

**APPROVED**

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE  
Minutes of Meeting  
July 17, 2015**

The meeting was called to order at 9:15 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, James Dumont, Jean Giddings (by telephone), William E. Griffin, Kathleen Hobart, Karen McAndrew, Hon. Dennis Pearson, Hon. Helen Toor. Also present was Professor L. Kinvin Wroth, Reporter.

**1. Minutes.** On motion duly made and seconded, the draft minutes of the meeting of June 12, 2015, were unanimously approved as previously circulated

**2. Status of proposed and recommended amendments.**

A. Further amendments to emergency amendments of V.R.S.C.P. 3, 7, 10, 11, and 12. The Committee considered the E-filing Advisory Committee's July 1, 2015, revised draft of the June 9 proposed amendments to the April 29 emergency Small Claims Rules amendments, together with the Civil Division Oversight Committee's June 25, 2015, suggested revisions of the June 9 draft.

On motion duly made and seconded, after discussion, it was voted, five in favor, four opposed, that draft V.R.S.C.P. 2.1 should not be proposed as an addition to the Small Claims Rules, but that Professor Wroth should prepare a draft containing its provisions that would be proposed to the Supreme Court as an administrative order or a section to be included in the instructions for small claims litigants that is to be prepared.

On motion duly made and seconded, after discussion, it was voted unanimously to recommend to the Court that the April 29 emergency amendments of V.R.S.C.P. 3, 7, 10, 11, and 12, as further amended in the July 1 revised draft, together with the amendments of V.R.S.C.P. 8 and 9 in that draft, be promulgated as permanent amendments to be effective when necessary technological resources, training, and revised forms are completed and in place, provided that the second sentence of Rule 3(a)(1) and comparable provisions of the other amended rules be revised to read, "If the plaintiff registers to receive documents from the court by e-mail in the action,..." and that the Reporter's Notes make clear that this provision does not apply to attorneys, who are required to register as a condition of licensure.

A.1. #s10-1/08-6/11-15/V.R.S.C.P. Forms, possible rules amendments, and Small Claims booklet. Ms. Hobart reported that the Small Claims booklet was in the process of revision in light of recent and pending amendments to the Small Claims Rules and was currently being

reviewed by the Civil Division Oversight Committee. That Committee was considering the question whether the content of the booklet could be presented only on line.

B. Amendments to V.R.C.P. 9.1, 55(b)(7); V.R.S.C.P. 3(e) and 3(h)(7)., Professor Wroth reported that these amendments, making provisions in the Civil Rules comparable to the credit card debt provisions of the Small Claims Rules, as recommended by the Committee, had been promulgated on July 1, effective September 1, 2015 .

C. Amendments to V.R.C.P. 4(b), 4(l), 5(d), (h), Forms 1, 1B, 1C, 28, 29. Professor Wroth reported that these amendments, making provisions for notices of appearance and certificates of service, as recommended by the Committee on June 12 for promulgation, would be considered by the Supreme Court at its July 20 administrative meeting.

D. #10-5—Proposal to conform V.R.C.P. 6 to federal amendments. Professor Wroth reported that the Committee’s recommendation to send the proposed day-as-a-day amendments to the Civil and Appellate Rules out for comment, and the Criminal Rules Committee’s recommendation to send the comparable amendments to the Criminal Rules out for comment, would be considered by the Supreme Court at its July 20 administrative meeting.

E. #15-4. Proposed amendment of V.R.C.P. 5(b)(2) The Committee considered the Electronic Filing Committee’s revised draft, dated July 15, 2015, and the Criminal Rules Committee’ previously distributed proposal, concerning e-mail service under V.R.C.P. 5(b).

On motion duly made and seconded, after discussion, it was voted unanimously that the amended rules should not make service by electronic means mandatory.

On motion duly made and seconded, after discussion, it was voted unanimously that the draft of proposed amendments to V.R.C.P. 5(b)(2) should be revised to read

(2) *Mailing.* Mailing of a copy within this rule means: sending by ordinary first-class mail; sending by third-party commercial carrier; ~~and or, if required or permitted by the Vermont Rules for Electronic Filing paragraph 4, transmission~~ sending by electronic means.

On motion duly made and seconded, after discussion, it was voted unanimously that the following language should be substituted for proposed V.R.C.P. 5(b)(4) or should be incorporated in V.R.C.P. 5(b)(2) in the Reporter’s discretion: “Documents may be sent by electronic means if the sending and receiving parties agree in a writing that specifies the type of electronic transmission to be used.”

On motion duly made and seconded, after discussion, it was voted unanimously that the revised amendment as further revised by the preceding motions should be recommended to the Court to be sent out for comment.

F. Proposed revised draft of V.R.C.P. 80.11, providing for expedited actions. No action was taken on this item, because the proposed rule was sent out for comment on June 9 with comments due on August 7, 2015.

G. Recommended V.R.A.P. 24(a)(1)(B)(iii). The Committee considered the request of the Supreme Court, transmitted in Justice Eaton's letter sent to Professor Wroth on July 2, to reconsider the amendment adding V.R.A.P. 24(a)(1)(B)(iii) concerning in forma pauperis proceedings in the Supreme Court, which the Committee had recommended for promulgation on December 3, 2014. The Court was concerned that the recommended amendment appeared to give consideration of cohabiting family members' income broader application than given by V.R.C.P. 3.1(b). In addition, a member of the Court had expressed the concern that the Civil Rule, the language of which was incorporated in the recommended amendment, created an unconstitutional barrier to access to the courts, because a cohabitant's income was to be considered in determining whether to grant an IFP application even if the cohabitant had no obligation to the applicant that would require payment of the court filing fee.

On motion duly made and seconded, after discussion, it was voted unanimously to recommend that V.R.C.P. 3.1(b)(1) be amended by substituting "rule" for "paragraph" in the last sentence of paragraph (1) and that V.R.C.P. 3.1(b)(2) be amended by substituting "filing fee" for "entry fee" in both places where it appears.

On motion duly made and seconded, after discussion, it was voted unanimously to recommend that V.R.C.P. 3.1(b) be amended by adding paragraph (4) to read as follows and that V.R.A.P. 24(a)(1) be amended for conformity with that amendment:

(4) An applicant may seek reconsideration, and a fee may be waived by the judge, if the applicant establishes that cohabiting family members do not contribute to the applicant's living expenses or that for other reasons their income should not be considered by the court.

Professor Wroth agreed to prepare a full draft of amendments to V.R.C.P. 3.1(b)(2) and V.R.A.P. 24(a)(1), with Reporter's Notes, for the next meeting. Chairman Keyes agreed to advise Justice Eaton that the Committee had considered the Court's request and that a response was under consideration.

**3. #15-3. V.R.P.C. 1.5, 1.8, 1.15, 1.15A, 8.3; #15-2. V.R.P.C. 1.15, 1.15A. Further consideration of proposed amendments.** The Committee considered Ms. Giddings' memorandum of July 17, 2015, distributed at the meeting. After discussion, it was agreed (1) to add "reasonably" to V.R.P.C. 1.15(b) and to amend V.R.P.C. 1.15A(a) as proposed in her draft, with the words "in appropriate circumstances a pooled trust account pursuant to Rule 1.15B" underlined; (2) to recommend adoption of the addition to V.R.P.C. 1.15A(4) proposed by the Professional Responsibility Board; to recommend adoption of the addition to V.R.P.C. 1.15A(4) proposed by the Professional Responsibility Board; and to recommend the amendments concerning advance fees proposed by the Professional Responsibility Board, with the addition of

“payable in guaranteed installments” to proposed V.R.P.C. 1.5(f)(3). Professor Wroth agreed to prepare appropriate drafts for the next meeting.

**4. Proposed amendment to V.R.A.P. 3(b)(2), sent out for comment on December 19, 2013, with comments due on February 17, 2014.** Professor Wroth reported that the amendment was ready to be recommended to the Court by the Criminal Rules Committee, with the Civil Rules Committee’s proposed revisions if accepted by the Criminal Rules Committee. He agreed to report that conclusion to the Criminal Rules Committee’s Chair and Reporter and remove the item from the agenda if they agreed.

**5. Proposed amendment to V.R.C.P. 43(f) concerning appointment of interpreters.** Professor Wroth reported that that the proposed amendment had been sent out for comment on June 13, with comments due on August 13, 2014, but that consideration had been deferred in light of comments by the Legislative Committee on Judicial Rules in December 2014. The Committee reviewed a revised draft with Emily Wetherell’s suggested changes. On motion duly made and seconded, after discussion, it was voted unanimously to recommend that the revised draft with those changes be sent out for comment.

**6. #15-6. Amendments to implement legislative adoption of the False Claims Act.** The Committee considered William Griffin’s July 14 e-mail concerning Civil Rules amendments necessary to implement the False Claims Act, adopted as Act No. 25 of 2015, codified at 32 V.S.A. 630 *et seq.* Mr Griffin and Professor Wroth agreed to prepare a draft for the next meeting..

In view of the time, the remainder of the agenda was deferred until the next meeting.

**7. Dates of next meetings.** The next meeting of the Committee will be held at Vermont Law School on Friday, September 11, 2015. It was agreed that subsequent meetings would be held at Vermont Law School on Friday, October 30, and Friday, December 11, 2015.

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

Respectfully submitted,

L. Kinvin Wroth, Reporter