

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
May 12, 2017**

The meeting was called to order at 9:05 a.m. in the Hoff Lounge, Oakes Hall, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Eileen Blackwood, James Dumont, Jean Giddings, Karen McAndrew, Hon. Dennis Pearson, and Hon. Helen Toor (by telephone). Also present were Hon. Harold Eaton, Supreme Court liaison; Megan Shafritz, Office of the Attorney General liaison, and Professor L. Kinvin Wroth, Reporter.

Professor Wroth advised the Committee that he had received a message from Kathleen Hobart expressing her regret that for personal reasons she could no longer continue as a member of the Committee. Those present expressed their regret at the loss of her presence and perspective from the Committee. On motion duly made and seconded it was voted, unanimously, to thank Ms. Hobart for her years of service as an active and effective member and to send her the members' best wishes for the future. Mr. Dumont undertook to convey the Committee's words to Ms. Hobart in an appropriate manner. Chairman Keyes asked Committee members to send him suggestions for a replacement that he could send to the Supreme Court.

1. Minutes. The minutes of the meeting of March 24, 2017, were unanimously approved as previously circulated, with the correction of the concluding sentence of item 5 to read, "... it was voted unanimously to ask Professor Wroth to prepare a draft proposed promulgation order with that addition for review at the next meeting."

ACTION ITEMS

2. Status of recommended, proposed, and pending amendments.

A. #17-2. Proposed amendment to Administrative Order No. 9, Rules Governing Professional Responsibility Program, adding Rule 1.E(4). Chairman Keyes reported that the Court had promulgated the previously propose amendment to AO No. 9 giving the Professional Responsibility Board the responsibility, previously exercised by the Committee, for proposing and recommending amendments to the Vermont Rules of Professional Conduct. Professor Wroth agreed to send any pertinent materials in his Committee files to the Board.

B. #15-7. Emergency amendments to certificate of service provisions of new V.R.C.P. 5(h). At its March 24 meeting, the Committee had voted to recommend that these amendments be promulgated as sent out for comment. Justice Eaton reported that the Court had deferred acting on this recommendation until review by the Legislative Committee on Judicial Rules.

C. #10-5. Amendments to conform discovery and other rules to Federal Rules amendments. At its March 24 meeting, the Committee had voted to recommend that these amendments be promulgated as sent out for comment. Justice Eaton reported that the Court had deferred acting on this recommendation until review by the Legislative Committee on Judicial Rules.

D. #16-4. Request from Chief Justice for consideration of new ABA Model Rule 8.4. At its March 24 meeting, the Committee had voted to recommend that its proposed amendments to V.R.P.C. 8.4 be promulgated as sent out for comment with the deletion of “creed” from the amendment. Justice Eaton reported that the Court had deferred acting on this recommendation in light of the amendment to AO No. 9, reported in item 2.A above.

E. #s12-1/14 -10—Event-witness amendments to V.R.C.P. 26(b)(4). sent out for comment on January 11, with comments due on March 13, 2017.

In review of the extensive comments received on this proposal, the Committee noted that the proposal consisted of three principal elements: (1) Clarification that the proposed amended rule applies to disclosure of the identity of all experts called under V.R.E. 702, 703, or 705; (2) a requirement that disclosure of an expert who is specially retained or an employee and is not an event witness must be accompanied by a written report; and (3) separate definitions of hired and regularly employed experts who are non-event witnesses. The principal concerns expressed in the comments were that the present rule worked well in practice and that the requirement of a written report prepared by the witness would impose significant practical difficulties and prohibitive costs, particularly if applied to the treating physician in a personal injury case. One comment was supportive of making disclosure requirements similar to those in the present rule mandatory, as distinct from the written report requirement.

In discussion, Committee members noted that the proposal did not clearly address the application of the report requirement to the hybrid expert—*e.g.*, an employee expert who is also an event witness, such as a treating physician. The Committee then proceeded to consider the following motions:

(1) On motion duly made and seconded, it was voted unanimously to revise proposed Rule 26(b)(4)(A)(i) to require automatic disclosure of the identity of experts and the subject and substance of their testimony as in V.R.C.P. 80.11(e)(3)A) and F.R.C.P. 26(a)(2)(A) and (C).

(2) On motion duly made and seconded, it was voted unanimously to insert a new proposed Rule 26(b)(4)(A)(ii) to read substantially as follows:

A party intending to present evidence under Vermont Rule of Evidence 702, 703, or 705 shall, in accordance with the court-approved discovery schedule and order, disclose all opinions the witness will express, the bases and reasons for the opinions, the facts or data considered by the witness in forming them, and any exhibits that will be used to summarize or support them, and a statement of the compensation charged by the expert for their work in the case.

(3) It was moved to eliminate the originally proposed Rule 26(b)(4)(A)(ii) requiring a report from hired or regularly employed experts who are not event witnesses. The motion failed for want of a second.

(4) It was moved and seconded that a new proposed Rule 26(b)(4)(A)(iii) be adopted that would require a report from the experts specified in the originally proposed Rule 26(b)(4)(A)(ii) and that would contain the first three bulleted items of the report required in that sub-subparagraph and the items in the disclosure requirement deleted from originally proposed Rule 26(b)(4)(A)(i) and incorporated in originally proposed Rule 26(b)(4)(A)(iii). In discussion, it was suggested that the report requirement was a potential barrier to access and should perhaps be required only in cases above a certain dollar value or from the specially retained “hired gun” expert. The motion was withdrawn by the mover and seconder.

Professor Wroth agreed to prepare a new draft incorporating the changes approved in motions (1) and (2) and reflecting the discussion of motion (4).

F. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court.

The Committee considered draft 6 of proposed V.R.C.P. 43.1 and related rules, dated 5/8/17, which would be considered by the Special ad hoc Committee on Video and Audio Appearance at a meeting on May 18. Professor Wroth noted two principal changes from the prior draft:

1. An addition to proposed Rule 43.1(a) elaborating on the concept of “availability.” The Evidence Rules Committee had suggested that the new rule remain silent on this issue pending developments in practice. The Special Committee had asked Professor Wroth to develop an expanded provision that would make clear the difference between “availability” in the context of live video/telephone testimony and in the context of deposition use. In discussion, the Committee reasserted its position that a witness who could testify in court by video conference should be deemed unavailable for purposes of use of a deposition under V.R.C.P. 32a(3). Committee members also suggested that under proposed Rule 43.1(c), three days is insufficient notice by mail and that the factors to be considered should be listed under paragraphs (3) and (4) in lieu of a cross-reference to paragraph (6).

2. A revised Rule 43.1(d) concerning telephone attendance, based on discussions between Chairman Keyes and Chairman Kainen of the Family Rules Committee and incorporating suggestions made at the last Civil Rules Committee meeting. Chairman Keyes asked Committee members to consider whether proposed new Rule 43.1(d) contained sufficient safeguards for telephone use in civil actions and to send any comments to the him and Professor Wroth.

G. Recommended amendments to conform V.R.C.P. 6 and other time provisions of the Civil and other Rules to federal rules amendments (“day is a day” rules), sent to the Supreme Court on January 1, 2016. Chairman Keyes reported that H.4, the bill providing that certain statutory time periods should be counted as “business days,” had been enacted as Act No. 11 of 2017 and signed by the Governor on May1, 2017. Conforming versions of the proposed

promulgation orders adopting “day is a day” amendments to the Civil Rules and other procedural rules have been sent out for comment, with comments due on July 10, 2017.

3. **#15-6. Proposal to review “tack and mail” provisions of V.R.C.P. 4.** Judge Toor reported that the Civil Division Oversight Committee had received negative comments from the state’s attorneys and sheriffs on a proposal addressing this question and had decided to drop the proposal for a rules amendment but would develop guidance for judges. It was agreed to drop this item from the agenda.

4. **#15-5/16-3. V.R.C.P. 45. Questions regarding out-of-state subpoenas in Vermont—Max Taylor’s May 19 and September 19 emails.** The Committee reviewed Professor Wroth’s April 6 draft of revisions made in Judge Toor’s draft at the last meeting. On motion duly made and seconded, after discussion, it was voted unanimously to recommend that the proposed amendments be sent out for comment.

5. **#13-11—V.R.P.C. Consideration of ABA Ethics 20/20 revisions to ABA Model Rules.** It was agreed to drop this item from the agenda in light of the amendment to A.O. No. 9 reported in item 2.A above.

6. **#12-6—V.R.P.C. 3.8(g), (h). Conformity to Model Rules amendments concerning duties of prosecutors.** It was agreed to drop this item from the agenda in light of the amendment to A.O. No. 9 reported in item 2.A above.

Agenda items 7-12 were deferred until the next meeting.

13. **#17.2. Incorporation of V.R.E.F. 4(g) in V.R.C.P. 7(b) or 78(b).** The Committee considered Judge Gerety’s proposal of April 17, 2017, to incorporate the essence of V.R.E.F. 4(g) in V.R.C.P. 7(b) or 78(b) so that it would be applicable to all filings in civil actions. Ms. McAndrew agreed to review the proposal and report at the next meeting.

INFORMATION ITEM

14. **Emergency amendment of V.R.C.P. 77(e) to remove confidentiality provisions in light of repeal of 4 V.S.A. 652(4).** Promulgated April 20, effective April 24, 2017. Justice Eaton reported that the Court had made this amendment permanent at its last administrative meeting.

15. Other business.

A. **Emergency order continuing the emergency amendments to V.R.S.C.P. 3, 7, 10, 12.** Amended January 11, effective April 15, 2016, and further amended March 7, 2016, effective April 15, 2016, with the Committee to report on the future status of amendments by July 15, 2017. Judge Toor stated that, in light of the resignation of Ms. Hobart, she would work with Mr. Avildsen and Ms. Shafritz to prepare the Committee’s report to the Court on the survey of Small Claims litigants that is due on July 15, 2017.

B. V.R.C.P. 80.11 Survey. Chairman Keyes noted that the Mr. Weimer is developing a survey for VBA members on the use and value of V.R.C.P. 80.11. Mr. Keyes will draft a similar survey for Judge Toor to send to the judges and clerks.

16. Date of next meeting: The next meeting of the Committee is scheduled for June 16, 2017. A further meeting was set September 29, 2017.

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

Respectfully submitted,

L. Kinvin Wroth, Reporter