

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
November 6, 2020

The meeting was called to order at 9:15 a.m. virtually on Teams by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Eileen Blackwood, James Dumont, Karen McAndrew, Hon. Robert Mello, Hon. Dennis Pearson, Navah Spero, and Gregory Weimer. Also present were Hon. Harold Eaton, Supreme Court liaison; Alan Bjerke, member of the bar, and Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of September 11, 2020, were unanimously approved as previously circulated.

2. Action items

A. #20-7, #19-11. Civil Division Oversight Committee proposal to move credit card cases out of small claims court and provide form for credit card complaints. Proposed amendments to V.R.C.P. 9.1, 55(c)(7), and V.R.S.C.P. 2(a), 3, and 8(c) sent out for comment on August 18, with comments due on October 19, 2020.

At the request of Chairman Keyes, Mr. Avildsen, who is also a member of the Oversight Committee, summarized the background of the proposal that the amendments proposed by the Civil Rules Committee were intended to implement. Chief Superior Judge Grearson had requested the Oversight Committee to address concerns about the Small Claims Court's jurisdiction of credit card claims, including the lack of training of side judges hearing them and the facts that such claims now make up nearly 70% of the Small Claims' docket and that 87% of the claims are brought by out-of-state lawyers and a small group of Vermont lawyers. Few debtors appear, and those who do are usually self-represented. The Oversight Committee in making its proposal had concluded that the added burden on the Superior Court entailed in moving the jurisdiction there was outweighed by the need to address the procedural and evidentiary needs currently presented in Small Claims Court.

Chairman Keyes summarized the comments on the proposed amendments received from creditor lawyers, including that a move to Superior Court would increase costs for debtors and that the greater difficulty to be experienced by self-represented debtors in navigating the more formal procedures of the Superior Court could lead to worse outcomes for them. There appeared to be no objections to the proposed amendments to V.R.S.C.P. 8(c)(2), reducing sanctions for non-appearance at a contempt hearing.

In response to the question whether the Superior Court was ready for such a change, it was noted that the Oversight Committee membership included Chief Superior Judge Grearson and four Superior Judges, as well as four court clerks or operations managers. Mr. Dumont noted that, when he sat as a Small Claims judge, full understanding of the process required a CLE and that side judges appeared on occasion to have problems with Due Process. Ms. Spero suggested that the Committee might propose legislation to reduce the Superior Court filing fee and provide an expedited process for actions on credit card debts. Judge Mello suggested that in credit card cases filed in the Superior Court, with creditors represented by lawyers and debtors self-

represented, the majority will be defaulted just as presently in Small Claims cases. In the few cases that are contested, however, the rules of evidence will apply and may present real issues.

It was moved and seconded that the proposed amendments be approved and recommended to the Supreme Court for promulgation as circulated

In discussion, Mr. Avildsen reported that the Oversight Committee is considering further relevant changes in a set of proposals that has not yet been completed. Mr. Bjerke, who represents creditors in Small Claims Court, noted that the vast majority of credit card debt cases were resolved by consent and suggested adoption of a process in which Superior Judges would be assigned to hear contested cases in that court. Judge Mello responded that currently in many counties, a Superior Judge passes on motions for default, and the Small Claims judges are involved only in trials or disclosure hearings. He suggested that a provision for trials to be held by Superior Judges would avoid the jurisdiction and fee issues. In response to a comment that the Small Claims Rules departed in other ways from the Civil Rules, he further suggested that the motion be amended to include in the recommended order provisions such as the pleading requirements of V.R.S.C.P. 3(a) and the financial disclosure procedure of V.R.S.C.P. 7.

Judge Pearson suggested as an alternative that credit card debt claims be left in the Small Claims Court with two changes: (1) Provide that contested matters be heard by a Superior Judge. (2) Make the rules of evidence applicable in any hearing on the merits. Mr. Avildsen suggested that the Oversight Committee should consider Judge Pearson's proposal. Chairman Keyes noted that it involved both administrative action regarding judicial assignments and a rule change to make the Rules of Evidence applicable.

The pending motion was withdrawn. It was agreed that the Oversight Committee should be asked to consider Judge Pearson's alternative proposal.

B. #19-1. Reconciliation of juror qualifications rules with V.R.C.P. 47(a) and V.R.Cr.P. 24(a).

Chairman Keyes reported that most of the Committee's comments had been incorporated in the Public Access Rules Committee's proposed promulgation order, which amended Rule 6(b) of the Vermont Rules for Public Access to Court Records, Rules 4(c) and 10 of the Vermont Rules Governing Qualifications, List, Selection and Summoning of All Jurors, Rule 24(a)(2) of the Vermont Rules of Criminal Procedure, and Rule 47(a)(2) of the Vermont Rules of Civil Procedure. The proposed order was sent out for comment on September 16, with comments due by November 16, 2020. He and Professor Wroth had attended an October 28 public hearing on the amendments at which there was no public comment. The Public Access Rules Committee would consider Ms. Spero's previously expressed concern that the proposed Rules governing access to juror questionnaires seemed to prohibit their duplication for internal circulation within a law firm in preparation for voir dire after the comment period ended. In discussion it was agreed that if the Civil Rules Committee were to recommend a specific revision of the proposed rules addressing this point, the Reporter's Notes could address both the ethical issues involved in the provision and the need for circulation of the full questionnaire to assure that a potential juror's employment information would be available to allow identification of potential conflicts involving employees of large institutions or industrial or commercial enterprises.

On motion duly made and seconded, there being no further discussion, it was voted unanimously to submit a formal comment from the Committee that law firms be permitted to circulate multiple copies of juror questionnaires internally to enable them to prepare for voir dire and avoid conflicts.

C. #20-2. Proposed amendment to conform V.R.C.P. 80.5(e) to amended 23 V.S.A. § 1203(k). The proposed amendment was sent to Court on October 1 and sent out for comment on October 7, with comments due on December 7, 2020. Chairman Keyes reported that one comment had been received from the proponent of the amendment thanking the Committee for proposing it. On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend the amendment to the Court on December 8, 2020, if no negative comments were received in the meantime.

D. #19-10. Proposed amendments to V.R.C.P. 26, 34, 78, conforming to recent amendments to the Federal Rules. Sent out for comment on February 11, with comments due by April 13, 2020.

(1) Professor Wroth reported that the amendments to V.R.C.P. 26 and 34, recommended by the Committee for promulgation, were promulgated on October 6, effective December 7, 2020.

(2) The Committee considered the November 4, 2020, draft prepared by Mr. Dumont and Professor Wroth of proposed amendments to V.R.C.P. 7 to accompany the abrogation of V.R.C.P. 78. After discussion, it was agreed that the drafters should prepare and distribute to the Committee a new draft for approval by e-mail to be sent out for comment, unless there was objection. The new draft should make clear that the provision for a reply to a memorandum in opposition applies to summary judgment motions.

E. #20-5. Requirement for current attorney and litigant addresses. The Committee reviewed Professor Wroth's revised drafts of proposed amendments to V.R.C.P. 11(a) and 79.1(b) and (i). On motion duly made and seconded, after discussion, it was voted unanimously to recommend to the Court that the proposed amendments be sent out for comment as drafted.

F. #20-8. Proposal to clarify V.R.C.P. 56 by providing that the response to a statement of undisputed facts must be paragraph-by-paragraph as opposed to a competing statement of facts. The subcommittee (Judge Mello and Ms. McAndrew) will report at the next meeting.

G. #20-10. V.R.C.P. 80.1(f). The Committee agreed to recommend to the Court that the reference to V.R.C.P. 55(b)(2) in V.R.C.P. 80.1(f) should be corrected to reflect that the former rule had been amended and redesignated as V.R.C.P. 55(c)(2) by a 2019 amendment.

H. #2012. Proposed amendment of V.R.C.P. 3 to require service of blank answer form, requested by the Civil Division Oversight Committee. Professor Wroth agreed to draft a proposed rule and form to be considered at the next meeting.

I. #2013. Proposed amendments of V.R.C.P. 58, 62, 77 regarding service of default judgments. The Committee considered the memorandum of Civil Division Oversight Committee and accompanying materials. After discussion of the benefits of the present rule that time runs

from the entry of a default judgment and case law concerning the effect of a judgment not being mailed in time, it was agreed to defer consideration until the next meeting.

3. Items for discussion and possible action.

A. #20-9. Amendments made necessary to conform Civil Rules to the 2020 Vermont Rules on Electronic Filing, promulgated December 10, 2019, effective March 2, 2020, Ms. Badgewick reported for the subcommittee (herself, Chairman Keyes, and Ms. Spero) that they were presently considering three approaches: Many of the E-filing Rules were technical and could be done away with as the use of and practice under Odyssey evolved. Some parts of those Rules could be moved into other formats such as administrative orders or prescribed electronic forms. Other parts could be adapted in the Civil Rules, with corresponding issues to be addressed in the Family, Probate, and Criminal Rules. The subcommittee has prepared a model suggesting specifically how these changes could be accomplished. Ms. Spero noted that the model provided a basis for identifying what the problems were and what could best be done through the Civil Rules. It was agreed that the subcommittee model would be distributed and placed higher on the agenda of the next meeting for discussion.

B. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. It was agreed that consideration of Judge Pearson's March 30, 2020, draft promulgation order would be placed higher on the agenda for discussion at the next meeting.

Judge Mello stated that there were significant problems under V.R.C.P. 80.1. Borrowers were unaware of the existence of the six-month redemption period because Rule 80.1 does not require service of the foreclosure decree and most lenders do not serve it. Judge Pearson noted that Rule 80.1 was not covered in his proposal, which was confined to enforcement of money judgments. It was agreed that the treatment of non-monetary judgments should be considered in the discussion of Judge Pearson's draft, perhaps with a banker invited to participate. Mr. Dumont and Judge Mello agreed to prepare a presentation on these issues for the next meeting, perhaps in conjunction with the proposal addressed under item 2.I above.

At this point, Mr. Bjerke left the meeting.

C. #14-1. Status of Appendix of Forms. Mr. Avildsen stated that he would report at the next meeting for the subcommittee (himself, chair; Mr. Dumont; and Chief of Trial Court Operations Theresa Scott) on a proposed administrative order concerning cooperation regarding development and adoption of forms.

D. #20-11. Methods of expediting civil trials; V.R.C.P. 68. The subcommittee (Mr. Dumont and Mr. Weimer) had no report. Mr. Weimer called the Committee's attention to the October 27, 2020, letter of the Vermont Association of Justice to Judge Grearson requesting an amendment to AO 49 to allow six-member juries.

At this point, Justice Eaton left the meeting.

Committee members noted that a jury of six was being used by consent in some counties, and that the Jury Restart Committee was working on development of a six-member jury plan for each

county. In further discussion of alternatives to a six-member jury, Mr. Dumont noted that in some states non-binding arbitration was used and that he had drafted a new mandatory pre-trial evaluation rule using evaluators from a panel to be established by the Court Administrator. As an alternative, Judge Mello suggested increased use of the offer of judgment process provided by V.R.C.P. 68, with amendments covering interest and fees and allowing plaintiffs to make offers. Mr. Dumont agreed to pursue the idea and to present a specific proposal at the next meeting.

In view of the hour, the remainder of the agenda was deferred until the next meeting.

4. Next meeting. It was agreed that the next meeting of the Committee would be held virtually at 9:00 a.m., Friday, January 22, 2021.

There being no other business, the meeting was adjourned at 12:00 p.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter