

APPROVED

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

The meeting was called to order at 9:15 a.m. in the Hoff Lounge, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Jean Giddings, William Griffin, 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. It was agreed to defer approval of the minutes of the meeting of February 26, 2016, pending resolution of the matters raised under item 2.E of the present agenda.

PRIORITY ITEMS

2. Status of promulgated and proposed amendments.

A. Recommended order continuing the emergency amendments to V.R.S.C.P. 3, 7, 10, 12. Professor Wroth reported that the order continuing the emergency amendments to V.R.S.C.P. 3, 7, 10, 12, promulgated April 28, 2015, effective May 4, 2015, and the order further amending and continuing those and other Small Claims Rules provisions as emergency amendments, promulgated January 11, effective April 15, 2016, was further amended to continue those and other rules as emergency amendments by order promulgated March 7, 2015, effective April 15, 2016. Judge Toor stated that she would make sure that relevant court personnel were aware of the most recent amendments.

B. 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 Mr. Keyes’ draft of proposed amendments to V.R.E.C.P. 4 and 5 to conform them to the day is a day amendments of other rules. On motion duly made and seconded, there being no discussion, it was voted unanimously to request that the amendments be sent out for comment.

Mr. Keyes noted that he had been advised that H.317, intended to coordinate the statutes with the day is day changes was unlikely to pass in the present session. He also reported that day is a day amendments to the Family and Probate rules were being considered by the appropriate advisory committees and that F.R.C.P. 6(d)—equivalent to V.R.C.P. 6(e)—had been amended effective December 1, 2016, to eliminate the three-day delay when papers were served electronically. After discussion of the impact of these developments on the proposed day is a day rule, on motion duly made and

seconded, there being no discussion, it was voted unanimously to recommend that the Court suspend the July 1, 2016, effective date of the amendments of V.R.C.P. 6 and other Civil and Appellate rules recommended to the Court on January 1, 2016, because (1) the Family and Probate Rules are still being developed by the respective committees and have not yet been sent out for comment. It is highly desirable that the changes take effect for all courts at the same time; (2) the fact that H.317 is unlikely to be enacted in this session means that adaptation of the rules amendments to existing statutes needs further consideration; (3) discussion of the changes in practice made by these rules at the September VBA meeting will assure that lawyers and court personnel understand their operation.

C. Proposed amendment to V.R.C.P. 43(f) concerning appointment of interpreters. Recommended for promulgation at the October 30 meeting, sent to the Court on November 9, 2015. Professor Wroth reported that the Criminal Rules Committee had received correspondence from the Vermont Legal Aid Disabilities Project noting that the requirements of the American Disabilities Act (ADA) were broader than support for the hard of hearing and suggesting revisions to the proposed amendment to V.R.Cr.P.28 reflecting that fact. After discussion, it was agreed to suggest to the Criminal Rules Committee that language such as “other disabilities that result in the need for interpreter’s services” should be added to both the Civil and Criminal rules and that the Reporter’s Notes make clear the broader scope of the ADA.

D. Recommended amendments to V.R.P.C. 1.0, 1.5, 1.15(b) and (c), 1.15A(a), 8.3(c). Professor Wroth reported that these amendments had been promulgated on March 7, effective May 9, 2016.

E. Proposed amendments to V.R.C.P. 4, 16.3, 80.10, sent out for comment on March 13, with comments due on May 13, 2016. It was agreed to defer consideration of these amendments until the next meeting. Judge Toor agreed to review a comment received from Michael J. Marks on proposed V.R.C.P.16.3 and draft any needed changes in the proposed rule.

F. Recommended amendment to V.R.C.P. 5 concerning e-mail service, sent to the Court on February 24, 2016. Chairman Keyes reported that the Court had asked the chairs and reporters of the Civil and Criminal rules committees to attend its May 10 administrative meeting by telephone to discuss differences between the two committees concerning e-mail service under V.R.C.P. 5. Essentially, the Civil Rules amendment called for parties to opt in to e-mail service, while the Criminal Rule amendment would require parties to opt out. In discussion, Committee members noted features of civil practice, such as the potential size of attachments and the incidence of self-represented litigants, that warranted the opt-in approach, indicating that in the present situation different civil and criminal rules might be appropriate.

G. Recommended amendment of V.R.C.P. 51(b), Jury Instructions. Sent to the Court on February 24, 2016. The Committee considered a comment from Justice Dooley on the recommendation. It was agreed that the rule should provide for a clear record of what was objected to and what was delivered. Judge Toot agreed to prepare a revised draft for the next meeting.

H. Recommended promulgation of new V.R.C.P. 80.11, providing a procedure for expedited actions, for a two-year period, sent to the Court on February 29, 2016. In response to a request from Emily Wetherell, Court staff attorney, the Committee agreed that there should be a sunset provision in the promulgation order similar to the following language suggested by Professor Wroth: “In the absence of further order, the rule will be void and of no further effect in any civil action commenced after May 3, 2019.”

I. New Comment 14 to V.R.P.C. 1.2, proposed by the Professional Responsibility Board, sent out for comment on February 15, with comments due on April 15, 2016. The Committee had no comment on this proposal.

3. **#14-1. Status of Appendix of Forms.** In the absence of Ms. Blackwood, this item was deferred to the next meeting.

4. **#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 reviewed Chairman Keyes’ draft memorandum of April 27, 2016, accompanied by a draft amendment adapting F.R.A.P. 25(a)(2)(C) as a proposed new V.R.A.P. 25(a)(2)(C). A communication from Emily Wetherell, Court staff attorney, noted that Rule 25 addressed filing and the present need was for an amendment to V.R.A.P. 4 similar to F.R.A.P. 4(c). In discussion of the Rule 25 draft, it was agreed that “made under oath” could be deleted from the third sentence as superfluous and that “that accompanies the filing” should be added to that sentence. It was also suggested that the last sentence of the draft should be deleted, but that if similar language were used, the period should run from “the time-stamped date of receipt.” Mr. Keyes agreed to provide a draft of V.R.A.P. 4 based on F.R.A.P. 4(c) and addressing these concerns.

OTHER ACTION ITEMS

5. **#10-5. Federal Rules Subcommittee.** Mr. Dumont will report at the next meeting.

6. **#15-6. Proposal to review “tack and mail” provisions of V.R.C.P. 4.** Judge Toor will raise the issues with the Oversight Committee before preparing a draft for the next meeting. Committee members agreed to send her comments on the desirability and possible terms of a definition of “due diligence.”

7. **#15-7. Proposal to reconsider certificate of service provisions of new V.R.C.P. 5(h).** Judge Toor will present a new draft at the next meeting. She agreed to send Professor

Wroth her February 24 draft so that he could put it into the form of a promulgation order for discussion.

TRAILING DOCKET

10. #s12-1/14-10—Event-witness amendment to V.R.C.P. 26(b)(4) and mandatory disclosure. See Professor Wroth's draft with Ms. McAndrew's comments, distributed in Professor Wroth's March 23 and June 9, 2015—Installment II—e-mails. At the Committee's request, Professor Wroth agreed to put this item on the action agenda for the next meeting.

16. #15-5. V.R.C.P. 45(f)(2)—Uniform Interstate Depositions and Discovery Act (UIDDA). Judge Toor reported that she had considered the questions regarding interpretation raised in Max Taylor's May 19, 2015 e-mail, distributed in Professor Wroth's June 9, 2015 e-mail. It was suggested in discussion that subparagraph (f)(2)(B) should not be treated as a definition of "foreign subpoena," but that its language should be substituted for that term where it appeared in subsequent sections of the rule. It was also suggested that "unless the court otherwise orders" should be added at the end of subparagraph (f)(3)(A) to give the court discretion regarding appearances. Professor Wroth suggested that there be further discussion of the rule at the next meeting in light of its purpose to achieve interstate uniformity. (37 states, the District of Columbia, and the US Virgin Islands have adopted UIDDA, and it is pending in two other states. Vermont is the only New England state to have adopted it.)

INFORMATION ITEM

17. #15-8. Special Hoc Committee on Video Appearance and Cameras in the Court. Professor Wroth reported that the Special Committee would meet on May 6, 2016, to consider a draft rule governing video and telephone conference appearance and testimony that would be circulated to all procedural rules committees for review when completed. Judge Pearson reported that his current caseload prevented him from representing the Committee on the Special Committee. Chairman Keyes agreed to designate a replacement.

The remaining agenda items were deferred for consideration at the next meeting.

Date of next meeting. The next meeting of the Committee will be at 9:00 a.m., Friday, June 24, 2016, at Vermont Law School.

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

Respectfully submitted,

L. Kinvin Wroth
Reporter