

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
September 11, 2015**

The meeting was called to order at 9:15 a.m. in Room 216 Debevoise Hall, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Eileen Blackwood, James Dumont, William E. Griffin, Hon. Dennis Pearson, Hon. Helen Toor, and Gregory Weimer. Also present were Honorable Harold E. Eaton, Jr., Supreme Court liaison, and Professor L. Kinvin Wroth, Reporter.

1. Minutes. On motion duly made and seconded, the draft minutes of the meeting of July 17, 2015, were unanimously approved as previously circulated

2. Status of proposed and recommended amendments. Professor Wroth reported that

A. The Committee's proposed order making permanent the emergency amendments to V.R.S.C.P. 3, 7, 10, 12, promulgated April 28, 2015, effective May 4, 2015, and further amending those and other Small Claims Rules provisions, had been sent out for comment on August 6, with comments due on October 5, 2015.

C. The Committee's recommended amendments to V.R.C.P. 4(b), 4(l), 5(d), (h), Forms 1, 1B, 1C, 28, 29, had been promulgated on July 20, effective September 21, 2015.

D. The Committee's proposed amendments to conform V.R.C.P. 6 and other time provisions of the Civil, Criminal, and Appellate Rules to federal rules amendments ("day is a day" rules), had been sent out for comment on August 6, with comments due on October 5, 2015.

E. The Committee's proposed amendment to V.R.C.P. 43(f) concerning appointment of interpreters, had been sent out for comment on August 6, with comments due on October 5, 2015.

F. Under #15-4, the joint subcommittee of the Civil and E-filing committees to consider the July 27 proposed draft of amendments to V.R.C.P. 5(b)(4) concerning e-mail service had met on September 9, 2015 and recommended that the paragraph be revised as shown in bold below:

(4) *Sending by Electronic Means.*

(A) Documents must be sent by electronic means if required by the Vermont Rules for Electronic Filing.

(B) Documents may be sent by electronic means when not required by the Vermont Rules for Electronic Filing if the sending and receiving parties agree to electronic transmission in a writing **filed with the court** that specifies the type of electronic transmission to be used.

(C) The sender of any document by electronic means under this rule must follow any applicable standards regarding electronic transmission of confidential documents **that the Supreme Court may adopt by administrative order.**

(D) Any e-mail address or addresses used under subparagraph (A) or (B) must match those that the attorney or party has registered under the judiciary's electronic filing system, and the registration information must be provided in all pleadings and other papers served or filed by the attorney or party.

(E) All attorneys and parties must immediately notify other attorneys and parties of any e-mail address change during the pendency of the action or proceeding **and must immediately update their registration information accordingly.**

The joint subcommittee had agreed that the amendment of (B) is intended to make clear to the court the nature and terms of an agreement for electronic communication for filing purposes. The reference to a potential administrative order in (C) is deleted, and the Reporter's Notes will describe the existing confidentiality requirements that may apply. (D) is not changed. Use of existing registered addresses is simpler and is in accord with evolving practice. The updating requirement in (E) is deleted as belonging in other rules or orders covering registration. The first sentence is retained in the interests of keeping applicable provisions in a single rule. Issues of noncompliance should be addressed at a later time.

On motion duly made and seconded, after discussion, it was voted, seven in favor, one opposed, to recommend that the July 27 draft of amendments to Rules 5(b), revised to incorporate the joint subcommittee's revisions, should be sent out for comment.

G. The proposed revised draft of V.R.C.P. 80.11 providing for expedited actions had been sent out for comment on June 9, with comments due on August 7, 2015. Comments received had been distributed. Mr. Weimer summarized the purposes of the rule and the comments received on both the original and revised drafts.

After extensive discussion, it was moved and seconded to propose that the revised rule as drafted be adopted as a pilot program in two counties. After further discussion, the motion was withdrawn, and it was agreed that Mr. Weimer and Professor Wroth

should prepare a revised draft for consideration at the next meeting that would incorporate at least the following suggestions raised in the comments:

- Limit application of the rule to actions seeking money damages of less than \$50,000.
- Provide for waiver of the limit by the parties.
- For motions by agreement, incorporate Federal Local Rule 7.
- Incorporate requirement of excusable neglect in paragraph (a)(5).
- Delete “opposing” where consent of parties is required—*e.g.*, paragraph (c)(2).
- Make provision for counterclaims.

H. He was reviewing the proposed revision of the Committee’s previous recommendation of V.R.A.P. 24(a)(1)(B)(iii)—In forma pauperis proceedings on appeal—with Supreme Court staff attorney Emily Wetherell and would report at the next meeting.

I. He would review the proposed amendment to V.R.A.P. 3(b)(2) sent out for comment on December 19, 2013, with the Criminal Rules Committee chair and reporter and report at the next meeting.

3. #s10-1/08-6/11-15/V.R.S.C.P. Forms, possible rules amendments, Small Claims booklet. Mr. Avildsen reported that a revised exemption form would be sent to the Oversight Committee for review and then sent to this Committee for action if appropriate. The subcommittee would report on the trustee process issue (#11-15) at the next meeting. He reported for the Committee’s information that the small claims booklet was still undergoing revision for what would presumably be on-line publication.

4. #15-3. V.R.P.C. 1,5, 1.8, 1.15, 1.15A, 8.3; #15-2. V.R.P.C. 1.15, 1.15A. Further consideration of proposed amendments. The Committee considered Professor Wroth’s draft of a proposed promulgation order containing previously approved amendments of V.R.P.C. 1.0, 1.5, 1.15, 1.15A, and 8.3. On motion duly made and seconded, after discussion, It was voted unanimously to recommend that the proposed amendments be sent out for comment, subject to review of a draft with Reporter’s Notes that Professor Wroth would send to the Committee by October 1 for comments to him by October 7, to enable transmission to the Court for its October 20 administrative meeting.

5. #12.6—V.R.P.C. 3.8(g), (h). Conformity to Model Rules amendments concerning duties of prosecutors. Ms. Blackwood reported for the subcommittee that it would have a report for the next meeting.

6. #13-11—V.R.P.C. Consideration of ABA Ethics 20/20 revisions to ABA Model Rules. Professor Wroth agreed to present a draft promulgation order at the next meeting based on the Professional Responsibility Board’s comments previously distributed to the Committee.

7. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct and amendments to sections 5A, 5B, of present Code. The Committee reviewed Judge Toor's July 15 memorandum concerning variations between the 2007 ABA Model Code and the present Vermont Code noted by the ad hoc committee. In discussion, the following changes were proposed in the ad hoc committee's recommendations:

- Rule 2.11(A)(6)(d). It was agreed to propose the ABA language with a Reporter's Note making clear that the language applies only to appellate review.
- Rule 2.11. It was agreed not to adopt the recommendation that a disqualified judge could sign an order to which all parties have stipulated. The availability of electronic signature by another judge largely mitigates the inconvenience that the recommendation was intended to address.
- Rule 3.8. It was agreed to retain the prohibition against a judge serving as a fiduciary for non-family entities in view of its longstanding presence in the Vermont Code and the possible appearance of undue influence if a fiduciary matter arose before another judge.

On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend adoption of the 2007 ABA Model Code with the variations recommended by the ad hoc committee as modified above.

Professor Wroth agreed to develop a method for making clear all substantive differences between the present Vermont Code and the ABA Model and to show the variations that would continue in the new Vermont Code.

8. #14-5. V.R.C.P. 51. Jury Instructions. Consider in light of *Straw v. VNA*, 2013 VT 102. The Committee considered Judge Toor's July 15 memorandum and proposed draft amendments to Rule 51. On motion duly made and seconded, after discussion, it was voted unanimously to adopt the proposed draft with revisions providing that objections could be made either at the charge conference or before the jury retires and making clear that an objection made at the charge conference need not be repeated. Professor Wroth agreed to send a revised draft with Reporter's Notes to the Committee and the chair of the Criminal Rules Committee by e-mail.

9. #14-6. V.R.C.P. 16.3. Alternative Dispute Resolution. Consider simplification. The Committee considered Judge Toor's July 15 memorandum and proposed draft amendments of Rule 16.3. Professor Wroth agreed to prepare a draft promulgation order containing Judge Toor's proposed amendments for consideration at the next meeting.

10. #15-6. Amendments to implement legislative adoption of the False Claims Act. Professor Wroth noted that there were apparently no special provisions in the Federal Rules to accommodate the substantially similar federal False Claims Act. Mr. Griffin stated that the Attorney General's office was concerned with issues arising from out-of-state claims and how to

make clear the sealing provisions to claimants and courts. He agreed to make any necessary proposals at the next meeting.

In view of the time, the remainder of the agenda was deferred until the next meeting.

11. Dates of next meetings. The next meetings of the Committee will be held at Vermont Law School on on Friday, October 30, and Friday, December 11, 2015.

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

Respectfully submitted,

L. Kinvin Wroth, Reporter