

**APPROVED**

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE  
Minutes of Meeting  
February 26, 2016**

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: Eric Avildsen, Eileen Blackwood, Jim Dumont, Jean Giddings, Kathleen Hobart (by phone), 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 January 29, 2016, were unanimously approved as corrected.

**PRIORITY ITEMS**

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

A. Small Claims Rules Emergency Amendments. The Committee further 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. The Committee approved Judge Toor's draft of further amendments to Rules 3(d) and 9(b)(2), as well as further amendments agreed on at the January 29 meeting, and agreed to recommend addition of "and file a certificate of service" at the end of Rule 3(g)(1)(C). On motion duly made and seconded, it was voted unanimously to recommend that these amendments be transmitted to the Court to be promulgated effective April 15, to concur with the effective date of the amendments promulgated January 11, 2016, with the Committee to review the amended Rules in operation and report to the Court by April 16, 2017, whether they should be further amended, continued as emergency rules, or made permanent,

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. Chairman Keyes noted that H.713, intended to conform statutes to the Rules changes, appeared to be inconsistent with the day-is-a-day approach. He and Professor Wroth agreed to contact Legislative Counsel on the matter. Mr. Weimer said that he had discussed it with the bill's sponsor. Mr. Keyes and Professor Wroth noted that proposed day-is-a-day amendments to the Criminal and Appellate Rules had been sent out for comment and agreed to pursue the status of amendments to other sets of rules.

C. #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 V.R.P.P. 43(e) had been sent out for comment and was ready to be recommended for promulgation simultaneously with the Civil Rule. He agreed to review and report on the status of the Criminal Rule and rules for other divisions at the next meeting

**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) had concluded that there were no major problems with the rule. On motion duly made and seconded, it was voted unanimously to drop this item from the agenda.

**4. #14-1. Status of Appendix of Forms.** The subcommittee (Ms. Blackwood and Professor Wroth) reported that it would have a report at the April meeting.

**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, and Judge Toor's suggested revisions. On motion duly made and seconded, it was voted that the following changes agreed upon in discussion, and in subsequent e-mail responses to a draft, should be made, and that the revised draft should be recommended to the Court for promulgation with a provision that the Committee should monitor the rule in operation and recommend to the Court within two years where the rule should be continued, amended, or eliminated:

**a) Applicability.**

(1) *Designation.* A civil action will proceed as an expedited action under this rule when

(A) The complaint expressly designates the case as an expedited action and seeks only money damages not exceeding a total of \$50,000, exclusive of interest, attorneys' fees, and costs; or  
[(B) and (C) as previously drafted].

(2) *Waiver.* Unless the parties have stipulated otherwise,

(A) Any plaintiff bringing a claim pursuant to subparagraph (1)(A) of this rule waives the right to recover any judgment exceeding a total of \$50,000, exclusive of interest, attorneys' fees, and costs.

(B) Except as provided in (C), the filer of a counterclaim, cross-claim or third-party claim in an action designated as expedited under paragraph (1) waives the right to recover any judgment exceeding a total of \$50,000, exclusive of interest, attorneys' fees, and costs.

(C) Any party to an action designated as expedited under paragraph (1) who seeks to recover, by counterclaim, cross-claim or third-party claim, damages

exceeding a total of \$50,000, exclusive of interest, attorneys' fees, and costs, or non-monetary relief, must file and serve with that party's pleading a request that the action no longer be so designated. The judge shall then strike the "expedited" designation and the action shall proceed as an ordinary civil action under the Vermont Rules of Civil Procedure.

**6. # 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 Chairman Keyes' proposed draft amendment. It was agreed to defer discussion in the absence of M. Griffin. Chairman Keyes agreed to obtain comments from the Defender General's office and to consider the question whether the rule should provide for a filing "under oath" or "subject to the penalties for perjury."

### **OTHER ACTION ITEMS**

**7. #10-5. Federal Rules Subcommittee.** The Committee considered the February 25 report of the subcommittee (Mr. Dumont, Ms. Blackwood, Mr. Weimer) on the Federal Rules amendments effective December 15, 2015, and took the following actions on the subcommittee's specific recommendations and language:

**Proposed VRCP 1.** It was agreed to insert "and employed by the court and the parties" in the final sentence.

**Proposed VRCP 26(b)(1), and (c) and (f).** It was agreed to delete present V.R.C.P.26(b)(1); to adopt proposed V.R.C.P. 26(b)(1)(A), Scope in General; not to adopt proposed V.R.C.P. 26(b)(1)(B)(i), allowing court alteration on permitted number of discovery devices, and change proposed (ii) and (iii) to (i) and (ii); in what would become (ii), to substitute "judge" for "court" and to delete "or by local rule;" to adopt addition of "or the allocation of expenses" in V.R.C.P. 26(c); and to adopt addition of "including any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced" in V.R.C.P. 26(f)(2). It was also agreed to delete captions for subsidiary sections throughout and to suggest that the revised Rule 26(b) be the subject of a VBA CLE.

**Proposed VRCP 34.** It was agreed to delete "The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for objection" from V.R.C.P. 34(b) and to adopt "For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. An objection must state whether any responsive materials are being withheld on the basis of that objection," as well as "and permit inspection of the rest" in the next sentence.

**Proposed VRCP 37(f).** The subcommittee was asked to consider whether a separate rule

for electronically stored information was necessary and why there was a difference between proposed V.R.C.P. 37(f)(1) and (2).

**Proposed VRCP 55(c).** The Committee agreed that the Federal Rule should be adopted verbatim as follows: “ **(c) Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).”

The subcommittee will prepare a new draft for the next meeting.

**10. #16-3. Proposal to refer credit card collection actions from Small Claims Rules.** On motion duly made and seconded, it was voted unanimously to drop this item from the agenda in light of pending legislation.

In view of the hour, the remainder of the agenda was deferred for consideration at the next meeting.

**22. Date of next meetings.** The next meeting of the Committee is scheduled for Friday, April 29, 2016, at 9:00 a.m. at Vermont Law School. It was agreed to schedule a subsequent meeting for Friday, June 24, 2016, at Vermont Law School.

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

Respectfully submitted,

L. Kinvin Wroth  
Reporter