VERMONT SUPREME COURT

Advisory Committee on Rules of Civil Procedure

2009 Annual Report

November 25, 2009

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 2008 annual report, dated October 9, 2008. Since filing that report, the Committee has met five times—on December 5, 2008, and February 13, May 29, September 11, and November 13, 2009—to consider amendments or other matters pertaining to the Vermont Rules of Civil Procedure, the Vermont Rules of Appellate Procedure, the Vermont Rules of Environmental Court Procedure, and the Vermont Rules of Professional Conduct and to review comments received from the bar and others on proposed amendments concerning those rules.

Revisions to the March 2005 proposed amendments conforming the Vermont Rules of Professional Conduct to amendments of the ABA Model Rules were circulated for comment on February 16, with comments due on April 13, 2007. See http://www.vermontjudiciary.org/rules1/VRPCprop2-2007.pdf. The March 2005 amendments were recommended to the Court in Professor Wroth's letter of January 28, 2008, with the February 2007 revisions and certain additional revisions. After a preliminary discussion with the Court on May 7, 2008, Professor Wroth reviewed the recommended amendments with the Court on April 7, May 7, and June 9, 2009. The Court promulgated the amendments with certain further minor revisions on June 17, 2009, effective September 1, 2009. See http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATED-JUN1709-VRPC.pdf.

Proposed Amendments to V.R.C.P. 55(b), Form 1A, and V.R.E.C.P. 5(b)(3) and 5(d)(2) were circulated to the bar for comment on March 19, 2008, with comments due by May 16, 2008. See http://www.vermontjudiciary.org/rules/proposed/proposedVRCP55(b)(1)Form1A_5(b)(3)and(d)(2).pdf. These proposed amendments were considered by the Legislative Committee on Judicial Rules at a meeting on December 8, 2008. That Committee asked that the Civil Rules Committee give further consideration to the proposed amendment of V.R.C.P. 55(b). The remaining amendments were recommended for promulgation in letter of December 9, 2008, and were promulgated on December 17, 2008, effective February 17, 2009. See http://www.vermontjudiciary.org/rules/Promulgated/vrcp-f1A_vrecp5(b)(3)and(d)(2)PROMULGATED.pdf. The Civil Rules Committee's recommendation that the amendment of V.R.C.P. 55(b) be promulgated as proposed was transmitted to the Court in letter of April 16, 2009. The Court promulgated it as recommended on May 7, 2009, effective July 6, 2009. See http://www.vermontjudiciary.org/LC/Statues%20and%20Rules/PROMULGATED-VRCP55(b)(1).pdf.

Amendments to V.R.C.P. 79.3 and V.R.A.P. 10.1, 12.1, proposed by the Court Administrator to reflect the availability of digital recording capability in some courts, were reviewed by the Committee and promulgated by the Court as emergency amendments by order of June 17, 2008, effective immediately, with a correction in the caption of V.R.C.P. 79.3(f) made by emergency amendment in order of July 21, 2008, effective immediately. See http://www.vermontjudiciary.org/rules/Promulgated/vrap10.1_12.1_vrcp79_vrcrp53_emergencypromulgated.pdf; http://www.vermontjudiciary.org/rules/Promulgated/vrcp79_vrcrp53_correct captionemergencypromulgated.pdf.

Amendments to V.R.A.P. 32(a)(5) and (7)(C) and 32(c) to specify approved typefaces for briefs, correct an erroneous cross-reference, and delete references to page limitations were reviewed by the Committee and promulgated by the Court as emergency amendments by order of June 17, 2008, effective immediately. See http://www.vermontjudiciary.org/rules/Promulgated/vrap32(a)(5)(7)(C)_emergencypromulgated.pdf.

The Committee's proposed amendment making V.R.C.P. 79.1(h) permanent and proposed amendments to V.R.C.P. 16.2, 26(b) and (f), 33(c), 34, 37(f), 45, and 50(b), and V.R.A.P. 31(e)(2) were sent out for comment on November 21, 2008, with comments due by January 26, 2009. *See* http://www.vermontjudiciary.org/rules/proposed/VRCP79.1(h)VRAP31(e)(2)PROPOSED.pdf and http://www.vermontjudiciary.org/rules/proposed/VRCP16.2_26_33_34_37_45_50(b)(d)PROPOSED.pdf. These amendments were reviewed by the Legislative Committee on Judicial Rules on January 14, 2009, without comment. In letter of April 16, 2009, the amendments were transmitted to the Court with other comments received and the recommendation that they be promulgated as proposed. On May 7, 2009, the Court promulgated the amendments as recommended, effective July, 2009. See http://www.vermontjudiciary.org/LC/Statues%20and%20Rules/PROMULGATED-VRCP16.2_26(b)and(f)_33(c)_34_37(f)_45_50(b).pdf and http://www.vermontjudiciary.org/LC/Statues%20and%20Rules/PROMULGATED-VRCP79.1(h)andvrao31(e)(2).pdf.

Emergency amendments of V.R.C.P. 77(d) and V.R.A.P. 45(c) that would permit electronic service by clerks and validate so-called "basket service" were promulgated by the Court on December 17, 2008, effective January 1, 2009, with a direction that the Advisory Committee report on any comments received by September 30, 2009. See http://www.vermontjudiciary.org/rules/Promulgated/vrcp77(d)_vrcrp56(d)_vrpp77(d)_vrap45(c)noticebyclerk.PROMULGATED.pdf. These amendments were reviewed by the Legislative Committee on Judicial Rules on January 14, 2009, without comment. The Advisory Committee is prepared to recommend that the rules should be made permanent, but not until after the administrative order or directive called for in the amended rules has been proposed and circulated for comment and reviewed by the Committee. See item III.7. below.

The Advisory Committee and the Superior Court Oversight Committee recommended to the Supreme Court an emergency amendment adding V.R.C.P. 80.1(b)(3) to require a notice informing defendants in residential foreclosure cases of free resources available to assist them in trying to arrange to keep their homes, or, where appropriate, make the most favorable arrangements for selling the homes and paying off the debt. The emergency amendment was promulgated on December 17, 2008, effective January 1, 2009, with a direction that the Advisory Committee report on any comments received by September 30, 2009. See http://www.vermontjudiciary.org/rules/Promulgated/vrcp 80-1(b)(3)-foreclosurePROMULGATED.pdf. This amendment was reviewed by the Legislative Committee on Judicial Rules on January 14, 2009, without comment. The Advisory Committee will recommend continuation of this rule for two additional years in a separate letter.

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 Vermont Rules of Appellate Procedure be circulated to the bar for comment (proposed promulgation orders are attached as Appendix I and Appendix II):

1. An amendment of V.R.C.P. 62(a) to eliminate a discrepancy between 12 V.S.A. § 4854, as amended in the last legislative session, and the rule, concerning the date of issuance of a writ of possession. See Appendix I.

2. Amendments proposed by the Superior Court Oversight Committee to V.R.C.P. 80.1(c) eliminating the requirement of a verified answer and elimination of the role of the clerk in entering a default and to V.R.C.P. 80.1(f) eliminating any inference that the clerk decides liability and adding provisions to the rule for a certificate of service of all filings and for service of post-judgment motions. See Appendix II.

3. An amendment to V.R.E.C.P. 3 to address the addition of Environmental Court jurisdiction of petitions for the revocation of municipal land use permits enacted in 2009 as 24 V.S.A. § 4455. See Appendix I.

II. PROPOSED AMENDMENTS NOT RECOMMENDED FOR PROMULGATION

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

1. The Court Administrator had proposed that V.R.C.P. 3.1(b) be amended to allow waiver of a portion of the entry fee and costs of service on the basis of a sliding scale of income and assets. After attempting to draft an administrative order that would implement the sliding scale, the Committee has decided not to recommend the rule amendment, because a relatively small group of litigants would be affected, the revenue impact would be minimal, and it would be difficult to provide a clear standard for the clerks to apply in determining the proper fee under the sliding scale. (#07-6).

2. It was proposed to limit the number of interrogatories and subparts by an amendment of V.R.C.P. 33 comparable to recently promulgated V.R.F.P. 4(g)(2)(B)(i). The Committee decided not to pursue this proposal, because, it appears that there is not a present problem with the number of interrogatories in Superior Court. (#05-10).

3. It was proposed that the Committee consider means of implementing Chittenden County Local Rule 16.4 providing an accelerated procedure for actions, other than personal injury actions, involving claims of less than $50,000. The Committee decided not to pursue this matter in light of the lack of substantial use of the procedures except as parties were guided into them in the case management process. (#08-3).

4. A proposal that a nominal filing fee be levied for indigent litigants in parentage and divorce cases and in post-judgment motions, forwarded to the Committee by the Chief Justice, was referred to the Family Rules Committee. (#09-2).

III. MATTERS REMAINING ON THE COMMITTEE'S AGENDA

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

1. Discovery Rules Amendments. The Committee will consider an amendment of V.R.C.P. 26(f) adapting some features of former F.R.C.P. 26(f) and a parallel amendment consolidating the pre-trial conference provisions of V.R.C.P. 16, 16.2, and 16.3. (#09-4).

2. Further Revisions to Federal Rules. The Committee is considering further amendments to the Federal Rules effective December 1, 2009, including time-computation provisions and amendments adding F.R.C.P. 62.1 and F.R.A.P. 12.1 to clarify the procedure for motions made in the trial court pending appeal. The Committee will review pending amendments to F.R.C.P. 26 and 56(c) if they are promulgated by the U.S. Supreme Court. (#09-4).

3. "Restyling" Amendments. The Committee, with the assistance of students at Vermont Law School, will continue to review a proposal to adapt for Vermont the comprehensive "restyling" amendments to the Federal Rules of Civil Procedure (2007) and the Federal Rules of Appellate Procedure (1998) intended to simplify their arrangement and language. (#06-6).

4. Uniform Mediation Act and V.R.C.P. 16.3 and V.R.E. 408. The Committee will continue to review the effect of differences between the Uniform Mediation Act, V.R.C.P. 16.3(g), and V.R.E. 408. (#07-2).

5. 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). (#07-3).

6. V.R.C.P. 75—Amendment and Voluntary Dismissal. The Committee is reviewing apparent inconsistencies between V.R.C.P. 75 and V.R.C.P. 15 and 41. (#09-7).

7. V.R.C.P. 77(d) and V.RA.P. 45(c)—Emergency Amendments. The Committee will consider any administrative order or directive developed by the Court Administrator to implement emergency amendments to V.R.C.P. 77(d) and 45(c) to allow the clerk to make service by electronic or other means not provided in V.R.C.P. 5.

8. V.R.C.P. 80.1—Mediation in Foreclosure Actions. The Committee will prepare an amendment to V.R.C.P. 80.1 for consideration by the Superior Court Oversight Committee. The amendment would require the judge in every foreclosure action to decide whether to order mediation under V.R.C.P. 16.3(a)(3), whether or not the defendant had appeared.

9. V.R.C.P. 80.5(j)—Test for a Stay. The Committee is considering revision of the test for a stay under V.R.C.P. 80.5(j). (#09-8).

10. The Committee will review the Court Administrator's *in forma pauperis* application form (Form 228) for consistency with the provisions of Rule 3.1. (#07-6).

11. Small Claims Forms. The Committee will review the Court Administrator's small-claims forms for consistency with current law and good practice. (#08-6).

12. Uniform Interstate Discovery and Depositions Act. The Committee will continue to consider whether to propose adoption of the Uniform Interstate Depositions and Discovery Act as a provision of the Vermont Rules of Civil Procedure. (#09-1).

13. Amendment of ABA Model Rule 1.10 to Permit Screening and other Model Rules Amendments. .The Committee will review screening issues under Rules 1.10 and 1.0, as well as recent changes to Model Rules 3.8 (2008) and 5.5, Comment (2007) not incorporated in the 2009 amendments to the Vermont Rules. (#09-3).

14. FRE 502 Amendments and Discovery. The Committee will review the connection between newly enacted Federal Rule of Evidence 502 and the 2009 amendments to the Vermont discovery rules. (#09-5).

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 and to former Court Administrator Lee Suskin, Court Administrator Robert Greemore, staff attorneys Leonard Swyer and Edward McSweeney, and Larry Abbott and Deborah Laferriere of the Court Administrator's staff for their continued and essential administrative support.

Respectfully submitted,

William E. Griffin, Chair

For the Committee:

Eric B. Avildsen
Hon. Geoffrey Crawford
James A. Dumont
Joseph E. Frank
Jean B. Giddings
Hon. Matthew Katz
Allan R. Keyes
Betty Loftus
Karen McAndrew
Gregory Weimer

Hon. John A. Dooley, Supreme Court Liaison
Professor L. Kinvin Wroth, Reporter

APPENDIX I TO 2009 ANNUAL REPORT OF THE CIVIL RULES COMMITTEE

December __, 2009

PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2010

Order Promulgating Amendment to the Vermont Rules of Civil and Environmental Court Procedure

Pursuant to Chapter II, Section 37, of the Vermont Constitution and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 62(a)(3) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT

(a) **Automatic Stay Prior to Appeal; Exceptions.**

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(3) *Orders for Possession.*

(A) No order for possession shall issue upon a final judgment for possession of ~~real estate or~~ a chattel, nor shall proceedings be taken for enforcement of the judgment for 10 days after its entry; provided that on motion made during the 10-day period the court may stay any such writ for a further period of 20 days or until the time for appeal from the judgment as extended by ~~Rule 80.1(m) or~~ Appellate Rule 4 has expired.

(B) A writ of possession shall issue on the date on which a final judgment for possession of real estate is entered, provided that on motion made within 10 days after entry of judgment the court may stay any such writ for a period of 20 days or until the time for appeal from the judgment as extended by Rule 80.1(m) or Appellate Rule 4 has expired.

(C) Any stay shall be granted upon such terms as the court considers necessary to protect the interests of any party. A timely motion for a stay acts as a further stay until the motion can be heard and determined, which shall be at the earliest possible time.

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Reporter's Notes—2010 Amendment

Rule 62(a) is amended for consistency with 12 V.S.A. § 4854, as amended by Act 176 of 2007 (Adj. Sess.), §52. The statutory amendment provided that the writ of possession in action of ejectment under 12 V.S.A.,§§ 4851-4856 should issue on the date of entry of judgment, rather than ten days thereafter as previously provided, unless a stay is ordered for good cause. The amendment also extends the date after which the sheriff is to put the plaintiff in possession from five to ten days after the writ is served.

The amendment divides Rule 62(a)(3) into subparagraphs (A)-(C). For reasons outlined in the Reporter's Notes to the 1996 addition of paragraph (3), subparagraph (A) preserves the language of the existing rule covering orders for possession of a chattel. Subparagraph (B) adapts the provisions of the amended statute to the structure of the rule, preserving the ten-day period after entry of judgment in which a motion for a stay may be made. Subparagraph (C) preserves the language of the present rule concerning the terms of a stay and the effect of a motion for judgments for possession of both real property and chattels.

2. That Rule 3(9) of the Vermont Rules for Environmental Court Proceedings be designated as Rule 3(10) and new Rule 3(9) be added to read as follows (deleted matter struck through; new matter underlined):

RULE 3. CIVIL ACTIONS

The following actions within the original jurisdiction of the Environmental Court shall be commenced and conducted as civil actions under the Vermont Rules of Civil Procedure and the Vermont Rules of Appellate Procedure, so far as those rules are applicable and except as they may be modified by subdivisions (b)-(e) of Rule 2:

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(9) Actions by municipalities to revoke a municipal land use permit issued under 24 V.S.A., chapter117, as provided in 24 V.S.A. § 4455.

(10) Any other original action concerning a subject matter within the jurisdiction of the Environmental Court in which the relief sought is not available under other provisions of these rules or by action pursuant to paragraphs (1)-(~~8~~9) of this rule.

Reporter's Notes—2010 Amendment

Present Rule 3(9) is renumbered as Rule 3(10), and new Rule 3(9) is added to include municipal actions authorized by 24 V.S.A. §4455, added by Act 54 of 2009, § 47, to revoke land use permits where the terms of the permit have been violated or the permit was obtained based on a misrepresentation of material facts.

3. That these rules, as adopted or amended, are prescribed and promulgated to become effective on _____, 2010. The Reporter's Notes are advisory.

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

Dated in Chambers at Montpelier, Vermont, this _____ day of _____, 2010.

_____
Paul L. Reiber, Chief Justice

_____
John A. Dooley, Associate Justice

_____
Denise R. Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Brian L. Burgess, Associate Justice

APPENDIX II TO 2009 ANNUAL REPORT OF THE CIVIL RULES COMMITTEE

December __, 2009

PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2010

Order Promulgating Amendment to the Vermont Rules of Civil and Appellate Procedure

Pursuant to Chapter II, Section 37, of the Vermont Constitution and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 80.1(b)(4) of the Vermont Rules of Civil Procedure be added to read as follows (new matter underlined):

RULE 80.1. FORECLOSURE OF MORTGAGES AND JUDGMENT LIENS

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(b) **Complaint; Process; Certificate of Service.**

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(4) *Certificate of Service*. All papers filed after the complaint shall be served on all parties who have appeared in the case. The party serving and filing any paper shall file a certificate that identifies the motion or other filing and shows when and how it was served on each party in accordance with Rule 5.

Reporter's Notes—2010 Amendment

Under Rule 5, parties to every civil action are required to serve all appearing parties with all pleadings, motions, notices, and other papers filed, but are not required to file a certificate of service to show that they have done so except under Rule 5(d) with respect to discovery items not filed with the court. Experience has shown that plaintiffs' lawyers (or their staff personnel) often do not remember to serve motions and other filings on defendants who have appeared but have been defaulted based on no valid defense. Because there is no requirement for filing a certificate of service, the court usually cannot tell whether or not a defendant was served with motions and other papers such as affidavits. Similarly, the

court cannot tell whether pro se defendants have met their obligations to send copies of filings to plaintiffs' counsel.

The amendment requires the filing of a certificate of service in foreclosure cases, so that all parties are clearly required to fulfill the service requirement, and so that the court is able to determine from the case record whether or not parties have received notice of the filings of others.

2. That Rule 80.1(c) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 80.1. FORECLOSURE OF MORTGAGES AND JUDGMENT LIENS

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(c) **Summary Judgment; Default.** If within the time allowed under Rule 12(a) a party defendant files an ~~verified~~ answer ~~or answer supported by affidavits, disclosing facts alleged to constitute a defense to plaintiff's claim~~, plaintiff may within 10 days after service of the answer move for summary judgment. The complaint shall be treated as though supported by affidavit and the matter shall proceed as provided in Rule 56. ~~The clerk shall enter a default,~~ If within the time allowed under Rule 12(a) a party defendant fails to file an answer, plaintiff may move for a default judgment against that defendant in accordance with Rule 55(~~a~~b)~~, against any defendant who fails to file such answer~~. Any motion filed under this section shall be accompanied by an affidavit as to the amount due.

Reporter's Notes—2010 Amendment

Rule 80.1(c) requires that an answer be verified or supported by affidavit(s) and disclose facts alleged to constitute a defense, and provides that the matter proceed as a Rule 56 summary judgment motion if such an answer is filed, or for entry of default by the clerk if "such answer" is not filed. While the reason for such a rule is rational, in practice the rule as written creates inequities and promotes inconsistent results.

Nearly all defendants in the voluminous number of current foreclosure cases are not represented by attorneys. Since Emergency Rule 80.1(b)(3) went into effect on January 1, 2009, more defendants are filing notices of appearance or answers and seeking assistance, which is beneficial, but a problem of fairness often arises when a motion for summary judgment or default is filed by plaintiff. Pro se defendants rarely file answers that are verified or supported by affidavit. Often they acknowledge liability but want to do a workout, or sometimes they describe facts that would be a defense (e.g., they received no letter of acceleration, or they have already reached an agreement with plaintiff's

workout department). Plaintiffs' attorneys often want the clerk to enter a default on the grounds that the answer is unverified, whether or not valid grounds for a defense are described.

First, the amendment takes the clerk out of the process altogether, making clear that it is the judge who responds with a ruling on a motion for default or summary judgment. Clerks should not be considered to have responsibility for deciding whether or not an answer sets forth facts that constitute a defense. That decision calls for legal analysis and should be made by the judge. Second, the requirement is not understood by pro se defendants, yet foreclosures are equitable proceedings in which people may lose their homes. Judges are put in the position of choosing whether to observe the requirement even when it does not appear to be consistent with equitable principles, or following the rule as written. The amendment seeks to standardize practices so that all litigants who are similarly situated receive fair and equal treatment; this outcome is best promoted by eliminating the rule mandating that an answer be verified. A judge can always give a defendant who presents a defense in an unverified statement additional time to file an affidavit and proceed on summary judgment, but elimination the verification requirement in the rule is intended to promote equality of treatment. Otherwise Defendant A, who responds without verification, is subject to entry of default by the clerk or a judge, whereas Defendant B, who writes the same substantive response but has it notarized, is treated as a full party.

This leads to the second problem: the rule does not distinguish between the two types of "default": failure to respond in any way to the summons and complaint, and failure to present a defense. In the second type, which is common (and even more common under Emergency Rule 80.1(b)(3)), a defendant may file an appearance and wants an opportunity to receive all motions, affidavits, etc. and generally be a party to the case in order to follow its progress and check amounts requested in the judgment, but in many cases, both plaintiffs' lawyers and clerks have treated that person as having "defaulted," with the result that the defendant is not served with motions or affidavits by plaintiffs, and may not be sent copies of rulings and notices of hearings by the court. The Judiciary is addressing the court staff training issue, but matters are clarified if the rule does not by its terms overlay the concept of failing to present a valid defense with the concept of failing to respond to a summons at all. The proposed amendment uses the same concept for default as applies to all other types of civil litigation.

3. That Rule 80.1(f) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 80.1. FORECLOSURE OF MORTGAGES AND JUDGMENT LIENS

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(f) **Accounting; Attorney's Fees.** If ~~default has been entered as provided in subdivision (c) and~~ the parties have not agreed upon the sum due and included it in a form of judgment, the clerk~~, upon request of the plaintiff accompanied by an affidavit as to the amount due and upon six days' notice to all parties who have appeared,~~ shall proceed to take an accounting based on the adjudications under subdivision (d) on motions filed under subdivision (c), and ~~find~~ shall set forth the amount of ~~principal~~ liability, interest to date, and costs due~~. Such accounting shall be made~~ upon forms furnished by the state. ~~If defendant is an infant or incompetent person, a plaintiff entitled to judgment by default shall proceed as provided in Rule 55(b)(2). If the entry is not by default~~ Alternatively, an accounting shall be taken at such time and in such manner as the court may order. Reasonable attorney's fees claimed by the plaintiff under the mortgage or other instrument evidencing indebtedness in an amount not exceeding two percent of the total of principal, interest, and costs due, or in a greater amount expressly agreed upon in the mortgage or other instrument, shall be allowed and included in the amount found due to the accounting without hearing, unless defendant objects, or plaintiff claims a higher fee in the demand for judgment. Upon such objection or claim, attorney's fees shall be set by the court after notice and hearing.

Reporter's Notes—2010 Amendment

Rule 80.1(f) implies that unless a stipulated judgment is submitted that specifies an agreed-upon sum due, the accounting is prepared by the clerk. In practice, with all the provisions that are currently in use in lengthy note and mortgage forms, there is a multiplicity of items for which a mortgagor may be liable to a mortgage holder, but there are also expenses that a mortgage holder may incur with respect to a property that are discretionary, and for which mortgagor may have no contractual liability. It can be (and often is, in practice) inferred from the current rule that it is the clerk's role to sort out what items included in the affidavit of amounts due (often taken off an institutional spreadsheet by a mortgage servicing company's employee unfamiliar with the property or the documents) should or should not be included in the judgment, and in what amounts.

The amendment makes clear that the clerk's role is the clerical one of mathematical computation, whereas it is the role of the judge to make decisions as to what items and amounts requested by plaintiff have been shown to be items for which the mortgagor is liable under the loan documents.

4. That Rule 80.1(g)(2) of the Vermont Rules of Civil Procedure be added to read as follows (new matter underlined):

RULE 80.1. FORECLOSURE OF MORTGAGES AND JUDGMENT LIENS

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(g) **Form of Judgment; Motions after Entry of Judgment.**

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(1) *Form of Judgment.* Plaintiff shall file and serve… . [remainder of present (g) unchanged].

(4) *Motions after Entry of Judgment*. Any party who seeks a modification of any term in a judgment pursuant to Rule 59(e) or 60(b) shall, at the time of filing a motion for modification, file a certificate showing when and how service of a copy of the judgment and the motion was made under Rule 5 on all defendants whose interest may be affected by the modification, whether or not a particular defendant had entered an appearance in the case prior to judgment. The court may, in its discretion, require service under Rule 4, after consideration of the nature of the modification requested.

Reporter's Notes—2010 Amendment

Motions are sometimes filed after the entry of judgment seeking changes in terms of the judgment: *e.g.*, to vacate a judgment and dismiss a complaint when the defendant refinanced with the plaintiff, or to stay the time for a judicial sale based on a bankruptcy filing or forbearance agreement, or to amend the amount of liability prior to a judicial sale in order to include in the redemption amount expenditures made after the accounting date, or to reinstate a foreclosure action that was previously dismissed without prejudice based on a workout plan that subsequently failed. Where a party defendant did not appear in the original case, plaintiffs frequently simply file such motions with the court without showing service of either the judgment or the motion on the defendant, apparently on the theory that, consistent with Rule 5(a), since there was an original default, there is no requirement of notice.

Sometimes, however, it is clear from the record that a non-appearing defendant has been in direct contact with the plaintiff despite not having entered an appearance in court—for example, when the plaintiff previously dismissed the case based on a workout agreement, which subsequently failed—or that the modification requested is significant in relation to what a defendant might have reasonably expected based on the original complaint.

The amendment is intended to assure, as principles of notice and due process require, that prior to the filing of such motions, the plaintiff be

required to serve a copy of the judgment and the motion on all parties to the original action who will be affected by the terms of any proposed modification. The final sentence is consistent with the provision of Rule 5(a) that "pleadings asserting new or additional claims for relief against them shall be served upon [parties in default for failure to appear] in the manner provided for service of summons in Rule 4."

5. That these rules, as adopted or amended, are prescribed and promulgated to become effective on _____, 2010. The Reporter's Notes are advisory.

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

Dated in Chambers at Montpelier, Vermont, this _____ day of _____, 2010.

_____
Paul L. Reiber, Chief Justice

_____
John A. Dooley, Associate Justice

_____
Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

_____
Brian L. Burgess, Associate Justice