

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
June 24, 2016**

The meeting was called to order at 9:15 a.m. in the Hoff Lounge, Vermont Law School, by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Eileen Blackwood, Bonnie Badgewick (effective July 1, 2016), James Dumont, Jean Giddings, William E. Griffin, Kathleen Hobart, Karen McAndrew, Hon. Dennis Pearson, and Hon. Helen Toor. Also present were Honorable John Dooley; Honorable Harold E. Eaton, Jr., Supreme Court liaison; and Professor L. Kinvin Wroth, Reporter.

The Committee voted unanimously to thank William E. Griffin, Esq., for his 30 years of service as member and chair and welcomed Bonnie J. Badgewick, Esq., as his successor, effective July 1, 2016.

1. **Minutes.** The minutes of the meetings of February 26, 2016, and April 29, 2016 (corrected draft), were approved as previously circulated,

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

A. #10-8/13-1—Adoption of 2007 amendments to ABA Model Code of Judicial Conduct. Chairman Keyes reported that the Supreme Court had requested consideration of a draft proposed by Judicial Conduct Board that would adapt the 2007 ABA Model Rules of Judicial Conduct for Vermont. The Committee agreed that he should work with Andrew Maass of the Judicial Conduct Board to prepare a joint draft of the Code, for which Professor Wroth would prepare Reporter's Notes.

B. #15-8. Special ad hoc Committee on Video/Audio Appearances and Cameras in the Court. Justice Dooley, chair of the Special ad hoc Committee, described and explained that committee's May 18, 2016, draft of proposed new V.R.C.P. 43.1 and related rules for family and probate proceedings, covering video and telephone participation and testimony. He explained that technical standards would be adopted by separate administrative order and that the Special Committee would turn next to rules pertaining to cameras and other electronic devices in the courtroom. In discussion, Committee members raised questions concerning the relationship of time periods in the proposed rule to those in the pending day is a day amendments, and the authority to require participation by out-of-state parties and witnesses and the means of assuring their identity and swearing witnesses. Justice Dooley indicated that the Special Committee would review these and issues raised by the other rules committees and would have a final draft for review by all the rules committees in September. He expected the equipment to be available in Chittenden and Franklin counties within six months and in

the smaller counties thereafter. In each county there would be one or more dedicated courtrooms with fixed equipment, which had proven to be more effective than moveable equipment. He further noted that only the audio recording of a video proceeding would be part of the record because of equipment and storage space issues and that the Committee should address appropriate provisions of the Appellate Rules when requested by the Court.

Justice Dooley left the meeting at this point.

C. 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, 2015, effective April 15, 2016, with Committee to report by April 17, 2017. The Committee considered the Civil Division Team survey of issues under the amended rules and the question of how the Committee would conduct the review of the amended rules required by April 2017. After discussion, Judge Toor and Ms. Hobart agreed to request the Civil Division Team to conduct a follow-up survey directed to all users that would be completed by September. Ms. Hobart agreed to draft a letter to Tari Scott, with a copy go the Court Administrator, outlining what the survey should cover.

D. Recommended amendment to V.R.C.P. 5 concerning e-mail service, sent to the Court on February 24, 2016. Chairman Keyes reported that the Supreme Court had said that there could be a separate Civil Rule for the time being, but that the Committee should consider adopting provisions that may be proposed by the Criminal Rules Committee. He agreed to discuss the matter with Judge Zonay, newly appointed chair of that committee.

E. Recommended amendment of V.R.C.P. 51(b), Jury Instructions. Sent to the Court on February 24, 2016. The Committee considered Judge Toor's revised draft. Chairman Keyes reported that Judge Morris, Criminal Rules Committee reporter, had indicated that his committee, in reviewing V.R.Cr.P. 30, would consider Justice Dooley's proposed language, which Judge Toor had revised. On motion duly made and seconded, after discussion, it was voted unanimously to adopt Judge Toor's language. Chairman Keyes agreed to send Judge Toor former Criminal Rules chair McGee's draft proposal for V.R.Cr.P. 30. Professor Wroth agreed to send Judge Toor a draft order containing her revised language.

F. Proposed amendment to V.R.C.P. 43(f) concerning appointment of interpreters, recommended for promulgation at October 30 meeting, sent to Court on November 9, 2015. After discussion, Professor Wroth agreed to draft a letter for Chairman Keyes to send to the Criminal Rules Committee proposing that "other disabilities that result in the need for interpreter's services" should be added to both the Civil and Criminal rules and that the Reporter's Notes should make clear the broader scope of the ADA.

G. Recommended amendments to conform V.R.C.P. 6 and other time provisions of the Civil and Appellate Rules to federal rules amendments (“day is a day” rules), sent to the Supreme Court on January 1, 2016. Chairman Keyes reported that H.317, the proposed legislative day is a day bill that was not enacted, would have inserted “business days” in certain statutory time periods, rather than adopt the formula of the proposed amendments. The bill may be resubmitted as a Senate bill in January. He agreed to urge the Family and Probate rules committees to approve day is a day amendments in September, so that they could be ready for recommendation to the Supreme Court in December. He also agreed to work with Mr. Dumont and Professor Wroth to make a presentation at the October VBA meeting.

