

**APPROVED**

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE**  
**Minutes of Meeting  
September 29, 2017**

The meeting was called to order at 9:05 a.m. in the Hoff Lounge, Debevoise Hall, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Anne Damone, James Dumont, Jean Giddings, Karen McAndrew, Hon. Dennis Pearson, and Greg Weimer. Also present was Professor L. Kinvin Wroth, Reporter.

The Committee welcomed Anne Damone, Clerk of Courts, Windham and Windsor counties, to the Committee as replacement for Kathleen Hobart who had resigned

**1. Minutes.** The minutes of the meeting of June 16, 2017, were unanimously approved as previously circulated.

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

A. #15-7. Recommended amendments to certificate of service provisions of new V.R.C.P. 5(h). Professor Wroth reported that these amendments had been promulgated on July 14, effective on September 18, 2017.

B. #10- 5. Recommended amendments to conform discovery and other rules to Federal Rules amendments. Professor Wroth reported that these amendments had been promulgated on July 14, effective on September 18, 2017.

C. #16-4. New ABA Model Rule 8.4. Professor Wroth reported that this rule had been promulgated on July 14, effective on September 18, 2017.

D. #s12-1/14-10—Event-witness amendment to V.R.C.P. 26(b)(4). The Committee reviewed Chairman Keyes' summary and compilation of comments received on the draft of these amendments, which had been sent out for comment on January 11, with comments due on March 13, 2017. It was agreed that the pending revised draft developed after review of the comments at the May 12 meeting and discussion at the June 16 meeting addressed the principal comments made. Professor Wroth agreed to draft a letter for Chairman Keyes responding to the comments.

The Committee then considered Professor Wroth's Revised Draft 2, dated 9/24/17, containing a clean draft of Rule 26(b) incorporating changes in prior drafts agreed on at the June 16 meeting and a draft of Rule 26(e) showing amendments suggested to existing Rule 26(e) and a proposed new Rule 26(e). The Committee also considered Mr. Dumont's September 27, 2017, report of the subcommittee proposing specific amendments to Rule 26(e).

In discussion, it was noted that version 2 of the subcommittee proposed draft of Rule 26(e) followed F.R.C.P. 26(e) in spelling out a general duty to supplement both a disclosure made under V.R.C.P. 26(b)(4) and a response to other forms of discovery. The proposed draft, however, conforms to Vermont practice concerning disclosure by imposing a duty to supplement any disclosed information at least 30 days prior to a deposition, or “promptly” if the new information arises after that date or after the taking of the deposition. On motion duly made and seconded, it was voted unanimously to adopt the subcommittee’s version 2 of draft Rule 26(e). After further discussion, on motion duly made and seconded, it was voted unanimously to recommend proposed Rules 26(b) and (e) to the Supreme Court for promulgation. Professor Wroth agreed to circulate to the Committee a full draft with Reporter’s Notes before transmission to the Court.

Chairman Keyes suggested that V.R.C.P. 37(c)(1) should include a reference to the disclosure requirements of V.R.C.P. 26 (b)(4) like the reference in F.R.C.P. 37(c)(1) to F.R.C.P. 26(a). It was agreed to table this question, in view of the fact that the reference in present V.R.C.P. 37(c)(1) to V.R.C.P. 26 (e) was sufficient for the present amendments.

E. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court. The Committee reviewed the Special Committee’s proposed new V.R.C.P. 79.2 regulating cameras and electronic devices in the court room sent out for comment on July 18, with comments due on September 18, 2017. Committee members expressed concern for the provision allowing confiscation of electronic devices in certain circumstances. It was agreed to leave the matter to the Committee’s members on the Special Committee—Ms. Badgewick and Mr. Weimer.

In discussion of the Special Committee’s May 7, 2017, proposed draft of V.R.C.P. 43.1 and related rules covering video and telephone appearance, Committee members continued to express concerns about the determination of unavailability of a witness if video appearance was possible. The Committee then reviewed the May 29, 2017, draft of a revised V.R.C.P. 43.1(d) covering telephone appearance. Professor Wroth agreed to propose changes to the draft that would substitute “unless” for “if” in the second-to-last line of paragraph (2); make clear in the Reporter’s Notes that, in accordance with V.R.E. 104, “findings” on preliminary questions do not have to be made under the Rules of Evidence; provide that findings could be covered in a form order; and delete “testify” and “testimony” from paragraph (2); and add “or testify” in paragraph (3).

F. 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). Professor Wroth reported that these amendments were promulgated on September 20, 2017, to be effective on January 1, 2018. A panel discussion on the amended rules is scheduled for the October 13 VBA meeting. The Committee reviewed the issues raised by the Chief Hearing Officer of the Judicial Bureau concerning time limits in V.R.C.P. 80.6. On motion duly made and seconded, after discussion, it was voted unanimously to recommend to the Court that the time limits in V.R.C.P. 80.6(c)(3) and (e) be changed from 21 to 30 days, the time limit in V.R.C.P. 80.6(f)(3) be changed from 40 to 30 days, and the time limit in Rule 80.9(b)(3) be changed from 21 to 30 days.

G. 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. The Committee was to report on the future status of the amendments by July 15, 2017. Chairman Keyes reported that Court had declined to follow the Committee's recommendation that the amendments be abrogated and the rules restored to their original form.

H. V.R.C.P. 80.11, promulgated June 15, effective August 15, 2016; amended July 11, effective September 12, 2016, with the Committee to review and report no later than August 15, 2018, whether the rule should be revised or made permanent. It was agreed that the Committee should request that the VBA and the Court Administrator provide further survey data by March 2018.

**3. #15-5/16-3. V.R.C.P. 45. Oversight Committee proposal.** Professor Wroth reported that his April 6 draft order, approved to be sent out for comment at the May 12 meeting had not yet been sent because of discussions with the Criminal Rules Committee on a proposed amendment to V.R.Cr.P. 17(a) on signing of subpoenas. Chairman Keyes reported that those discussions were continuing. It was agreed that the previously approved draft should be sent out for comment.

**11. #17-3. Review emergency amendment of V.R.A.P. 11(b)(3).** promulgated March 9, effective April 10, 2015. Professor Wroth noted that, although this amendment is not labeled "emergency" in the published print or online texts of the rule, the original promulgation order described it as an emergency amendment effective 30 days after promulgation, but with a 60-day comment period, with a direction to the Civil Rules Committee to review comments and advise the Court whether the amendment should be revised. No comments have been received. It was agreed to recommend to the Court that the amendment be made permanent.

**12. #17-4. Review status of amendments to V.R.A.P. 24 (IFP proceedings).** Professor Wroth reported that the amendment had been recommended for promulgation on December 3, 2014. At its July 17, 2015, meeting, the Committee had considered a letter of July 2, 2015, from Justice Eaton, reporting objections raised by members of the Court to the amendments. At that meeting, the Committee proposed revisions to address the objections, but no further action was taken on the proposals. Mr. Avildsen agreed to look into the current status of the amendments and report at the next meeting.

The remainder of the agenda was deferred for consideration at the next meeting.

**13. Date of next meeting:** The next meeting of the Committee is scheduled for November 17, 2017. A subsequent meeting was set for January 26, 2018.

There being no further business, the meeting was adjourned at 12:10 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter