

**APPROVED**  
**6/17/15**

**VERMONT SUPREME COURT**  
**ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE**  
**Minutes of Meeting**  
**June 12, 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, William E. Griffin, Kathleen Hobart, Karen McAndrew, Hon. Helen Toor, and Gregory Weimer. Also present was Professor L. Kinvin Wroth, Reporter.

Mr. Keyes noted that the Supreme Court had appointed him as chair effective July 1, 2015, and that he and Mr. Griffin had agreed that Mr. Keyes should preside at the present meeting. On motion duly made and seconded, the following resolution was adopted by acclamation:

**RESOLVED:** That the members and reporter of the Vermont Supreme Court's Advisory Committee on Rules of Civil Procedure express their gratitude and great thanks to William E. Griffin, Esquire for his long and effective service and calm and patient leadership as member and chair of the Committee from 1989 until 2015 and their hope that they will be able to benefit from his wise counsel for years to come.

**1. Minutes.** On motion duly made and seconded, the draft minutes of the meeting of March 27, 2015, and the draft summary of the telephone meeting of April 28, 2015, were unanimously approved as previously circulated

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

A. Emergency amendments to V.R.S.C.P. 3, 7, 10, 11, and 12. The Committee considered comments on the emergency amendments to V.R.S.C.P. 3, 7, 10, 11, and 12, promulgated April 28, 2015, effective May 4, 2015, with comments due June 29, 2015, including a proposal from the Electronic Filing Committee for further amendments to the April 28 emergency amendments.

On motion duly made and seconded, after discussion, it was voted, eight in favor, one opposed, that the Committee supports in principle the provisions of the proposed amendments for electronic delivery of court documents to attorneys and self-represented litigants who had properly submitted an e-mail address and agreed to accept electronic delivery, provided that the relevant language of the rule and any related administrative orders or administrative directives be simplified for the benefit of self-represented litigants. Judge Toor agreed to draft revised language for the proposed rules provision for consideration by the Committee and by the Civil Division Oversight Committee at its June 19 meeting.

B. Comments on previously proposed amendments to V.R.C.P. 5(d), (h), Form 29. The Committee considered Professor Wroth's draft of amendments of proposed Rules 5(d), (h), that would incorporate the suggestions of Zachary Gates, Esquire, in his letter of February 17, 2015. In discussion, it was agreed that the need for such service would seldom arise and that the rule should not apply to service upon or by non-parties except to the extent that in the circumstances they became parties. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend promulgation of Rules 5(d), (h), as sent out for comment, with the following addition to the first sentence of Rule 5(h): "Every document filed with the court after the complaint, and required by this rule to be served upon a party, ... ."

The Committee considered the proposal of Barry Kade, Esquire, that the form of the required certificate of service be incorporated in the forms for every paper to be filed, rather than be adopted as a separate form. Committee members noted the purpose of proposed Rule 5(h) and Form 29 was to make clear to all the new requirement of a certificate of service and to standardize its use. Accordingly, on motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that Rule 5(h) be promulgated with the following further addition to the first sentence of Rule 5(h): "...must be accompanied by a separate certificate of service... ."

On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend\to the Supreme Court that the amendments to Rules 4(b), (l), Forms 1, 1B, 1C, and Form 28, as sent out for comment on June 13, 2014, and Rules 5(d),(h), and Form 29 as sent out for comment on December 15, 2014, be promulgated as previously circulated for comment, with the changes to Rule 5(h) recommended in the two previous motions.

**3. #15-3. V.R.P.C. 1.5, 1.8, 1.15, 1.15A, 8.3. Amendments proposed by Professional Responsibility Board.** Ms. Giddings reported that she had reviewed the proposed amendments with the following conclusions:

Rule 8.3. The proposed amendment, which would include counsel to the Professional Responsibility Board on the list of those exempted from the requirement of disclosure of lawyer misconduct, is appropriate for the reasons stated in Michael Kennedy's letter to the Supreme Court transmitted in his e-mail of January 12, 2015, to Chairman Griffin and Professor Wroth. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend that the proposed amendment be sent out for comment

Rule 1.8. The proposed amendment to Rule 1.8 would incorporate a provision of ABA Model Rule 1.8, currently adopted in 31 states, that prohibits a lawyer from having sexual relations with a client in the absence of a pre-existing consensual sexual relationship. Ms. Giddings reminded the Committee that in 2009 the Committee had recommended by a divided vote that similar language added to Model Rule 1.8 not be adopted in the Vermont rule. The Supreme Court had accepted this recommendation. As noted in the Reporter's Notes to the 2009 amendment and stated in amended Comment [17] to Vermont Rule 1.8, the majority of the

Committee had been of the view that such an absolute bar was an invasion of privacy and duplicated the specific provisions of other provisions of the /Rules of Professional Conduct that would apply in a case of exploitation by a lawyer of a sexual relationship—i.e., Rules 1.1 (incompetence), 1.3 (lack of diligence), 1.7(a)(2) (conflict with lawyer’s personal interests), 1.8(b) (using client information to client’s disadvantage), 8.4(c)(conduct involving dishonesty), 8.4(d) (conduct prejudicial to the administration of justice). On motion duly made and seconded, after discussion, it was voted, six in favor, three opposed, not to recommend that the proposed amendment be sent out for comment.

Rules 1.15, 1.15A, and related provisions. The proposed amendments of Rule 1.15 and related rules concerning flat fees and Rule 1.15A concerning timely reconciliation of accounts would be acceptable with some minor modifications. However, to allow simultaneous consideration of other pending agenda items concerning the Rules of Professional Conduct, it was agreed to defer these items until the next meeting.

**4. #10-5—Proposal to conform V.R.C.P. 6 to federal amendments.** The Committee reviewed Mr. Keyes’ memoranda of March 25, 2015, containing the basic amendments of V.R.C.P. 6 necessary to adopt the “day is a day” rule of F.R.C.P. 6 and necessary amendments to other provisions of the Vermont Rules of Civil Procedure and the Vermont Rules of Appellate Procedure to conform to the Rule 6 changes. Mr. Keyes noted that his draft of V.R.A.P. 4 should be revised to provide in Rule 4(a)(b)(2) that State has 14 days to appeal in a criminal case, instead of seven. The draft of Rule 4(b)(10) should provide that a post-judgment motion for newly discovered evidence tolls the time for appeal if made within 28 days instead of 30, in contrast to his previous proposal of 14 days for consistency with the federal rule. The 28-day period is closer to the original 30 days and is consistent with the treatment in V.R.A.P. 4 of V.R.C.P. 60 motions (28 days as proposed). Arguably a motion for newly discovered evidence needs more time, post judgment, than a motion based on trial error. Mr. Keyes noted that the current proposal eliminates the three-day provision of V.R.C.P. 6(e). He also noted that the current Criminal Rule Committee proposal for V.R.Cr.P. 33 is 14 days for the other post-judgment motions. On motion duly made and seconded, after further discussion, it was voted, eight in favor, one opposed, to recommend that the drafts be sent out for comment. It was agreed that further discussion of the Criminal Rules concerns would take place at the next meeting.

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

**3. Date of next meetings.** The next meeting of the Committee is scheduled to be held at Vermont Law School on Friday, July 17, 2015, at Vermont Law School. It was agreed that a subsequent meeting would be held on Friday, September 11.

There being no further business, the meeting was adjourned at 12:05 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter