

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
May 23, 2014

The meeting was called to order at 9:15 a.m. in Room 216 Debevoise Hall, Vermont Law School, by William E. Griffin, Chair, with the following Committee members present: Eric Avildsen, Eileen Blackwood, Allan R. Keyes, Karen McAndrew, Hon. Dennis Pearson, and Hon. Helen Toor. Also present was Professor L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of February 28, 2014, were unanimously approved as previously circulated.

2. Status of proposed and recommended amendments. Professor Wroth reported that the Committee's recommended amendments to V.R.C.P. 4(b) and 79(b) and (c) were promulgated on May 8, effective July 7, 2014. The Committee's recommended emergency amendments to V.R.C.P. 80.1(b)(3), promulgated on December 17, 2013, effective January , 2014, were made permanent, as further recommended by the Committee, by order of March 27, effective May 27, 2014. The emergency amendment of V.R.A.P. 32(b), promulgated and effective on December 17, 2013, was made permanent, as informally suggested by the Committee, by order of March 27, effective May 27, 2014.

The Committee reviewed a draft revision of the Criminal Rules Committee's proposed amendment to V.R.A.P. 3(b)(2) prepared by Professor Wroth and Supreme Court staff attorney Emily Wetherell. In discussion, Committee members suggested that subparagraph (2)(A) should make clear that the defendant had to file the notice of appeal in those cases where (i) and (ii) required a notice of appeal, that the last sentence of the first paragraph of the Reporter's Notes regarding the colloquy should be deleted, and that conforming changes in V.R. Cr. P. 32 should be considered. On motion duly made and seconded, it was voted unanimously that Professor Wroth should convey those comments to the Criminal Rules Committee

3. #s10-1/08-6/11-15/13-8—V.R.S.C.P. forms and proposed rule revisions. Mr. Avildsen reported for the subcommittee (Mr. Avildsen, chair; Mr. Dumont; Ms. Blackwood; and Ms. Hobart) that the subcommittee was continuing its work on forms. In response to Mr. Avildsen's questions, it was agreed that the subcommittee (1) should turn over to the Civil Division Oversight Committee its work on any forms that are not in the Appendix of Forms to the Civil Rules, (2) should continue its work on the trustee process issues under agenda # 11-15 (item 6 below), and (3) should continue its work on the small claims exemption list because of its connection to V.R.C.P. Form 34. Chairman Griffin will advise Judges Davenport and Teachout of these decisions.

The Committee then considered Professor Wroth's revised draft of an amendment adding V.R.C.P. 9.1 and V.R.C.P. 55(b)(7) to incorporate the 2013 credit card debt collection amendments of V.R.S.C.P. 3. In discussion, it was agreed that V.R.C.P. 55(a)-(b) would apply to credit card civil actions, so that the first and last sentences of V.R.S.C.P. 3(e) were not needed in proposed V.R.C.P. 55(b)((7)); that "clearly" should be deleted in the last sentences of

proposed V.R.C.P. 9.1(g) and 55(b)(7); that V.R.S.C.P. 3(e) and 3(h)(7) should be amended to conform to those changes in the proposed Civil Rules amendments; and that the Reporter's Notes should make clear the intent of the amendments to harmonize the practice in civil and small claims actions. On motion duly made and seconded, it was voted unanimously to recommend that the proposed rules and amendments be sent out for comment with those changes.

4. #10-5—Proposal to conform V.R.C.P. 6 to Federal Rules amendments. The Committee considered Professor Wroth's May 22 draft of the day-as-a-day amendments to V.R.C.P. 6(a) and selected other rule provisions. It was noted that the three-day rule of present V.R.C.P. 6(e) created anomalies dependent on the method of service employed. On motion duly made and seconded, it was voted unanimously to delete V.R.C.P. 6(e) and to make sure that all time limits will allow adequate response time regardless of the method of service. In discussion of the conflict of the time limits in Rules 3 and 4(l), it was agreed that V.R.C.P. 4(l) should be reviewed for conformity with V.R.C.P. 3. Professor Wroth agreed to try to complete the rule-by-rule draft before the next meeting.

5. #s10-8/13-1—Adoption of amendments to ABA Model Code of Judicial Conduct. Judge Pearson reported that the two subcommittees had been formed but had not yet met. He expected to have a progress report at the next meeting.

6. #11-15—Trustee process against banks on certain federal agency direct deposits. See item 3 above.

7. #12-1—Event-witness amendment to V.R.C.P. 26(b)(4). Ms. McAndrew and Professor Wroth will report at the next meeting.

8. #12.6—V.R.P.C. 3.8(g), (h)—Conformity to Model Rules Amendments. Ms. Blackwood reported for the subcommittee (Judge Pearson, Ms. Blackwood, chair, and Mr. Dumont and representatives of the Attorney General, the Defender General, the state's attorneys, and the private defense bar) that it had met and expected to have a report at the next meeting.

9 and 10. #12-7—V.R.C.P. 5—certificate of service and form; V.R.C.P. 4(b)—notice of appearance and form . The Committee considered Professor Wroth's revised drafts of amendments to V.R.C.P. 4(b) and 5(h) and related forms. It was agreed that the all of the recommended forms should be proposed as amendments or additions to the Civil Rules Appendix of Forms, that V.R.C.P. 4(l) should be amended to require the notice of appearance form, that the rules and forms should make clear that the notice of appearance was "in addition to filing the required answer," that the notice of appearance form should be simplified to conform to the similar form used in the Family Division, that "in a form approved by the Court Administrator" should be deleted from V.R.C.P. 4(b), that the first sentence of V.R.C.P. 5(h) should refer to "a" party, and that the Reporter's Notes to Form 29 should make clear that if e-mail service is used the "Other" box should be checked. On motion duly made and seconded, it was voted unanimously to recommend that the proposed rules and forms should be sent out for comment with the agreed-upon changes.

11. #13-2—Proposed amendments to V.R.C.P. 43(f) concerning appointment and compensation of interpreters. The committee reviewed Professor Wroth’s January 31 revision of the proposed amendment to V.R.C.P. 43(f), which he reported had been approved by the Court’s interpretation subcommittee. In discussion, it was suggested that “appointment of interpreter” should be deleted. . On motion duly made and seconded, it was voted unanimously to recommend that the proposed rule should be sent out for comment with that change.

12. #13-4—Recent amendments of F.R.C.P. 37 and 45 and various F.R.A.P. Provisions. The Committee considered Professor Wroth’s February 25 draft of a proposed amendment to conform V.R.C.P. 45 to a recent amendment of F.R.C.P. 45. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend that the proposed amendment should be sent out for comment.

13. # 13-9—V.R.A. P. 1(b), 2, 26(b)—Consider in light of *In re D.D.*, 2013 VT 79, and *In re A.D.T.* 174 Vt. 369 (2002). In view of the absence of Mr. Dumont, it was agreed to defer this item until the next meeting.

14. #13-11—V.R.P.C.—Consideration of ABA Ethics 20/20 revisions to ABA Model Rules. In view of the hour, it was agreed to defer this item until the next meeting.

15. #14-1. Forms. Chairman Griffin reported that the Court Administrator continued to have the matter of eliminating the Appendix of Forms under advisement.

16. #14-2. Proposed Expedited Actions Rule prepared by VBA Committee. The Committee considered the Vermont Bar Association’s proposed V.R.C.P. 80.11 providing for expedited actions. It was noted that the reference to a request by the Supreme Court should be deleted from the Reporter’s Notes. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the proposed amendment should be sent out for comment

17. #14-3. V.R.A.P. 24(a)(1)(B)(i). Amendment to conform to V.R.P.C. 3.1(b)(1). The Committee considered the proposed amendment to conform the Appellate rule to V.R.C.P. 3.1. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend that the proposed amendment should be sent out for comment.

18. #14-4. V.R.C.P. 54(d)(1). Award of costs to prevailing defendants in non-common law actions. Professor Wroth reported on Justice Dooley’s concerns that the decision on costs in *Murphy v. Sentry Insurance*, 2014 VT 25, ¶¶ 47-54 (entry order, 3/7/14) raised a question whether an amendment was necessary to make the rule applicable to non-common-law actions. It was the consensus that the merger of law and equity in Rule 1 would, as noted in actions under the Federal Rules, make the decision applicable in non-common-law actions. Chairman Griffin agreed to write a letter to Justice Dooley reporting the Committee’s conclusion.

19. Date of next meeting. It was agreed that Professor Wroth would circulate potential dates for meetings to be held in September and November.

There being no further business, the meeting was adjourned at 12:15 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter