

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2024

Proposed Order Promulgating Amendments to Rules 4(c), (d), (e), and (f), 55, 62(b), and 80.1(f) of the Vermont Rules of Civil Procedure

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

1. That Rules 4(c), (d), (e), and (f) of the Vermont Rules of Civil Procedure be amended as follows (new matter underlined; deleted matter struck through):

RULE 4. PROCESS

(c) **By Whom Served.** Service of all process must ~~shall~~ be made by a sheriff or deputy sheriff, by a constable or other person authorized by law, or by some indifferent person specially appointed for that purpose by any superior judge, ~~or a judge of the court to which it is returnable,~~ except that process served by mail under paragraph (d)(2) or subdivision (f), or and a notice and request sent pursuant to subdivision (l), ~~of this rule~~ may be deposited in the mail by plaintiff or plaintiff's attorney, ~~and a~~ A subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

(d) **Summons: ~~Personal Service Within the State.~~** The summons and complaint must ~~shall~~ be served together. ~~Personal service~~ Service within the state may ~~shall~~ be made as follows:

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(2) Upon the State of Vermont or any agency or officer thereof, by delivering ~~a copy of~~ the summons and ~~of~~ the complaint to the Attorney General or the Deputy Attorney General. But ~~Service of a copy of~~ the complaint and written disclosure of material evidence and information required to be served pursuant to 32 V.S.A. § 632(b)(3), ~~enacted by Act No. 25 of 2015,~~ or 31 U.S.C. § 3730(b)(2), must use a ~~shall be by any~~ method of delivery that requires a ~~requiring the~~ signature by the ~~of an~~ addressee or by an agent of the ~~an~~ addressee. When service may be made upon an officer of the state as a statutory agent for the service of process under paragraph (1), (7), or (8) of this subdivision, service in accordance with the applicable statute may be made by mailing the summons and complaint to the officer by first class mail, postage prepaid.

* * * * *

(e) **Personal Service Outside the State.** A person whose contact or activity in the state or such contact or activity imputable to that person is sufficient to support a personal judgment against that person may be served with the summons and complaint outside the state, in the same manner as if such service were made within the state, or in any manner in which service may be effected under the laws of the state in which the person is served. Service outside the state may be made by any person authorized to serve civil process by the laws of the place of service or by a person specially authorized to serve it.

An affidavit of the person making service ~~must~~ shall be filed with the court, stating the time, manner, and place of service. Such service has the same force and effect as ~~personal~~ service within the state.

(f) **Service by Mail Outside the State.**

(1) When Available. A party may serve the summons and complaint by mail on a person outside the state if: Where service cannot with due diligence be made personally within or outside the state, service of the summons and complaint may be made by mail upon a person described in subdivision (e) in the following cases:

(A) Where the person to be served has an interest in, title to, or right to the possession of goods, chattels, rights, credits, land, tenements, or hereditaments in the state which has been or on pending motion may be attached or secured by trustee process in the commencement of the action, or will be affected by a judgment in the action;

(A) After due diligence, the party is unable to serve the person under subdivision (d) or (e);

(B) The person to be served has contact or activity in the state or imputable contact or activity sufficient to support a personal judgment; and

(C) The person to be served:

(i) has an interest in, title to, or right to the possession of goods, chattels, rights, credits, land, tenements, or hereditaments in the state which has been or on pending motion may be attached or secured by trustee process in the commencement of the action, or will be affected by a judgment in the action; or

(B ii) Where the person to be served is one against whom a judgment for divorce or annulment of marriage is sought.

(2) Return Receipt. The party must first attempt a mail delivery that requires a signature by the addressee or by the agent of the addressee for receipt of mail. If delivery is successful, service is complete on delivery if the party files proof of service with:

(A) The signed return receipt; and

(B) An affidavit stating the party’s efforts to serve the person according to subdivision (d) or (e).

(3) First-Class Mail. If the receipt is not returned signed according to paragraph (2), then the party may mail the summons and complaint by first-class mail. Service is complete when mailed, if the party files proof of service with:

(A) Any notice that delivery was refused; and

(B) An affidavit stating:

- (i) the party’s efforts to serve the person both under subdivision (d) or (e) and by return receipt mail;
- (ii) that the mail was not returned as undeliverable; and
- (iii) that the party used the last known address of the person to be served.

~~Such service shall be by delivery to the defendant outside the state by registered or certified mail, with restricted delivery and return receipt requested. Service by registered or certified mail under this paragraph shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused, provided that the plaintiff shall file with the court an affidavit setting forth the efforts made to obtain personal service and either the return receipt or, if acceptance was refused, an affidavit that upon notice of such refusal a copy of the summons and complaint was sent to the defendant by ordinary first class mail.~~

~~(2) When service may be made upon an officer of the state as a statutory agent for the service of process pursuant to paragraph (1), (7) or (8) of subdivision (d), service in accordance with the applicable statute may be made by mailing a copy of the summons and of the complaint by first class mail, postage prepaid, to the officer.~~

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Reporter’s Notes—2024 Amendment

Rule 4(c) permits any superior judge to appoint an indifferent person to serve process. The rule is amended to reflect the 2010 restructuring of the judiciary by omitting the phrase permitting appointment by “a judge of the court to which it is returnable.” A cross-reference to service under paragraph (d)(2) is added because that paragraph now includes provisions for mail service by plaintiff or plaintiff’s attorney that do not require a sheriff or other official. Other changes are made for clarity with no change of meaning intended.

The caption and text of Rules 4(d) and 4(e) are amended to delete the references to “personal” service. This clarifies that Rules 4(d) and 4(e) authorize methods of substituted service not within the common meaning of personal service as in-hand delivery to the person to be served. See 2020 V.R.E.F. 2(j) (“Personal Service means actual delivery of a nonelectronic copy of the notice or process to the person to whom it is directed.”)

Rule 4(d)(2) is amended to aggregate into a single subdivision the methods of service on the State of Vermont or any agency or officer thereof. Former Rule 4(f)(2), relating to mail service on an officer of the state as a statutory process agent, is moved to Rule 4(d)(2). The existing provision of Rule 4(d)(2), for service in false claims actions, is reworded for clarity with no change of meaning intended. As stated in the original reporter’s note, “The provision in the rule for service ‘by any method of delivery requiring the signature of an addressee or an agent of an addressee’ is intended to include service by registered mail, certified mail, commercial carrier, or in-hand delivery.” See Reporter’s Notes to the 1976 Amendment of Rule 4(d)(2).

Rule 4(f) is recaptioned “Service by Mail Outside the State.” The text is reorganized to clarify each step in the mail service process and, in some cases, to modify the requirements of the existing rule.

Rule 4(f)(1) clarifies what was implicit in the original rule, that it applies only to service by mail outside the state. The jurisdictional requirements of Rule 4(e) for service outside the state are repeated in the text of Rule 4(f)(1)(B). The Rule remains limited to two special classes of cases involving property and divorce, Rule 4(f)(1)(C)(i) and (ii).

Rule 4(f)(2) changes the requirement to use “registered or certified mail, with restricted delivery and return receipt requested” to any mail delivery method that “requires a signature by the addressee or by the agent of the addressee for receipt of mail.” The change reflects 1 V.S.A. § 134a, which states that registered mail in this context includes “any method of mail delivery requiring the signature of the addressee or his or her agent.” See Reporter’s Notes to the 2016 Amendment of Rule 4(d)(2).

Rule 4(f)(3) clarifies when service by first-class mail under Rule 4(f) is permitted and how it is completed. The requirements that the first-class mailing use the last known address of the person to be served, and that the mailing not be returned as undeliverable, are new. They are intended to assure that the method of service “be such as is reasonably calculated to reach interested parties.” Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 318 (1950).

2. That Rule 55 of the Vermont Rules of Civil Procedure be amended as follows (new matter underlined; deleted matter struck through):

RULE 55. DEFAULT

* * * * *

(c) Judgment.

* * * * *

(6) *Failure to Appear at Trial.* In those cases in which a party has appeared in the action but has failed to appear at a duly noticed trial on the merits, any other party seeking affirmative relief may either waive trial and move for a default judgment or proceed to trial. If the party seeking affirmative relief obtains judgment based on evidence submitted at trial, that judgment shall be deemed a default judgment solely for the purposes of Rule 55(~~d~~ e), Rule 62(b), and Vermont Rule of Appellate Procedure 4. If the party seeking affirmative relief chooses to file a motion for default judgment, a hearing shall be scheduled on the motion pursuant to paragraph (4).

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(8) *Cost of Service* The court may include in the judgment the projected cost of service required by subdivision (d).

(d) Notice to Parties Who Have Not Appeared.

(1) *Rule 4 Service.* When a party has not appeared in the case and another party obtains a default judgment against that party, the party to whom judgment was awarded must serve the judgment on the defaulted party under Rule 4(d) or (e).

(2) *Return Receipt Mail.* If after due diligence, the party is unable to serve the defaulted party under Rule 4(d) or (e), the party must first attempt a mail delivery that requires a signature by the addressee or by the agent of the addressee for receipt of mail. If delivery is successful, service is complete upon delivery if the party files proof of service with:

(A) The signed return receipt; and

(B) An affidavit stating the party’s efforts to serve the defaulted party according to Rule 4(d) or (e).

(3) First-Class Mail. If the receipt is not returned signed according to paragraph (2), then the party may mail the summons and complaint by first-class mail. Service is complete when mailed, if the party files proof of service with:

(A) Any notice that delivery was refused; and

(B) An affidavit stating:

(i) the party’s efforts to serve the defaulted party under Rule 4(d) or (e) and by return receipt mail;

(ii) that the mail was not returned as undeliverable; and

(iii) that the party used the last known address of the person to be served.

(4) Publication. If the court finds, based on a party’s motion and affidavit, that the party cannot with due diligence serve by mail under the above methods, the court may order service by publication as under Rule 4(g).

(e) Setting Aside a Default Judgment. The court may set aside its order granting a motion for a default judgment for good cause, and it may set aside a final default judgment under Rule 60(b).

(e f) Judgment Against the State. The court may enter judgment by default against the State of Vermont or an officer or agency thereof only if the claimant establishes a claim or right to relief by evidence satisfactory to the court.

Reporter’s Notes—2024 Amendment

Rule 55(d) is added to require service of a default judgment against a party who has not appeared in the case. This follows V.R.S.C.P. 3(f) that was changed to require service of default judgments by a sheriff or other person authorized to serve process. See Reporter’s Notes to 2020 amendments of V.R.S.C.P. 3, 7, 9, 10. By expressly providing that a party who has obtained a default judgment is responsible for serving a copy of that judgment upon the defaulting party, Rule 55(d)(1) extends Rule 62(b), which since 1988 has required service of a default judgment before issuance of execution. The purpose of these service requirements is to give the defaulted party effective and timely notice of the judgment. The amendment does not affect the finality of the judgment or the running of the time for appeal. See V.R.A.P. 4.

The methods of service of a default judgment stated in new Rule 55(d) differ from those in former Rule 62(b), which are deleted by concurrent amendment. Former Rule 62(b) allowed mail service of a default judgment as an alternative to personal service. New Rule 55(d)(1) requires service under Rule 4(d) or (e). Mail service is allowed only if such Rule 4 service cannot be made with due diligence.

If the due diligence condition is met and verified by affidavit, Rule 55(d)(2) requires an attempt at service by a method of mail delivery requiring the signature of an addressee or an agent of an addressee.

If no return receipt is signed, Rule 55(b)(3) allows service by first-class mail addressed to the party's last known address that was not returned undeliverable. Rule 55(d)(2) and (3) detail when service by mail is complete and the requirements for an affidavit of service filed as the proof of service under V.R.C.P. 4(i). These methods of mail service under Rule 55 are consistent with the methods of mail service outside the state allowed under amended Rule 4(f). See Rule 4(f), 2024 Reporter's Note.

Finally, in a provision based on former Rule 62(b), Rule 55(d)(3) allows service by publication on motion, findings, and order that none of the other methods of service can be made with due diligence.

New Rule 55(c)(8) is added to allow the court to include in a default judgment the projected cost of service required by Rule 55(d). The cost of initial service of the summons and complaint is presumptively a reliable measure of the projected future cost of service of the default judgment.

Former subdivision (d) and its cross reference in subdivision (c)(8) is relabeled as subdivision (e); and former subdivision (e) is relabeled as subdivision (f).

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

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT

(b) **Stay of Execution on Default Judgment.** Execution on a default judgment in a personal action against a party who has not appeared in the case is stayed until the party to whom judgment was awarded serves the judgment pursuant to Rule 55(d). ~~in a personal action shall not~~

~~issue upon a judgment by default until it has been served on the defendant by personal service or by mail by the methods provided in Rule 4(f) for a summons and complaint served outside the state. If the court finds that service cannot with due diligence be made by either of the above methods, based on a motion and affidavit filed by the plaintiff, it shall order service by publication by the method provided in Rule 4(g). A motion to set aside a default judgment shall operate~~ operates as a stay of execution until it is decided.

Reporter's Notes—2024 Amendment

As amended in 1988, Rule 62(b) precluded issuance of execution on a default judgment until it had been served personally or served by mail under Rule 4(f) as if the judgment were a summons and complaint being served outside the state. If neither of these methods was available, service could be made by publication. These requirements are incorporated into the amendments to Rule 62 and 55, with modifications stated in the Reporter's Notes to Rule 55.

Rule 62(b) is amended to state that execution against a party who has not appeared is stayed until the party to whom judgment was awarded serves the default judgment pursuant to new Rule 55(d), which now specifies the method of service. The purpose of the rule—to give the defendant an opportunity to move to set aside a default judgment—remains the same.

4. That Rule 80.1(f) of the Vermont Rules of Civil Procedure be amended as follows (new matter underlined):

RULE 80.1. FORECLOSURE OF MORTGAGES AND JUDGMENT LIENS

(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 7 days' notice to all parties who have appeared, shall proceed to take an accounting and find the amount of principal, 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(c)(1). The court may include in a default judgment the projected cost of service required by Rule 55 (d). If the entry is not by default, 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—2024 Amendment

Rule 80.1(f) is amended to allow the court to include in a default judgment the projected cost of service required by Rule 55(d). The cost of initial service of the summons and complaint is presumptively a reliable measure of the projected future cost of service of the default judgment.

5. That these amendments be prescribed and promulgated, effective on _____.
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 _____, 2024.

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice