Order Promulgating Amendments to Administrative Order No. 49

The Vermont Supreme Court issues this administrative order pursuant to its authority under the Vermont Constitution, Chapter II, § 30 and Administrative Order No. 48.

1. That ¶ 2 of Administrative Order No. 49 be amendment to read as follows (new matter underlined; deleted matter struck through):

   2. For these reasons, the Court hereby declares a judicial emergency pursuant to Administrative Order 48. The emergency will go into effect immediately and will extend until ~~March 31, 2021~~ May 31, 2021, unless extended by order of this Court. This Order supersedes any previously issued administrative directive or order, including orders issued in the Superior Court, related to COVID-19.

2. That ¶ 3 of Administrative Order No. 49 be amended to read as follows (deleted matter struck through):

   3. **Jury Trials:**
   ~~a. Jury trials in civil cases are suspended until at least January 1, 2021.~~
   ~~b.~~ Superior courts may schedule and hold individual jury trials in criminal proceedings and civil proceedings after January 1, 2021, only with the authorization of the Chief Superior Judge and the Court Administrator. Factors to be considered in authorizing a proposed jury trial include: the current course of the COVID-19 pandemic; the current recommendations of public-health experts; whether the unit has adopted a plan that addresses ventilation and air flow and allows for socially distanced seating and movement of all participants and jurors through the course of a jury draw and trial; the availability of staff and other resources to support court proceedings; and the rights and interests of the litigants.

3. That ¶ 6 of Administrative Order 49 be amended to read as follows (new matter underlined; deleted matter struck through):

   6. **Email filings and service**:

      a. In Superior Court divisions and units where ~~either the 2010 Vermont Rules for Electronic Filing or~~ the 2020 Vermont Rules for Electronic Filing apply and require electronic filing through ~~another mechanism (eCabinet or~~ Odyssey File and Serve~~)~~, or electronic service through a specified means, those rules must be followed.

      b. ~~In Superior Court divisions and units where there is no electronic filing or for~~ For litigants that are not required to electronically file, notwithstanding the provisions of

V.R.C.P. 5(e) (incorporated by reference in V.R.Cr.P. 49, V.R.F.P. 4.0(a)(2)(A), V.R.E.C.P. 3, 4(a), 5(a)(2)) and V.R.P.P. 5(f), or any other rule, parties may file documents with the court using email, subject to the following requirements if a party opts to file by email.

i. Filings must be sent as an attachment to the email account for the unit where the filing will be made. The subject line must indicate the division where it is being filed and the case docket number.
ii. Further details concerning the method of filing by email will be posted on the vermontjudiciary.org website, and may change from time to time. Parties and lawyers should check the guidance on the website before filing by email.
iii. A signature block containing the filer's typed-in name preceded by "/s/," or an electronic facsimile of the filer's signature, a scanned copy of it, or another form of electronic signature as defined in 9 V.S.A. § 271(9), will serve as a party's signature on pleadings, motions, and other documents that must be filed with a signature. This exception does not apply to affidavits, verified pleadings, or other signatures that must be notarized by statute.

c. ~~In Superior Court divisions and units where there is no electronic filing rule that requires a specified means of service, notwithstanding~~ Notwithstanding the requirements of V.R.P.P. 5(b) and V.R.C.P. 5(b) (incorporated into other divisions by V.R.A.P. 25, V.R.Cr.P. 49, V.R.F.P. 4.0(a)(2)(A), and V.R.E.C.P. 3, 4(a), 5(a)(2)), until the conclusion of this judicial emergency or further amendment to this Administrative Order~~, service of pleadings and other papers (other than process) must be made by the following means~~:

~~i. Where service is made by an attorney on an attorney, service must be made by email unless the attorneys mutually agree otherwise.~~

~~1. In all pleadings or other papers served or filed, attorneys must provide up to three email addresses at which they agree to accept service. Any email addresses provided must match those that the attorney has registered pursuant to the requirements of Administrative Order 44, § 1. The sending attorney should make service on the receiving attorney by email to each of the listed addresses, attaching the document or documents to be served. (Attorneys who have not yet provided an email address or email addresses on any pleadings or filings should promptly notify one another of the email addresses to which service should be directed.)~~
~~2. Attorneys may agree to make service by other means, such as paper or alternate electronic means. Any such agreement must be reduced to writing.~~

~~ii.~~ i. Where service is made by or to a self-represented party, service may be made by electronic means by mutual agreement between the sending and receiving parties. The parties are not required to enter into such an agreement. If the parties agree to service by electronic means, they must document their agreement to electronic transmission in a writing filed with the court. The

written agreement must describe with specificity any email addresses, digital storage systems, or other means the parties agree to use.

iii. Where service is made by electronic means pursuant to this emergency order, the following applies:

1. The sender of any document by electronic means must follow any applicable standards regarding electronic transmission of confidential documents.
2. The parties must mutually agree in writing to any changes in the method of service, and parties must immediately notify one another of any changes that affect the method of service, including changes in email addresses.
3. Service by email to an email address provided pursuant to this emergency order is complete upon transmission, provided that such service is not effective if the sending party learns that the attempted service did not reach the receiving party.
4. Any certificate of service filed with the court must indicate the method by which the document was served. If the document was served by email, the certificate of service should specify the email address or addresses to which it was sent.

d. In the Supreme Court, notwithstanding the provisions of V.R.A.P. 25, V.R.C.P. 5, and any other rules relating to the filing of motions, documents, and briefs with the Supreme Court:

i. Parties may file motions and other documents other than briefs by email. Filings must be sent as an attachment to jud.supremecourt@vermont.gov and the subject line should contain the Supreme Court docket number.
ii. The requirements to file paper copies of appellate briefs and printed cases in V.R.A.P. 31 and 32 are suspended. Appellate briefs and printed cases will be considered filed when transmitted as an attachment by email to jud.supremecourtbriefs@vermont.gov as required by V.R.A.P. 32. Parties must file one paper copy of all appellate briefs and printed cases within 7 days of submitting the electronic copy. The Court may by order require parties to file additional paper copies of briefs and printed cases.

e. In the Supreme Court, parties must serve motions and filings other than briefs and printed cases pursuant to the requirements of 6(c) above. Briefs or printed cases must be served on the other parties to the appeal as required by the appellate rules. In particular, pursuant to V.R.A.P. 31(b), an electronic version of the brief must be served on each party to the appeal, except that a paper copy must be served on any self-represented party unless the parties agree otherwise.

f. Filings sent by email will be considered filed on that date if the email is received before 4:30 p.m.

4. That ¶ 23 of Administrative Order No. 49 be amended to read as follows (new matter underlined):

23. **February and July 2021 Bar Examinations**: The Board of Bar Examiners is authorized to administer the February 2021 and July 2021 Uniform Bar Examinations by remote means.

5. That ¶ 24 be added to Administrative Order No. 49 to read as follows:

24. **Extension of Offer of Judgment Rule to Plaintiffs.** Rule 68 of the Vermont Rules of Civil Procedure is amended to read as follows (new matter underlined; deleted matter struck through):

RULE 68. OFFER OF JUDGMENT

At any time more than 14 days before the trial begins or within such shorter time as the court may approve, a party ~~defending against a claim~~ may serve upon ~~the~~ an adverse party an offer to allow judgment to be ~~taken against the defending party~~ entered for the money or property or to the effect specified in the offer, with costs then accrued. If within 14 days after the service of the offer or within such shorter time as the court may order the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally ~~obtained by the offeree~~ entered is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 14 days, or such shorter time as the court may approve, prior to the commencement of hearings to determine the amount or extent of liability.

Explanatory Note—March 15, 2021 Amendment

The March 15 amendment extends the effective date of the Administrative Order until May 31, 2021, updates provisions regarding service and filing in the superior courts, provides for remote administration of the July 2021 Uniform Bar Exam, and temporarily amends Vermont Rule of Civil Procedure 68 regarding offers of judgment.

Paragraph 2 is amended to extend the effective date of the Administrative Order until May 31, 2021, based on the projections of public-health experts concerning the course of the pandemic. The Court will amend individual provisions of the Administrative Order as necessary but anticipates that at least

some of the provisions of this Administrative Order will continue to be necessary due to the ongoing impacts of the COVID-19 pandemic.

Paragraph 3(a), suspending jury trials in civil cases until at least January 1, 2021, is deleted. The resumption of civil and criminal jury trials is governed by former paragraph 3(b), requiring court-by-court authorization of the Chief Superior Judge and the Court Administrator on the basis of various specified factors.

Paragraph 6, regarding filing and service by email, is amended to reflect that the provisions of the 2020 Vermont Rules for Electronic Filing govern service by and to attorneys in all Superior Courts as of March 15, 2021.

Paragraph 23 is amended to authorize the Board of Bar Examiners to administer the July 2021 UBE by remote means. Given the ongoing course of the pandemic, it is not clear whether in-person administration of the July bar examination will be consistent with public-health guidance. The remote administration of the February 2021 UBE was successful, and the Board of Bar Examiners has opted to plan for remote administration in July as well to eliminate ongoing uncertainty for potential examinees.

New ¶ 24 amends Vermont Rule of Civil Procedure to allow plaintiffs to make offers of judgment as previously provided in the rule only for defendants. The emergency amendment is made at a time when in-person civil jury trials are largely on hold pursuant to Administrative Order No. 49, ¶¶ 3 and 5(d). The Advisory Committee on the Rules of Civil Procedure proposed the emergency amendment. Though the present amendment is triggered by the current situation, Vermont will not be alone in making the formal offer of judgment process available to plaintiffs. Among the 46 states and the federal system that provide an offer of judgment procedure, 21 states make it available to plaintiffs and two provide a partial role for them.

The present amendment continues to award to a successful offering party only costs accruing since the offer was made, thus following Federal Rule 68 and the similar rules of Vermont and the 21 other states that provide the procedure only for defendants, as well as the rules of eight of the states allowing

plaintiffs to invoke the procedure. The rules of other states provide additional recoveries not adopted in the present amendment, such as interest, attorney's fees, and expert witness fees that may be available as an exercise of judicial discretion under Vermont law. See D'Arc Turcotte v. Estate of LaRose, 153 Vt.196, 569 A.2d 1086 (1989) (holding that readily ascertainable damages result in prejudgment interest as of right); Estate of Fleming v. Nicholson, 168 Vt. 495, 724 A.2d 1026 (1998) (affirming monetary award to compensate for delay); see also Marek v. Chesny, 473 U.S. 1 (1975) (under F.R.C.P. 68, attorneys' fees defined as "costs" in underlying statute).

6. That this order is effective March 15, 2021, and extends until May 31, 2021, unless extended by order of this Court.

7. That the Chief Justice is authorized to report this order to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Done in Chambers at Montpelier, Vermont this 8th day of March 2021.

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Signed by the Vermont Supreme Court