H. Proposed amendments to V.R.E.P. 4, 5, to conform to the “day is a day” Provisions. Professor Wroth reported that these amendments had been sent out for comment on May 15, with comments due on July 15, 2016. No comments had yet been received. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend these amendments for promulgation if no comments were received before the due date.

I. Proposed amendments to V.R.C.P. 4, 16.3, 80.10, sent out for comment on March 13, with comments due on May 13, 2016.

No comments had been received on the proposed amendment to V.R.C.P. 4(d)(2) providing a uniform method of service upon the Attorney General in actions under the state and federal False Claims acts. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend this amendment for promulgation as circulated.

The Committee considered Judge Toor’s June 24 draft of the proposed amendment to V.R.C.P. 16.3(b)(3) incorporating changes suggested in Michael Marks’ March 15 e-mail. On motion duly made and seconded, there being no discussion, it was voted unanimously to recommend that V.R.C.P. 16.3 be abrogated and replaced to read as circulated with the following revisions to Rule 16.3(b)(3):

(3) *Participation*. All parties and their counsel must attend a scheduled mediation unless the parties stipulate otherwise or the court or the mediator, for good cause, excuses ~~an individual~~ a person from participation or authorizes ~~an individual~~ a person to participate by telephone. A corporation, partnership, or other entity that is a party, and a liability insurer that is defending the action or that sues in the name of its insured, must each be represented by a person (other than outside counsel) who has settlement authority and authority to enter stipulations. With the agreement of all parties and the mediator, any nonparty having an interest that may be materially affected by the outcome of the proceeding, or whose presence is essential to its resolution, may be invited to attend the session in person or by counsel.

No comments had been received on the proposed amendment to V.R.C.P. 80.10(e) providing a five business-day limit on requests for hearing after denial of a temporary order against stalking or sexual assault. Professor Wroth noted that, through a misunderstanding, he had included language in V.R.C.P. 80.10(e) as sent out for comment that would have excluded jurisdictional issues from the rule. After discussion, it was agreed that the language should be eliminated from the amendment as unnecessary. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend this amendment for promulgation as circulated, with that language eliminated.

J. #s12-1/14-10—Event-witness amendment to V.R.C.P. 26(b)(4) and mandatory disclosure. Professor Wroth and Ms. McAndrew agreed to present a report at the next meeting.

K. V.R.C.P. 80.11, providing a procedure for expedited actions, for a two-year period, promulgated June 15, effective August 15, 2016, with August 17, 2018, Committee report date and August 16, 2019, sunset date. The Committee considered a draft by Chairman Keyes and Mr. Weimer of proposed non-substantive technical amendments intended to incorporate references to ADR in V.R.C.P. 80.11 for consistency with changes made by the abrogation and replacement of V.R.C.P. 16.3. (Item 2.I above). On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that the V.R.C.P. 80.11 amendments be promulgated without notice and comment, simultaneously with the V.R.C.P. 16.3 order, because they are technical, and so that they may take effect on the effective date of the abrogation and replacement of V.R.C.P. 16.3 in order to avoid confusion.

L. Amendment of ABA Model Rule 5.5 regarding registration of foreign in-house counsel. The Committee considered the request of the Chief Justice to consider a recommendation from the ABA that this recent Model Rule amendment be incorporated in the Vermont Rules of Professional Conduct. It was agreed to ask Professor Wroth to incorporate this request in his consideration of the ABA 20/20 amendments under item 10, #13-11, of the agenda for the present meeting.

3. #14-1. Status of Appendix of Forms. Ms. Blackwood and Professor Wroth agreed to report at the next meeting. The item will be placed among the priority items for that meeting.

4. #16-1. Amendments to the Rules of Appellate Procedure to implement prison mailbox rule, as requested in *In re Joseph Bruyette, 2016 VT 3*. The Committee reviewed Chairman Keyes' draft memorandum of June 2, 2016, containing a proposed new V.R.A.P. 4(f). In discussion, it was agreed to add language to the effect that "Nothing in this rule precludes other evidence of timely filing such as a postmark or an official date stamp showing the filing date of the document," similar to that of the December 2016 Federal Rule amendment.

Professor Wroth agreed to prepare a draft promulgation order containing the suggested language for the next meeting.

5. #10-5. Federal Rules Subcommittee. The subcommittee will present a revised draft of the proposed amendments based on the December 2015 Federal Rules Amendments and a report on all December 2016 federal amendments at the next meeting.

The remaining agenda items were deferred for consideration at the next meeting. It was agreed that item 7, #15-7, reconsideration of certificate of service provisions of new V.R.C.P. 5(h), will be placed among the priority items for that meeting.

Date of next meeting. The next meeting of the Committee will be at 9:00 a.m., Friday, September 23, 2016, at Vermont Law School.

There being no further business, the meeting was adjourned at 12:05 p.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter