

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
October 30, 2015**

The meeting was called to order at 9:10 a.m. in Room 216 Debevoise Hall, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eileen Blackwood, James Dumont (by telephone), Jean Giddings (by telephone), Kathleen Hobart, Karen McAndrew, 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 September 11, 2015, were unanimously approved as previously circulated.

The Committee proceeded to consider the following items in a priority agenda proposed by Chairman Keyes and Professor Wroth. Numbers below are those in the original agenda:

2.C. Proposed amendments to conform V.R.C.P. 6 and other time provisions of the Civil, Criminal, and Appellate Rules to federal rules amendments (“day is a day” rules). Professor Wroth reported that these proposed amendments had been sent out for comment on August 6, with comments due on October 5, 2015, and had been reviewed by the Legislative Committee on Judicial Rules (LCJR) on September 24, 2015.

The Committee reviewed Legislative Counsel Erik Fitzpatrick’s September 23 e-mail and comments made at the September 24 LCJR meeting regarding the elimination of “applicable” to modify “statute” in proposed Rule 6(a) and the need for possible statutory amendments if the rule changes were promulgated. In discussion, it was noted that the present rule had functioned effectively with the word “applicable” and that additional time might be required for conforming amendments to other sets of rules as well as enacting statutory amendments. On motion duly made and seconded, there being no further discussion, it was voted unanimously to insert “applicable” before “statute” in proposed Rule 6(a) and to recommend a July 1 effective date.

The Committee then considered three comments from members of the bar opposing the elimination of present Rule 6(e) adding three calendar days to any time period for action required after service under Rule 5(b)(2) or (3). The comments noted that mail delivery may now take up to five days, that e-mail is not always used for service even when it is allowed, and that papers served by self-represented parties frequently may be mailed later than the service date. On motion duly made and seconded, after discussion, it was voted unanimously to restore the three-day rule. Professor Wroth agreed to prepare a draft for the next meeting based on present Federal Rule 6(d). Chairman Keyes agreed to advise Mr. Fitzpatrick of the Committee’s decisions on Rules 6(a) and (e) and the effective date.

2.A. Proposed order making permanent 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. Professor Wroth reported that these proposed amendments had been sent out for comment on August 6, with comments due on October 5, 2015, and had been reviewed by the Legislative Committee on Judicial Rules (LCJR) on September 24, 2015, without objection.

Comments received from the bar indicated that self-represented small claims litigants were consistently reported to be having trouble with the new procedural responsibilities imposed on them by the April 28, 2015, emergency amendments. Suggestions included developing rules with a separate track for collection cases (cf. VBA Futures Commission Report 37-39 [9/24/15]—shift collection cases to superior court civil division), extending the time for return of service to 90 days, and delaying permanent amendments. On motion duly made and seconded, after discussion, it was voted, seven in favor, one opposed, to consider at the next meeting a revised draft order that would amend the April 28, 2015, emergency amendments as provided in the August 6, 2015, proposal, continuing them as emergency amendments with a 60-day comment period between promulgation and effective date.

7. # 14.2—Proposed revised draft of V.R.C.P. 80.11 providing for expedited actions, sent out for comment on June 9, comments due on August 7, 2015. In the absence of Mr. Weimer it was agreed to defer this item until the next meeting.

2.A.1. Amendment of V.R.E.F. 1(a)(1) proposed by the Electronic Filing Rules Committee. Professor Wroth reported that this proposed amendment, intended to implement the Small Claims Centralization Pilot Project scheduled to get under way in the Addison, Orange, Rutland, and Windsor units of the Civil Division on January 26, 2016, was proposed by the Electronic Filing Committee and sent out for comment on August 6 with comments to be sent by October 5 to Allan Keyes for the Civil Rules Committee. No comments had been received. It was agreed to defer to the decision of the Electronic Filing Rules Committee as to whether to recommend promulgation of the amendment

17. #15-1. Consider revisions to V.R.C.P.16.1 concerning complex action designation. Justice Eaton advised the Committee that the Supreme Court has requested that the Committee review V.R.C.P.16.1 in light of issues arising from effects of the rotation system that seemed to account for limited use of the procedure. Other issues to be considered were the possibilities of judge-shopping and the possible concern of judges for being stuck with a single complex case. The chair appointed a subcommittee consisting of Mr. Dumont, Ms. McAndrew, and Judge Toor, with Justice Eaton *ex officio*, to consider and report on the issues and possible amendments.

19. #14-1. Status of Appendix of Forms. Justice Eaton advised the Committee that the Supreme Court intends to establish on-line forms as a substitute for the present Appendix of Forms, as was done with the Probate Rules. The similar shift with the Federal Rules will provide a guide as to which forms must be mandated in the Rules. A proper process for the transition will

be important. Ms. Blackwood agreed to serve as a subcommittee to review the present forms and identify the issues that must be addressed.

2.D. Proposed amendment to V.R.C.P. 43(f) concerning appointment of interpreters. Professor Wroth reported that the proposed amendment had been sent out for comment on August 6, with comments due on October 5, 2015. No comments were received from the bar. The proposal was reviewed by the Legislative Committee on Judicial Rules (LCJR) on September 24, 2015, with no substantive objection and a request that Professor Wroth make clear in the Reporter's Notes that the rule does not supersede statutory provisions there mentioned. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the rule be promulgated as circulated, with that revision in the Reporter's Notes.

8. #14-5. V.R.C.P. 51. Jury Instructions. The Committee considered Professor Wroth's draft amendment of V.R.C.P. 51(b) clarifying the procedure for objecting to jury instructions as sent to the Committee on October 28, 2015. In discussion it was agreed that "to be preserved" should be added at the end of the last sentence of the added language. On motion duly made and seconded, there being no further discussion, it was voted unanimously to request that the rule be sent out for comment with that addition.

9. #14-6. V.R.C.P. 16.3. Alternative Dispute Resolution. The Committee considered Professor Wroth's draft amendment of V.R.C.P. 16.3 intended to simplify the rule by limiting it to mediation. It was agreed to defer discussion of the draft until the next meeting and to consider it in light of V.R.F.P. 18 providing for Family Division mediation, effective September 21, 2015.

20. Other Business. It was agreed to add these items to the next agenda:

- Reports of the special ad hoc committee on video/audio appearances and cameras in the court (Judge Pearson and Mr. Weimer to represent Civil Rules Committee).
- Restore docket #10-5—Federal Rules subcommittee—to accommodate Mr. Dumont's report on FRCP amendments effective December 15, 2015.
- Proposal to review "tack and mail" provisions of V.R.C.P. 4.
- Proposal to reconsider certificate of service provisions of new V.R.C.P. 5(h).

The remainder of the original agenda was deferred until the next meeting.

Next meetings. The next meetings of the Committee will be held at Vermont Law School at 9:00 a.m. on Friday, December 11, 2015 at 9:00 a.m. on Friday, January 29, 2016.

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

Respectfully submitted,

L. Kinvin Wroth, Reporter