

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
February 5, 2021

The meeting was called to order at 9:00 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; Hon. Beth Robinson (by telephone); Assistant Attorney General Eleanor Spottswood, Chief of the Civil Division; James Levins, President, Vermont /Association for Justice; and Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of January 22, 2021, were unanimously approved as previously circulated.

2. Action items

A. #20-11. Methods of expediting civil trials.

(1) Further discussion of amendment of V.R.C.P. 68 allowing either party to serve an offer of judgment. The Committee considered Mr. Dumont's revised draft of a proposed amendment to V.R.C.P. 68 dated January 24, 2021, together with a supporting memorandum and a summary of the procedure in the other 49 states attached to his e-mail of that date. The revised draft omitted the language providing for interest on a judgment for money damages against a defendant that had been discussed at the January 22 meeting. Mr. Dumont proposed that the amendment be recommended for adoption as an emergency amendment because it would be helpful in the present situation. The question of interest could be addressed at a later date. In response to questions, he noted that similar provisions in other states did not put specific time limits on a plaintiff's offer and that he had no information on the frequency of use in the 21 states which allowed a plaintiff's offer.

On motion duly made and seconded, there being no further discussion, it was voted unanimously to recommend that Mr. Dumont's draft be adopted as an emergency amendment to run concurrently with Administrative Order No. 49 unless otherwise ordered.

(2) Proposed Emergency V.R.C.P. 16.4, Trial by Court in Jury Cases; Remote Jury Trial. The Committee considered Mr. Dumont's proposed Emergency V.R.C.P. 16.4, Draft 3, 2/2/21, which would require trial by court in any civil action ready for jury trial except worker's compensation and probate appeals, or one requiring special interrogatories, or one in which the court finds good cause not to apply the rule. After the court's decision, any party may elect to have the matter tried de novo to a jury.

Ms. McAndrew noted that Judge Toor had advised her that she had successfully conducted remote jury trials in civil actions by Zoom, and that Florida, Texas, and Washington had similarly used Zoom. Judge Mello reported that in a recent presentation to Vermont trial judges, Washington trial judges had described successful experiences with Zoom in civil trials. Justice Eaton noted that the Jury Restart Committee had not focused on this option, but that it offered great promise and should be considered by the Supreme Court, which is considering ideas such

as Mr. Dumont's V.R.C.P. 16.4 proposal and six-member jury possibilities. He suggested that the Committee consider the issues and bring forward a proposal as soon as possible. He noted that the underlying problem with the approach of proposed Rule 16.4 was that questions of accommodating juries and assuring connectivity for jurors who lacked internet access had not been resolved.

Further discussion focused on interlocking practical issues and concerns with Zoom trials. Staff capability was critical and was uneven among the counties. Research and Information Services in the Court Administrator's office would be asked to assess where the capability existed. Creative solutions to the problem of connectivity were suggested such as allowing remote jurors to gather in a courthouse that had the capability. The Senate Judiciary Committee might be able to find funds for a capacity study. Justice Eaton will send materials to Messrs. Dumont and Weimer and Professor Wroth, who will review the practice in Florida, Texas, Washington, and other states where Zoom may be being used. It was agreed that the Committee should proceed to explore all aspects of remote trials, but thanks were expressed to Mr. Dumont for initiating the discussion with his proposed V.R.C.P. 16.4.

B. #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. Revised proposed amendments to V.R.C. P. 7 and 56 and abrogation of V.R.C.P. 78, sent out for comment on January 5, with comments due by March 8, 2021. Mr. Dumont agreed to prepare a new draft for the next meeting, considering comments received and the possibility of developing standards to be applied to a movant's request to present evidence.

C. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. Judge Pearson and Professor Wroth reported that they would prepare a clean draft of Judge Pearson's March 30, 2020, draft promulgation order incorporating the change made at the last meeting, to be sent out by the Court for comment without further review by the Committee.

D. #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. Chairman Keyes reported that Judge Toor had advised him that the Oversight Committee was withdrawing the proposal to move credit card cases to the superior court in light of current legislative consideration of the small claims jurisdictional limit and credit card issues. Mr. Avildsen reported that the Oversight Committee would separately present a proposed draft of Small Claims Rule 8 on contempt at the Civil Rules Committee's next meeting.

E. #20-2. Proposed amendment to conform V.R.C.P. 80.5(e) to amended 23 V.S.A. § 1203(k). Proposed amendment sent to Court on October 1, sent out for comment on October 7, with comments due on December 7, 2020. Reviewed on December 8, 2020, by the Legislative Committee on Judicial Rules without comment. Professor Wroth stated that he would send the Committee's promulgation recommendation to the Court in a consolidated order with the recommended amendment to V.R.C.P. 80.1(f), item 2.G. below.

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 Committee considered Ms. McAndrew's February 4 revised draft of amendments to V.R.C.P. 56, which had been delayed for her consultation with Judge Toor. She stated that the Reporter's Notes would make clear that no substantive change was intended. It was agreed that she would circulate a revised draft electronically to the Committee with full Reporter's Notes and clarification of the numbering before the amendment would be sent to the Court for circulation to the bar.

G. #20-10. V.R.C.P. 80.1(f). Reference to V.R.C.P. 55(b)(2), amended and redesignated as V.R.C.P. 55(c)(2) by 2019 amendment. Sent out for comment on December 7, 2020, with comments due on February 8, 2021. Professor Wroth stated that he would send the Committee's promulgation recommendation to the Court in a consolidated order with the recommended amendment to V.R.C.P. 80.5(e), item 2(E) above, if no comments were received by February 8.

H. #20-12. Proposed amendment of V.R.C.P. 4 to require service of blank answer form. Memorandum of Civil Division. Mr. Avildsen agreed to circulate for electronic committee approval a new draft covering issues raised at the January 22 meeting and concerning other rules where the reference to forms was necessary, as well as the issues concerning insufficiency of process and cohabiting family members (item 2.J below).

I. #20-13. Proposed amendments of V.R.C.P. 58, 62, 77 regarding service of default judgments. The Committee considered the Civil Division Oversight Committee's memorandum of October 28, 2020, and attached materials proposing amendments regarding service of default judgments. In discussion, Mr. Dumont noted that the reference to V.R.C.P. 4 in the amendment to Rule 62(b) was overbroad and suggested that the specific reference to Rule 4(g) should be retained, perhaps with an amendment to that rule reflecting the current state of the newspaper industry. A motion to recommend the amendments to V.R.C.P. 58 and 77 for circulation to the bar but send Rule 62 back to the Oversight Committee with an expression of these concerns was withdrawn. In discussion members questioned the abandonment of entry of judgment as the beginning date of the time for appeal. It was agreed that Mr. Dumont and Professor Wroth would prepare a revised draft for the next meeting.

J. Amendment of V.R.C.P. 3.1 For consistency with current practice re application to waive filing fees and service costs. Request of Dawn Sanborn, Judiciary Trial Court Operations Division. Professor Wroth reported on concerns expressed by clerks with the inconsistency between Rule 3.1 and the current waiver application forms. Mr. Avildsen agreed to consider this issue in conjunction with his draft to be prepared under item 2.H above.

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. Chairman Keyes reported that Justice Dooley had appointed him to a committee to clarify the relationship

between the Appellate and Electronic Filing rules and that he will keep the subcommittee (Ms. Badgewick, Ms. Spero and himself) informed of the new committee's activities.

B. #14-1. Status of Appendix of Forms. Mr. Avildsen reported that he had not yet drafted an administrative order outlining the process for coordination among the various committees and offices for development and review of forms but that the Civil Division Oversight Committee favored that approach. He will prepare a draft administrative order, a motion to abrogate the Appendix of Forms, and a new draft of V.R.C.P. 84 for the next meeting.

C. #20-14. Possible amendment regarding treatment of competing dispositive motions filed by a party. Chairman Keyes stated that this item stemmed from a request that the Committee consider a rule that would avoid confusion between motions under Rules 12 and 56 by prioritizing them. The Committee agreed with his conclusion that no rule was needed and that the item should be removed from the agenda. Chairman Keyes agreed to notify the proponent of this decision.

D. #21-1. Application of V.R.C.P. 50(b) to "pure questions of law." Mr. Dumont noted that in *Blondin v. Milton Town School District*, 2021 VT 2, the Court declined to consider the question whether a motion for judgment on "a pure question of law" would be an exception to the express requirement of V.R.C.P. 50(b) that a motion for judgment as a matter of law must be renewed after judgment in order to appeal its denial. The Court noted, *id.* at 10-11, that a number of federal courts of appeal had found an exception for motions raising pure questions of law to the implicit renewal requirement of the federal rule. The Court then asked the Committee to consider whether to adopt for the Vermont rule the language of F.R.C.P. 50(b), which did not contain the express requirement. *Id.* at 13, n.10. After discussion, Professor Wroth agreed to provide a memorandum on the issues for the next meeting.

4. Information items.

A. #19-3. Vermont Rules for Public Access to Court Records. Abrogated and replaced by order of May 1, effective July 1, 2019. Judge Mello had not been able to find Judge Toor's suggested amendments to those Rules. It was agreed to remove this item from the agenda.

B. AO 49 as amended through December 22, 2020. Professor Wroth reported that there had been no amendments to AO 49 subsequent to the December 22, 2020, amendment that limited civil proceedings to remote participation by all parties and witnesses, unless the court found good cause, or granted a party's motion under V.R.C.P. 43.1, to proceed with partial or full in-person participation.

C. Status of Court's Long Term Planning Committee Ramp-up Report, May 13, 2020. In response to a question from Chairman Keyes concerning that committee's progress toward re-establishing civil jury trials, Justice Eaton reiterated his comments described under item 2.A(2) above, stating that the matter was high on the Court's agenda, but criminal cases had priority in consideration. He has asked Judge Grearson and Court Administrator Gabel to look into

personnel, technological, and connectivity issues with remote jury trials and will report on progress to Chairman Keyes and Mr. Dumont.

5. Other business. There was no other business.

6. Next meeting. It was agreed that the next meeting of the Committee would be held virtually at 9:00 a.m., Friday, March 19, 2021.

The meeting was adjourned at 11:05 p.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter