VERMONT SUPREME COURT

Advisory Committee on Rules of Civil Procedure

2010 Annual Report

May 5, 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 2009 annual report, dated November 25, 2009. Since filing that report, the Committee has met eight times—on January 22, February 26, May 28, September 10, October 15, and December 17, 2010, and February 11, and April 8, 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.

In August 2010, Betty Loftus resigned from the Committee, having left state service. She was succeeded by Richard Carroll, clerk of the Superior Court, Windham Unit. Mr. Carroll was in turn replaced by Kathleen Hobart, clerk of the Superior Court, Lamoille Unit.

The Committee recommended that the emergency amendment adding V.R.C.P. 80.1(b)(3)(B) (notice to mortgagors) promulgated on December 17, 2008, effective January 1, 2009, should be extended for two years. An order extending Rule 80.1(b)(3) until December 31, 2011, was promulgated December 10, 2009, effective January 1, 2010. See http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRCP-extend%20R80.1_b__3_dec09.pdf.

The Committee's proposed amendments to V.R.C.P. 80.1 were circulated for comment in Court Administrator's memorandum of December 16, 2009, with comments due February 15, 2010. See http://www.vermontjudiciary.org/LC/Statutes and Rules/PROPOSEDVRCP80.1December09.pdf. Comments were reviewed at the February 26 meeting and referred to the Superior Court Oversight Committee for comment. At a meeting on April 1, the Legislative Committee on Judicial Rules agreed to defer consideration of these proposals pending continuing consideration of the effect of Act 132 of 2009 (Adj. Sess.), signed May 29, 2010. *See* http://www.leg.state.vt.us/docs/2010/Acts/ACT132.pdf. These amendments remain under consideration by a subcommittee.

The Committee's recommended amendments to V.R.C.P. 62(a)(3) and V.R.E.C.P. 3(9) and (10) were promulgated by the Court on May 20, effective July 26, 2010. *See*

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRCP62andVREC3.pdf.

The Court Administrator's memorandum of June 24, 2010, contained new standard headings for forms in the Civil, Criminal, Environmental, and Family Divisions of the Superior Court as approved by the Court Administrator and Administrative Judge for Trial Courts to accommodate Act 154 of 2009 (Adj. Sess.), § 7, enacting 4 V.S.A. § 30 to establish a single statewide Superior Court with those divisions, effective July 1, 2010. *See* http://www.vermontjudiciary.org/LC/Shared%20Documents/MEMOtoBAR_Act154_H470CHANGES_SurchargesandCourtForms.pdf.

The Supreme Court promulgated an emergency amendment to V.R.A.P. 33.1, reviewed by the Committee at its May 28 meeting, concerning provisions for oral argument before three-justice panels on July 19, 2010, effective on that date. Comments were due on September 20, 2010. *See* http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDEMERGENCYVRAP33.1.pdf. Limited use of the rule has resulted in no experience or comments to date.

The Supreme Court promulgated emergency amendments to the Civil, Criminal, Appellate, Small Claims, Environmental Court, and Family rules to accommodate Act 154 of 2009 (Adj. Sess.), § 7, enacting 4 V.S.A. § 30 to establish a single statewide Superior Court, on July 1, 2010, effective on that date. *See* http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDEMERGENCY_VT--restructuring%20rules-070110.pdf.

The Supreme Court promulgated the Vermont Rules for Electronic Filing as emergency rules, together with related emergency amendments to the Civil Rules and the Rules for Dissemination of Electronic Case Records, on August 17, effective October 1, 2010, to provide for the use of the Judiciary's e-Cabinet electronic filing system in the Superior Court, Civil Division, for Rutland and Windsor counties, beginning on October 18, 2010. Comments were due by September 30, 2010. *See* http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATED_vciv-vrdecr-vref-emrgcy%20rules.pdf. By orders of October 20, and December 14, 2010, and February 23, and March 22, 2011, the Court promulgated emergency amendments to the Vermont Rules for Electronic Filing and the Rules for Dissemination of Electronic Case Records, containing revisions to them based on comments received on the original August 17 promulgation and successive amendments and continuing those rules and the August 17 emergency amendments to the Civil Rules until further order. The relevant rules committees were directed to report on comments on the rules in operation in the Rutland and Windsor pilot projects and subsequent applications on a continuing basis. The rules as promulgated and amended on August 17, 2010, through March 23, 2011 have been consolidated in a single clean text. *See* http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/CONSOLIDATEDElectronicDisseminationAppellateCivil.pdf.

The Committee's proposed amendments of V.R.P.C. 1.15B(d) and (e) to accommodate Automated Clearing House transactions and clarify the rule, sent out for comment on July 19, 2010, were recommended to the Court as circulated and were promulgated on December 21, 2010, effective February 21, 2010. http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDAmendmentVRPCRule1.15B(d)(e).pdf.

The Committee's 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, all as approved at the Committee's February 26 or May 28 meetings, were sent out for comment on July 19, 2010, with comments due on September 20, 2010. At its October 15 meeting, the Committee reviewed comments received and recommended that these amendments be recommended for promulgation. The Legislative Committee on Judicial Rules has not yet reviewed the amendments. Transmission of the Advisory Committee's recommendation for their promulgation will be deferred until that review has occurred.

The Committee prepared a proposed revision of Form 228 for waiver of filing and service costs that Judge Davenport approved. At its October 15 meeting, the Committee approved the draft for submission to Judge Davenport with additional comments.

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. See http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDVRCP80.1EMERGENCY12-21-10.pdf.

By order of January 31, effective 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 is asked to report on its recommendation, if any, on the whether the amendment should be made permanent by April 1, 2011. See http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDEmergencyAmendmentA%20O10B(2)(3).pdf. No comments have been received. The Committee accordingly makes no recommendation.

By order of March 22, 2011, effective March 23, 2011, the Supreme Court promulgated emergency amendments to Rule 5(f) of the Vermont Rules for Electronic Filing, as amended, and to Rules 28(d) and 30 of the Vermont Rules of Appellate Procedure to accommodate appeals from electronically filed cases. The Civil Rules and Electronic Filing Rules committees are asked to report to the Court by May 27, 2011, on any comments received on these amendments. See

http://www.vermontjudiciary.org/LC/Statutes%20and%20Rules/PROMULGATEDemergencyVREF5andVRAP28and30_March22_2011.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 Civil Procedure, Vermont Rules of Appellate Procedure, and Vermont Rules of Professional Conduct be circulated to the bar for comment. A proposed promulgation order is appended to this report:

1. 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.
2. 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.
3. An amendment adding V.R.C.P. 43(b) to provide a procedure for telephone or video testimony in civil actions involving incarcerated persons.
4. 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.
5. 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.

II. PROPOSED AMENDMENTS NOT RECOMMENDED FOR PROMULGATION

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

1. Action on "Basket Service" Administrative Order. The Committee agreed that the emergency amendments of V.R.C.P. 77(d) and V.RA.P. 45(d) ("basket service") promulgated on December 17, 2008, effective January 1, 2009, should be made permanent but that permanent promulgation should not be recommended until the Administrative Order called for in amended V.R.C.P. 77(d)(2) had been proposed and circulated for comment. The item was removed from the agenda because it will be considered by the Special Advisory Committee on Electronic Filing.
2. V.R.C.P. 75—Amendment and Voluntary Dismissal. In response to a concern that V.R.C.P. 75, by not requiring an answer, contained no cut-off date for motions for voluntary dismissal and amendment as of right, the Committee determined that an amendment was not necessary. The court has discretion to order an answer when appropriate. Where that practice is followed it is effective in addressing the problem.

3. V.R.A.P. 4(d)—Good Cause and Excusable Neglect. It had been proposed that the effect of the 2006 amendment of V.R.A.P. 4(d) that allowed either good cause or excusable neglect to be the basis for allowing extension of time if raised before the expiration of 30 days from the expiration of the original time period be reversed. A lesser standard for granting a request for an extension made while the original period was still running and a more rigorous standard for a request made after the period had expired was proposed. The Committee determined that no Vermont case had been identified rejecting an extension requested within the original time period where neither good cause nor excusable neglect had been shown. Accordingly, it was decided to make no change in the absence of such a decision.

4. ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster. Unless otherwise instructed by the Court, the Committee will not again review the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster. The Committee previously reported to the Court that although the rule was desirable, adoption of it for Vermont would be more appropriate in the Rules for Admission to the Bar or the Rules for Licensing Attorneys but that the Committee would be prepared to consider the ABA's recommended addition to Comment [14] of V.R.P.C. 5.5 if the Model Rule were adopted.

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); a parallel amendment consolidating the pre-trial conference provisions of V.R.C.P. 16, 16.2, and 16.3; and 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. (#09-4).

2. 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).

3. V.R.C.P. 80.1—Effect of Act 132. The Committee will continue to consider the effect of Act 132 of 2009 (Adj. Sess.) on the proposed amendments and other provisions of Rule 80.1. (09-10).

4. 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)

5. 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).

6. 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 (item A.4. above) will consider whether its provisions for argument by video or telephone should be extended to all appeals. (#10-6).

7. Adoption of Amendments to ABA Model Code of Judicial Conduct. The Committee will establish a subcommittee to consider adaptation of 2007 amendments of the ABA's Model Code of Judicial Conduct to the Vermont Code. (#10-8).

8. Availability under V.R.A.P. 10.1 of Transcripts in Proceedings of Less Than 12 Hours. The Committee will review issues concerning the operation of V.R.A.P. 10.1. (#10-10).

9. Proposed Amendments to VREPC 5(a), (h), to Accommodate Trafffic Bureau Appeals. The Committee will consider whether amendments to VREPC 5(a), (h), are necessary to accommodate the effect of appeals to the Environmental Division from certain Traffic Bureau decisions (#11-1).

10. Electronic Filing Amendments. The Committee will continue to review the effect of further amendments to the Vermont Rules for Electronic Filing on civil practice (#s 11-2, 11-3),

11. Question Regarding Text of VRPC 4.1 Comment.The Committee will review a discrepancy between the Comment to VRPC 4.1 as adopted and the text of the rule (#11-4).

12. V.C.J.C. Canon 5(A)(3). The Committee will review Canon 5(A)(3) in light of the enactment of 4 V.S.A. § 278 and *In re Hodgdon*, 2011 VT 19, para. 29 (2/10/11) (#11-5).

13. V.C.J.C. Canon 4(H)(2). At the request of the Supreme Court, the Committee will review Canon 4(H)(2) concerning extra-judicial income of part-time judges (#11-6).

14. Service in Residential Eviction Cases. The Committee will review VRCP provisions concerning service of process in residential eviction cases (#11-7).

15. Proposed Amendment of V.R.E. 510. The Committee will review the amendment of VRE 510 proposed by the Evidence Rules Committee that adopts provisions of FRE 502 to Vermont practice (#11-8).

16. ABA Model Rules for Client Trust Account Records. The Committee will review the recently promulgated ABA Model Rules for Client Trust Account Records in light of VRPC 1.15 (#11-9).

17. 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)

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 Betty Loftus and Richard Carroll for their service as members of the Committee, and to 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
Kathleen Hobart
Hon. Matthew Katz
Allan R. Keyes
Karen McAndrew
Gregory Weimer

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

APPENDIX

PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2011

Order Promulgating Amendments to the Vermont Rules of Civil Procedure and Vermont Rules of Professional Conduct

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

1. That Rule 8(c) of the Vermont Rules of Civil Procedure is amended to read as follows (deleted matter struck through; new matter underlined):

RULE 8. GENERAL RULES OF PLEADING

****

(c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall affirmatively set forth and establish accord and satisfaction, arbitration and award, assumption of risk~~;~~, contributory negligence, ~~discharge in bankruptcy,~~ duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Reporter's Notes—2011 Amendment

The list of affirmative defenses in Rule 8(c) is amended by the deletion of "discharge in bankruptcy" for consistency with the December 2010 amendment of Federal Rule 8(c). The federal amendment deleted the phrase because under the federal Bankruptcy Code, 11 U.S.C. § 524(a)(1), (2), a discharge is not strictly speaking an affirmative defense. It voids a judgment to the extent of the debtor's personal liability and operates as an injunction against effort to collect or otherwise affect a discharged debt. Moreover, 11 U.S.C. § 523(a) excepts several categories of debt from discharge; whether a debt is excepted must be determined on a case-by-case basis. See Advisory Committee's Note to December 2010 amendment of F.R.C.P. 8(c)(1).

The amendment also replaces an inadvertently used semicolon with a comma.

2. That Rule 16.3 (g) of the Vermont Rules of Civil Procedure is amended to read as follows (deleted matter struck through; new matter underlined):

RULE 16.3. ALTERNATIVE DISPUTE RESOLUTION

****

(g) **Confidentiality.** ~~Except as hereinafter provided, a~~All written or oral communications made in connection with or during an alternative dispute resolution proceeding conducted under this rule, other than binding arbitration, ~~are confidential and are inadmissible pursuant to Vermont Rule of Evidence 408~~ are governed by Chapter 194 of Title 12 of the Vermont Statutes Annotated. ~~This subdivision does not apply to any stipulation or agreement to narrow the scope of the dispute, facilitate future settlement, or otherwise reduce cost and delay that was approved by all the parties. Parties, counsel, insurance representatives, and neutrals may respond to inquiries from persons authorized by the Supreme Court to monitor or evaluate proceedings under this rule, provided that the sources of data and opinions collected for this purpose shall be kept confidential.~~

Reporter's Notes—2011 Amendment

Rule 16.3(g) is amended to conform the rule to the Uniform Mediation Act, 12 V.S.A., ch. 194, §§ 5711-5723, adopted by Act 126 of 2005 (Adj. Sess.), § 1. For the drafters' comments, see 7A *Uniform Laws Annotated* (Part III) 91 (Master Edition, 2006), http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm.

The amendment deletes the references to confidentiality and to inadmissibility under V.R.E. 408 in favor of a single reference to the Act, which covers both. Section 5715(a) creates a privilege against discovery or admission in evidence of a "mediation communication;" the privilege is embraced in the saving of statutory privileges in Vermont Rule of Evidence 501. The privilege may be exercised by a party to refuse to make or to prevent any disclosure, by a mediator to refuse to make any disclosure and to prevent anyone else from disclosing, a communication by the mediator, and by a nonparty participant to refuse to make, or to prevent disclosure of, a communication by the nonparty. 12 V.S.A. § 5717(b). Section 5715(c) provides that otherwise discoverable or admissible evidence or information is not rendered inadmissible solely because disclosed or used in a mediation. Other exceptions to the privilege are set out in 12 V.S.A. § 5717, significantly narrowing the exceptions to inadmissibility in V.R.E. 408. The separate reference to confidentiality in Rule 16.3(g) is deleted as superfluous, because section 5720 of the Act provides that mediation communications are confidential (that is, are not

to be disclosed be disclosed outside of a proceeding) "to the extent agreed to by the parties or provided by law."

The initial clause referring to exceptions "hereinafter provided" is deleted, because those exceptions are also deleted. Under section 5717(a)(1), the privilege does not apply to a communication included in a written agreement signed by all the parties; thus, the second sentence of the rule, stating that it is inapplicable to certain agreements "approved by all the parties," is deleted as both under- and over-inclusive. The final sentence of the rule, which was intended to facilitate study of what was initially adopted as an experimental rule, is deleted as unnecessary. V.R.C.P. 81(d) recognizes the inherent power of the court to make temporary provision for experimental procedures by administrative order.

"Mediation communication" is broadly defined in section 5713(3) as an oral, written or electronically recorded, verbal or nonverbal statement made or occurring during a mediation "or for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." The Act defines "mediation" in section 5713(2) as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." The term should be understood as including early neutral evaluation and other nonadjudicative forms of dispute resolution where the ability of parties to speak freely is paramount. *Cf.* Comment to Uniform Mediation Act, § 2(1). Thus, the exclusion of "binding arbitration" is retained in the rule. Under §5714, the Act applies, with certain exceptions, to a mediation required by statute, rule, or under a reference by a court or other tribunal. The privilege may be asserted in a "proceeding" defined by section 5713(8) as "a judicial, administrative, arbitral, or other adjudicative process, including related prehearing and posthearing motions, conferences, and discovery; or a legislative hearing or similar process."

Rule 16.3(c)(6) (mediator's report) and Rule 16.3(e)(5) (impartiality and conflicts of interest) are not amended, although they concern matters covered in 12 V.S.A. §5718. Both sections of the rule are essentially consistent with the statute. Any differences are dictated by the fact that the rule applies to court-connected mediation in litigation that has already begun and operates within the limits of court procedure and structure.

3. That Rule 26 of the Vermont Rules of Civil Procedure is amended to read as follows (deleted matter struck through; new matter underlined):

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

****

(b) **Discovery Scope and Limits.** Unless otherwise limited by order of a superior judge in accordance with these rules, the scope of discovery is as follows:

****

(4) *Trial Preparation: Experts*.

(A) Identification and Deposition of an Expert Who May Testify.

(i) A party may through interrogatories require any other party to identify each person whom the other party ~~expects to call as an expert witness at trial~~ may use at trial to present evidence under Vermont Rule of Evidence 702, 703, or 705; to state the subject matter on which the expert is expected to testify~~,~~; and to state the substance of the facts and opinions as to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party may depose any person who has been identified as an expert ~~in an answer to an interrogatory posed pursuant to subparagraph (a)(i)~~ whose opinions may be presented at trial.

(B) Trial-Preparation Protection for Draft Disclosures or Reports. Rule 26(b)(3) protects drafts of any disclosure required under Rule 26(b)(4)(A)(i) and drafts of any report prepared by any witness retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, and regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rule 26(b)(3) protects communications between the party's attorney and any witness retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(~~B~~D) Expert Employed Only for Trial Preparation. A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(~~C~~E) Payment. Unless manifest injustice would result, (i) the judge shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this paragraph (4); and (ii) with respect to discovery obtained under subparagraph (~~B~~D) of this paragraph the judge shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.

Reporter's Notes—2011 Amendment

Rule 26(b)(4)(A)(i) is amended to adapt from Federal Rule 26(a)(2)(A) language making clear that the disclosure requirement extends to all experts who may testify under V.R.E. 702, 703, and 705, including an "event" witness, such as a treating physician, who is not retained or specially employed as an expert. Subparagraph (A)(ii) is amended for conformity with the language of the federal rule.

The amendment supersedes the holding of *Hutchins v. Fletcher Allen Health Care, Inc.*, 172 Vt. 580, 776 A.2d 376 (2001), that an expert who is an "event" witness should be treated for discovery purposes as an ordinary witness. Thanks to the liberality of V.R.E. 702, expert witnesses in a wide variety of fields are now commonly used in most litigation. *Cf.* Reporter's Notes to 2004 Amendments of V.R.E. 701-703; *State v. Streich*, 163 Vt. 331, 658 A.2d 38 (1995), following *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The extension of pre-trial disclosure requirements to "event" witnesses is necessary in light of this increased use and importance of expert testimony and the consequent need to prevent surprise and unfairness in the process by requiring disclosure of any expert opinion that is to be offered at trial. Since "event" witnesses will invariably be called at trial, their expertise can be routinely disclosed in response to initial interrogatories, and the basis of their opinions will in all likelihood be part of the evidence to be offered at trial. In the case of an "event" witness who is a treating professional—for example, a physician—any opinion to be offered must be disclosed, but the treatment records may ordinarily be offered as disclosure of the facts on which the opinion will be based Separate disclosure would be required only if these matters were not evident in the records.

Note that the rule applies only to the use of the discovery methods provided in V.R.C.P. 26-36 and is silent on the availability or propriety of other means of obtaining information or documentation, such as investigation or informal inquiry. Thus, the amended rule does not preclude informal communication by a lawyer with an event witness in the course of investigation, subject to the protection of trial preparation materials and work product provided by new subparagraph (C). Of course, such communication with a represented party witness without permission of counsel would be precluded by V.R.P.C. 4.2.

Rule 26(b)(4) is amended to adapt to Vermont practice December 2010 amendments of Federal Rule 26(b)(4) specifying that work-product protections for an expert's draft reports and most expert communications with lawyers survive the disclosure of the expert as a testifying expert. Captions are provided for subparagraph (A)-(E) for consistency with the federal rule.

Subparagraph (B) extends the trial preparation and work-product protections of Rule 26(b)(3) to drafts of any answer to an interrogatory concerning identity and testimony of an expert under Rule 26(b)(4)(A)(i) and, in language taken from the required report provisions of Federal Rule 26(a)(2)(B), to drafts of any report by a retained or specially employed expert or a person regularly employed to give expert testimony.

Subparagraph (C) similarly extends those protections to all communications in any form between a retained or specially or regularly employed expert and a party's lawyer, with exceptions for communications regarding the expert's compensation or data or assumptions provided by the lawyer as a basis for the expert's opinions. These provisions are intended to allow attorneys to interact freely with testifying experts without exposing the attorney's work product imposing the expense of retaining both consulting and testifying experts to avoid that exposure. Even when communications are subject to the exceptions, or otherwise discoverable, the protection of Rule 26(b)(3) against disclosure of the attorney's mental impressions and the like continues to apply. See, generally, Federal Advisory Committee's Note to 2010 amendment of Federal Rule 26(b)(4).

Former subparagraphs (B) and (C) are redesignated (D) and (E) and carried forward with minor conforming amendments.

4. That Rule 43(b) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 43. EVIDENCE

****

(b) ~~**Scope of Examination and Cross-Examination. [Abrogated.]**~~ **Testimony by Telephone or Video in Actions Involving Incarcerated Persons.** Except as otherwise provided by statute, in any action or proceeding under these rules involving a person who is incarcerated in the custody of the Department of Corrections in or out of the state, upon request of any party the court may permit any person to testify in a hearing or trial by telephone or video if the court finds that

(1) the testimony of the person is necessary to the fair determination of the issues;

(2) the person is either physically unable to be present or cannot be produced without imposing substantial administrative burdens or costs on the state, a party, or the witness;

(3) there is assurance satisfactory to the court of the identity of the person appearing by telephone or video and the administration of the oath to that person;

(4) all parties and the court have adequate opportunity to examine or cross-examine the witness, including access to any documentary or other tangible evidence necessary to the examination or cross-examination;

(5) the telephone or video connections and equipment employed are adequate to enable all participants to hear the proceedings and to speak at all appropriate times during the hearing; and

(6) in all the circumstances, there are no substantial obstacles to a full and fair presentation of the testimony and other evidence, including assessment of the credibility of the witness, and no substantial prejudice will result to any participant.

Reporter's Notes—2011 Amendment

Rule 43(b) is added to provide that in a civil action involving a person incarcerated in the custody of the Vermont Department of Corrections in or out of the state, the court, upon a party's request, may permit any person to testify by telephonic or video means if six tests taken from Rule 17(a) and (b) of the Vermont Rules for Family Proceedings are satisfied. See, generally, Reporter's Notes to V.R.F.P. 17. Unlike the Family Rule, the present rule applies only to testimony and does not address the question whether a party who does not testify may participate electronically.

The rule is primarily intended for the many civil actions brought by prisoners concerning the circumstances of their confinement, such as complaints about conditions, challenges to disciplinary action, and disputes about the computation of sentences. The great majority of the plaintiffs are located out of state. Resolution of these cases on the merits presents difficulties caused by the lengthy travel and disruption of routine involved for the prisoner. A more serious problem is that the state's witnesses are almost always employees of the contractor that operates the out-of-state correction facility. While the rule would also apply to post-conviction relief cases in which more fundamental issues might be raised, the requirement of clause (6) that no substantial prejudice result may limit its use in that situation.

The rule permits the prisoner, the state, or any other party, to request allowance of telephone or video testimony and is not limited to potential witnesses who are located outside Vermont. However, the rule expresses a preference for live testimony, which in turn suggests a preference for video rather than telephonic communication. The court might well permit video testimony in a situation where audio testimony would be unacceptable.

The strict application of the six required findings will prevent abuse of the practice. Findings (1) and (2) assume that the choice is between allowing electronic testimony or doing without the testimony of an essential witness who is prevented by substantial physical or financial hardship from being present. Mere inconvenience to the witness will not suffice. Findings (3)-(5) focus on the conditions under which the testimony is to be offered. The identity of the person testifying and the administration of the oath must be established by means satisfactory to the court, such as the presence of a corrections officer or counsel with the witness or use of a video link rather than telephone equipment. The opportunity for full examination and cross-examination depends both on the adequacy of the equipment and on sufficient preparation to assure that necessary supporting documentation and other material is available to all participants. Plainly, as clause (5) makes clear, the equipment used must provide full audio and, where available, video communication throughout the hearing. Finally, the requirement of finding (6) assures that "in all the circumstances," testimony and other evidence, including that necessary to a determination of credibility, can be fully presented and assessed and the use of electronic means will not result in "substantial prejudice."

Together these findings provide a framework for decision that is "intended to assure that an order for telephone [or video] participation satisfies the standards of *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)," for due process in noncriminal proceedings. Numerous decisions in other jurisdictions have upheld electronic testimony against Due

Process challenges on the basis of similar findings. See Reporter's Notes to V.R.F.P. 17.

5. That Rule 56 of the Vermont Rules of Civil Procedure be abrogated and replaced to read as follows:

RULE 56. SUMMARY JUDGMENT

(a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **Time to File and Oppose a Motion**. A party may file a motion for summary judgment at any time until 30 days after the close of all discovery, unless a different time is set by stipulation or court order. The adverse party may file a memorandum in opposition, statement of disputed facts and affidavits, if any, up to 30 days after the service of the motion upon the party.

(c) **Procedures.**

(1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) Filing a separate and concise statement of undisputed material facts or a separate and concise statement of disputed facts, consisting of numbered paragraphs with specific citations to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits. stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence*. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited*. The court need consider only the materials cited in the required statements of fact, but it may consider other materials in the record.

(4) *Affidavits*. An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.

(d) **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or to take discovery; or

(3) issue any other appropriate order.

(e) **Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) **Judgment Independent of the Motion**. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to Grant All the Requested Relief**. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or Declaration Submitted in Bad Faith**. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the

other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Reporter's Notes—2011 Amendment

Rule 56, as originally adopted and amended, is replaced by a rule based almost entirely on the December 2010 amendments of Federal Rule 56. The new Vermont rule clarifies the substance and process for summary judgment and establishes uniformity with the current federal rule. The rule does not make significant changes in the standard for granting summary judgment or other aspects of present Vermont practice, except as noted below.

Rule 56(a) taken from the federal rule, combines in briefer form the provisions of former V.R.C.P. 56(a) and (b) for a motion by any claimant or defendant. It incorporates the standard for granting summary judgment from former V.R.C.P. 56(c), substituting "dispute" for "issue" of material fact, as better reflecting "the focus of a summary judgment determination" (federal Advisory Committee's Note) and leaving the basis for the decision to new subdivision (c). The provision for partial summary judgment is consistent with former V.R.C.P. 56(a), (e). Provisions of former subdivision (a) concerning the time of filing the motion and the need for supporting affidavits are addressed in new subdivisions (b) and (c). New subdivision (a) encourages the court to give reasons for its decision on the record.

Rule 56(b) adopts the approach of the federal rule, requiring the motion to be filed within 30 days after the close of discovery in the absence of court order or a stipulation. The Vermont rule also specifies that opposition to the motion must be filed within 30 days after service of the motion. This is consistent with current Vermont practice, which uses stipulated scheduling orders to regulate timing of summary judgment motions, but changes former V.R.C.P. 56(a), (b), which permit a defending party to file at any time, and limits a claimant to any time "after the expiration of 20 days from the commencement of the action."

Rule 56 (c) adopts the provisions of the federal rule, supplemented by the requirement of former V.R.C.P. 56(c)(2) that the parties file separate statements of facts that "shall consist of numbered paragraphs and shall contain specific citations to the record." The rule is also consistent with the requirement of former V.R.C.P. 56(e) that an opposition "must set forth specific facts showing that there is a genuine issue for trial."

Rule 56 (c)(1)(A), specifying the scope of the citable record, reflects modern practice in which motions for summary judgment are

most often based on the discovery record , rather than affidavits alone. *Cf. Johnson v. Harwood*, 2008 VT 4, ¶ 10 ("Rule 56's purposes are served equally well by sworn statements other than affidavits, provided that those statements meet the rule's other requirements.") Reference to the "record, including…documents, electronically stored information,… stipulations,… or other materials" is broader than, but generally consistent with, former V.R.C.P. 56(c)(3), which describes the material to be considered in applying the "genuine issue" standard and with the provisions of former V.R.C.P. 56(e) for supplementation of affidavits, though it does not expressly state that "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

.

Rule 56(c)(1)(B) and (c)(2) clarify that all asserted facts must be based on admissible evidence, a point only partially suggested by former V.R.C.P. 56(e) requiring that affidavits be made on personal knowledge and set forth such facts as would be admissible in evidence. This federal language is new to Vermont. The requirement of admissible evidence is consistent with the current practice, though not explicit in the current rule. *E.g. Ross v. Times Mirror, Inc.*, 164 Vt. 13, 22-23 (1995) (noting that hearsay statements in a deposition that are not supported by specific facts admissible in evidence are insufficient to defeat summary judgment motion). These new provisions together clarify that both the sufficiency of the evidence and the admissibility of the evidence may be put in issue—even if facts are undisputed. This follows current practice that a statement of undisputed facts is unecessary where the moving party does not have burden of persuasion and is claiming there is no admissible evidence to support the nonmovant's case. *State v. Great Northeast Prods., Inc.*, 2008 VT 13, ¶ 8.

The statement in new Rule 56(c)(3) that the court need consider only the materials cited by a party is consistent with former V.R.C.P. 56.(c)(2). See, *e.g.*, Clayton v. Unsworth, 2010 VT 84 ¶ 28 (rejecting argument that party had expert testimony "available," because none of it was before the trial court in the statement of material facts); see Reporter's Notes, V.R.C.P. 56 (noting that Rule 56 was specifically amended to make clear that facts that are omitted from such statements are not considered by the court.) The language in paragraph (c)(3) that the court "may consider other material in the record" makes explicit the discretion of the trial court to make rulings in the interest of justice, regardless of whether facts are properly cited in the required statements. See new Rule 56(e).

Rule 56(c)(4) is taken from the federal rule, with the reference to a "declaration" (an unsworn document executed subject to the penalties of perjury under 28 USC § 1746) omitted. The proposal is consistent with former V.R.C.P. 56(e) that provides, "Supporting and opposing affidavits

shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Rule 56(d), follows the federal rule, omitting the reference to a declaration. It is consistent with former V.R.C.P. 56(f), providing for unavailable affidavits:

Rule 56(e) is taken from the federal rule. According to the federal Advisory Committee's Note, the provision means that summary judgment can neither be granted nor denied by default under this rule. At most, facts are deemed admitted for purposes of the motion, and the merits of the motion must always be considered.

The language of paragraph (e)(2) that the court may "consider the fact undisputed for purposes of the motion" varies the deemed-admitted proviso of former V.R.C.P. 56(c)(2). Under the current rule, a party's failure to controvert facts in a counter-statement requires that the moving party's undisputed facts be taken as true. Webb v. Leclair, 2007 VT 65, ¶ 1- ¶ 7; Openaire, Inc. v. L.K. Rossi Corp., 2007 VT 120, ¶ 11-¶16 (Vt. 2007) ; Gallipo v. City of Rutland, 2005 VT 83, ¶ 35, 178 Vt. 244, 882 A.2d 1177; Travelers Ins. Cos. v. Demarle, Inc., 2005 VT 53, ¶ 9, 178 Vt. 570, 878 A.2d 267 (mem.); Boulton v. CLD Consulting Eng'rs, Inc., 2003 VT 72, ¶ 29, 175 Vt. 413, 834 A.2d 37; Richart v. Jackson, 171 Vt. 94, 97, 758 A.2d 319, 321 (2000) However under the new rule, the word "may" means the court may choose not to consider the fact as undisputed, for example if the court knows of record materials that show grounds for genuine dispute. The phrase, "for purposes of the motion," clarifies that a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. This would avoid such controversies as arose in Cassani v. Hale, 2010 VT 8, ¶20 (Vt. 2010) as to whether an unopposed statement of undisputed material facts submitted for summary judgment is deemed admitted for all purposes including trial of any remaining issues even when the underlying motion for summary judgment is denied.

Rule 56(e)(3) requiring decision on the merits of the motion is consistent with the court's interpretation of former V.R.C.P. 56(e) Under the former rule, the court may grant judgment "if appropriate" against a nonmovant who does not respond to a motion with "specific facts showing that there is a genuine issue for trial." The Court has said "the failure to respond does not require an automatic summary judgment; rather, two requirements must be met: (1) the supporting materials must be both formally and substantively sufficient to show the absence of a fact question, and (2) summary judgment must be appropriate in the sense that the moving party is entitled to judgment as a matter of law" Miller v.

Merchants Bank, 138 Vt. 235, 238, 415 A.2d 196, 198 (Vt., 1980)(citing Alpstetten Association, Inc. v. Kelly, supra, 137 Vt. at 514-15, 408 A.2d at 647-48

Rule 56(f) is taken from the federal rule. Former V.R.C.P. 56(c)(3) allows summary judgment "if appropriate" for a nonmovant, but is silent as to summary judgment on the court's own motion or on grounds not raised by a party. The new rule requires notice and time to respond before any such action.

Rule 56(g), taken from the federal rule, is consistent with the former V.R.C.P. 56(d) providing for an order establishing uncontroverted material facts for purposes of trial.

Rule 56(h) is taken from the federal rule, with the reference to a declaration omitted. Sanctions are made discretionary, and the requirement of notice and reference to other appropriate sanctions is new, but the rule is otherwise consistent with former V.R.C.P. 56(g)

6. That Rule 69 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 69. EXECUTION

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. No execution running against the body shall be issued to enforce a judgment in any civil action for money damages. In addition to the procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution, as provided by law, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

Executions shall be made returnable within sixty days from the date thereof. Executions may be issued so long as the judgment remains unsatisfied~~, but not after eight years from the date of rendition of the judgment~~ and the time limit of 12 V.S.A. §2381(a) on issuance of an execution on the judgment has not run. ~~Actions or motions to renew or revive judgments shall not be a prerequisite to issuance of a writ of execution as long as the eight-year period has not expired.~~

The judgment creditor shall deliver to the officer levying execution a list of exemptions, which the officer shall serve on the judgment debtor, together with a copy of the writ of execution.

In the writ of execution, the clerk shall set forth the amount of post-judgment interest due per day, calculated on the full amount of principal included in the judgment at the maximum rate allowed by law. In levying execution, the officer shall collect per diem interest in the daily amount from the date of entry of judgment to and including the

date of satisfaction. If an execution is returned partially satisfied, the return shall show the date of partial satisfaction. The amount collected shall be first applied to interest accrued to that date. Interest on the portion of the judgment remaining unsatisfied shall be computed from the date of partial satisfaction and collected in the same manner on any subsequent levy of execution.

Process to enforce a judgment for the delivery of possession of land shall be a writ of possession.

Reporter's Notes—2011 Amendment

Rule 69 is amended for consistency with 12 V.S.A. §506 as amended by Act No. 132 of 2009 (Adj. Sess.), §8, effective May 29, 2010, to provide that actions on judgments or for their renewal or revival must be brought "by filing a new and independent action on the judgment" no later than eight years after its rendition. The amended statute codified the Supreme Court's decision in *Nelson v. Russo,* 2008 VT 66, 184 Vt. 550, 956 A.2d 1117, holding that Vermont's common law recognized only an action for that purpose. Despite the reference to "motions to renew or revive judgments" in Rule 69 and the provision of Rule 81(b) for obtaining the relief formerly available by writ of scire facias by "appropriate action or motion" under the Rules of Civil Procedure, the Court held that the Rules did not provide an appropriate procedure for such a motion.

The amendment, consistent with *Nelson* and the amended statute, eliminates "motion" as a means of seeking revival or renewal of a judgment. The amendment also substitutes a general reference to the limit imposed by 12 V.S.A. §2381(a) on issuance of an execution for the former reference to the present statutory eight-year period. The latter change is intended both to recognize the statutory source of that period and to avoid the need for a further amendment in the event of a subsequent statutory change.

The final sentence of the paragraph is deleted as superfluous in light of the language added by the amendment. By virtue of 12 V.S.A. § 2381(a), no action or motion is necessary to seek execution on a judgment within the present statutory eight-year period. That section as amended in 1979 essentially repealed the common-law "year and a day" rule, which required that an action to renew the judgment be brought before execution on a judgment more than a year old could issue even within the eight-year period. *See Koerber v. Middlesex College*, 136 Vt. 4, 383 A.2d 1054 (1978). However, as the Court recognized in *Nelson*, *supra*, 2008 VT 66, paragraph 7, quoting *Koerber*, *supra*, 136 Vt. 4, at 9, "a 'judgment creditor can start the limitation period anew by bringing an action upon the judgment' within the [eight-year] limitation period."

7. That Rule 1.10(a) and its Comment and Comment [8] to Rule 1.0 of the Vermont Rules of Professional Conduct be amended to read as follows (deleted matter struck through; new mater underlined):

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the ~~prohibited~~ disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm in a matter in which the disqualified lawyer did not participate personally or substantially, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a

client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

* * *

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires in language adapted from Rule 1.11 that a lawyer disqualified under Rule 1.9 be one who "did not participate personally and substantially" in the matter giving rise to the conflict and that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to

disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[~~7~~11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[~~8~~12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

* * *

Rule 1.0 Terminology

Comment

* * *

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

Reporter's Notes—2011 Amendment

Rule 1.10(a) of the Vermont Rules of Professional Conduct is amended to incorporate in slightly revised form an amendment of ABA Model Rule 1.10(a) adopted in February 2009. The amended rule permits screening of lawyers whose former representation, or whose former firm's previous representation, of a client would bar the lawyer's present firm from representation. Simultaneous ABA amendments to the Comments to Model Rules 1.10 and 1.0 are also adapted for Vermont.

The amendment reflects growing awareness that large law firms face difficult or intractable conflict issues when an attorney proposes to move from one such firm to another under the present strict rule that all such prior conflicts are imputed to all lawyers in the new firm. There are now several relatively large Vermont firms that are increasingly in this position. A realistic screening procedure facilitates freedom of movement by individual lawyers. Without such a procedure, a lawyer wishing to move from one Vermont firm to another may be denied his or her choice simply because of the unamended Rule 1.10. Large firms unable to hire a particular lawyer can always hire someone else. The one most impacted by the prohibition of the rule is the individual lawyer. A recent survey indicates that 24 states have adopted a screening rule.

Amended Rule 1.10(a)(2) has three salient provisions: (1) Screening of a disqualified lawyer must be timely, must extend to any participation in the matter involving the conflict, and must receive no part of the fee that the firm receives from the matter. (2) Any affected former client must be given prompt written notice that will enable the client to evaluate the degree of compliance with the rule and pursue objections to the representation. (3) The screened lawyer and the firm must provide periodic certifications of compliance to the client upon request and upon termination of the screening. Additionally, amended V.R.P.C. 1.10(a)(2) provides a further safeguard, adapted

from the existing screening provisions of V.R.P.C. 1.11(a)(2), (d)(2)(i) concerning lawyers moving between government and private practice and not found in the Model Rule: The prohibition to which screening will be applied must arise out of a matter "in which the disqualified lawyer did not participate personally and substantially."

New Comments [7] and [8] added by the amendment emphasize that client consent is not required but that compliance is to be measured by the three provisions summarized above, that screening is defined in Rule 1.0(k), and that the rule does not prohibit compensation of the screened lawyer under a general employment agreement not tied to the matter in question. Comment [7] also emphasizes the effect of the Vermont substantial-participation qualification described above. New Comments [9] and [10] elaborate on the notice and certification provisions of the rule.

The amendment to Rule 1.0, Comment [8], adds Rule 1.10 to the list of rules to which the definition of screening applies.

8. That these rules, as amended, are prescribed and promulgated to become effective on _____, 2011. The Reporter's Notes are advisory.

9. That the Chief Justice is authorized to report these amendment 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 _____, 2011.

_____
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