VERMONT SUPREME COURT
Advisory Committee on Rules for Family Proceedings

2008 Annual Report
October 1, 2008

The Committee submits this report to the Supreme Court pursuant to Administrative Order No. 29, § 3. This report covers the Committee's activities since its last annual report submitted to the Court on December 5, 2007. Since that report, the Committee has met four times—on January 25, March 21, May 30, and September 19, 2008—to consider proposals to amend the Vermont Rules for Family Proceedings, the Vermont Rules of Appellate Procedure, and related administrative orders. During the year, Hon. Ernest Balivet was appointed to replace Hon. Joanne Ertel, who had been appointed to the Probate Rules Advisory Committee. Katherine Berkman Spence resigned because she had left the employment of Vermont Legal Aid. Jill Richard replaced Dianne Jabar as representative of the Vermont Network, Ms. Jabar having left the employment of the Network.

At a meeting On October 25, 2007, the Legislative Committee on Judicial Rules raised concerns about V.R.F.P. 4(b)(2)(B) as amended by order of August 15, effective October 15, 2007. See http://www.vermontjudiciary.org/rules1/vrfp1-4_8-2007.pdf. As noted in Part I of this report, the Committee now recommends circulation for comment of further proposed amendments to that rule addressing the concerns of the Legislative Committee.

The Committee's proposed amendment adding V.R.F.P. 1(j) to provide a procedure governing withdrawal of an admission of delinquency comparable to V.R.Cr.P. 32(d) was circulated for comment on January 2, with comments due by March 3, 2008. See http://www.vermontjudiciary.org/rules1/proposedVRFP1(j).pdf. No comments having been received, the amendment will be recommended to the Court for promulgation in a separate letter.

In its order of June 1, 2007, the Supreme Court promulgated the Committee's recommended emergency amendments of V.R.F.P. 1(f) and 2(f), covering notice to caregivers, effective June 22, 2007, with comments due by September 1, 2007, and a report from the Committee on any comments received due on January 2, 2008. See http://www.vermontjudiciary.org/rules1/vrfp1f-2fJune2007.pdf. On June 21, 2007, the Court Administrator sent out for comment the amendment to V.R.F.P. 3(a) addressing the issue of notice of TPR hearing raised by *In re M.T.* that the Committee had recommended be promulgated as an emergency amendment. Comments were due by September 1, 2007. See http://www.vermontjudiciary.org/rules1/vrfp3-proposedJune2007.pdf. On December 5, 2007, the Committee recommended that the amendments of V.R.F.P. 1(f) and 2(f) be made permanent and that the amendment to V.R.F.P. 3(a) be adopted with a minor revision. These recommended amendments were promulgated by the Court in order of January 11, effective March 11, 2008. See http://www.vermontjudiciary.org/rules1/vrfp1(f)2(f)3(a).pdf. At a meeting on February

7, 2008, the Legislative Committee on Judicial Rules raised concerns about V.R.F.P. 3(a)(3) as thus amended. In a separate letter, the Committee will recommend that editorial amendments addressing the Legislative Committee's concerns be promulgated without the need for public comment.

At its meeting On September 19, 2008, the Committee reviewed the Court Administrator's proposed amendment of V.R.C.P. 3.1(b) to allow waiver of all or part of the entry fee and costs of service on a sliding scale of income and assets. The Committee had no comment on the proposed rule.

The remainder of this report summarizes the Committee's activities under three headings: I. Proposed amendments recommended for circulation to the bar for comment. II. Matters not to be considered further at this time. III. Matters remaining on the Committee's agenda.

I. PROPOSED AMENDMENTS RECOMMENDED FOR CIRCULATION TO THE BAR

The Committee recommends that the following proposed amendments to the Vermont Rules for Family Proceedings be circulated to the bar for comment. A proposed promulgation order is appended to this report.

(1**)** An amendment of V.R.F.P. 4(b)(2)(B) to clarify the procedure for scheduling a hearing or case manager's conference in cases involving minor children and to extend the time periods in which the hearing or conference is to be held, consistent with current practice.

(2**)** An amendment of V.R.F.P. 9(a)(3) to allow depositions to be taken in relief from abuse proceedings only by order of court on a showing of good cause.

(3) An amendment of V.R.F.P. 15 to permit lawyers to enter limited appearances for *pro se* clients in certain cases in Family Court.

(4) A new V.R.F.P. 17 incorporating the provisions of V.R.F.P. 4(g)(1) for testimony by telephone, which would be abrogated, and making them applicable in all Family Court actions.

II. MATTERS NOT TO BE CONSIDERED FURTHER AT THIS TIME

The following items have been dropped from the Committee's agenda and will not be considered further unless consideration is requested by the Court or another committee:

(1**)** An amendment was proposed to V.R.A.P. 3(d) that would require parents appealing TPR orders to sign the notice of appeal. The Committee decided not to recommend the proposed amendment at this time. Lawyers would in many cases have

difficulty finding the parents, there was no provision for a case where parents were found after the time for appeal had run, and there would be problems in determining which parents should be required to sign.

(2) It was proposed to add a provision to the Family Rules similar to V.R.C.P. 68 that would provide for offers of settlement in Family Court actions. The Committee decided not to develop the proposed procedure at this time. Such a procedure might be a good idea in principle but there were significant problems in drafting a rule. Offers of settlement would presumably not be appropriate for parental rights and responsibilities. Even on financial issues there were so many discretionary alternatives for the allocation of funds that it would be difficult in many cases to decide whether a judgment was more or less favorable than the offer. An offer rule based on V.R.C.P. 68 would be less flexible than effective use of settlement and case manager conferences to achieve the same goal.

III. MATTERS REMAINING ON THE COMMITTEE'S AGENDA

The following matters remain on the Committee's agenda for further consideration:

1. Redaction of social security numbers. The Committee will consider issues pertaining to redaction of social security numbers in Qualified Domestic Relations Orders (QDRO) in light of V.R.C.P. 5(g).

2. V.R.F.P. 7. The Committee will consider proposals presented by the Family Court Oversight Committee for a full review of V.R.F.P. 7 concerning representation of minors by guardians *ad litem* in proceedings under V.R.F.P. 4.

3. V.R.F.P. 9(j). The Committee will continue to consider the need for an amendment of V.R.F.P. 9(j) to address issues in proceedings for protection of vulnerable adults pursuant to 33 V.S.A. § 6931 *et seq*.

4. H. 615. The committee will consider potential changes in the Family Rules that may be necessary or appropriate in light of the passage of H. 615 making significant revisions in 15 V.S.A. ch. 33 concerning juvenile proceedings, effective January 1, 2009.

In closing, the Committee and the Reporter wish to thank all the members of the Vermont bench and bar, the members of the Legislative Committee on Judicial Rules, and members of the public who have participated in the rule-making process through their thoughtful suggestions and comments; Hon. Joanne Ertel and Katherine Berkman Spence, Esquire, for their long service as members of the Committee; and Court Administrator Lee Suskin, Deb Laferriere, and other court administrative personnel for their continuing assistance.

Respectfully submitted,

Jody Racht, Chair

For the Committee:

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Hon. Christina C. Reiss
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Professor L. Kinvin Wroth, Reporter

APPENDIX

PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2009

Order Promulgating Amendments to the Vermont Rules for Family Proceedings

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 4(b)(2)(B) of the Vermont Rules for Family Proceedings be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 4. DIVORCE, ANNULMENT AND LEGFAL SEPARATION; ABUSE PREVENTION

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(b) **Complaint; Service; Parties.**

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(2) *Commencement of Action; Service of the Complaint.*

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(B) *Cases involving minor children.* If either party is or may be obligated to pay child support to the other party or to the Office of Child Support, the action shall be commenced and service shall be performed according to this paragraph. The complaint shall be filed and a hearing or case manager's conference shall be scheduled before the complaint is served. After filing, ~~T~~the family court clerk shall complete a notice of hearing or notice of case manager's conference and shall attempt to schedule the hearing or case manager's conference so that it is held from ~~15~~45 to ~~30~~60 days after the summons and complaint were filed, unless because of unavailability of magistrates, judges, or case managers, or because of a subsequent failure to complete service, it is not practical to do so. After a hearing or case manager's conference has been scheduled, the clerk, or upon request, the plaintiff's attorney, shall provide for prompt service upon the defendant. Service may be made by personally serving the defendant with a summons and complaint and the notice of hearing or case manager's conference signed by the clerk. In the alternative, the summons, complaint and notice of hearing or case manager's conference may be served by mailing them to the defendant at one or more of the addresses supplied by the plaintiff or by the defendant or otherwise, by

certified mail, return receipt requested and delivery restricted to the addressee, the expense being paid by the plaintiff. If certified mail is refused by the defendant, the clerk may serve the notice of hearing or case manager's conference, summons and complaint by mailing it to the defendant by ordinary first class mail and by certifying that such service has been made. The clerk also may provide for service by mail pursuant to Vermont Rule of Civil Procedure 4(l).

Reporter's Notes—2009 Amendment

Rule 4(b)(2)(B) is amended to make clear that the clerk is to complete the notice of a hearing or case manager's conference after filing of the complaint and is to attempt to schedule the conference or hearing within 45 to 60, rather than 15 to 30, days after filing. The amended time period, which reflects current scheduling practice, is intended to assure that that the hearing or conference will be held after the 20 day period for filing an answer, so that the defendant will have time to prepare.

2. That Rule 4(g)(1) of the Vermont Rules for Family Proceedings be abrogated.

Reporter's Notes—2009 Amendment

Rule 4(g)(1) is abrogated. By simultaneous amendment, its provisions have been incorporated in new Rule 17 and made applicable to all Family Court proceedings.

3. That Rule 9(a)(3) of the Vermont Rules for Family Proceedings be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 9. ABUSE PREVENTION

(a) Application of the Civil Rules.

(1) *In General*. Except as provided by this rule or by statute, the Rules of Civil Procedure shall apply to actions to prevent abuse.

(2) *Rule Not Applicable*. Rule 79.1 of the Vermont Rules of Civil Procedure (Appearance and Withdrawal of Attorneys) does not apply to actions under this rule.

(3) *Rule<u>s</u> Modified.* <u>Rule 30 of the Vermont Rules of Civil Procedure shall apply to actions under this rule, except that a deposition may be taken only by order for good cause shown.</u> Rule 58 of the Vermont Rules of Civil Procedure shall apply to actions under this rule, except that a judgment need not be set forth on a separate document and is effective only when it is in writing, signed by the judge, and entered as provide in Rule 79(a) <u>of those Rules</u>.

Reporter's Notes—2009 Amendment

Rule 9(a)(3) is amended to provide that in relief from abuse actions, depositions under V.R.C.P. 30, which is otherwise applicable by virtue of Rule 9(a)(1), may be taken only on order for good cause shown. The amendment is consistent with the similar provision of Rule 4(g)(2)(A). While the use of depositions in relief from abuse actions is infrequent because of the short time-frame of most such actions, a defendant under V.R.C.P. 30 may seek a deposition on ten days notice at any time after the action is commenced. The potential for abuse and intimidation is significant. *Cf.* Reporter's Notes to Rule 4.

4. That Rule 15 of the Vermont Rules for Family Proceedings be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 15. APPEARANCE AND WITHDRAWAL OF ATTORNEYS

(a) Appearance: In General. This rule applies to all proceedings under Family Rules 2, 3, 4 and 9.

(1) *Entry; Effect*.

(A) Upon the entry of an appearance in accordance with paragraph (2) or (4) of this subdivision, or with subdivision (g), or the entry of a limited appearance underto subdivision (h), the name of the attorney appearing or the words "pro se," as appropriate, shall be entered on the docket. If the representation of any party changes during the pendency of the action, the name of the new attorney or the words "pro se," as appropriate, shall be substituted on the docket for the previous entry.

(B) Entry of an appearance by an attorney or a party pro se in accordance with this rule shall be deemed a designation by the party of the person upon whom all service is to be made and to whom all notices are to be sent by the court or other parties, except in cases in which by law the notice is required to be given to the party personally. The designation shall remain in effect until an attorney who has appeared withdraws pursuant to subdivision (f) or until an attorney enters an appearance for a party who had previously appeared pro se.

(2) *Form; Service*. Except as provided in a limited appearance under subdivision (h), ~~A~~an attorney's signature to a pleading or motion shall constitute an appearance. Otherwise an attorney who wishes to participate in any action must appear in open court, or file notice in writing with the clerk, which shall be served pursuant to Civil Rule 5. Appearances entered in open court shall be confirmed in writing and served within five days. An appearance, whether by

pleading or motion or by formal written appearance, shall be signed by an attorney in the attorney's individual name and shall state the attorney's office address.

(3) *Multiple Parties*. In entering appearances when there are multiple parties, attorneys shall specify, and the clerk shall enter upon the docket, for whom they appear. An appearance for the plaintiffs or the defendants, as the case may be, shall be deemed to be an appearance for all, unless stated to be for one or more only, and so entered upon the docket by the clerk.

(4) *Parties Appearing Pro Se*. A party may make an initial appearance pro se by signing a pleading or motion, by appearing in open court if no pleading or motion is required, or by filing a signed notice with the clerk, which shall be served pursuant to Civil Rule 5. Initial appearances entered in open court shall be confirmed in writing and served within 5 days. An initial pro se appearance, whether by pleading or formal written appearance, shall state the party's current mailing address and telephone number. A pro se party shall advise the clerk of any change of address or telephone number. When a party appears pro se, the clerk shall provide that party information concerning the responsibilities of a pro se party and a form upon which the party may notify the clerk of any change of address or telephone number.

(5) *Continuances to Secure Counsel*. Except as provided in Rule 9(h), when no attorney has entered an appearance for a party by the date of a scheduled hearing, the hearing shall not be continued to enable that party to secure counsel unless that party has not had reasonable opportunity to secure counsel, or unless an appropriate order for temporary relief is entered.

(b) Same: Divorce, Parentage, and Other Actions under Rule 4. The appearance of an attorney for a party in a divorce, parentage, or other action under Rule 4 shall constitute the attorney's appearance for that party in all related matters in the Family Court, except when otherwise provided in subdivisions (c), and (d), and in a limited appearance under subdivision (h).

(c) Same: Abuse Prevention Actions.

(1) An attorney who has entered an appearance for any party in an abuse prevention action shall not be obliged to appear in a subsequently filed divorce, parentage, or other action under Rule 4 unless the final hearing on the abuse prevention order is consolidated with a hearing for temporary relief in the action under Rule 4. In the event of such a consolidation, the attorney must represent the party for all purposes at that hearing. After entry of the final order in the abuse prevention action, the attorney shall not be obliged to undertake further representation of the party in the action under Rule 4 unless the attorney enters a separate appearance in that action.

(2) Except as may be otherwise agreed or ordered pursuant to a limited appearance under subdivision (h), ~~A~~an attorney who has entered an appearance for any party in an abuse prevention action ~~shall not be obliged to appear in a previously filed divorce, parentage, or other action under Rule 4 unless the relief sought in the abuse prevention action would have the effect of modifying an order previously entered in the action under Rule 4~~ shall be obliged to appear in a previously filed divorce, parentage, or other action under Rule 4 if the relief sought in the abuse prevention action would have the effect of modifying an order previously entered in the action under Rule 4.

(3) Except as may be otherwise agreed or ordered pursuant to a limited appearance under subdivision (h), ~~T~~the appearance of an attorney for any party in a divorce, parentage, or other action under Rule 4 shall be deemed an appearance for that party in an abuse prevention action subsequently filed pro se by that party during the pendency of the original action. When an abuse prevention action is filed pro se, the clerk, subsequent to the issuance of any order, shall notify all counsel of record and parties in any pending divorce, parentage, or other action under Rule 4 between the parties to the abuse prevention action.

(d) Same: Child Support Hearings. Except as may be otherwise agreed or ordered pursuant to a limited appearance under subdivision (h), ~~A~~an attorney who has entered an appearance for any party in a divorce, parentage, or other action under Rule 4 shall participate in all child support hearings and shall comply with all provisions for the exchange and filing of all required financial documents. In the discretion of the judge or magistrate, and for good cause shown, an attorney may be excused from attending a child support hearing, provided that not less than 5 days prior to the scheduled hearing date, the attorney files (1) all financial affidavits and other documentation required by statute and these rules; and (2) a joint waiver of representation, signed by attorney and client and setting forth that the client has affirmatively requested to appear pro se at the child support hearing and understands the nature and scope of the hearing; and further provided that parental rights and responsibilities are the subject of a court order or an existing written stipulation on file with the court.

(e) Attorneys Not Admitted to Practice in Vermont. Any member in good standing of the bar of any other state or the District of Columbia who has filed a pro hac vice licensing statement form with the Court Administrator and who has paid the required fee, in accordance with Administrative Order No. 41, § 13, may, in the discretion of the court on motion by a member of the bar of this state who is actively associated with the attorney in a particular action, be permitted to practice in that action. The motion shall designate which attorney will serve as lead counsel. The court may at any time for good cause revoke such permission. An attorney so permitted to practice in a particular action shall at all times be associated in such action with a member of the bar of this state, upon whom all process, notices and other papers shall be served and who shall sign all papers filed with the court and whose attendance may be required by the court.

(f) Withdrawal.

(1) *In General*. Except as may be otherwise agreed or ordered pursuant to a limited appearance under subdivision (h),

(A) *Actions under Rule 4*. In any divorce, parentage, or other action under Rule 4, the appearance of an attorney shall be deemed to be withdrawn upon the entry of final judgment and the expiration of the time for appeal therefrom. Prior to the expiration of the time for appeal from a final judgment in such an action, an attorney who has entered an appearance may withdraw only with leave of court granted as provided in paragraph (2) or (3) of this subdivision.

(B) *Other Actions*. In any other action, an attorney who has entered an appearance may withdraw only with leave of court granted as provided in paragraph (2) or (3) of this subdivision.

(2) *Leave to Withdraw without Hearing*. The court shall grant leave to withdraw on motion without notice and hearing, (A) after entry of final judgment and the expiration of the time for appeal therefrom in any action where withdrawal is not automatic under subparagraph (1)(A) of this subdivision; or (B), except in any action where a final hearing has been scheduled, when a represented party files a written pro se appearance pursuant to paragraph (4) of subdivision (a) or another attorney enters an appearance for such a party. The court may grant appointed counsel leave to withdraw on motion without notice and hearing only when the ground of withdrawal is a conflict of interest.

(3) *Leave to Withdraw after Hearing*. In any case where withdrawal is not automatic under subparagraph (1)(A) of this subdivision and leave to withdraw may not be granted under paragraph (2), the court shall grant leave to withdraw only on motion, after notice and hearing, for good cause shown, and on such terms as the court may order.

(4) *Motion and Notice*. A motion to withdraw under paragraph (3) of this subdivision shall include the party's last known address. No motion to withdraw under paragraph (3) shall be considered by the court until the party has been given notice of the motion and the date and time of hearing thereon by the clerk. The only exceptions to this requirement shall be (A) when the attorney includes in the motion an affidavit that after diligent search the attorney cannot determine the present address of the party, or (B) when other counsel has entered an appearance for the party.

(g) Same: Notification of Party. When an attorney has been granted leave to withdraw an appearance pursuant to paragraph (3) of subdivision (f) or a limited appearance pursuant to paragraph (3) of subdivision (h), the clerk shall cause notice of the withdrawal to be served upon the party forthwith in the manner provided in Civil Rule 5. The notice shall inform the party that unless an attorney enters an appearance on

behalf of the party within 15 days after service of the notice, the party will be deemed to have entered a pro se appearance. If no appearance by attorney is entered within 15 days, the clerk shall send the party written notification of the party's pro se status and shall serve that notification upon all other parties pursuant to Civil Rule 5. The notification to the party shall be accompanied by the material required by paragraph (4) of subdivision (a) to be sent to a party making an initial appearance pro se.

(h) Limited Appearance.

(1) Except in a proceeding under Rule 2 or 3 of these Rules, an attorney acting pursuant to an agreement with a client for limited representation that complies with the Vermont Rules of Professional Conduct may enter an appearance limited to one or more of the following purposes on behalf of a client who is pro se and who has entered, or will enter, an initial appearance in accordance with paragraph (4) of subdivision (a) or pursuant to subdivision (g):

(A) Filing a complaint or other pleading;

(B) Conducting one or more specific discovery procedures;

(C) Participating in a case management or status conference, an alternate dispute resolution or parent coordination proceeding, or a proceeding before a property or visitation master.

(D) Acting as counsel for a particular hearing or court event.

(E) Filing a notice of appeal from a decision of a Family Court magistrate or judge and taking any subsequent actions concerning the record, briefing, or argument in connection with an appeal.

(F) With leave of court, for a specific issue or a specific portion of a hearing.

(2) An attorney who wishes to enter a limited appearance shall do so by filing with the clerk and serving pursuant to Civil Rule 5 a written notice of limited appearance as soon as practicable prior to commencement of the appearance. The purpose and scope of the appearance shall be specifically described in the notice, which shall represent that the client is pro se and has entered, or will forthwith enter, an initial appearance. The attorney's name and a brief statement of the purpose of the limited appearance shall be entered upon the docket. The notice and all actions taken pursuant to it shall be subject to the obligations of Civil Rule 11.

(3) An attorney who has entered a limited appearance shall be granted leave to withdraw on motion without notice and hearing pursuant to paragraph (2) of subdivision (f) when the purpose for which the appearance was entered has

been accomplished. An attorney who seeks to withdraw before that purpose has been accomplished may do so only on motion and notice, for good cause and on terms, as provided in paragraphs (3) and (4) of subdivision (f).

(4) Every paper required by Civil Rule 5 to be served upon a party's attorney that is to be served after entry of a limited appearance shall be served upon the party and upon the attorney entering that appearance unless the attorney has been granted leave to withdraw pursuant to paragraph (3) of this subdivision.

Reporter's Notes—2009 Amendment

Rule15 is amended to permit a lawyer acting pursuant to a limited representation agreement with a *pro se* client to enter a limited appearance in the Family Court in certain specific situations. The principal change to affect this purpose is the addition of Rule 15(h), which is adapted from V.R.C.P. 79.1(h). That rule was adopted effective April 14, 2006, for a two year period, extended to April 10, 2009, by order of March 13, 2008.

At the direction of the Supreme Court, the Advisory Committee on Rules of Civil Procedure inquired about use of V.R.C.P. 79.1(h) and, with the assistance of the Vermont Bar Association, conducted a survey of practice under it. While the survey reflected relatively little use of limited appearance, a significant number of lawyers who used the procedure found it helpful, and there have been no reports of problems in its use. The rule has proven effective in achieving its original purposes of providing assistance of lawyers to courts and litigants at critical stages in trials or other proceedings and encouraging lawyers to take on *pro bono* representation. See Reporter's Notes to 2006 amendment of V.R.C.P. 79.1. It may be anticipated that greater familiarity with the rule and growing interest at the bar in providing *pro bono* representation will lead to increased use of the unbundling procedure. Accordingly, the Civil Rules Committee has now recommended that V.R.C.P. 79.1(h) as adopted be made permanent. Given the great and increasing numbers of *pro se* litigants in Family Court, the use of the limited appearance procedure there is potentially of even greater importance.

For a general explanation of the rationale and operation of proposed V.R.F.P. 15(h), see Reporter's Notes to 2006 amendment of V.R.C.P. 79.1. Proposed V.R.F.P. 15(h)(1) departs from V.R.C.P. 79.1(h)(1) in certain respects that reflect differences in Family Court practice. The unbundling procedure is not available in proceedings under V.R.F.P. 2 and 3, given the special requirements of CHINS and TPR proceedings. The client appearance language in the last clause of paragraph (1) is tailored to the requirements of V.R.F.P. 15(a)(4) and (g). The provision of V.R.C.P. 79.1(h)(1)(B) for filing or arguing specific motions is not carried forward because essentially duplicated by V.R.F.P.

15(h)(1)(D), discussed below. V.R.F.P. 15(h)(1)(C) makes clear that limited representation is available in specific pre-trial proceedings in Family Court. The words "court event" have been added to V.R.F.P.15(h)(1)(D), both to reflect more accurately the broader nature of Family Court proceedings and to make clear that the representation is limited in terms of particular matters, rather than by time. V.R.F.P. 15(h)(1)(E) makes clear that limited appellate representation includes appeals from both a magistrate and a judge and can include subsequent steps in the appeal. V.R.F.P. 15(h)(1)(F), like V.R.C.P. 79.1(h)(1)(G), is intended to affirm the inherent control of the judge over the course of a hearing. See Reporter's Notes to 2006 amendment of V.R.C.P. 79.1.

V.R.F.P. 15(h)(2)-(4) are identical to V.R.C.P. 79.1(h)(2)-(4), with minor variations to fit the framework of other provisions of Rule 15.

Amendments to V.R.F.P. 15(a)(1)and (2), (b), (c)(2) and (3), and (d)-(g) make clear the effect of a limited appearance under subdivision (h) on the matters covered by those provisions, and paragraph (c)(2) has been rewritten for clarity.

V.R.F.P. 15(e) has been amended to incorporate language from a recent amendment of V.R.C.P. 79.1(e) regarding *pro hac vice* practice by out-of-state lawyers. See Reporter's Notes to 2006 amendment of V.R.C.P. 79.1(e).

5. That Rule 17 of the Vermont Rules for Family Proceedings be added to read as follows:

RULE 17. TESTIMONY AND PARTICIPATION BY TELEPHONE

(a) Required Findings. In any action or proceeding under these Rules, except as otherwise provided by statute,

(1) The court may require any witness or party to testify or participate in a hearing by telephone if the court finds

(A) that the testimony or participation of the witness or party is necessary to the fair determination of the issues, and

(B) that the witness or party is either physically unable to be present or cannot be produced without imposing substantial administrative burdens or costs on the state.

(2) Upon motion of a party granted in advance of hearing, or upon the court's own motion, the court may permit any witness or party to testify or

participate in a hearing by telephone if the court finds that exceptional circumstances require it.

(b) Necessary Conditions. Except as otherwise provided by statute, testimony or participation by telephone shall be required or permitted only if

(1) there is assurance satisfactory to the court of the identity of any witness appearing by telephone and the administration of the oath to that witness;

(2) all parties and the judge or magistrate have adequate opportunity to examine or cross-examine all witnesses, including access to any documentary or other tangible evidence necessary to the examination or cross-examination of any witness;

(3) the telephone connections and equipment employed are adequate to enable all participants to hear the proceedings and to speak at all appropriate times during the hearing; and

(4) the court finds that, in all the circumstances, there are no substantial obstacles to a full and fair presentation of the testimony and other evidence and that no substantial prejudice will result to the witness or any party.

Reporter's Notes

Rule 17 is added to make clear that a Family Court judge or magistrate in any action or proceeding under the Family Rules may require or permit a witness or party to testify or participate by telephone. The rule is based on former V.R.C.P. 4(g)(1), adopted for proceedings under Rule 4 in 1995 and now abrogated because replaced by the new rule. The purpose of the rule is to provide a uniform practice that meets Constitutional standards in all actions or proceedings under the Family Rules. The clause, "except as otherwise provided by statute," has been incorporated in Rules 17(a) and (b) to make clear that statutory provisions giving the court more or less discretion to permit telephonic participation or testimony control. *See, e.g.*, 15B V.S.A. §§316(a), (f).

Rule 17(a)(1) permits the court to require a party or witness to testify or participate by telephone despite the objection of that party or witness only if two factors are present: The court must find that the testimony or participation is necessary and that physical presence is either impossible or substantially burdensome to the state. In addition, the standards of subdivision (b) must be met.

Under Rule 17(a)(2), on motion of a party or its own motion, the court may permit that party or a witness to participate or testify by telephone upon a finding of "exceptional circumstances," despite the

objection of the opposing party. This provision is also subject to the standards of subdivision (b). "Exceptional circumstances" include, but are not limited to, extraordinary economic hardship, such as the need for significant travel; a history of abuse giving rise to fear on the victim's part; physical incapacity of the witness; and a history of frivolous motions.

Rule 17(b) makes clear that certain conditions must be met before the court may require or permit telephonic participation or testimony. The court must be satisfied as to the identity of the witness and the proper administration of the oath, whether by the court over the telephone or by an officer present with the witness; that adequate opportunity for examination and cross-examination is provided whether a party participates or a witness testifies by telephone; and that the technology is adequate to permit effective communication. In addition, the court must find that there will be a full and fair presentation of the evidence and that no party or witness will be substantially prejudiced by the procedure.

Together, these required findings and conditions are intended to assure that an order for telephone participation satisfies the standards of *Mathews v. Eldridge*, 424 U.S. 319, 334-35 [96 S.Ct. 893, 902-903] (1976), in which the Supreme Court held that due process in noncriminal proceedings requires the importance of the private interest affected by the challenged procedure, the risk of an erroneous deprivation under the challenged procedure, and the effectiveness of any additional procedural safeguards that might be employed to be weighed against the government's functional, fiscal, and administrative interests.

In a number of cases, courts in other states have upheld required telephonic participation under the *Mathews* standard. *See, e.g.*, *In re Juvenile Appeal*, 187 Conn. 431, 446 A.2d 808 (Conn.1982) (putative father incarcerated in California could be required to testify and be cross-examined by speaker phone in Connecticut termination of parental rights hearing even though demeanor deemed to be of great importance due to hostility of opposing witness); *State ex rel. Juvenile Dep't of Lane County v. Stevens*, 100 Or.App. 481, 786 P.2d 1296 (1990), *reh. denied*, 310 Or. 71, 792 P.2d 104 (1990) (father required to testify by telephone in termination of parental rights proceeding); *Casey v. O'Bannon*, 536 F.Supp. 350 (E.D.Pa.1982) (due process not violated by requirement of telephonic hearing for state public assistance applicants unable to travel to regional hearing sites); *Babcock v. Employment Division*, 72 Or.App. 486, 696 P.2d 19 (1985) (unemployment compensation claimant was not denied due process by telephonic hearing where documentary evidence could be presented by mail in advance and opportunity for cross-examination was afforded); *In re Plunkett*, 57 Wash.App. 230, 788 P.2d 1090 (1990) (prisoner not denied due process in disciplinary hearing where he sat with hearing officer and heard and could have cross-

examined witnesses presented by telephone). But see *Dey v. Edward G. Smith & Assoc., Inc.*, 110 Idaho 946, 719 P.2d 1206 (1986) (due process violated where telephonic unemployment compensation hearing was interrupted by either deliberate or inadvertent disconnections). The cases are collected in Annot., 85 A.L.R.4th 476 (1991) (state courts); 88 *id.* 1094 (1991) (public welfare); 90 *id.* 532 (1991) (unemployment compensation); 9 A.L.R.5th 451 (1993) (prison discipline).

Telephone participation has been permitted in a number of cases over due process objections. See, e.g., *Elson v. State*, 633 P.2d 292 (Alaska App.1981), *aff'd on other grounds*, 659 P.2d 1195 (Alaska 1983) (sentence appeal); *People v. Williams*, 123 Mich.App. 752, 333 N.W.2d 577 (1983) (pretrial competency hearing); *In re W.J.C.*, 124 Wis.2d 238, 369 N.W.2d 162 (App.1985) (civil mental health commitment hearing). But see *Archem, Inc. v. Simo*, 549 N.E.2d 1054 (Ind.Ct.App.1990) (telephone cross-examination of witness violated due process where testimony in chief had been presented through video deposition).

Rule 17 provides a framework within which the court may determine the appropriateness of requiring or permitting telephone participation on a case-by-case basis, consistent with *Mathews* and these decisions. The rule assumes that the party opposed to telephone participation has significant substantive interests and a strong procedural interest in a fair and full presentation of the evidence. Accordingly, the rule comes into play only when the state's interests are strong as well. Under Rule 17(a)(1), a party may be required to accept the potentially less effective means of serving those interests only when the state cannot otherwise meet its obligation to resolve the dispute, or cannot do so without bearing substantial burdens. Under Rule 17(a)(2), a party may be permitted to impose those less effective means upon an opponent only when the state's interests are affected by a slightly broader range of "exceptional circumstances."

Rule 17(b) requires the court to balance the remaining *Mathews* factors--risk of deprivation and effectiveness of additional safeguards--in the circumstances of each case. Clauses (1)-(3) represent safeguards that will assure a full and fair hearing for each party without unduly burdening the state. Clause (4) in effect requires a finding that there is not a substantial risk of deprivation in the circumstances.

6. That these rules, as amended, are prescribed and promulgated effective _____, 2009. The Reporter's Notes are advisory.

7. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this _____ day of _____, 2009.

_____
Paul L. Reiber, Chief Justice

_____
John A. Dooley, Associate Justice

_____
Denise R. Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Brian L. Burgess, Associate Justice