

VERMONT SUPREME COURT
Advisory Committee on Rules of Civil Procedure
2014 Annual Report
December 3, 2014

The Advisory Committee on Rules of Civil Procedure submits this report to the Supreme Court pursuant to Administrative Order No. 17, § 5. The report covers the Committee's activities since its 2013 annual report, dated November 12, 2013. Since filing that report, the Committee has met five times—on December 6, 2013, and February 28, May 23, October 3, and November 14, 2014—to consider amendments or other matters pertaining to the Vermont Rules of Civil Procedure, the Vermont Rules of Appellate Procedure, the Vermont Rules for Environmental Court Proceedings, the Vermont Rules of Small Claims Procedure, the Vermont Rules of Professional Conduct, and the Vermont Code of Judicial Conduct, and to review comments received from the bar and others on proposed amendments concerning those rules.

Hon. Helen M. Toor was appointed to the Committee in December 2013 to replace Hon. Robert A. Mello, who had resigned from the Committee.

The remainder of this report summarizes the Committee's activities under three headings: I. The status of amendments promulgated and proposed since the 2013 annual report. II. Proposed amendments considered by the Committee and not recommended for circulation to the bar for comment or for promulgation at this time. III. Matters remaining on the Committee's agenda.

I. STATUS OF PROMULGATED AND PROPOSED AMENDMENTS

The Committee's proposed amendments to V.R.C.P. 4(b) and 79(b) and (c) were sent out for comment on December 4, 2013, with comments due on February 3, 2014. No comments were received from the bar. The proposed amendments were reviewed by the Legislative Committee on Judicial Rules (LCJR) on December 13, 2013, without comment and were promulgated on May 8, effective July 7, 2014.

The Committee's proposed amendments to V.R.C.P. 80.1(b)(3) and 80.9 and V.R.E.C.P. 5(h)(1) were sent out for comment on June 13, with comments due by August 16, 2013. One comment, offering technical corrections in the proposed amendment to V.R.C.P. 80.1(b)(3), was received. The LCJR reviewed the proposed rules on August 15, 2013, and had no comments. The amendments were promulgated with a slight change in V.R.E.C.P. 5(h)(1) on December 2, 2013, effective February 3, 2014, and were reviewed by the LCJR on December 13, 2013, without further comment.

The Committee's further recommended emergency amendments to V.R.C.P. 80.1(b)(3) were promulgated on December 17, 2013, effective January 1, 2014, with comments due by February 21, 2014, and a direction to the Committee to recommend to the Court by March 1, 2014, whether the amendment should be made permanent. On the

Committee's recommendation, the amendments were made permanent by order of March 27, effective May 27, 2014.

The Court's emergency amendment of V.R.A.P. 32(b), promulgated and effective on December 17, 2013, was made permanent, as informally suggested by the Committee, by order of March 27, effective May 27, 2014.

The Committee reviewed a proposed amendment to V.R.A.P. 3(b)(2) sent out for comment on December 19, 2013, by the Criminal Rules Advisory Committee with comments due on February 21, 2014. The Committee's suggested revisions to that proposal and its suggestion that conforming changes in V.R.Cr.P. 32 should be considered were communicated to the Criminal Rules Committee.

The Committee proposed the following amendments that were sent out for comment in four separate proposed promulgation orders on June 13, with comments due on August 13, 2014. The status of each order is indicated below:

(1) Proposed amendments to V.R.C.P. 4(b), 4(l)(3)(H) and Forms 1, 1B, 1C, and addition of V.R.C.P. 5(h) and Forms 28 and 29. Two comments were received from the bar. By separate communication, the Committee has asked the Court whether an additional amendment to V.R.C.P. 5(d), supplementing proposed new V.R.C.P. 5(h), should be sent out for comment. These amendments have not been reviewed by LCJR.

(2) Proposed new V.R.C.P. 9.1, 55(b)(7), and amendments to V.R.S.C.P. 3(e), (h)(7). Three comments were received from the bar. The Committee will consider the comments at its meeting on January 30, 2015. These amendments have not been reviewed by LCJR.

(3) Proposed amendments to V.R.C.P. 43(f), 45, and new V.R.A.P. 24(a)(1)(B)(iii). These amendments were reviewed by LCJR on December 2, 2014. Questions were raised about V.R.C.P. 43(f) that will be considered by the Committee at its meeting on January 30, 2015. A recommended promulgation order for V.R.C.P. 45, and new V.R.A.P. 24(a)(1)(B)(iii) is being transmitted separately to the Court.

(4) Proposed new V.R.C.P. 80.11 (comment period extended to September 26, 2014). Numerous comments were received in writing during the comment period and orally at the Vermont Bar Association meeting on September 19, 2014. The Committee has referred the comments to the VBA Board of Managers, the original proponent of the rule, for review and response.

II. PROPOSED AMENDMENTS NOT RECOMMENDED FOR CIRCULATION OR PROMULGATION

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

1. **#13-6—V.R.A.P. 4(c)—question raised in *Coles v. Coles*, 2013 VT 36, note 2.** In *Coles*, the Court requested that the Committee consider an amendment of V.R.A.P. 4(c)—now restyled as V.R.A.P. 4(c)(1)—to provide that a presumption of receipt of a notice of entry of judgment would arise from the timely mailing of notice by the clerk. The Committee reported in its 2013 annual report that a presumption rule was not feasible or necessary. No response having been received from the Court, the Committee has removed this item from the agenda.

2. **#13-7—Proposed Federal Rules amendments sent out for comment.** The Committee agreed to remove this item from the agenda pending promulgation of any or all of the proposed Federal Rules amendments.

3. **#14-4. V.R.C.P. 54(d)(1). Award of costs to prevailing defendants in non-common law actions.** In *Murphy v. Sentry Insurance*, 2014 VT 25, ¶¶ 47-54 (entry order, 3/7/14) the question was raised whether an amendment was necessary to make the ruling of the case on costs in common-law actions applicable to non-common-law actions. The Committee concluded that no amendment was necessary because the merger of law and equity in Rule 1 would, as noted in actions under the Federal Rules, make the decision applicable in non-common-law actions.

4. **# 13-9—V.R.A. P. 1(b), 2, 26(b)—Consider in light of *In re D.D.*, 2013 VT 79, and *In re A.D.T.* 174 Vt. 369 (2002).** It was proposed that these cases warranted a rule allowing the Supreme Court the discretion, in the interests of justice, to waive rules prohibiting enlargement of the appeal period. The Committee declined to take action on the proposal because the cases cited in fact allowed an extension for cause or because there was no final order and.

III. MATTERS REMAINING ON THE COMMITTEE'S AGENDA

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

1. Proposed amendments adding V.R.C.P. 5(h) and Forms 28 and 29. At its next meeting, the Committee will consider the Court's response to the question whether an additional amendment to V.R.C.P. 5(d), supplementing proposed new V.R.C.P. 5(h), should be sent out for comment.

2. Proposed new V.R.C.P. 9.1, 55(b)(7), and amendments to V.R.S.C.P. 3(e), (h)(7). The Committee will consider comments received from the bar at its next meeting.

3. Proposed amendment to V.R.C.P. 43(f). The Committee will consider questions raised in a review by LCJR on December 2, 2014, at its next meeting.

4. Proposed new V.R.C.P. 80.11. The Committee will consider any response received from the VBA Board of Managers at its next meeting.

5. Small Claims Forms and Proposed Rule Revisions. The Committee will continue to review the Small Claims Rules and forms, as well as the Small Claims booklet for consistency with current law (including federal regulations) and good practice. (#s10-1, 1-15).

6. Proposal to Conform V.R.C.P. 6 to Federal Amendments; Restyling the Civil Rules. The Committee will continue to develop amendments to V.R.C.P. 6 and other provisions of the Civil and Appellate rules adapting the timing provisions of F.R.C.P. 6, as well as comprehensive “restyling” amendments to the Civil Rules adapted from the 2007 restyling amendments to the Federal Rules of Civil Procedure (2007). (#10-5).

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

8. V.R.C.P. 26(b)(4). The Committee will continue to consider whether to propose an amendment to V.R.C.P. 26(b)(4)(A)(i) providing that the required disclosure of the identity of expert witnesses extends to all opinion witnesses qualified and testifying as experts under V.R.E. 702, 703, and 705, and generally to consider mandatory disclosure of certain other matters. (#s12-1, 14-10).

10. V.R.P.C. 3.8(g), (h)—Conformity to Model Rules Amendments. The Committee will continue to consider whether to propose adaptation in the Vermont Rules of Professional Conduct of Rules 3.8(g), (h), of the ABA Model Rules of Professional Conduct concerning prosecutorial obligations toward a person potentially innocent of a crime for which she or he has been convicted. (#12-6).

11. V.R.P.C.—Consideration of ABA Ethics 20/20 revisions to ABA Model Rules. The Committee will continue to consider whether to adapt the Ethics 20/20 revisions in the Vermont Rules of Professional Conduct. (#13-11).

12. Forms. The Committee awaits the direction of the Supreme Court on whether to eliminate the Appendix of Forms in the Civil Rules in favor of on-line forms. (#14-1).

13. V.R.C.P. 51. The Committee will consider clarification of provisions of the rule concerning objections to instructions in light of *Straw v. VNA*, 2013 VT 102 (#14-5).

14. V.R.C.P. 16.3. The Committee will consider simplification of the rule in light of current practice. (#14-6).

15. V.R.C.P. 41(b)(1)(iii). The Committee will consider whether to conform the 6-month time period of the rule to the 60-day service requirement of V.R.C.P. 3. (#14-7).

16. V.R.C.P. 69. The Committee will consider whether the current rule is obsolete in light of current post-judgment practice. (#14-8).

17. V.R.C.P. 74-75. The Committee will consider whether to revise or clarify these rules along the lines of the federal Administrative Procedure Act. (#14-9).

18. V.R.C.P. 7. The Committee will consider whether to adopt a rule similar to federal Local Rule 7(a)(7) requiring the parties to seek agreement on any motion. (#14-11).

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. Robert A. Mello for his years of service on the Committee; Court Administrator Patricia Gabel; staff attorneys Leonard Swyer, Edward McSweeney, and Emily Wetherell; and Larry Abbott and Debra Laferriere of the Court Administrator’s staff for their continued and essential support.

Respectfully submitted,

William E. Griffin, Chair

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