

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
March 24, 2017**

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: Bonnie Badgewick, Eileen Blackwood, James Dumont, Jean Giddings (by telephone), Hon. Dennis Pearson, Hon. Helen Toor and Greg Weimer. Also present were Hon. Harold Eaton, Supreme Court liaison; Megan Shafritz, Office of the Attorney General liaison, and Professor L. Kinvin Wroth, Reporter.

1. **Minutes.** The minutes of the meeting of January 27, 2017, were unanimously approved as previously circulated.

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).** The Committee discussed this proposed amendment, sent out for comment on February 9, with comments due on April 10, 2017. The amendment would give the Professional Responsibility Board the responsibility, previously exercised by the Committee, for proposing and recommending amendments to the Vermont Rules of Professional Conduct. Chairman Keyes reported that in a letter of February 3, 2017, to Justice Eaton, he had set forth the views expressed by members of the Committee at its January 27 meeting that the Committee should continue to exercise this responsibility in view of (1) the Committee's longstanding role in adapting the ABA Model Rules of Professional Conduct and their revisions for Vermont in coordination with the Professional Conduct Board and the bar, (2) the Committee's experience and processes as a rule-making body, and (3) the varied professional practices of its members. In discussion, Committee members also noted the benefits of separating responsibility for the substantive development of the Rules from responsibility for their administrative enforcement. It was agreed that the Court should be asked to consider Chairman Keyes' February 3 letter in reviewing comments on the proposed amendment to A.O. No. 9, and that members of the Committee should feel free to submit individual comments to the Court during the comment period.

B. **#15-7. Recommended emergency amendments to certificate of service provisions of new V.R.C.P. 5(h).** Chairman Keyes reported that no comments had been received on these amendments, which, though proposed as emergency amendments, had been sent out for comment by the Court on December 7, 2016, with comments due on February 6, 2017. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend that the amendments be promulgated as sent out for comment.

C. #10-5. Proposed amendments to conform discovery and other rules to Federal Rules amendments. Chairman Keyes reported that one favorable comment had been received on these amendments, which had been sent out for comment on December 20, 2016, with comments due on February 21, 2017. On motion duly made and seconded, after discussion, it was voted unanimously to recommend that the amendments be promulgated as sent out for comment.

D. #16-4. Request from Chief Justice for consideration of new ABA Model Rule 8.4. Chairman Keyes reported that one comment had been received on the Committee's proposed amendments To V.R.P.C. 8.4, which had been sent out for comment on January 11, with comments due on March 13, 2017. The comment had suggested that, in light of current understanding, the term "creed," though found in some statutes, was either redundant or ambiguous. On motion duly made and seconded, after discussion, it was voted unanimously to delete "creed" from the proposed amendment. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the amendments be promulgated with that deletion.

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 view of the necessary absence of Ms. McAndrew, it was agreed to defer consideration of these amendments until the next meeting.

F. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court. Ms. Badgewick and Mr. Weimer reported that no further action on the Committee's concerns regarding proposed V.R.C.P. 43.1 had been taken at the meeting of the Special Committee on February 24, 2017. Professor Wroth noted that the final draft proposal of the Special Committee would be presented to the Civil, Family, and Probate rules committees for final review for being sent out for comment.

Chairman Keyes reported that he and Professor Wroth had met with Justice Dooley and Hon. Michael Kainen, chair of the Family Rules Committee, to discuss providing simpler language in proposed V.R.C.P. 43.1(d) relating to telephone conferencing that could apply to both civil and family cases. The Committee examined a draft of proposed Rule 43.1(d)(1) covering evidentiary proceedings, prepared by Chairman Keyes and Professor Wroth that Judge Kainen believed would satisfy the Family Rules Committee's wish to preserve the simplicity of V.R.F.P. 17. After discussion, Chairman Keyes and Professor Wroth agreed to prepare a draft to see if further simplification can be achieved by combining text for both evidentiary and non-evidentiary proceedings.

The Committee continued its consideration of the relationship between proposed Rule 43.1(a) and V.R.C.P. 32(a)(3)(E) and the substantially parallel provision of V.R.E. 804(a)(5). The most recent revision of Rule 43.1(a) provided that a witness testifying remotely would be deemed "available," thus precluding use of a deposition under V.R.C.P. 32(a)(3)(E). The Special Committee had deferred further action until the position of the Evidence Rules Committee had been obtained. Civil Rules Committee members agreed that the Committee's position remained that if a lawyer preferred to offer the deposition of an otherwise absent witness who could not

physically attend trial, the deposition could be used at trial even if it could have been possible to have that witness appear live at trial by remote video. In discussion, suggestions for greater clarity included substituting “presence in the courtroom” for “attendance” in Rule 32(a)(3)(E). Ms. Badgewick agreed to present the Committee’s concerns at the Special Committee’s March 30 meeting.

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 revised by the House Judiciary Committee to extend some 10-day periods to 14 days and to treat as “business days” only the remaining periods of 10 days or less. The bill will be heard by the Senate Judiciary Committee on March 28.

H. Constitutional Challenge to V.R.C.P. 77(e). The Committee took notice of the pendency in federal court of an action challenging V.R.C.P. 77(e) on Constitutional grounds and agreed not to discuss the matter because it was involved in pending litigation.

3. #16-5. V.R.A.P. 41. Consistency of rule with practice concerning mandate. Justice Eaton reported that he had advised Chief Judge Grearson, the trial judges, and court staff of the new practice concerning the mandate,

4. #15-6. Proposal to review “tack and mail” provisions of V.R.C.P. 4. Judge Toor reported that the Civil Division Oversight Committee was seeking input on a proposal addressing this question and that she would report at the next meeting.

5. #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. Judge Toor reviewed her January 27 revised draft of the Civil Division Oversight Committee’s proposed amendments of V.R.C.P. 45. The Committee approved the draft, with the suggestion that the Reporter’s Notes should contain a statutory reference to the fee provision referred to in Rule 45(b)(1). On motion duly made and seconded, after discussion, it was voted unanimously to ask Professor Wroth to prepare a draft proposed promulgation order with that addition for review at the next meeting.

6. #13-11—V.R.P.C. Consideration of ABA Ethics 20/20 revisions to ABA Model Rules. It was agreed to defer action on this agenda item pending consideration of the proposed amendment discussed under item 2.A above.

7. #12-6—V.R.P.C. 3.8(g), (h). Conformity to Model Rules amendments concerning duties of prosecutors. It was agreed to defer action on this agenda item pending consideration of the proposed amendment discussed under item 2.A above.

8. #14-7. V.R.C.P. 41(b)(1)(iii). Conform to Rule 3’s 60-day service requirement. Judge Toor presented the Civil Division Oversight Committee’s further draft of proposed amendments to V.R.C.P. 41. The Committee offered the following comments:

Rule 41(a)(1)-(4). Judge Toor agreed to clarify the draft, making the provision beginning “Impact” paragraph (3) and numbering present paragraphs (3) and (4) ad (4) and (5).

Rule 41(a). Regarding a question whether the rule should require a court order after a voluntary or stipulated dismissal, Justice Eaton will ask the clerks about present practice.

Rule 41(b)(1)(i). The language is necessarily vague because of uncertainty about the trial list.

Rule 41(b)(1)(ii). 60 days was used as more realistic.

Rule 41(b)(1)(iii). The discrepancy with Rule 3 is deliberate. The time has been reduced to three months. Judge Toor will make clear that relief under this paragraph is available only for a defendant not served.

Rule 41(b)(2). It was agreed to leave this provision as in the present rule

Judge Toor agreed to present a final draft at the next meeting.

Items 9-12 were deferred until the next meeting.

13. # 17-1. Allocation of residual class action funds. The Committee considered the materials on the practice of Maine and other states concerning allocation of class action residuals. It was agreed in concept that a mandatory percentage of funds available for allocation should go either directly to Vermont Legal Aid or to the Vermont Bar Foundation for distribution in manner similar to that for IOLTA funds. Mr. Weimer agreed to continue to work with Mr. Avildsen and to present a draft rule at the next meeting.

14. Date of next meeting. The next meeting of the Committee is scheduled for Friday, May 12, 2017, at 9:00 a.m. at Vermont Law School. It was agreed to hold a subsequent meeting on Friday, June 16, 2017.

There being no further business, the meeting was adjourned at 11:55 a.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter