal Rules requirement of renewal of an objection made at the charge conference by "reasonable reference" could lead to litigation but addressed the need for greater formality in preserving Constitutional objections. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend the amendment to the Court for promulgation as previously circulated. Chairman Keyes agreed to suggest that the Criminal Rules Committee consider adoption of a rule more closely resembling the Civil Rules recommendation.

3. #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..

4. #14-1. Status of Appendix of Forms. The subcommittee (Ms. Blackwood and Professor Wroth) reported that it would have a report at the February or April meeting. In response to Judge Toor's January proposal from the Civil Division Oversight Committee regarding the addition of a reference to the filing fee for a counterclaim to Form 1 in the Appendix of Forms, it was agreed that the Oversight Committee should recommend that the provision be added to the present online summons form, and that an addition to Form 1 in the printed Appendix should be deferred until the subcommittee's report was considered.

5. # 14-2. Proposed revised draft of V.R.C.P. 80.11 providing for expedited actions. The Committee considered Mr. Weimer's October 26 revised draft of the proposed rule most recently sent out for comment on June 9, with comments due on August 7, 2015. Judge Toor agreed to provide language clarifying the waiver provision of subparagraph (a)(1)(D) for the next meeting. On motion duly made and seconded, there being no further discussion, it was voted, nine in favor, one opposed, to recommend the Rule to the Court for promulgation, subject to approval of the added language, with a provision in the order that that the Committee monitor the Rule in operation and report to the Court in two years.

6. #15-6. Amendments to implement legislative adoption of the False Claims Act. The Committee reviewed Professor Wroth's January 28 draft of an amendment to V.R.C.P. 4(d) 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). On motion duly made and seconded, there being no further discussion, it was voted unanimously to propose that the amendment be sent out for comment as drafted.

7. # 16-1. Amendments to the Rules of Appellate Procedure to implement prison mailbox rule, as requested in *In re Joseph Bruyette*, 2016 VT 3. The Committee considered the materials distributed by Chairman Keyes in his January 28 e-mail. Questions considered included whether the rule should be limited to appellate filings, how far it should extend, what form proof of filing should take, whether Vermont prisoners regularly have e-mail access,

whether access has to be enabled by a prison official, and whether notarization is necessary. Chairman Keyes agreed to draft a rule for the next meeting based on other states' practices, with assistance from Mr. Griffin.

8. #16.2. Incorporation of amendment of VR.F.P. 9(e), effective September 21, 2015, for Civil Division petitions for protective order for stalking or sexual assault. The Committee considered Professor Wroth's draft of an amendment to V.R.C.P. 80.10(e), the comparable Civil Rules provision. Judge Toor's suggested addition of "except on jurisdictional grounds" was rejected. On motion duly made and seconded, there being no further discussion, it was voted unanimously to propose that the amendment be sent out for comment as circulated.

OTHER ACTION ITEMS

9. #10-5. Federal Rules Subcommittee. The Committee considered the January 27 report of the subcommittee (Mr. Dumont, Ms. Blackwood, Mr. Weimer) on the Federal Rules amendments effective December 15, 2015. In discussion, the Committee agreed with all of the subcommittee's recommendations on whether or not to adopt specific Federal amendments. For the next meeting, the subcommittee will prepare drafts of those Rules to be adopted and will include the text of the specific Federal amendments.

10 #14-6. V.R.C.P. 16.3. Alternative Dispute Resolution. The Committee considered Professor Wroth's side-by-side drafts of V.R.C.P. 16.3 and V.R.F.P. 18. On motion duly made and seconded, after discussion, it was voted unanimously to propose that the draft amendment of V.R.C.P. 16.3 be sent out for comment, with addition of "or mediator" in paragraph (b)(3), the deletion of paragraph (b)(4), and the deletion of "upon the filing of the report" in subparagraph (c)(1)(B). .

12. #15-7. Proposal to reconsider certificate of service provisions of new V.R.C.P. 5(h). The Committee considered Professor Wroth's January 28 draft amendment. In discussion, it was agreed that clause (3)(c) was unclear on the effect on the filing date of a filing being deemed null and void and that language similar to that of V.R.A.P. 3(b) might be more appropriate. Judge Toor agreed to provide a new draft for the next meeting.

In view of the time, the remainder of the agenda was deferred until 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 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