

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
September 23, 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: Bonnie Badgewick, James Dumont, Jean Giddings, Kathleen Hobart, Karen McAndrew, Hon. Dennis Pearson, Hon. Helen Toor (by telephone), and Gregory Weimer. Also present were Honorable Harold E. Eaton, Jr., Supreme Court liaison; Megan Shafritz, Office of the Attorney General liaison; and Professor L. Kinvin Wroth, Reporter.

The Committee welcomed Megan Shafritz as liaison from the Office of the Attorney General.

1. Minutes. The minutes of the meetings of June 24, 2016, were approved as previously circulated.

2. Status of promulgated and proposed amendments.

A. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court room. The Committee considered the Special Committee's proposed Draft 4A of new V.R.C.P. 43.1, providing a uniform rule for video and audio appearance in the Civil, Family, and Probate Divisions. In discussion, it was agreed that that the Reporter's Notes to the rule should make clear that rules and statutes for administration of the oath and subpoenas to out-of- state witnesses were consistent with Rule 43.1. Concerns for the short length of some of the time periods need to be reviewed in terms of the day is a day amendments; the length issue, as well as other questions concerning use of remote witnesses could be addressed case-by-case under V.R.C.P.16 or 16.1.

On motion duly made and seconded, there being no further discussion, it was voted unanimously to advise the Special Committee that the Committee approved Draft 4A in concept, subject to consideration by the Special Committee of the following questions and suggestions:

(1) In civil actions, unless otherwise stipulated should the proponent of a witness be required to provide for a neutral party such as a notary to be present with the witness to avoid improper coaching or other conduct by other persons present?

(2) The rule or Reporter's Notes should make clear whether a witness present by video or telephone is "available" for attendance and testimony in the terms of V.R.E. 804(a)(5).

(3) Whether the rule or Reporter's Notes should make clear that in civil actions a prior deposition of a witness testifying by telephone should be admitted in accordance with V.R.C.P. 32(a)(3)(E).?

(4) The underlined language should be added to proposed V.R.C.P. 43.1(c)(2)(A) and (B):

(A) A motion for participation or testimony shall be filed and served at least [30] days prior to the date of the scheduled trial or any other proceeding scheduled more than [30] days in advance. Any other party may file an objection to the motion within [ten] days of the motion being filed.

(B) A motion for participation or testimony in any other proceeding shall be filed and served at least [seven] days prior to the date of the scheduled proceeding. Any other party may file an objection to the motion within [three] days of the motion being filed or, for good cause shown, up to the date of the hearing.

(5) The Reporter's Notes to the rule should make clear that rules and statutes for administration of the oath and subpoenas to out-of-state witnesses were consistent with Rule 43.1.

(6) Concerns for the short length of some of the time periods need to be reviewed in terms of the day is a day amendments;

(7) The length issue, as well as other questions concerning use of remote witnesses could be addressed case-by-case under V.R.C.P.16 or 16.1.

B. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct. The Committee considered the draft adopting the 2007 version of the ABS Model Code of Judicial Conduct proposed by the Judicial Conduct Board and various memoranda reconciling that draft with previous suggestions previously made by the Committee. In discussion, it was agreed that "color, ancestry, gender identity, place of birth" should be added as proposed in the Judicial Conduct Board draft for consistency with the Vermont Fair Employment Practices Act, 21 V.S.A. § 495(a)(1). Chairman Keyes and Professor Wroth agreed to prepare proposed promulgation order with the expectation of sending it to the Supreme Court by the beginning of January.

C. Recommended amendment of V.R.C.P. 51(b), Jury Instructions. Sent to the Court on February 24, 2016. The Committee considered the revised draft based on discussion with the Criminal Rules Committee Chair and Reporter. On motion duly made and seconded, after discussion, it was voted unanimously to recommend the revised draft to the Court for promulgation. The Committee's transmittal letter will explain the relationship with the Criminal Rule.

D. Proposed amendment to V.R.C.P. 43(f) concerning appointment of interpreters, recommended for promulgation at October 30 meeting, sent to Court on November 9, 2015. The Committee considered the revised draft based on discussion with the Criminal Rules Committee Chair and Reporter. On motion duly made and seconded,

after discussion, it was voted unanimously to recommend the revised draft to the Court for promulgation.

E. Recommended amendment to V.R.C.P. 5 concerning e-mail service, sent to the Court on February 24, 2016. Chairman Keyes reported that a revised draft would be presented based on action by the Criminal Rules Committee at its next meeting.

F. 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, 2015, effective April 15, 2016, with Committee to report by April 17, 2017. Ms. Hobart distributed a compilation of the previous Civil Division Team survey of court staff that she had prepared. Judge Toor and Ms. Hobart will follow up with the Team on the preparation of a further survey and will discuss the matter with the Civil Division Oversight Committee at its next meeting. Chairman Keyes stated that data needed to be available by April 2017 if the Committee is to meet its deadline and, with Judge Pearson, noted the need for “real numbers” if the survey was to be useful.

G. Recommended amendments to conform V.R.C.P. 6 and other time provisions of the Rules to federal rules amendments (“day is a day” rules), sent to the Supreme Court on January 1, 2016. Chairman Keyes noted that he and Mr. Dumont are leading a seminar on day is a day at the October 14 VBA meeting at which, among other things, the need for the three-day rule for mail service would be discussed. Professor Wroth will see that the Family and Probate rules day is a day orders that he and Mr. Keyes had prepared and a Small Claims Rules order that he would prepare would go out for comment before October 14.

3. #s12-1/14-10—Event-witness amendment to V.R.C.P. 26(b)(4) and mandatory disclosure. The Committee considered the new draft of amendments to V.R.C.P. 26(b)(4) prepared by Ms. McAndrew and Professor Wroth. The present draft does not contain the mandatory initial disclosure provisions of F.R.C.P. 26(a), but uses the interrogatory process to trigger revised expert discovery provisions that would require disclosure of any witness to be used at trial to present expert evidence under V.R.E. 702, 703, or 705. The amended rule would require any witness “retained or specially employed to provide expert testimony in the case or one whose duties as an employee of the party involve giving expert testimony” to prepare and sign an extensive written report with the contents required by F.R.C.P. 26(a)(2)(B). For other “expert” witnesses, the disclosure must state the subject matter, substance, and grounds of each opinion to be offered.

In discussion, the problem of how to cover the problem that *Hutchins* and *Stella* had addressed—the treating physician who was both a fact and an expert witness—was considered. It was noted that the rule had to deal with four categories of witness: The true retained expert, the hybrid not-retained witness who would testify both to the event and as an expert, the employed expert, and the true fact witness. It was agreed that Ms. McAndrew and Professor Wroth should prepare a new draft providing mandatory initial disclosure for expert witnesses only. The new draft would provide that the full report required in the present draft would be required for a witness who is not otherwise involved in the matter and is specially retained to

testify or whose duties as an employee include providing expert testimony. For the hybrid fact- or fact-only expert witness only the disclosure of subject matter, substance, and grounds would be required.

4. #15-7. Proposal to reconsider certificate of service provisions of new V.R.C.P. 5(h). The Committee considered the revised draft prepared by Professor Wroth on the basis of Judge Toor's proposed revisions. On motion duly made and seconded, after discussion, it was voted unanimously to recommend the revised draft to the Court for promulgation as an emergency rule.

5. #10-5. Federal Rules Subcommittee. Subcommittee (Mr. Dumont, Ms. Blackwood, Mr. Weimer). The Committee considered Mr. Dumont's draft amendment of V.R.C.P. 37(f) incorporating provisions of present F.R.C.P. 37(e). He noted that the proposed Vermont amendment would extend the provision to "other evidence" and left remedies for intentional non-disclosure covered in paragraph (2) of the Federal Rule to Vermont case law. On motion duly made and seconded, after discussion, it was voted unanimously to ask Mr. Dumont and Professor Wroth to add the proposed draft to a final draft order containing the other federal discovery changes approved at previous meetings that would be presented at the next meeting.

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 Professor Wroth's draft order containing an amendment adding V.R.A.P. 4(f) implementing a prison mailbox rule. On motion duly made and seconded, after discussion, it was voted unanimously to propose that amendment as drafted be sent out for comment after Professor Wroth had circulated proposed Reporter's Notes to the Committee.

7. #14-1. Status of Appendix of Forms. Ms. Blackwood and Professor Wroth will report at the next meeting.

8. #15-6. Proposal to review "tack and mail" provisions of V.R.C.P. 4. Judge Toor will present a draft at the next meeting.

9. #15-5/16-2. V.R.C.P. 45.

(A) Questions regarding out-of-state subpoenas in Vermont—Max Taylor's May 19 and September 19 emails. Ms. Hobart will send the current protocol to the Committee and raise the question with the Oversight Committee. Mr. Weimer will review the issue under the Uniform Act as incorporated in Rule 45(f)

(B) Questions regarding service of copies of subpoenaed documents—William Towle's May 9, letter, will be considered at the next meeting.

Items 10-15. In view of the time, these items were deferred until the next meeting.

The following items were listed on the agenda for the information of the Committee:

16. The Committee's recommended amendments of V.R.C.P. 4, 16.3, 80.10 were promulgated July 11, effective September 12, 2016.

17. The Committee's recommended emergency amendments of V.R.C.P. 80.11 to incorporate references to ADR under V.R.C.P. 16.3 (Item 2.I above) were promulgated July 11, effective September 12, 2016.

18. The Court's order promulgating amendments to conform a reference in V.R.C.P. 4.2(a) and references in other rules to new V.R.F.P. 4.0-4.3, as recommended by the Family Rules Committee, was promulgated August 25, effective December 5, 2016.

19. The Court's order promulgating the addition of Comment 14 to Rule 1.2 of the Vermont Rules of Professional Conduct, recommended by the Professional Conduct Board, was promulgated August 25, effective October 31, 2016.

20. Other business. There was no other business.

21. Date of next meetings: It was agreed that the next meetings of the Committee would be held at Vermont Law School on Friday, November 18, and Friday, December 16, 2016.

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

Respectfully submitted,

L. Kinvin Wroth, Reporter