

APPROVED
VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE
Minutes of Meeting
March 19, 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, Anne Damone, James Dumont, Hon. Robert Mello, Hon. Dennis Pearson, Navah Spero, and Gregory Weimer. Also present were Hon. Harold Eaton, Supreme Court liaison; Assistant Attorney General Eleanor Spottswood, Chief of the Civil Division; and Professor Emeritus L. Kinvin Wroth, Reporter.

1. Minutes. The draft minutes of the meeting of February 5, 2021, were unanimously approved as previously circulated.

2. Action items

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

(1) Amendment of V.R.C.P. 68 allowing either party to serve an offer of judgment. Professor Wroth reported that the amendment had been sent to the Court on February 22, 2021. The Court had promulgated the amendment on March 8, effective March 15, 2021, as A.O. 49, ¶ 24, rather than as a separate emergency amendment of Rule 68. Justice Eaton stated that the Court wanted to observe the use of the procedure under A.O. 49. It was agreed to keep the item on the agenda for possible future consideration as an amendment to Rule 68.

(2) Recommended amendments to A.O. 49, ¶¶ 3, 5, providing authorization and procedure for civil jury trials. Professor Wroth reported that the amendments had been sent to the Court on March 7, 2021. Justice Eaton stated that the recommendation had been passed on to a Court work group chaired by Justice Carroll that was taking a broad look at virtual trial possibilities. He suggested that the information on the New Jersey practice that had been acquired by the Committee should be sent to the work group.

B. #19-10. 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. The Committee considered Mr. Dumont's March 15, 2021, revised draft, sent to the Committee on March 17, that responded to all comments received. The Committee agreed with Ms. Spero's proposal to substitute "newly raised" for "new" in the last sentence of Rule The court may hold oral argument on the motion or may dispose of the motion without argument 7(b)(4). After further discussion, it was agreed that the first sentence of Rule 7(b)(5) should read "," and that the second sentence should be deleted. The present third sentence should begin, "The court may award" Mr. Dumont and Professor Wroth agreed to prepare a new draft for the next meeting addressing these issues and clarifying the difference between oral argument under Rule 7(b)(5) and evidentiary hearings under Rule 7(b)(6), limiting paragraph (6) to: "newly requested" evidence, and making clear that under that paragraph, the evidence must be not only material but relevant to the motion.

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 for the next meeting they would prepare a clean draft of Judge Pearson's March 30, 2020, draft proposed promulgation order ready to be sent to the Court.

D. #20-7, #19-11. 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. Withdrawn by the Oversight Committee. Mr. Avildsen reported that there is no legislative action yet on a proposal to remove the upper small claims limit on credit card claims. The Oversight Committee is prepared to present a new package of the previously withdrawn rules, including Small Claims Rules 8 on contempt, after legislative action.

E. #20-2. Proposed amendment to conform V.R.C.P. 80.5(e) to amended 23 V.S.A. § 1203(k). Professor Wroth reported that the amendment was promulgated on March 8, effective May 12, 2021.

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. This item was deferred in view of the necessary absence of Ms. McAndrew.

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. Professor Wroth reported that the amendment was promulgated on March 8, effective May 12, 2021.

H. #20-12. Proposed amendment of V.R.C.P. 4 to require service of blank answer form. Memorandum of Civil Division. It was agreed to defer consideration of Mr. Avildsen's March 18 e-mail to Professor Wroth and its attachments until the next meeting. Professor Wroth will circulate the e-mail and attachments to the Committee. Mr. Avildsen agreed to consider and report at the next meeting on whether other rules where the reference to forms was necessary required amendment.

I. #20-13. Proposed amendments of V.R.C.P. 58, 62, 77 regarding service of default judgments. The Committee considered Mr. Dumont's clean draft of proposed amendments to V.R.C.P. 62(b) and 77(e), sent to the Committee on March 18, 2021. Mr. Dumont noted that his draft did not include the previously proposed amendment adding V.R.C.P. 58(e). Changing the starting point for the running of the time to appeal from the time-honored entry of judgment to service of the judgment would also require a new V.R.C.P. 77(e) and a change to V.R.A.P. 4(a)(1), implications of which had not been considered by the proponents of the amendment. The execution timing issue could be properly raised under Rule 60(b). It was agreed that Rule 62(b) was appropriate as drafted. After discussion, it was agreed that Mr. Dumont and Professor Wroth would prepare a new draft for the next meeting with Reporter's Notes and the inclusion of the language of Rule 62(b) verbatim in Rule 77(e).

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. Mr. Avildsen felt that, as stated in his March 18 e-mail (see 2.H above), he believed that the current Judiciary form was consistent with Rule 3.1. Ms. Damone will obtain more information on the clerks' concerns and report at the next meeting. Professor Wroth agreed to send her the earlier e-mail file on the issues.

K. Juror Questionnaire Confidentiality and Access amendments. The Committee considered Judge Morris's March 9 request on behalf of the Public Access Rules Committee, circulated in Professor Wroth's March 17 e-mail, that the Civil Rules Committee join the other procedural rules committees in approving the attached final recommended amendments to the Juror Questionnaire Confidentiality and Access Rules to be submitted to the Court in the near future. Professor Wroth noted that the Committee had given tacit approval to these amendments at previous meetings. On motion duly made and seconded, there being no discussion, it was voted unanimously that the Committee approved and accepted the amendments, including the amendment to V.R.C.P. 47(a)(2).

3. Items for discussion and possible action.

A. #20-9. Amendments made necessary to conform the Civil Rules to the 2020 Vermont Rules on Electronic Filing, promulgated December 10, 2019, effective March 2, 2020, as amended February 22, effective March 15, 2021.

The Committee considered Ms. Badgewick's March 16 e-mail and its attachments reflecting the status of the work of the subcommittee (herself, Ms. Spero, and Chairman Keyes). The subcommittee was proceeding as previously agreed to draft provisions incorporating appropriate portions of the E-filing Rules into the Civil Rules, as exemplified by the attachments to her e-mail. The subcommittee would then draft an administrative order or other instrument (first draft also attached) to incorporate the remaining necessary provisions of the E-filing Rules, which would then "go away." She noted that the process was a slow one, in part because technical manuals concerning the e-filing system were not yet complete.

Chairman Keyes echoed the general feeling of the Committee that the subcommittee's approach appeared to be working well. He noted that the committee to address electronic issues in the Appellate Rules, on which he serves, is considering similar questions. However, because Odyssey will apply in the Supreme Court in two months, that committee's initial recommendation is for an amendment to the E-filing Rules stating that they apply in the Supreme Court as they do in the Superior Court.

It was agreed that Committee members should send individual comments to the subcommittee members on the process and the drafts attached to Ms. Badgewick's March 16 email and that time would be set aside for a full discussion at a subsequent meeting.

On motion duly made and seconded it was voted unanimously to thank the members of the subcommittee for their extensive efforts on the issues and process.

B. #14-1. Status of Appendix of Forms. This item was deferred until the next meeting. As noted above (item 2.H), Professor Wroth will circulate Mr. Avildsen's March 18 e-mail and attachments to the Committee.

C. #21-1. Application of V.R.C.P. 50(b) to "pure questions of law." The Committee considered Professor Wroth's memorandum of March 18, 2021, responding to the Court's request in *Blondin v. Milton Town School District*, 2021 VT 2, 13, n.10, that the Committee consider adoption of F.R.C.P. 50(b), which does not include the language of V.R.C.P. 50(b). expressly requiring renewal of a motion

for judgment as a matter of law as a basis for an appeal from a denial or failure to grant such a motion. Under the Federal Rule, a number of federal courts of appeal have considered such an appeal that raises “a pure question of law” without requiring a renewed motion. After discussion of the issues raised and the form that an amendment would take, Professor Wroth agreed to prepare a draft for the next meeting that would preserve the general requirement of a post-verdict motion but would provide an exception for “a pure question of law,” to be defined in the rule or Reporter’s Notes.

4. Information items.

A. AO 49 as amended through March 8, effective March 15, 2021. Professor Wroth reported that the March 8 amendment of AO 49 had extended the judicial emergency declared in AO 48 until May 31, 2021; deleted the suspension of civil jury trials until January 1, 2021, leaving in place provisions for determining when such trials should be held; made clear that the 2020 E-filing Rules applied to filing and service; authorized offering the July 2021 bar examination; and incorporated, as a new §24, the Committee’s proposed emergency amendment of V.R.C.P. 68 described in item 2.A(1) above.

Chairman Keyes and Ms. Spero agreed to review AO 49 to determine whether any of its provisions should be considered for retention as Rules when the order expires.

B. Status of Court’s Long Term Planning Committee Ramp-up Report, May 13, 2020. There was no report.

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. on Friday, May 21, 2021.

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

Respectfully submitted,

L. Kinvin Wroth
Reporter