

**APPROVED**

**VERMONT SUPREME COURT**

**ADVISORY COMMITTEE ON RULES FOR FAMILY PROCEEDINGS**

**Minutes of Meeting**

**February 2, 2018**

The meeting was called to order at 1:35 p.m. in the Hoff Lounge, Oakes Hall, Vermont Law School, by Hon. Michael Kainen, chair. Present were Committee members Penny Benelli, Hon. Robert Gerety, Hon. Gregory Glennon, Hon. Christine Hoyt, Alicia Humbert (by telephone), Harriet King, Marshall Pahl, Linda Reis (by telephone), Karen Reynolds, Christine Speidel, and Caryn Waxman. Also present were Hon. Beth Robinson, Supreme Court Liaison; Hon. John A. Dooley, chair of the Special Committee on Video Appearance and Cameras in the Court (by telephone); and Professor L. Kinvin Wroth, Reporter.

**1. Minutes.** The draft minutes of the meeting of December 15, 2017, were unanimously approved as previously distributed.

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

A. Application to Family Division of new V.R.C.P. 79.2, recommended to the Court on January 2, 2018, by Special Committee on Video and Cameras in the Court for consideration on March 8, 2018. The Committee considered draft amendments to V.R.F.P. 4.0 and 9 prepared by the subcommittee (Ms. Reis, Judge Gerety, Judge Corsones, and Ms. Speidel). The draft was intended to implement the resolution, adopted unanimously at the Committee's December 15 meeting, "to advise the Special Committee for Video Appearance and Cameras in the Court and the Supreme Court that the Advisory Committee is concerned with the application of proposed V.R.C.P. 79.2 in the Family Division and is considering a rule providing that no one may make or transmit a visual or audio recording of any proceeding or activities in a proceeding in the Family Division without the permission of the judge granted for good cause." The Committee then welcomed Hon. John A. Dooley, chair of the Special Committee, who had asked to be present to provide background on the process and rationale of recommended new V.R.C.P. 79.2.

Justice Dooley noted that existing V.R.C.P. 79.2, adopted in 1988 and applicable in the Family Division by virtue of V.R.F.P. 4.0(a)(2)(A), was focused on media use of conventional video and still cameras and was significantly out of date in light of continuing technological advances. The Special Committee consisted of two members from each procedural rules committee, two representatives from the video and print media, the Chief Superior Judge, and a representative of the Court Administrator. After reviewing rules from nearby states, the Committee developed a proposed new rule that was sent out for comment in July and presented at a public hearing in August. At a meeting in October, the Committee reviewed the public hearing transcript and eleven comments received, and recommended changes in the proposed

draft. In December, the Committee by e-mail approved the revised draft that was recommended to the Supreme Court on January 2. The Court will review the recommended at a meeting on March 8, 2018.

Justice Dooley stated that the principal concerns in the revision process were that the potentially large number of non-media individuals using currently available personal devices with visual and sound recording capability could be located anywhere in the court room and could present a risk of intimidating parties and witnesses. The following specific provisions of the recommended rule were intended to address these concerns:

- Non-media individuals could use devices only with specific restrictions.
- Use by participants in a proceeding was less restricted than use by non-participants.
- “Device” was broadly defined because of continuing rapid technological change.
- The rule and its related administrative order provided for local plans to take account of differing conditions at each court location.
- The separate standards for media use required a definition of “media” and registration requirements for three categories of media.
- A provision in the proposed draft for temporary confiscation of an inappropriately used device was eliminated.

Professor Wroth reported that the Civil Rules Committee had recommended to the Court that recommended V.R.C.P. 79.2(f) should be revised to provide that good cause for waiver of the limitations of the rule “may include the fact that there is a particularized public interest in the proceeding.”

In response to questions, Justice Dooley stated that new Rule 79.2 was intended to cover all divisions of the Superior Court as does the present rule and that media representatives on the Committee had reported some Family Division coverage, but that it was less frequent than in the Criminal and Civil divisions. He noted that the provisions of the revised rule essentially continued media access; the main focus was on definition and regulation of non-media access. He added that if a proceeding were confidential, media would not be present to record. Committee members noted that existing Rule 79.2 was inapplicable to proceedings under V.R.F.P. 1-3.

Discussion then turned to the draft amendments to V.R.F.P. 4.0 and 9 proposed by the subcommittee.

Justice Dooley noted that the Special Committee’s process had been more public than the usual rule amendment process, that the Family Rules Committee had not commented during the comment period, and that a Family Rule differing from recommended V.R.C.P. 79.2 would presumably require a similar public process, which would disrupt uniform adoption of the recommended rule. He added that, on the substance of the rule, the many states that had adopted such rules differed on whether family proceedings were public.

Judge Gerety, speaking for the subcommittee, said that its proposed amendments reflected the concern that the use in Family Court of the personal visual recording and transmitting devices now generally available required a different approach than that provided in the recommended revision of V.R.C.P. 79.2. In discussion of the proposed draft amendments, issues raised included that counsel or the parties might need to record when direct and cross-examination of a witness must be scheduled several weeks apart; that self-represented parties and others would not be aware of the rules; that recording by an individual might not be observed by the judge or a court officer; that sanctions and the process for imposing them were unclear, but that it would be preferable to impose sanctions by contempt rather than to include specific penalties that would create opposition to the rule; that in Family Court parties need “to feel safe,” given the personal and emotional nature of the issues; and that in Family Court private interests, rather than the public interest, are being served.

In further discussion, it was noted that many records involved in family proceedings are not publicly accessible and, under 12 V.S.A. § 5, public access to family case records via the internet is prohibited. Allowing the recording of testimony in which the content of otherwise inaccessible records is presented would undermine these restrictions on access. It was noted that Rule 79.2 regulated specific means of recording and conveying information. Whether information could be recorded and conveyed by other means—*e.g.* a journalist taking handwritten notes or the purchase of a transcript—may or may not be subject to other forms of regulation. It was then suggested that the Court should be asked to make new V.R.C.P. 79.2 inapplicable in the Family Division and to apply the subcommittee proposal as an interim rule. Justice Dooley suggested that since there would be no comment period or public hearing on an interim rule, it would be preferable to have existing Rule 79.2 serve as the interim rule.

On motion duly made and seconded, there being no further discussion, it was voted unanimously to ask the chair to convey to the Supreme Court the recommendation of the Committee that, if the Court promulgates revised V.R.C.P. 79.2 as recommended by the Special Committee on Video and Cameras in the Court on January 2, 2018, the new rule should expressly be made inapplicable in cases in the Family Division, and that existing V.R.C.P. 79.2 should continue to apply in the Family Division as an interim measure pending a further proposal by the Committee. Professor Wroth agreed to draft a letter for Chairman Kainen to convey this recommendation.

B. Proposed draft of V.R.C.P. 43(a), et al. (including V.R.F.P. 17), video and audio appearance, and proposed AO 47, Technical Standards, prepared by Special Committee on Video and Cameras in the Court, sent out for comment on January 24, with comments due on March 23, 2018. Members of the Committee expressed their appreciation for the changes made in this draft to reflect previous Committee concerns. No additional comments were proposed.

**3. Consideration of *In re K.F.*, 2013 VT 39, note 2 (6/7/13) (request to develop procedure for addressing ineffective assistance of counsel claims by parents in TPR proceedings).** Mr. Pahl reported for the subcommittee (Ms. Racht, Judge Kainen, Mr. Pahl, Ms. Reynolds) that it was considering a proposed amendment making clear that collateral challenges could be made under Rule 60(b), and that it would make a recommendation at the next meeting.

**4. V.R.F.P. 6. (Amendments made necessary by Act 170 of 2013 (Adj. Sess.) concerning minor guardianships).** Professor Wroth reported that the Probate Rules Committee was continuing its consideration of four proposed rules that would incorporate in probate practice applicable provisions of present V.R.F.P. 6, 6.1, 7, and 7.1.

**5. Joint subcommittee to consider possible amendments to Vermont Rules of Public Access concerning Family Division records.** Ms. Benelli reported for the Family Rules members of the joint subcommittee with the Public Access Rules Committee (Ms. Benelli, Ms. Racht, Ms. Reis, with the assistance of Mr. Woodward) that they were proceeding on the assumption that the intranet available on kiosks in courthouse should provide the same access to records that was available at the window in accordance with Section 6 of the Vermont Rules for Public Access to Court Records (V.R.P.A.C.R.), and subject to the exceptions in Section 6(b). The subcommittee's broader charge is to review those exceptions applicable to family proceedings. In order to assure that the Advisory Committee on Rules for Public Access to Court Records is represented on the subcommittee, Professor Wroth agreed to contact Hon. Walter Morris, Reporter to that Committee. Professor Wroth will make sure that the subcommittee has copies of prior correspondence and materials concerning the issues.

**6. Case manager's conference—issues raised by Judge Carroll.** It was agreed to table this item in the absence of Ms. Racht. Professor Wroth agreed to send Justice Carroll's original e-mail to the Committee.

**7. Adoption of Prisoner's Mailbox Rule for Family Rules.** Professor Wroth reported that the Civil Rules Committee had approved proposed amendments to V.R.C.P. 3 and 5 and V.R.A.P. 25 addressing prisoner's mailbox issues for pleadings and other papers that he would send to the Court on February 5 for circulation to the bar for comment. The proposed amendments will be on the Family Rules Committee's agenda for the next meeting.

**8. Act 72 of 2017. An Act Relating to Juvenile Jurisdiction.** (Section 7 directs the Supreme Court to consider adoption of appropriate rules by July 1, 2018.) Mr. Pahl reported for the subcommittee (Mr. Pahl, chair; Ms. Racht; Ms. Reynolds) that it was considering whether a rule change was necessary and would present a recommendation at the next meeting.

**9. V.R.F.P. 18. Mediation. Concerns with requirement of V.R.F.P. 18(d)(1) regarding Family Division Program's list of mediators.** Ms. Benelli stated that the issues were fully addressed in Ms. Speidel's February 2 report e-mailed to the Committee. She and Ms. Speidel will prepare draft amendments for the next meeting, taking into account Jeremy Zeligler's memorandum transmitted to the Committee in Patricia Gabel's February 2 e-mail.

**10. Status of Form 813-A.** The Committee considered the problem raised by Scott Woodward that Form 813-A no longer automatically calculates monthly budget items and adds them into the form totals. Mr. Woodward agreed to pursue the issue with appropriate personnel in the Trial Court Administrator's Office.

## **11. Other Business.**

A. Ms. Benelli raised a concern about the current status of the Child Support Guidelines. Ms. Humbert stated that Robin Arnell, Director of the Office of Child Support, would pursue the question with Ms. Benelli.

B. The Committee gave a rising vote of thanks to Ms. Speidel for her years of important service as a member of the Committee.

**12. Dates of next meetings.** The next meeting will be held at 1:30 p.m. on Friday May 4, 2018, at Vermont Law School. Subsequent meetings are scheduled for September 7 and November 2, 2018.

There being no further business, the meeting was adjourned at 4:15 p.m.

Respectfully submitted,

L. Kinvin Wroth  
Reporter