

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
February 28, 2014

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

1. Minutes. The draft minutes of the meeting of December 6, 2013, were unanimously approved as previously circulated.

2. Status of proposed and recommended amendments. Professor Wroth reported that the Committee's recommended amendments to V.R.C.P. 80.1(b)(3) and 80.9 and V.R.E.C.P. 5(h)(1) were promulgated on December 2, 2013, effective February 3, 2014. The Committee's proposed amendments to V.R.C.P. 4(b) and 79(b) and (c) were sent out for comment on December 4, 2013, with comments due on February 3, 2014. These promulgated and proposed amendments were reviewed by the Legislative Committee on Judicial Rules on December 13, 2013, without comment.

The Committee's further recommended emergency amendments to V.R.C.P. 80.1(b)(3), were promulgated on December 17, 2013, effective January 1, 2014, with comments due by February 21, 2014, and a direction to the Committee to recommend to the Court by March 1, 2014, whether the amendments should be made permanent. The Committee reviewed the comments of Susan Steckel, Chad Hickey, Jack Kennelly, and Elizabeth Glynn, asserting that the unqualified term "residence" in the amended rule had the effect of expanding the right to request mediation beyond what was intended in 12 V.S.A. §§ 4361 *et seq.*, as amended by Act No. 8 of 2013, effective December 1, 2013. The comments noted that the amended statute requires notice of the opportunity for mediation only for foreclosures of one-to-four family dwellings occupied by the owner as a principal residence and exempts from the requirement such dwellings that secure commercial loans or loans that are not subject to government loss-mitigation requirements if the mortgagee discussed or reasonably attempted to discuss loss mitigation options.

In discussion, Committee members noted that that the amended rule requires two copies of the Court Administrator's form, Important Notice to Homeowner, https://www.vermontjudiciary.org/eforms/Foreclosure_NoticeToHomeowner.pdf, adopted to implement the amended statute, to be attached to every summons and complaint in an action to foreclose a residential mortgage. However, the form advises the homeowner only that he or she "may" have the right to mediation in a foreclosure of an owner-occupied one-to-four family dwelling and contains other advice important to any residential foreclosure defendant, including the need to appear and the desirability of consulting a lawyer, as well as information on how to obtain legal assistance and advice on financial issues. Under the statute, whether mediation is to be employed is to be determined by the court. On motion duly made and seconded, there being

no further discussion, it was voted unanimously to recommend to the Court that the emergency amendment be made permanent as previously promulgated.

The Committee reviewed the proposed amendment to V.R.A.P. 3(b)(2) eliminating the automatic entry of an appeal in cases where the defendant has been sentenced to life imprisonment on a plea of guilty or nolo contendere, as circulated for comment on December 19, 2013, at the request of the Criminal Rules Advisory Committee with comments due on February 21, 2014, to the chair of that committee. Justice Skoglund agreed to note to the Supreme Court that the Civil Rules Committee had jurisdiction of amendments to the Vermont Rules of Appellate Procedure and that the Committee found the language of the proposed amendment confusing, especially in light of the recent restyling of those rules as adopted by the Court.

The Committee reviewed the emergency amendment to V.R.A.P. 32(b) promulgated and effective on December 17, 2013, that restored language concerning the electronic filing of the printed case inadvertently omitted when the rule was restyled. Justice Skoglund agreed to report to the Court the consensus of the Committee that the emergency amendment was appropriate and should be made permanent.

3. #s10-1/08-6/11-15/13-8—V.R.S.C.P. forms and proposed rule revisions. Mr. Avildsen reported for the subcommittee (Mr. Avildsen, chair; Mr. Dumont; Ms. Blackwood; and Ms. Hobart) that the subcommittee was continuing its work on forms and would report at the next meeting. There was no report on agenda # 11-15. See item 6 below.

The Committee then considered Professor Wroth's revised draft of an amendment adding V.R.C.P. 9(h) and V.R.C.P. 55(b)(7) to incorporate the 2013 small claims credit card debt collection amendments of V.R.S.C.P. 3. In discussion, it was agreed that, for clarity, it was preferable to restate the Small Claims and provisions in their entirety and without variations in language, rather than to incorporate them by reference, and that the credit card debt provisions were different in kind from the other special pleading matters contained in V.R.C.P. 9 and so should be incorporated in a separate V.R.C.P. 9.1. It was also agreed that requiring the complaint to contain specific information regarding standing and the statute of limitations as well as the details of debt and its assignment was necessary and appropriate because these are the critical issues when there is a dispute. On motion duly made and seconded, there being no further discussion, it was voted unanimously to propose that the amendments adding V.R.C.P. 9.1 and 55(b)(7) be sent out for comment with revisions adopting the exact language of the Small Claims Rules provisions, subject to review of a draft to be prepared by Professor Wroth for the next meeting.

Professor Wroth noted that, at a meeting of the Legislative Committee on Judicial Rules on August 15, 2013, considering the 2013 Small Claims Rules amendments, a member expressed concern about possible confusion in the elimination of the 20-day response time in V.R.S.C.P. 3(b) and (d) in favor of a uniform 30 days. In discussion, Committee members agreed that the Small Claims complaint would make the time for answer clear to the defendant and that it would be more confusing to change the time for answer in the Superior Court just for a credit card debt action. Professor Wroth also noted that LCJR expressed a concern with the change to a fully

discretionary contempt finding in V.R.S.C.P. 8(c) and asked the Civil Rules Committee to monitor the consequences and implications of this change.

4. #10-5—Proposal to conform V.R.C.P. 6 to Federal Rules amendments. The Committee considered Professor Wroth’s February 25 alternative draft of the day-as-a-day amendments to V.R.C.P. 6(a) that would incorporate the necessary changes in the framework of the existing rule. After discussion, on motion duly made and seconded, it was voted unanimously to adopt the draft based on current F.R.C.P. 6(a), eliminating the definition of “legal holiday” in paragraph (6) and inserting “state or federal in subparagraph (1)(C). Professor Wroth agreed to prepare a final draft for review and adoption at the next meeting. He will also prepare a rule-by-rule draft of changes in time periods made necessary by adoption of the day-as-a-day rule for the next meeting.

5. #s10-8/13-1—Adoption of amendments to ABA Model Code of Judicial Conduct. Chairman Griffin reported that the Court had accepted the Committee’s proposal to establish one subcommittee to consider amendment of the provisions of V.C.J.C. 5A and 5B covering elected probate judges and a second larger subcommittee to work with it on the adaptation of the revised ABA Model Code for Vermont. The small subcommittee will consist of three superior court judges, one assistant judge, and one probate judge. The larger subcommittee will consist of three members of the Committee, including a superior court judge; another superior court judge; a person chosen by the Probate Judges Association; a person chosen by the Assistant Judges Association; a member of the Judicial Conduct Board; and three lawyers familiar with judicial conduct issues. Chairman Griffin will proceed to appoint the subcommittees.

6. #11-15—Trustee process against banks on certain federal agency direct deposits. See item 3 above.

7. #12-1—Event-witness amendment to V.R.C.P. 26(b)(4). Ms. McAndrew and Professor Wroth will report at the next meeting.

8. #12.6—V.R.P.C. 3.8(g), (h)—Conformity to Model Rules Amendments. The subcommittee (Judge Pearson, Ms. Blackwood, chair, and Mr. Dumont and representatives of the Attorney General, the Defender General, the state’s attorneys, and the private defense bar) will report at the next meeting.

9. #12-7—V.R.C.P. 5—certificate of service and form. The Committee considered Professor Wroth’s May 1, 2013, drafts and February 24, 2014, memorandum. He agreed to prepare new drafts for the next meeting based on comments by the Committee.

10. #12-8—V.R.C.P. 3—Notice of appearance form. The Committee considered Professor Wroth’s May 1, 2013, draft and February 24, 2014, memorandum. He agreed to prepare new drafts for the next meeting based on comments by the Committee.

11. #13-2—Proposed amendments to V.R.C.P. 43(e) concerning appointment and compensation of interpreters. In view of the hour, it was agreed to defer this item until the next meeting.

12. #13-4—Recent amendments of F.R.C.P. 37 and 45 and various F.R.A.P. Provisions. In view of the hour, it was agreed to defer this item until the next meeting.

13. # 13-9—V.R.A. P. 1(b), 2, 26(b)—Consider in light of *In re D.D.*, 2013 VT 79, and *In re A.D.T.* 174 Vt. 369 (2002). In view of the hour, it was agreed to defer this item until the next meeting.

14. #13-11—V.R.P.C.—Consideration of ABA Ethics 20/20 revisions to ABA Model Rules. In view of the hour, it was agreed to defer this item until the next meeting.

15. #14-1. Forms. Chairman Griffin reported that he had discussed issues concerning the status of the Appendix of Forms with the Court Administrator and that she had the matter under advisement. Professor Wroth noted the pending proposal to abrogate F.R.C.P. 84 and the Federal Rules Appendix of Forms.

16. #14-2. Proposed Expedited Actions Rule prepared by VBA Committee. In view of the hour, it was agreed to defer this item until the next meeting.

17. #14-3. V.R.A.P. 24(a)(1)(B)(i). Amendment to conform to V.R.P.C. 3.1(b)(1). In view of the hour, it was agreed to defer this item until the next meeting.

18. Date of next meeting. It was agreed that Professor Wroth would circulate potential dates for a meeting to be held in late April or early May and would pose the question whether the meeting should be scheduled for a full day to dispose of the pending items.

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

Respectfully submitted,

L. Kinvin Wroth, Reporter