

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
January 22, 2021

The meeting was called to order at 9:05 a.m. virtually on Teams by Allan R. Keyes, Chair, with the following Committee members present: Eric Avildsen, Bonnie Badgewick, Eileen Blackwood, Anne Damone, James Dumont, Karen McAndrew, Hon. Robert Mello, Hon. Dennis Pearson, Navah Spero, and Gregory Weimer. Also present was Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of November 6, 2020, were unanimously approved as previously circulated.

2. Action items

A. #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) Amendments to V.R.C.P. 26, 34, recommended for promulgation, October 1, promulgated October 6, effective December 7, 2020. Reviewed on December 8, 2020, by Legislative Committee on Judicial Rules (LCJR). Chairman Keyes reported that LCJR had no objections to the amendments.

(2) 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. Chairman Keyes reported that four comments had been received. One supported the amendment as proposed. The others suggested substitution of language in proposed V.R.C.P. 7(b)(4) similar to that of V.R.C.P. 37(a)(4) for “terms and costs,” clarification of the term “reply” in proposed V.R.C.P. 7(b)(6), and addition of a provision allowing a motion for a “sur-reply.” Mr. Dumont agreed to prepare a new draft for the next meeting, considering these comments, as well as a recent comment by Judge Toor and the possibility of developing standards to be applied to a movant’s request to present evidence.

B. #14-8. V.R.C.P. 4.1, 4.2, 69, 69.1. Collection and Enforcement of Judgments. The Committee considered Judge Pearson’s March 30, 2020, draft promulgation order. Judge Pearson explained that the purpose was to modernize the provisions and format of provisions of the Civil Rules pertaining to enforcement of judgments (V.R.C.P. 4.1, 4.2, and 69 and new V.R.C.P. 69.1). No substantive changes were intended. After brief discussion, and consideration of a comment by Judge Toor concerning time periods, on motion duly made and seconded, there being no further discussion, it was voted unanimously to send the rules out for comment, with a change of the time period in Rule 4.1(f) to three days. Professor Wroth agreed to assist Judge Pearson in preparing a clean draft of the proposed rules for that purpose. On motion duly made and seconded, there being no discussion, it was voted unanimously to thank Judge Pearson for his careful and extensive work on this important project.

C. #20-7, #19-11. Civil Division 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 last meeting, the Committee had referred to the Civil Division Oversight Committee an alternative proposal to retain Small Claims Court jurisdiction, with contested claims to be heard either in Superior Court or by Superior Judges in Small Claims Court. Chairman Keyes reported that members of LCJR had expressed surprise at the 70% figure for creditors’ claims in Small Claims Court, but indicated a preference for additional training for assistant judges rather than use of Superior judges in that court or trial of small claims in Superior Court and that he had reported both the Civil

Rules and LCJR positions to Judge Toor, Chair of Civil Division Oversight. Mr. Avildsen reported that the Oversight Committee was meeting next week. It was agreed that further consideration should be deferred until Oversight's position was known, and that the Committee's position remained that contested small claims cases should either be tried in the Superior Court or before Superior Judges in Small Claims Court. As to the separate question regarding V.R.S.C.P. 8 (contempt), it was agreed to defer to the Oversight Committee's position, which Mr. Avildsen would also report.

D. #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 the Public Access Committee's final draft of the Juror Qualification Rules incorporated Mr. Dumont's and Ms. Spero's suggestions. Chairman Keyes agreed to report to the Public Access Committee that the Civil Rules Committee had no further concerns with the Juror Qualification Rules amendments.

E. #20-2. Proposed amendment to conform V.R.C.P. 80.5(e) to amended 23 V.S.A. § 1203(k). Reviewed on December 8, 2020, by LCJR. Chairman Keyes reported that LCJR had no comment on the amendment. It was agreed that the amendment should be recommended to the Court for promulgation as previously agreed.

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. Reviewed on December 8, 2020, by LCJR. The Committee considered Ms. McAndrew's draft presented for the subcommittee (Judge Mello and herself). In discussion, Mr. Dumont agreed that it was appropriate to consider the amendment independently of the amendments to Rules 7 and 56 considered under item 2.A above. Ms. McAndrew agreed to send the proposal to Judge Toor for comment. In response to Ms. Spero's concern with a departure from Federal Rule 56 and possible clarification in the Reporter's Notes, Ms. McAndrew agreed to review the Federal Rule and the slightly different and more complicated Maine Rule and to prepare a further draft for consideration at the next meeting.

H. #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. A proposed amendment to V.R.C.P. 80.1(f) was sent out for comment on December 7, 2020, with comments due on February 8, 2021. Chairman Keyes reported that no comments had yet been received. On motion duly made and seconded, there being no discussion, it was voted to recommend the amendment for promulgation if no comments were received by February 8.

I. #20-12. Proposed amendment of V.R.C.P. 3 to require service of blank answer form. Memorandum of Civil Division. The Committee considered Professor Wroth's draft of an amendment to V.R.C.P. 4(b) adding the requirement that plaintiff serve with the summons and complaint a blank answer form found on the list of forms approved by the Court Administrator. It was agreed that Rule 4(b) was an appropriate place for the amendment, subject to any further considerations that might be raised in discussion of agenda item 3.B. Mr. Avildsen noted that a draft answer form developed by the Civil Division Oversight Committee had been sent to the Court Administrator for inclusion in the list of forms. In discussion, the question was raised whether failure to include the form could result in dismissal for insufficiency of process. This issue might be addressed and clarified by a reference in the Reporter's Notes to the last three sentences of Rule 4(i) and Form 2C concerning return of service or possibly by an amendment to that Rule and Form. In response to a question of the effect on self-

represented litigants who might file only an answer, Mr. Avildsen suggested that the required answer form be referred to in and attached to the summons as is the present required notice of appearance form. It was also noted that other rules would require amendment to require the answer form—*e.g.*, V.R.C.P. 4(l)(3)(H)—as well as other forms in which the notice of appearance form is specified.

On motion duly made and seconded, there being no further discussion, it was voted unanimously to propose the amendment for circulation to the bar after e-mail approval by the Committee of a redraft by Mr. Avildsen addressing the questions raised above.

J. #20-13. Proposed amendments of V.R.C.P. 58, 62, 77 regarding service of default judgments. It was agreed that Judge Toor's October 28, 2020, memorandum for the Civil Division Oversight Committee and materials, previously sent to the Committee on November 3, should be redistributed for consideration at the next meeting. Professor Wroth noted that the proposal had been deferred at the November 6 meeting 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.

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. The Committee considered the materials prepared by the subcommittee (Chairman Keyes, Ms. Badgewick, and Ms. Spero), showing how changes to attain conformity could be made. In discussion, Ms. Spero noted that the subcommittee's approach at this time was still conceptual and involved two possible approaches to amending the Civil Rules: (1) Include provisions involving electronic filing in the Civil Rules as V.R.C.P. 5.1, 5.2, etc. (2) Amend specific provisions of the Civil Rules affected by E-filing. Ms. Badgewick noted that the subcommittee's draft of V.R.C.P. 11 was an example of how other rules might be amended. She also noted that some provisions might more properly be dealt with in a Court Administrator's administrative directive. After discussion it was agreed that the subcommittee should proceed in accordance with option 2 in the subcommittee memo:

2. Strip the current 2020 Rules removing all technical components already found elsewhere, or to be created in different documents by the courts, and incorporate the remaining Rules into the Civil Rules where they would naturally (or unnaturally) belong. The procedural rules for the other divisions (*e.g.*, Environmental, Family) will have to either make a similar incorporation, or reference the newly revised Civil Rules.

It was suggested that the other Rules committees should be advised that the Civil Rules Committee was proceeding in this fashion and that it should be suggested that those committees defer action until that work was completed. Professor Wroth agreed to draft an appropriate letter for Chairman Keyes. Ms. Badgewick and Ms. Spero said that they might call for volunteers to assist in the drafting if necessary.

B. #14-1. Status of Appendix of Forms. The Committee considered Mr. Avildsen's memorandum of January 21, 2021, and proposed drafts of amendments to V.R.C.P. 4(l)(3)(D) and 84, presented for the subcommittee (himself, chair; Mr. Dumont; and Chief of Trial Court Operations Theresa Scott). In discussion, concerns were expressed for a means of assuring conformance between elements that a rule required to be set forth in a pleading, motion, or other paper—*e.g.*, Rule 4(b)—and forms posted on the Judiciary website. Also, there presently was insufficient communication on development and changes

of forms among the Rules committees, the Civil and other divisions, the Chief Superior Judge, and the Court Administrator. It was suggested that “and are intended to indicate the simplicity and brevity which the Rules contemplate” be included in Rule 84. After further discussion, it was agreed that the subcommittee would present a draft administrative order setting forth a process for developing, approving, and posting forms, and a new draft of V.R.C.P. 84, at the next meeting.

C. #20-11. Methods of expediting civil trials. The Committee considered Mr. Dumont’s January 20, 2021, draft amendment of V.R.C.P. 68, intended to allow a plaintiff to make an offer of judgment and to require an offeree who has declined an offer that is more favorable than the judgment entered to pay interest as well as costs. Extension of the Rule to plaintiffs was a way of addressing the curtailment of jury trials in response to COVID. Ms. McAndrew opposed extension of the rule to plaintiffs, because they were in possession of all critical information at the outset of the action. She further noted that early neutral evaluation had not worked well because parties wanted to complete discovery, and that the parties could make an offer of judgment at any time. Offers under Rule 68 was for cases that were going to trial.

In further discussion, it was suggested that the same effect could be achieved by allowing plaintiff in an ADR stipulation to reply to defendant’s offer and that judges could be given discretion to invoke the process at any time after a case had been pending for six months. Questions raised included whether an extended process should apply to unliquidated damages and whether interest was to be considered as a separate amount or included in a lump-sum award. It was agreed that M. Dumont’s proposal should be taken up for further discussion as the first item on the agenda of 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, February 5, 2021.

The meeting was adjourned at 12:10 p.m.

Respectfully submitted,

L. Kinvin Wroth
Reporter