

**APPROVED**

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE  
Minutes of Meeting  
January 27, 2017**

The meeting was called to order at 9:05 a.m. in Room 216, Debevoise Hall,, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Eileen Blackwood, James Dumont, Jean Giddings, Kathleen Hobart (by telephone), Karen McAndrew, Hon. Dennis Pearson, Hon. Helen Toor (by telephone) 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.

Chairman Keyes noted that Kam Johnston, a member of the public, was present and wished to videotape the meeting. Chairman Keyes had advised Mr. Johnston that videotaping would require the consent of the Committee members present. On motion duly made and seconded, it was voted unanimously to allow Mr. Johnston to videotape the meeting.

1. **Minutes.** The minutes of the meeting of December 16, 2016, were unanimously approved as previously circulated.

**ACTION ITEMS**

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

A. **Recommended amendment of V.R.C.P. 51(b), Jury Instructions.** The Committee considered Professor Wroth January 25 draft of the revised recommendation of the Committee's October 25, 2016, recommended amendments of V.R.C.P. 51(b). On motion duly made and seconded, after discussion, it was voted unanimously to recommend the revised draft to the Court for promulgation with the correction of a typographical error at the end of the last line of the Reporter's Notes.

B. **#10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct.** The Committee reviewed Professor Wroth's January 25 partial draft of amendments adopting the 2007 ABA Model Code of Judicial Conduct. It was agreed that the changes made in Rules 306 and 315 were those proposed at the last meeting—subject to elimination of duplication in the list of forbidden grounds of discrimination in Rule 306. With regard to the definition of “appropriate authority” in the Terminology section, it was noted that Rule 215 referred to the “appropriate authority” in both judicial conduct and professional conduct violations. Either the definition or the language of Rule 215 should be changed to make clear that the term could mean either the Judicial Conduct Board or the Professional Responsibility Board. In response to Professor Wroth's request for guidance on questions of form, it was agreed that the general format of the partial draft was appropriate and that the Reporter's Notes for specific rules should include the ABA Reporter's Explanations to the extent useful, as well citations of Vermont Supreme Court decisions interpreting relevant provisions of the former Code.

**C. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court.** Ms. Badgewick and Mr. Weimer reported that there had not been a meeting of the Special Committee since December 6, 2016. The next meet is scheduled for February 24, 2017.

**D. 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, with the Committee to report on the future status of amendments by April 17, 2017. Judge Toor and Ms. Hobart reported that a survey of Small Claims litigants is now on the website and would be distributed to parties in new actions by the clerks and that the Oversight Committee would collect data by the end of March. Justice Eaton will ask the Supreme Court to extend the Committee's reporting date to July 15 to enable the data to be processed.

**E. 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 the recommended amendments were being held by the Court, pending legislative action on H.4, which would add "business days" to statutory time periods in court proceedings, thus departing from the "day is a day" counting method provided in the recommended amendments of V.R.C.P. 6. The relatively small number of the statutory sections directly conflicting with a time period in a rule was being reviewed. He recommended that, to move the process along, a definition of "business day" should be added to the presently recommended rule as V.R.C.P. 6(a)(6). On motion duly made and seconded, it was voted unanimously to recommend to the Court that V.R.C.P. 6(a)(6) be added to the recommended rule, defining "business day" as "as a day that is not a Saturday, Sunday, or state or federal legal holiday." Chairman Keyes and Professor Wroth will continue in contact with the relevant legislative committees and the other procedural rules committees whose rules would be affected by any change.

**F. #16-7. Addition of "prisoners' mailbox" provision (item 13 below) to Civil Rules.** Justice Eaton's letter of January 10, 2017, on behalf of the Court requested the Committee to consider whether a "prisoners' mailbox" rule should be added to the Civil Rules. Ms. Shafritz reported that, based on the views of the Attorney General's Office's Corrections Unit, the Office supported incorporating such a rule in the Civil Rules. She noted that the rule would not apply in most civil actions, which are commenced by service, but that it would be an important addition to administrative appeal proceedings under V.R.C.P. 75 and could be extended to all civil filings including post-conviction proceedings without a negative impact because so few are commenced by filing. Chairman Keyes noted that F.R.A.P. 25 contained a provision for inmate filing. It was agreed that Professor Wroth should prepare drafts for the next meeting to cover inmate filing in the Civil Rules and under V.R.A.P. 25 and that other Rules Committees should be sent his drafts for consideration.

**3. #16-5. V.R.A.P. 41. Consistency of rule with practice concerning mandate.** Professor Wroth noted that after a judgment is entered in accordance with V.R.A.P. 36, the clerk, under V.R.A.P. 45(c)(1), is to "immediately" send notice of the entry, together with any opinion or order of the Court, to the parties. V.R.A.P. 41(b) provides that the "mandate" of the Court is embodied in those documents. However, under V.R.A.P. 41(a), the mandate does not "issue"—

*i.e.*, become effective—until 21 days after entry of judgment, or until 7 days after denial of a motion for reargument. Under Rule 40(a), such a motion must be made within 14 days after judgment is entered unless the Court allows a longer time.

Justice Eaton reported that staff attorney Emily Wetherell will prepare a form letter for the clerk to send to the parties and the trial judge in actions other than those dismissed for lack of progress, advising them that the mandate is effective and the case is now closed, either when the 21 days has passed without the filing of a reargument motion or, when a motion has been filed, when 7 days has passed after its denial. If the motion is granted, the clerk will send appropriate notice under V.R.A.P. 45(c)(1) of the Court's action under V.R.A.P. 40(d)(2). Justice Eaton will ask the Chief Superior Judge to send an e-mail to the trial judges advising them of the new practice.

**4. #15-6. Proposal to review “tack and mail” provisions of V.R.C.P. 4.** Judge Toor will present a proposal 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.** The Committee reviewed Judge Toor’s draft of the Civil Division Oversight Committee’s proposed amendments of V.R.C.P. 45.

Rule 45(a)(3). It was agreed to delete “notary public” from the list of those empowered to issue a subpoena. The term was carried over in the original rule from the repealed statute. Notary practice is not governed by rules and training.

Rule 45(a)(4). Judge Toor agreed to revise the language concerning service of copies on all parties to require service before or simultaneously with service upon the person to whom it was directed.

Rule 45(b)(1). It was agreed to insert the following words in the last clause: “...to that person, with the subpoena, the fees...,” and not to add the proposed last sentence, “Failure to provide payment makes the subpoena unenforceable.”

Rule 45(c)(3)(A)(ii). It was agreed not to make the proposed change that would have eliminated the separate travel provisions for residents and nonresidents.

Rule 45(f)(3)(A). After discussion of problems concerning unrepresented litigants and foreign lawyers, Judge Toor agreed to redraft the proposed provision. Mr. Weimer will review the Uniform Interstate Depositions and Discovery Act for possible guidance.

Rule 45(f)(3)(B). It was agreed to revise the first sentence to read, “...the clerk shall provide it to the judge for review without delay...”

Rule 45(f)(4). It was agreed to accept the added language making clear the responsibility of the party requesting the subpoena for service and payment of the witness fee.

Rule 45(f)(6). After discussion, Judge Toor agreed to clarify the proposed language to insure that it was consistent with Rule 45(f)(3) and adequately covered a motion to enforce a subpoena.

**6. #13-11—V.R.P.C. Consideration of ABA Ethics 20/20 revisions to ABA Model Rules.** Justice Eaton reported that the Court wished to consider the question whether the Civil Rules Committee should continue to address issues pertaining to amendment of the Vermont Rules of Professional Conduct. In discussion, Committee members agreed that, subject to the Court's judgment, it would like to continue exercising this responsibility, which it has carried on at least since its recommendation of the adoption of the ABA Model Rules of Professional Conduct as adapted for Vermont in 1999 and significant ABA revisions in 2009. The Committee's work has involved coordination with the Professional Conduct Board and other members of the bar. The Committee's role is of value to the Court and bar because of its experience as a rule-making body, the varied practices of its members, and the benefit of separating the legislative development of the Rules from their enforcement. Justice Eaton suggested that Chairman Keyes address a letter to the Court outlining the Committee's views. It was agreed to defer action on the present agenda item pending the Court's response.

**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 the Court's response to Chairman Keyes' letter to be sent under item 6.

**8. #16-6. Consideration of Uniform Enforcement of Foreign Judgments Act.** Judge Toor reported that, in general, trial judges did not favor the Act, which provides that an authenticated foreign judgment filed in a Vermont court, with notice to the judgment debtor, is to be treated like a Vermont judgment for enforcement purposes. It was agreed to remove this item from the agenda pending Legislative action on the Uniform Act.

**9. #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 preliminary draft of proposed amendments to V.R.C.P. 41. She will present the final draft at the next meeting.

**10. #14-8. V.R.C.P. 69. Executions.** The Committee considered Judge Pearson's January 24 memorandum proposing revisions of V.R.C.P. 69 and related rules in light of current practice. Professor Wroth agreed to prepare a draft proposed promulgation order and send it to Judge Pearson and Mr. Avildsen for comment before the next meeting.

**11. #14-1. Status of Appendix of Forms.** Ms. Blackwood and Professor Wroth will report at the next meeting.

**12-18. Information items.** The Committee had no comment on the list of recently recommended and proposed Rules amendments.

**19. Other Business: # 17-1. Allocation of residual class action funds.** The Committee considered Chief Justice Reiber's letter of January 10, 2017, asking the Committee to review and recommend to the Court whether Vermont should follow an ABA request that states

consider the adoption of procedures providing for the allocation of residual class action funds to nonprofit organizations that improve access to civil justice for persons living in poverty. In particular, the Committee should address any effect that such allocations would have on the revenue sources of the Attorney General's Office. Mr. Weimer will review the request and will report at the next meeting.

**20. Date of next meeting.** The next meeting of the Committee is scheduled for Friday, March 24, 2017, at 9:00 a.m. at Vermont Law School. It was agreed to hold a subsequent meeting on Friday, May 12, 2017.

There being no further business, the meeting was adjourned at 11:40 a.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter