

APPROVED

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
June 16, 2017

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

1. Minutes. The minutes of the meeting of May 12, 2017, were unanimously approved as previously circulated, with the correction that the words “with that addition” were deleted at the end of the concluding sentence of item 4.

ACTION ITEMS

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

A. Previously promulgated amendments to V.R.C.P. 5, 43, 51(b), 77(e), and V.R.A.P. 4(f). Chairman Keyes reported that at its meeting on June 8, 2017, the Legislative Committee on Judicial Rules (LCJR) reviewed the following previously promulgated amendments with the comments indicated:

V.R.C.P. 77(e), promulgated April 20, effective April 24, 2017. Repeals prohibition on disclosing filing of action until at least one defendant receives actual notice or action is finally disposed of. No questions were raised.

V.R.C.P. 5, promulgated December 15, 2016, effective February 20, 2017. Procedures for electronic filing in Superior Court. Questions were raised as to the meaning of “writing” and the effect of the rule on pro se litigants without e-mail addresses, but no objections were raised.

V.R.C.P. 43(f), promulgated January 9, effective March 13, 2017. Appointment of interpreters for hearing impaired or those with limited English proficiency in compliance with federal law. Questions raised concerning accommodation of mental or cognitive disabilities were agreed to be an administrative issue, and no objections were raised.

V.R.A.P. 4(f), promulgated January 9, effective March 13, 2017. Inmate’s deposit of notice of appeal in prison mailing system can constitute timely filing. No questions were raised.

V.R.C.P. 51(b), promulgated February 6, effective April 10, 2017. Timing of objections to jury instructions. A question was raised whether language concerning the repetition of an objection when the proposed charge is amended was unclear as to what part of charge has been changed, but no objections were raised.

B. #15-7. Proposed amendments to certificate of service provisions of new V.R.C.P. 5(h). Recommended at March 24.meeting for promulgation. Chairman Keyes reported that at its meeting on June 8, 2017, LCJR reviewed these amendments and had no comments. He will advise the Court that the Committee continues to recommend promulgation.

C. #10- 5. Proposed amendments to conform discovery and other rules to Federal Rules amendments. Recommended at March 24.meeting for promulgation. Chairman Keyes reported that at its meeting on June 8, 2017, LCJR reviewed these amendments and made no objections or requests for substantive modification. He will advise the Court that the Committee continues to recommend promulgation.

D. #16-4. Request from Chief Justice for consideration of new ABA Model Rule 8.4. Sent out for comment on January 11, with comments due on March 13, 2017. Recommended at March 24 meeting for promulgation. Chairman Keyes reported that in a letter of May 15, 2017, the Court, in light of its May 10 amendment of Administrative Order No. 9, §1, had sent the Committee's recommended order to the Professional Responsibility Board to make a recommendation concerning its promulgation. Professor Wroth reported that he had sent his files on pending proposals to amend the Vermont Rules of Professional Conduct to Bar Counsel Michael Kennedy and offered his assistance to the Board in considering future amendments.

E. #s12-1/14-10—Event-witness amendment to V.R.C.P. 26(b)(4). Sent out for comment on January 11, with comments due on March 13, 2017. Chairman Keyes reported that at the LCJR meeting on June 8, 2017, he had advised the committee that comments received were being reviewed and that there would be a resulting revised draft to be considered.

The Committee then considered Mr. Dumont's June 15 revised draft of Professor Wroth's June 12 revised draft of V.R.C.P.26(b)(4). The following changes in the Dumont draft of Rule 26(b)(4) and (e) were agreed on (changes in **bold**.):

(4) Trial Preparation: Experts.

(A) Identification and Deposition of an Expert Who May Testify.

(i) A party ~~may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, shall must,~~ without waiting for a discovery request, **in accordance with the court-approved discovery schedule and order,** disclose the identity of any witness it may use at trial to present expert testimony under Vermont Rule of Evidence 702, 703, or 705 to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions as to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party intending to present evidence under Vermont Rule of Evidence 702, 703, or 705 **also shall must, in accordance with the court approved discovery schedule and order, disclose, in a report prepared and signed by the witness, or in a writing signed by the party's attorney or a self-represented litigant, all** opinions the witness will express, the bases and reasons for the opinions, the facts or data considered by the witness in forming them, **and** any exhibits that will be used to summarize or support **them the opinions, the qualifications of the witness,** and a statement of the compensation charged by the expert for **his or her the** work in the case.

[The Reporter's Notes will explain that "qualifications" may be shown by attaching a CV or similar document.]

~~(iv iii)~~ The parties must make these disclosures at times and in a sequence provided by stipulation or **a scheduling order of the court issued under Rule 16.2.** In the absence of a stipulation or **court scheduling order,** the disclosures must be made at least 90 days before the **earlier of the** date set for trial or for the case to be ready for trial; or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter offered by another party, **the disclosure must be made** within 30 days after the other party's disclosure under (A)(ii) ~~or (A)(iii).~~

[Rule 16.2 will be amended to included experts.]

~~(v iv)~~ A party may depose any person who has been **identified in an answer to an interrogatory posed disclosed as a witness** pursuant to subparagraph (A)(i) ~~as an expert whose opinions may be presented at trial.~~ **If a report from the expert is required by subparagraph (A)(ii), the report must be produced in advance of the deposition.**

~~(vi v)~~ A party may obtain by request for production or subpoena any **final written** report of the opinions to be expressed by an expert who has ~~been identified in an answer to an interrogatory posed pursuant to subparagraph (A)(i) as an expert whose opinions may be presented at trial~~ has been disclosed pursuant to subparagraph (A)(iii) **i), as well as any exhibits that will be used to summarize or support the expert's opinions.**

[NOTE that parts of existing Rule 26(b)(4)(A) that need to be shown as struckover are not in this draft.]

~~(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement or~~

~~correct the response to include information thereafter acquired with respect to the following matters if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing:~~

~~(1) Any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters; and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.~~

~~(2) Any other prior response to an interrogatory, request for production, or request for admission.~~

~~(3) Any disclosure made under Rule 26(b)(4).~~

~~(4) Any deposition of that party — including a person described in Rule 32(a)(2) — or that a party intends to use or uses pursuant to Rule 32(a)(3).~~

~~(5) Any matter by order of any superior judge, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.~~

(e) Supplementing Disclosures. A party who has made a disclosure under Rule 26(b)(4), or who has responded to an interrogatory, request for production, or request for admission, must supplement or correct its disclosure or response,

(1) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(2) as ordered by the court.

It was agreed to consider at the next meeting the questions whether the duty to supplement should apply to a deposition and whether a supplemental disclosure should be presented in a writing. Chairman Keyes said that he would prepare a summary of all comments on Rule 26(b) received from the bar to enable the Committee to be sure that all points had been addressed.

F. #15-8. Special ad hoc committee on video/audio appearances and cameras in the court. Professor Wroth reported that the Special Committee had not reviewed comments on its draft of proposed V.R.C.P. 43.1 on video appearance at its May 18 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. Proposed revised draft sent out for comment on May 11, with comments due July 10, 2017. Chairman Keyes reported that at the LCJR meeting on June 8, 2017, a few specific comments had been made on the draft now out for comment, and that the

Chief Hearing Officer of the Judicial Bureau had raised questions about time limits in V.R.C.P. 80.6. Responses were pending from the State's Attorneys, the Attorney General's Office, and the Department of Public Safety. He will seek a response from the Police Chiefs Association. All comments will be considered by the Committee at the next meeting after the comment period closes.

H. 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 July 15, 2017. The Committee considered Judge Toor's June 15 subcommittee report recommending that the Small Claims Rules be returned to their original form. On motion duly made and seconded, there being no further discussion, it was voted unanimously that the Court be advised to accept the subcommittee's recommendation. Chairman Keyes agreed to transmit that recommendation to the Court with a copy of the subcommittee report.

I. V.R.C.P. 80.11, promulgated June 15, effective August 15, 2016; amended July 11, effective September 12, 2016, with Committee to review and report no later than August 15, 2018, whether the rule should be revised or made permanent. The Committee reviewed an interim report on results of the Vermont Bar Association's survey of members' attitudes toward the expedited procedure provided by the rule. It was agreed that the survey data, together with data on use to be provided by the Court Administrator, would be reviewed at the next meeting.

Agenda items 3-11 were deferred to the next meeting.

12. Date of next meeting: The next meeting of the Committee is scheduled for September 29, 2017. A further meeting was set for November 17, 2017.

There being no further business, the meeting was adjourned at 11:50 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter