

VERMONT SUPREME COURT
Advisory Committee on Rules of Civil Procedure

2013 Annual Report

November 12, 2013

The Advisory Committee on Rules of Civil Procedure submits this report to the Supreme Court pursuant to Administrative Order No. 17, § 5. The report covers the Committee's activities since its 2012 annual report, dated January 29, 2013. Since filing that report, the Committee has met four times—on February 8, May 3, July 19, and October 4, 2013—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, and the Vermont Code of Judicial Conduct, and to review comments received from the bar and others on proposed amendments concerning those rules.

Eileen Blackwood, Esquire, was appointed to the Committee in July 2013 to replace Joseph E. Frank, Esquire, who had declined to be reappointed at the end of his most recent term. On August 29, 2013, Hon. Robert Mello resigned from the Committee because of the requirements of other judicial and committee assignments. No successor has yet been appointed.

On December 6, 2012, the Court Administrator sent out for comment amendments proposed by the Special Committee on Rules for Electronic Case Filing to the following rules: V.R.C.P. 79.1; V.R.A.P. 3(d), 10(a)(3), 13(c), 45.1; V.R.F.P. 15(i); V.R.E.P. 5(c); V.R.Cr.P. 44.2(e); V.R.P.P. 79.1(i); and V.R.E.F. 3, 7(d), 12, and to A.O. 45, intended to facilitate the transmission of court notices by electronic means by requiring attorneys and other filers to include their eCabinet registration number in their initial filings. Comments were due by January 7, 2013. The Advisory Committee had no comments. On February 6, the Court promulgated those amendments, effective April 8, 2013. See <https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDAmendments%20E-filing%20et%20al.pdf>.

On February 12, 2013, the Court Administrator sent out for comment the proposed restyled Vermont Rules of Appellate Procedure and proposed “substantive” amendments to 14 of the restyled rules, with comments due on April 12, 2013. The comment draft and subsequent revisions were prepared with significant assistance from Supreme Court staff attorney Emily Wetherell. On May 9, 2013, on the recommendation of the Committee, the Court Administrator sent out for comment a proposed emergency amendment to existing V.R.A.P. 30 concerning the number of copies of the printed case, with comments due on June 7, 2013. On June 11, the Court promulgated emergency amendments to that rule in slightly different form, effective July 1, 2013. See https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDEMERGENCYVRAP30_June11%202013%20with%20dissent.pdf. On June 11, effective

September 3, 2013, the Court promulgated the restyled Vermont Rules of Appellate Procedure as recommended by the Committee in the form sent out for comment, including the separately sent-out “substantive” changes and the emergency amendments to V.R.A.P. 30. On August 12, 2013, effective on that date, the Court promulgated emergency amendments to the restyled rules as promulgated on June 11 to incorporate February 6 amendments, noted in the preceding paragraph, which had been inadvertently omitted in the June 11 promulgation, together with a corrected text of the full restyled rules to be effective September 3, 2013. See <https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/Corrected%20PROMULGATED%20Final%20Pure%20Restyled%20Appellate%20Rules.pdf>. The Legislative Committee on Judicial Rules reviewed the promulgated rules on August 15, 2013, and had no substantive comments.

On February 12, 2013, the Court Administrator sent out for comment proposed amendments to Rules 3, 7, 8, and 13 of the Vermont Rules of Small Claims Procedure with comments due on April 12, 2013. One comment was received. On July 10, effective September 9, 2013, the Court, on the Committee’s recommendation, promulgated the amendments as previously sent out for comment. See https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRS CP3_7_8_13.pdf. The Legislative Committee on Judicial Rules reviewed the promulgated rules on August 15, 2013, and had no substantive comments.

On June 18, 2013, the Court Administrator sent out for comment amendments to Rules 80.1(b)(3) and 80.9 of the Vermont Rules of Civil Procedure and Rule 5(h)(1) of the Vermont Rules for Environmental Court Proceedings proposed by the Committee. Comments were due by August 16, 2013. See [https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDVRCPP80.1\(b\)\(3\)_80.9_VRECP5\(h\)\(1\).pdf](https://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDVRCPP80.1(b)(3)_80.9_VRECP5(h)(1).pdf). One comment, offering technical corrections in the proposed amendment to V.R.C.P. 80.1(b)(3), was received. The Legislative Committee on Judicial Rules reviewed the proposed rules on August 15, 2013, and had no comments. Subsequently, the amendments to V.R.E.C.P. 5(h)(1) were revised to reflect the fact that transcripts are now to be ordered from a Court-approved transcription service rather than from an individual court reporter. *Cf.* V.R.A.P. 10(b) as amended in 2013. By separate letter, the Advisory Committee will recommend promulgation of the amendments as sent out for comment with the noted corrections and revisions.

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 be circulated to the bar for comment. A proposed promulgation order is being transmitted to the Court separately from this report.

1. A proposed amendment to V.R.C.P. 4(b) eliminating the requirement that the summons contain the e-mail address of the court in light of the fact that a defendant cannot respond to a summons by e-mail.

2. A proposed amendment abrogating V.R.C.P. 79(b) and amending V.R.C.P. 79(c) in light of the elimination of record-keeping requirements by Act 67 of 2013.

II. PROPOSED AMENDMENTS NOT RECOMMENDED FOR PROMULGATION

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

1. V.R.A.P. 4(c). In *Coles v. Coles*, 2013 VT 36, at note 2, the Court requested that the Committee consider an amendment of V.R.A.P. 4(c)—now restyled as V.R.A.P. 4(c)(1)—to provide that a presumption of receipt of a notice of entry of judgment would arise from the timely mailing of notice by the clerk. The Committee has concluded that a presumption rule would not be feasible because of the difficulty in ascertaining the date of mailing from which the presumption would run, and because *Coles* establishes an appropriate approach. Present V.R.A.P. 4(c)(1) in effect creates a presumption of receipt based on date of entry of judgment. *Coles* makes clear that “receipt” means receipt in the party’s (or counsel’s) mailbox (i.e., the mailing address on file with the court), not in-hand receipt. The presumption is thus rebuttable by evidence that the notice was not delivered to that address within 21 days of the entry of judgment. The rule as so interpreted makes clear that the burden is on the recipient to take adequate measures to maintain a current mailing address and to be informed of mail that is received at it.

2. V.R.A.P. 28(j). It was proposed that V.R.A.P. 28(j) be amended to conform to F.R.A.P. 28(j) as amended in 2002. The amendment would provide that a letter informing the Court of additional authorities after the briefs have been filed or oral argument held must be limited to 350 words. The Committee determined to take no action on the proposal. The present rule is infrequently used and the procedure is not abused. The proposed amendment could lead to confusion.

3. V.R.A.P. 33.1(b). The Committee has had on its docket consideration of the question whether V.R.A.P. 33.1(b), adopted in July 2010 to permit oral argument before three-justice panels to be made by telephone or video conference, should be extended to all appeals. In light of the limited use of the rule to date, the Committee has removed this item from its agenda, pending an indication from the Court of a desire to extend the rule.

4. V.R.P.C. 4.1, Comment. It had been proposed that the Committee recommend an amendment to the Comment to V.R.P.C. 4.1 inserting language from the ABA Model Rules Comment stating that there is no general duty to inform an opponent of relevant facts. The language was inadvertently omitted when the promulgated Vermont rule was published. The Committee did not make a formal amendment proposal because the Court agreed that the addition could be made as an editorial correction in the 2013 supplement to the published Rule volume.

III. MATTERS REMAINING ON THE COMMITTEE'S AGENDA

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

1. 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 (including federal regulations) and good practice. (#s10-1/08-6/11-15).

2. Proposal to Conform V.R.C.P. 6 to Federal Amendments; Restyling the Civil Rules. The Committee will consider proposals to adapt for Vermont recent amendments to the timing provisions of Rule 6 of the Federal Rules of Civil Procedure and to continue development of comprehensive "restyling" amendments to the Civil Rules adapted from the 2007 restyling amendments to the Federal Rules of Civil Procedure (2007). (#10-5).

3. Adoption of Amendments to ABA Model Code of Judicial Conduct. The Committee will continue to consider proposing adoption of 2007 amendments of the ABA's Model Code of Judicial Conduct to the Vermont Code and revision of Code provisions covering elected probate judges. (#s10-8/13-1).

4. V.R.C.P. 26(b)(4). The Committee will continue to consider whether to propose an 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. (#12-1).

5. V.R.P.C. 3.8(g), (h)—Conformity to Model Rules Amendments. The Committee will consider whether to propose adaptation of Rules 3.8(g), (h), of the ABA Model Rules of Professional Conduct concerning prosecutorial obligations toward a person potentially innocent of a crime for which she or he has been convicted. (#12.6).

6. V.R.C.P. 5—Certificate of Service Form. The Committee will consider whether Rule 5 should provide that a certificate of service form be included with every document filed with the court (#12-7).

7. V.R.C.P. 3—Notice of Appearance Form. The Committee will consider whether Rule 3 should require that a notice of appearance form for unrepresented litigants be included with every summons (#12-8).

8. V.R.C.P. 43(e)—Proposed Amendments Concerning Appointment and Compensation of Interpreters. The Committee will consider amendments requested by the Court's Interpretation Subcommittee to bring Rule 43(e) into compliance with federal guidelines for interpreters.

9. V.R.C.P. 37, 45. Recent Amendments of F.R.C.P. 37 and 45. The Committee will consider whether to propose adaptation of pending amendments to F.R.C.P. 37 and 45 for Vermont. (#13-4).

10. Proposed Federal Rules Amendments. The Committee will consider whether to propose for Vermont various amendments that have been proposed to the Federal Rules of Civil Procedure and sent out for comment. (#13-7).

11. Small Claims Rules Amendments. The Committee will consider whether to propose adaptation of recently adopted Small Claims Rules amendments (p. 2 above) to the Civil Rules. (#13-8).

12. V.R.A. P. 1(b), 2, 26(b). The Committee will consider whether to propose amendments allowing waiver of appeal time periods in light of *In re D.D.*, 2013 VT 79, and *In re A.D.T.* 174 Vt. 369 (2002). (# 13-9).

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 many years of guidance as judicial liaison, to Joseph E. Frank, Esquire for his long service as chair and as a member of the Committee, Hon. Robert Mello for his Committee service, and to Court Administrator Robert Greemore; Patricia Gabel, his successor in that office; staff attorneys Leonard Swyer, Edward McSweeney, and Emily Wetherell; and Larry Abbott and Debra Laferriere of the Court Administrator's staff for their continued and essential administrative support.

Respectfully submitted,

William E. Griffin, Chair

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