

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
November 14, 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: Eileen Blackwood (by phone), James Dumont (by phone), Jean Giddings, Kathleen Hobart (by phone), Karen McAndrew, Hon. Dennis Pearson, Hon. Helen Toor, and Gregory Weimer. Also present was Professor L. Kinvin Wroth, Reporter.

1. Minutes. Professor Wroth reported that the draft minutes of the meeting of October 3, 2014, as previously circulated required several corrections. It was agreed to defer review and approval of them until he had circulated a corrected copy for review.

2. Status of proposed and recommended amendments.

- The Committee considered Professor Wroth’s draft of a revision to proposed new V.R.C.P. 5(h) responding to a comment considered at the last meeting. Judge Toor offered a redlined draft of a simplified version of the revision.

After discussion of the original purpose of the proposed new rule, on motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend to the Court that new V.R.C.P. 5(h) be promulgated as previously sent out for comment.

Mr. Weimer pointed out that the last two sentences of V.R.C.P. 5(d), providing that the filing of a paper by an attorney was a representation that the paper “had been or will be served” pursuant to V.R.C.P. 5(a) was inconsistent with the amendment just recommended. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend to the Court that an additional amendment deleting the last two sentences of V.R.C.P. 5(d) be promulgated and, because the amendment was a technical correction, that it not be sent out for comment.

Professor Wroth stated that he would transmit the previously recommended amendments to V.R.C.P. 4(b), 4(l)(3)(H), 5(h), and Forms 1, 1B, 1C, 28, 29, to the Court for promulgation with the recommended amendments to V.R.C.P. 5(d) and the recommendation concerning comment.

- Professor Wroth stated that he would transmit proposed V.R.C.P. 43(f), proposed amendments to V.R.C.P. 45, and proposed new V.R.A.P. 24(a)(1)(B)(iii), recommended for promulgation at the last meeting, to the Court after review by the

Legislative Committee on Judicial Rules at a meeting scheduled for December 2, 2014, if there were no comments on them from that committee.

- It was agreed that comments on proposed new V.R.C.P. 9.1, 55(b)(7), and proposed amendments to V.R.S.C.P. 3(e), (h)(7) would be considered at the next meeting
- Chairman Griffin, reported that pursuant to the Committee's vote at the last meeting, he had sent proposed new V.R.C.P. 80.11 and the comments on it received from the bar and Committee members to the Vermont Bar Association Board of Managers, with the suggestion that the Board consider the comments received and advise the Committee of its conclusions on them.

3. #s10-1, 11-15—V.R.S.C.P. forms and proposed rule revisions. The Committee considered Mr. Avildsen's preliminary draft of the subcommittee's proposed changes to the list of exemptions from attachment, trustee process, or other seizure in V.R.C.P. Form 34 and on-line Civil Division Form 511. Committee members made various suggestions concerning the draft form noting, in section 1, the change of the name of the Food Stamp Program to the Supplemental Nutrition Assistance Program (SNAP) and the termination of Catamount Health and. in section 5(g), that there is no blanket \$10,000 exemption for retirement accounts in 12 V.S.A. § 2740(16). It was suggested that the list should include other sources of exemptions in addition to those in § 2740, such as the federal exemptions to trustee process on earnings recognized in V.R.C.P. 4.2(j)(2) and 12 V.S.A. § 3170 and the provision for the inalienability of assistance payments in 33 V.S.A. § 124. As an editorial note, it was suggested that statutory references in the form should uniformly be given as 12 V.S.A. §0000.

Ms. Hobart asked that Committee members send comments to her on the subcommittee's draft revision of the Small Claims booklet that she had previously sent to the Committee by e-mail.

4. #10-5—Proposal to conform V.R.C.P. 6 to Federal Rules amendments. In the absence of Mr. Keyes, this item was deferred until the next meeting.

5. #s10-8, 13-1—Adoption of amendments to ABA Model Code of Judicial Conduct. Judge Pearson asked to be relieved as chair of the two Code of Judicial Conduct subcommittees because of the pressing nature of his current trial docket. Judge Toor agreed to replace him as chair. Professor Wroth agreed to send her his summary of the effect of the 2007 ABA Model Code revision on the Vermont Code of Judicial Conduct, as well as other information about the charge to the subcommittees.

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. It was agreed that consideration of agenda #14-10 (item 16 below) should be included in their report.

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; Mr. Dumont; and representatives of the Attorney General, the Defender General, the state’s attorneys, and the private defense bar) that it would report at the next meeting.

9. #13-11—V.R.P.C.—Consideration of ABA Ethics 20/20 revisions to ABA Model Rules. The Committee reviewed Professor Wroth’s November 11 memorandum summarizing the ABA 20/20 changes and state adoptions of them. Chairman Griffin agreed to send the memorandum to the Professional Conduct Board and ask the Board’s opinion on the ABA changes.

10. #14-1. Forms. Chairman Griffin reported that he expected the question of the elimination of the Appendix of Forms to be placed on a future administrative agenda of the Court.

11. #14-5. V.R.C.P. 51. Consider in light of *Straw v. VNA*, 2013 VT 102. The Committee considered Professor Wroth’s November 11 memorandum on this item. After discussion of the importance of the charge conference, both for the presentation of draft instructions by the court and the necessity of making objections there to preserve them, Judge Toor agreed to provide a proposed draft for the next meeting after obtaining Justice Robinson’s views.

12. #14-6. V.R.C.P. 16.3. Consider simplification. Judge Toor and others noted that significant portions of the present rule, such as the provisions for early neutral evaluation, were never used. She agreed to provide a proposed draft revision for the next meeting. Ms. Hobart agreed to send suggestions to her.

13. #14-7. V.R.C.P. 41(b)(1)(iii). Conform to Rule 3’s 60-day service requirement. The Committee considered Professor Wroth’s November 11 memorandum on this item. After discussion of the question whether the different time periods of V.R.C.P. 3 and V.R.C.P. 41(b)(1)(iii) were inconsistent or served different purposes, Professor Wroth agreed to look into the files concerning the 1981 amendments that created both provisions and to report at the next meeting.

14. #14-8. V.R.C.P. 69. Consider practical effect. After discussion of the relative obsolescence and disuse of the writ of execution and its relationship to post-judgment attachment and trustee process, Professor Wroth agreed to review the issues and the statutory basis of V.R.C.P. 69 and report at the next meeting.

15. #14-9. V.R.C.P. 74-75. Revise to clarify along lines of federal APA. After discussion of the complexity of the two rules and their purpose to provide separate tracks for

state APA appeals and common-law administrative review (*e.g.*, mandamus), Professor Wroth and Chairman Griffin agreed to look into the issues and report at the next meeting.

16. #14-10. V.R.C.P. 26. Reconsider mandatory disclosure provisions. It was agreed that this item should be incorporated in agenda # 12-1 (item 7 above).

17. Other Business. It was agreed that Jerry O'Neill's August 18 suggestion that D.Vt. Local Rule 7(a)(7) concerning a duty to seek agreement on any motion be incorporated in the Civil Rules should be added to the agenda for the next meeting as # 14-11.

18. Date of next meetings. The next meeting of the Committee is scheduled to be held at Vermont Law School on Friday, January 30, 2015. It was agreed to hold a further meeting on Friday, March 27, at the Law School

There being no further business, the meeting was adjourned at 11:15 a.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter