

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
December 14, 2012

The meeting was called to order at 9:15 a.m. in Room 101, Debevoise Hall, Vermont Law School, South Royalton, by William E. Griffin, Chair. Present were Committee members Eric Avildsen, James A. Dumont, Jean Giddings (by telephone), Kathleen Hobart, Allan R. Keyes, Karen McAndrew, and Greg Weimer. Also present were Emily Wetherell, Supreme Court staff attorney, and Professor L. Kinvin Wroth, Reporter.

1. Minutes.

The draft minutes of the meeting of October 5, 2012, were unanimously approved as previously distributed.

2. Status of Proposed and Promulgated Amendments.

Chairman Griffin and Professor Wroth reported that at its November 13 meeting the Legislative Committee on Judicial Rules had no objection to the amendments to V.R.C.P. 28(d) and 72 promulgated July 10, effective September 10, 2012.

3. #12-2—Restyled Vermont Rules of Appellate Procedure.

The Committee reviewed Ms. Wetherell's current draft of the restyled Appellate Rules incorporating changes previously agreed upon and her "suspense docket" of items requiring further consideration. It was agreed that the suspense items, if accepted should be (1) incorporated immediately in the current draft as "restyling" changes, (2) incorporated in a second draft order of "substantive" changes, or (3) deferred for later consideration. The Committee made the following decisions on the suspense list items:

1. V.R.A.P. 5(b)(5)- can delete (B) requiring appeal to be limited to questions of law as redundant. Agreed to delete (B) as carrying forward a mistake in the existing rule and as redundant in light of Rule 5(b)(1)-(3) and not applicable to (4). Category (2).
2. V.R.A.P. 5(b)(8)(A)- eliminate language "if it finds that the appeal does not meet either requirement of Rule 5(b)(1)(A) and (B)." Agreed to delete the language. Category (2).
3. V.R.A.P. 9(b)(1)- possibly change to conform with statutory directive in § 7556(d) that these appeals are "de novo." Agreed to leave in the rule for now with a Reporter's Note reference to a case and statutory change, and to refer it to Criminal Rules Committee for recommendation. Category (3).
4. V.R.A.P. 10(b)(5)- question of whether to remove "with a Supreme Court staff attorney" in final sentence. Agreed to delete the language and add a Reporter's Note statement that V.R.A.P. 33(a) provides a procedure that may be used but is not mandated. Category (2).

5. V.R.A.P. 13- question as to whether 13(a) needs revision in light of restructuring. Agreed to refer the question of practice regarding the statement of questions to Probate Rules Committee. Category (3).
6. V.R.A.P. 24. V.R.C.P. 3.1(b)(1) was amended in 2006 and the text of former (b)(1) is now in (b)(1), (2) and (3). I think the cross references in V.R.A.P. 24(a)(B)(ii) and V.R.A.P. 24(a)(2) should be changed to V.R.C.P. 3.1(b)(1)-(3). Agreed to make the corrections. Category (1).
7. V.R.A.P. 28(j)- Add requirement for parties to file 8 copies of any supplemental citations. Agreed. Category (2).
8. V.R.A.P. 32
 - a. 32(a)(5)- There was a suggestion to change the proportional typeface designation. Agreed to reject the suggestion.
 - b. 32(a)(5)- There was a suggestion to eliminate use of footnotes in brief (see 32(a)(7)(C) which requires footnotes to be included in word count). Agreed to reject the suggestion.
9. V.R.A.P. 33(a)(1)- Seems to apply only to those parties represented by counsel. Should a reference to self-represented parties be added? Agreed to address the question by deleting “attorneys for.” Category (2).
10. V.R.A.P. 33.1(d)- There was a request to change the nonprecedential value of three-justice decisions. Agreed to consider. Category (3).
11. V.R.A.P. 35- perhaps the technical requirements of this rule should be looked at to see if they remain current and to address the use of cellphones or other electronic devices in the courtroom. Agreed to consider. Category (3).
12. V.R.A.P. 39
 - a. 39(c)(3)- possibly add supplemental printed case to list of items that can receive costs for copying. Agreed to reject the suggestion.
 - b. 39(c)(4)- This can be deleted because the rules no longer require an original brief to be filed, just eight copies, see V.R.A.P. 31(b). Also the price per folio is no longer used. Agreed to delete. Category (2).
13. V.R.A.P. 40
 - a. Question to add a cross reference to V.R.A.P. 32 as to the proper form for a motion. Agreed to reject the suggestion.
 - b. Question of whether the rule should require a certification of compliance with the word-count limit. Agreed to reject the suggestion.
14. V.R.A.P. 45.1

a. Suggested addition to Reporter's Notes regarding self-representation in cases of corporations or organizations. The following language is suggested: "While Rule 45.1(a)(3)(A) allows any party to proceed pro se, corporate and non-profit entities do not have an automatic right to proceed pro se. Under 11A V.S.A. § 3.02(1), a corporation can be represented by a nonattorney if the nonattorney is authorized to represent the corporation, demonstrates adequate legal knowledge and skills, and shares a common interest with the corporation. These same criteria apply to nonattorney representation of an organization. Vt. Agency of Natural Res. v. Upper Valley Reg'l Landfill Corp., 159 Vt. 454, 458 (1992)." Agreed to incorporate the addition. Category (1).

b. Agreed to revise V.R.A.P.45.1(a)(3)(A) to read "These Rules do not prevent a party from being self-represented." Category (1).

On motion duly made and seconded, there being no further discussion, it was voted unanimously to proceed as agreed under items 1-14 above.

Ms. Wetherell raised the question of the effective date provision of the order or of the Rules. On motion duly made and seconded, after discussion, it was voted unanimously to keep the wording of present V.R.A.P. 49 as carried forward in restyled V.R.A.P. 1(e) and (f).

Ms. Wetherell and Professor Wroth agreed to prepare three drafts to submit to the Court as a basis for sending the restyled rules out for comment: (1) a clean draft of the "pure" restyled rules, including the Category (1) changes approved above; (2) a draft of the provisions of the "pure" rules for which Category (2) changes were approved above, showing the changes with underlining and strikeouts and including brief Reporter's Notes explaining the changes; and (3) a clean draft incorporating the Category (2) changes and Reporter's Notes in the "pure" restyled rules and their Reporter's Notes.

4. #s10-1/08-6, 11-10, 11-15—V.R.S.C.P.— Forms and Proposed Rule Revisions.

Ilerdon Mayer, Esquire, of South Royalton, joined the meeting at this point.

Mr. Avildsen, on behalf of the Small Claims Subcommittee, presented draft amendments of V.R.S.C.P. 3, 7, and 8. He noted that the only changes from the drafts presented at the October 5 meeting were added language in Rule 3(e) concerning default and changes to Rule 3(h) resulting from a conference call that the subcommittee held with a group of creditor and debtor lawyers as agreed at the October 5 meeting. He also noted a December 13 e-mail to the Committee from Mr. Mayer and Alan Bjerke opposing the changes to Rule 3 and a December 13 memorandum from Jean Murray supporting them. Mr. Avildsen noted that the Civil Division Oversight Committee supported the amendments.

Mr. Mayer asked and received permission to participate in the discussion. He noted that SEC regulations concerning how long credit card statements must be kept might make the documents required under proposed Rule 3(e) unavailable. It was suggested that language such

as “or some other proof” or “or other competent evidence” be inserted in the second sentence of the addition to that rule. Mr. Mayer also suggested that in Rule 3(h)(4) the charge-off date be substituted for “The date default is claimed.” After discussion of various alternatives, it was agreed that (4) should contain words to the effect, “The date plaintiff claims debtor defaulted on the debt and an explanation of why it is correct.” It was also agreed to add to (2) and the last sentence of (7), “...or other unique identifier.” It was suggested that the reference to V.R.C.P. 11 in (7) would more appropriately be included generally in Rule 3. Given the difficulty in defining “consumer loan,” it was agreed that the words should be deleted in Rules 3(e) and (h).

On motion duly made and seconded, there being no further discussion, it was voted, seven in favor, one opposed, to recommend that the proposed amendments as modified above be submit to the Court to be sent out for comment.

Given the hour, agenda items 5-17 were deferred until the next meeting.

It was agreed that the next meeting would be held at Vermont Law School on Friday, February 8, 2013, at 9:00 a.m.

There being no further business, the meeting was adjourned at 12:20 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter