

**VERMONT SUPREME COURT**  
**Advisory Committee on Rules of Civil Procedure**

2011 Annual Report

December 13, 2011

The Committee submits this report to the Supreme Court pursuant to Administrative Order No. 17, § 5. The report covers the Committee's activities since its 2010 annual report, dated May 5, 2011. Since filing that report, the Committee has met three times—on June 17, November 9, and December 2, 2011—to consider amendments or other matters pertaining to the Vermont Rules of Civil Procedure, the Vermont Rules of Appellate Procedure, the Vermont Rules for Environmental Court Proceedings, the Vermont Rules of Small Claims Procedure, the Vermont Rules of Professional Conduct, the Vermont Code of Judicial Conduct, and the Vermont Rules for Electronic Filing, and to review comments received from the bar and others on proposed amendments concerning those rules.

Hon. Robert Mello was appointed to the Committee in May 2011 to replace Hon. Geoffrey Crawford, whose term had expired.

An emergency amendment adding V.R.C.P. 80.1(b)(3) (notice to mortgagors) promulgated on December 17, 2008, effective January 1, 2009, was extended for two years until December 31, 2011, by order of December 10, 2009, effective January 1, 2010. The Committee will recommend in a separate transmittal letter to the Court that this emergency amendment be extended for an additional two years.

Proposed amendments to V.R.C.P. 5(g) and V.R.A.P. 25(a)(2) permitting inclusion of social security numbers when required by federal law; to V.R.C.P. 45(f) incorporating the provisions of the Uniform Interstate Depositions and Discovery Act; and to V.R.C.P. 80.5(j) revising the standard for a stay of civil license suspensions were sent out for comment on July 19, 2010, with comments due on September 20, 2010; were reviewed by the Legislative Committee on Judicial Rules on June 29, 2011; were transmitted to the Supreme Court on August 23, 2011; and were promulgated on August 31, effective October 31, 2011. *See* [http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRC P5\(g\)45\(f\)80.5VRAP25.pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRC%20P5(g)45(f)80.5VRAP25.pdf). These promulgated amendments were reviewed by the Legislative Committee on Judicial Rules on September 20, 2011, without comment.

By order of December 21, 2010, effective on that date, the Court promulgated an emergency amendment to V.R.C.P. 80.1(g), recommended by the Committee in letter of December 17, 2010, to provide additional protections for foreclosure defendants. The Civil Rules Committee was asked to report to the Court by September 30, 2011, on any comments received on this amendment. *See* [http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRC P80.1EMERGENCY12-21-10.pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRC%20P80.1EMERGENCY12-21-10.pdf). No comments were received. The Committee will recommend in a separate transmittal letter to the Court that this amendment be made permanent.

By order of January 31, 2011, effective on that date, the Court promulgated an emergency amendment to Application Section B of the Vermont Code of Judicial Conduct to clarify the application of the Code to probate judges in light of the Court Restructuring Act, Act 154 of 2009 (Adj. Sess.). The Civil Rules Committee was asked to report by April 1, 2011, on its recommendation, if any, on whether the amendment should be made permanent. See [http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDEmergencyAmendmentA%20O10B\(2\)\(3\).pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDEmergencyAmendmentA%20O10B(2)(3).pdf). No comments were received. The Committee on August 2, 2011, asked the advice of the Court on whether the emergency amendment should be made permanent. No response to that query was received. The Committee will recommend in a separate transmittal letter to the Court that this amendment be made permanent.

In a letter of February 10, 2011, the Court requested that the Committee consider an amendment of V.C.J.C. Canon 4(H)(2) to address extra-judicial income reports by side judges and probate judges. The Committee appointed a subcommittee chaired by Hon. Robert Mello and consisting of Hon. Matthew Katz, Hon. Harold Eaton, Hon. James Colvin, (designated by the Assistant Judges Association), and Hon. James Mahoney to explore the issues. In a careful report, the subcommittee recommended to the Committee that no change be made in the provisions of the Judicial Conduct Code exempting part-time assistant and probate judges from this requirement but, noting that presently one probate judge serves full-time and that others might do so in the future, it recommended that the Code be clarified to exclude full-time probate judges from the definition of “continuing part-time judge” and thus from the exemptions accorded to part-time probate judges, except for those relating to the electoral process. In a separate letter, the Committee will transmit to the Court a copy of the subcommittee report and a draft promulgation order containing implementing amendments to the Code that the committee recommends for circulation to the bar.

A consolidated text of Vermont Rules for Electronic Filing, as amended, and to Rule 3 of the Vermont Rules Governing Dissemination of Electronic Case Records, as amended, and all related Civil and Appellate rules amendments through March 22, 2011, has been compiled. See <http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/CONSOLIDATEDElectronicDisseminationAppellateCivil.pdf>. These amendments, as well as other amendments promulgated subsequently to V.R.E.F. 3(f) and 10(a), were made permanent by order of the Supreme Court dated August 31, 2011, effective October 31, 2011. See <http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVREMadePermanent.docx.pdf>. The relevant rules committees have been directed to report on necessary changes to those rules made necessary by experience in practice on a continuing basis. The Committee will continue to monitor civil procedure issues in electronically filed cases.

On June 6, 2011, the following amendments as recommended in the Committee’s 2010 Annual Report submitted to the Supreme Court on May 5, 2011, were sent out for comment, with comments due by August 6, 2011: Amendments of V.R.C.P. 8(c), 26(a),

and 56 to conform those rules to recent amendments of the Federal Rules of Civil Procedure; an amendment of V.R.C.P. 16.3(g) to conform that rule to provisions of the Uniform Mediation Act, adopted as 12 V.S.A., ch. 194; an amendment to V.R.C.P. 69 for consistency with 12 V.S.A. § 506 as amended by Act 132 of 2009 (Adj. Sess.), § 8; an amendment to Rule 1.10 of the Vermont Rules of Professional Conduct adapting a recent amendment to ABA Model Rule 1.10 to permit screening of lawyers joining a firm to avoid conflicts in certain matters, and a related amendment amending Comment [8] to Rule 1.0 of the Vermont Rules of Professional Conduct. *See* <http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDVRCPandVRPrC.pdf>. (The Committee's amendment adding V.R.C.P. 43(b) to provide a procedure for telephone or video testimony in civil actions involving incarcerated persons, proposed in the 2010 Annual Report, was withheld by the Supreme Court pending a broader review of such procedures by the Special Advisory Committee on Electronic Filing.)

After review of comments received from the bar, further comments by Advisory Committee members, and comments by members of the Legislative Committee on Judicial Rules, revisions of the order as proposed were sent to the Court on October 18, 2011. After further consideration of concerns of the Legislative Committee about disclosures of "event" witnesses, the Advisory Committee, in a further communication of November 12, 2011, recommended promulgation of the previously recommended amendments, except for elimination of the provision of the recommended amendment of V.R.C.P. 26(b)(4)(A)(i) that the required disclosure of the identity of expert witnesses extends to all opinion witnesses qualified and testifying as experts under V.R.E. 702, 703, and 705. In conference, the Court decided to eliminate from that subparagraph a sentence specifying the kinds of experts whose identity could be disclosed, leaving the provision unamended. On November 28, 2011, the Court promulgated the recommended order with that change. *See* [http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRC\\_P8\\_16.3\(g\)\\_26\\_56\\_69andVRPrC1.10\(a\)andCommentandComment8ofRule1.pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRC_P8_16.3(g)_26_56_69andVRPrC1.10(a)andCommentandComment8ofRule1.pdf).

On September 2, 2011, the following amendments proposed by the Committee were sent out for comment, with comments due on November 4, 2011: Amendments to V.R.A.P. 10, 12, 28-32; permanent adoption of emergency amendments to V.R.A.P. 28(d) and 30; abrogation of V.R.A.P. 10.1, 12.1, 28.1; amendment of V.C.J.C. § 5A(3). *See* [http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDVRAP10\\_10.1\\_12\\_12.1\\_28\\_28.1\\_29\\_30\\_31\\_32.pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDVRAP10_10.1_12_12.1_28_28.1_29_30_31_32.pdf); [http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDvcjc-5A\(3\).pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDvcjc-5A(3).pdf). No comments have been received. The Committee will recommend in a separate transmittal letter to the Court that these amendments be promulgated.

The remainder of this report summarizes the Committee's activities under three headings: I. Proposed amendments recommended for circulation to the bar for comment. II. Proposed amendments considered by the Committee and not recommended for circulation or promulgation at this time. III. Matters remaining on the Committee's agenda.

## **I. PROPOSED AMENDMENTS RECOMMENDED FOR CIRCULATION TO THE BAR**

The Committee recommends that the following proposed amendments to the Vermont Rules of Civil Procedure and the Vermont Code of Judicial Conduct be circulated to the bar for comment. A proposed promulgation order is being transmitted to the Court simultaneously with this report:

1. An amendment to V.R.C.P. 28(d) in light of the recent promulgation of V.R.C.P. 45(f).
2. Amendments to V.R.C.P. 72 proposed by the Probate Rules Committee to implement the interlocutory appeal provision of the Vermont Trust Code, 14A V.S.A. §201, and to reflect the establishment of the Civil Division by the Court Restructuring Act.#11-17—Probate Rules Committee’s Proposed Amendment of V.R.C.P. 72.

## **II. PROPOSED AMENDMENTS NOT RECOMMENDED FOR PROMULGATION**

The Committee will not at this time pursue the following matters proposed to it:

1. Service in Residential Eviction Cases. The Committee undertook a review of V.R.C.P. provisions concerning service of process in residential eviction cases. The Committee decided not to continue its review in light of the facts that the Committee had previously rejected a proposed rule for tack-order service in such cases and that the Civil Division Oversight Committee had adopted best practices for such service.
2. Proposed Amendments to V.R.E.C.P. 5(a), (h), to Accommodate Traffic Bureau Appeals. This item had been put on hold pending further legislative action on the matter. The Committee decided to take no action at this time due to the continuing possibility of legislation.
3. Proposed Amendment of V.R.P.C. 1.4 to Require Notice of Lack of Professional Liability Insurance. An amendment was proposed to add V.R.P.C. 1.4(c), a provision requiring a lawyer to inform a client if the lawyer did not maintain adequate professional liability insurance. The Committee, in 2006, had proposed that the Court consider such a provision, if at all, as part of the Rules for Licensing of Attorneys, rather than the Rules of Professional Conduct. The Court has taken no action on this matter. The Committee decided to take no action on this matter in light of its prior recommendation.
4. ABA Model Rules for Client Trust Account Records. The Committee determined that V.R.C.P. 1.15A eliminated any need to consider the proposed ABA Model Rules for Client Trust Account Records.

## **III. MATTERS REMAINING ON THE COMMITTEE'S AGENDA**

The following matters remain on the Committee's agenda for further consideration:

1. V.R.C.P. 62(a). At the request of the Court, the Committee will conduct a thorough review of the automatic stay provisions of V.R.C.P. 62(a) as part of the restyling project. (#07-3).

2. Small Claims Forms and Proposed Rule Revisions. The Committee will continue to review the Court Administrator's small-claims forms and the Small Claims Rules for consistency with current law and good practice. (#s10-1/08-6)

3. Potential Amendments to Accommodate Passage of Court Restructuring Bill (H.470) and Restyling of the Rules. The Committee will consider detailed amendments to follow up on the emergency amendments described above, as well as proposals to adapt for Vermont the comprehensive "restyling" amendments to the Federal Rules of Civil Procedure (2007) and the Federal Rules of Appellate Procedure (1998) and amendments to the Vermont Rules for Environmental Court Proceedings, intended to simplify their arrangement and language. (#10-5).

4. Extension of Emergency Amendment of V.R.A.P. 33.1 to All Appeals. The Committee in reviewing comments on the emergency amendment of V.R.A.P. 33.1 will consider whether its provisions for argument by video or telephone should be extended to all appeals. (#10-6).

5. Adoption of Amendments to ABA Model Code of Judicial Conduct. The Committee will continue to consider whether to study 2007 amendments of the ABA's Model Code of Judicial Conduct to the Vermont Code. (#10-8).

6. Question Regarding Text of VRPC 4.1 Comment. The Committee will determine whether a discrepancy between the Comment to VRPC 4.1 as adopted and the text of the Comment in the published version can be resolved editorially rather than by amendment (#11-4).

7. Pleading Requirements in "Debt Buyer" Cases. The Committee will consider whether special pleading requirements are necessary in cases where the plaintiff is a debt buyer (#11-10).

8. Motions to Reconsider. The Committee will consider whether a special procedure for motions to reconsider interlocutory orders would be appropriate in the Vermont Rules for Environmental Court Proceedings (#11-13).

9. Proposed Amendment of V.R.C.P. 4(b). The Committee will consider a proposed amendment to remove the requirement of V.R.C.P. 4(b) that a judge or clerk sign the summons of a pro se plaintiff to facilitate electronic filing, the (#11-14).

10. Trustee Process against Banks on Certain Federal Agency Direct Deposits. The Committee will consider whether federal regulations affecting trustee process against banks in the case of certain federal direct deposits require an amendment of V.R.C.P. 4B (#11-15).

11. Disclosure of Expert "Event" Witnesses. The Committee will consider whether to propose a further amendment to V.R.C.P. 26(b)(4)(A)(i) providing that the required disclosure of the identity of expert witnesses extends to all opinion witnesses qualified and testifying as experts under V.R.E. 702, 703, and 705.

In closing, the Committee and the Reporter wish to thank all the members of the Vermont bench and bar, the members of the Legislative Committee on Judicial Rules, and others who have participated in the rule-making process through their thoughtful suggestions and comments. In particular, thanks are due to Hon. John A. Dooley of the Supreme Court for his guidance as judicial liaison, to Hon. Geoffrey Crawford for his long service as a member of the Committee, and to Court Administrator Robert Greemore, staff attorneys Leonard Swyer and Edward McSweeney, and Larry Abbott and

Deb Laferriere of the Court Administrator's staff for their continued and essential administrative support.

Respectfully submitted,

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