

VERMONT SUPREME COURT
Advisory Committee on Rules of Civil Procedure

2012 Annual Report

January 29, 2013

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 2011 annual report, dated December 13, 2011. Since filing that report, the Committee has met five times—on February 24, May 4, July 13, October 5, and December 14, 2012—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. Dennis Pearson was appointed to the Committee in July 2012 to replace Hon. Matthew Katz, who had resigned because of illness.

By letter of December 13, 2011, the Committee transmitted a report requested by the Court considering issues concerning extra-judicial income of part-time judges and a draft promulgation order containing proposed amendments to the definitions section and sections 5A and 5B of the Vermont Code of Judicial Conduct to be circulated to the bar. The proposed amendments have not yet been circulated.

By order of December 21, 2011, effective January 1, 2012, the Court, as recommended by the Committee, extended an emergency amendment of V.R.C.P. 80.1(b)(3) (notice to foreclosure defendants of available assistance) until December 21, 2013, and made permanent an emergency amendment to V.R.C.P. 80.1(g)(2) (additional protections for foreclosure defendants). See [http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDExtendingVRCP80.1\(b\)\(3\)Permanent80.1\(g\)\(2\).pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDExtendingVRCP80.1(b)(3)Permanent80.1(g)(2).pdf).

By order of December 21, 2011, effective February 20, 2012, the Court, as recommended by the Committee, made permanent 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.) and an amendment of V.C.J.C. § 5A(3), providing that an assistant judge or candidate for that office may run for the office of probate judge and, if elected to both offices, may serve in both. See http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRJCanon5_SectionBApplicationofCodeofJudicialConductandMakingPermanent.EmergencySectionBAO10.pdf.

By order of March 14, effective May 14, 2012, the Court, as recommended by the Committee with some revisions, promulgated amendments to V.R.A.P. 10, 12, 28-32; permanently adopted emergency amendments to V.R.A.P. 28(d) and 30; and abrogated V.R.A.P. 10.1, 12.1, 28.1. See

[http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRA P10 12 28-32 PERMANENT28\(d\)and30ABROGATION10.1 12.1 28.1.pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRA%20P10%2012%2028-32%20PERMANENT28(d)and30ABROGATION10.1%2012.1%2028.1.pdf).

By order of May 30, effective July 30, 2012, the Court, as recommended by the Special Committee on Rules for Electronic Case Filing, promulgated amendments to V.R.C.P. 77(d), V.R.E.F. 3(b) and (c), and A.O. 41 and new Administrative Orders Nos. 44 and 45. See

[http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRC P77\(d\)andVREF3\(b\)and\(c\).pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRC%20P77(d)andVREF3(b)and(c).pdf).

By order of July 10, effective September 10, 2012, the Court, as recommended by the Committee, promulgated an amendment abrogating V.R.C.P. 28(d) as redundant in light of the recent promulgation of V.R.C.P. 45(f) and 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. See

[http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRC P28and72.pdf](http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRC%20P28and72.pdf).

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); V.R.E.F. 3, 7(d), 12 and to A.O. 45 intended to facilitate the transmission of court notices by electronic means. Comments are due by January 7, 2013. See

<http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSED%20AMENDMENTS%20E-filing%20et%20al.pdf>;

<http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROPOSEDAMENDMENTS%20SAO45.pdf>.

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 Appellate Procedure and Vermont Rules of Small Claims Procedure be

circulated to the bar for comment. Proposed promulgation orders are being transmitted to the Court separately from this report:

1. Proposed amendments to the Vermont Rules of Appellate Procedure adapting for Vermont the approach of the comprehensive “restyling” amendments to the Federal Rules of Appellate Procedure (1998) intended to simplify their arrangement and language.

2. Proposed amendments to the Vermont Rules of Appellate Procedure making “substantive” changes to accompany the restyled rules, including amendments adding a provision concerning time to move in the trial court for permission to appeal under V.R.A.P. 6(a) and provisions for a stay both in that subdivision and in V.R.A.P. 6(b) concerning motions in the Supreme Court.

3. Proposed amendments to the Vermont Rules of Small Claims Procedure requiring initial information and attachments in complaints and motions for default in actions on assigned credit card debts.

II. PROPOSED AMENDMENTS NOT RECOMMENDED FOR PROMULGATION

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

1. V.R.C.P. 62(a). The Committee will not consider this matter until it undertakes a full review of the proposed restyled version of the Civil Rules.

2. ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster. The Committee will not consider adoption of this rule further pending further direction from the Supreme Court.

3. Motions to Reconsider in the Environmental Division. The Committee will not consider whether a special procedure for motions to reconsider interlocutory orders would be appropriate in the Vermont Rules for Environmental Court Proceedings, because the Environmental Division judges have withdrawn their request for such a rule.

4. Proposed Amendment of V.R.C.P. 4(b). The Committee will not 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 pending further progress with the electronic filing system.

5. Proposed Amendment of V.R.P.C. 1.4 to Require Notice of Lack of Professional Liability Insurance. The Committee will not proceed further with consideration of this proposal in the absence of a formal request from the Professional Responsibility Board.

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 and good practice. (#s10-1/08-6)
2. Potential Amendments to Accommodate Passage of Court Restructuring Bill (H.470) and Restyling of the 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, the comprehensive "restyling" amendments to the Federal Rules of Civil Procedure (2007), including amendments to accommodate court restructuring; and amendments to the Vermont Rules for Environmental Court Proceedings intended to simplify their arrangement and language. (#10-5).
3. Extension of Emergency Amendment of V.R.A.P. 33.1 to All Appeals. The Committee in reviewing comments on the 2010 emergency amendment of V.R.A.P. 33.1 will continue to consider whether its provisions for argument by video or telephone should be extended to all appeals. (#10-6).
4. 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).
5. 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).
6. 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).
7. Disclosure of Expert "Event" Witnesses. The Committee will continue to 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. (#12-1).
8. Amendment of V.R.E.C.P. 5(h) to Require Transcripts in All On-the-Record Appeals. The Committee will consider whether to propose an amendment to V.R.E.C.P. 5(h) that would require a transcript in all on-the-record appeals to the Environmental Division regardless of duration (#12-3).
10. Updating References in V.R.C.P. 80.1(b)(3) and 80.9(a). The Committee will consider whether to update a reference to the name of a state agency in V.R.C.P. 80.1(b)(3) and to a statutory reference to the District Court in V.R.C.P. 80.9(a) (#12-4).
10. Abrogation of V.R.C.P. 79(b). The Committee will consider whether to abrogate as obsolete V.R.C.P. 79(b) referring to docket indices and calendars (#12.5).
11. V.R.P.C. 3.8(g), (h)—Conformity to Model Rules Amendments. The Committee will consider whether to adopt 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).
12. 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).

13. 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).

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. Matthew Katz for his long service as a member of the Committee, and to Court Administrator Robert Greemore; staff attorneys Leonard Swyer, Edward McSweeney, and Emily Wetherell; and Larry Abbott and Deb Laferriere of the Court Administrator's staff for their continued and essential administrative support.

Respectfully submitted,

William E. Griffin, Chair

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