

STATE OF VERMONT
VERMONT SUPREME COURT
DECEMBER TERM, 2019

Order Promulgating Amendments to Rules 5 and 79 of the Vermont Rules of Civil Procedure and Rules 5 and 79 of the Vermont Rules of Probate Procedure

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

1. That Rule 5(b), (e), (f), and (h) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(b) **Same: How Made.** Whenever under Rule 5(a) or 77(d) service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney or party's last known address or, if no address is known, by leaving it with the clerk of the court.

(1) *Delivery.* Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(2) *Mailing.* Mailing of a copy within this rule means: sending by ordinary first-class mail; sending by third-party commercial carrier; or, if required or permitted by paragraph 4, sending by electronic means. Service by mail or by commercial carrier is complete upon mailing or delivery to the carrier. ~~Service by electronic means is complete upon transmission, provided that such service is not effective if the party making service learns that the attempted service did not reach the party to be served.~~

(3) *Leaving With the Clerk.* Leaving a copy with the clerk of the court within this rule means delivering or mailing the copy to the clerk by any means permitted or required for the filing of papers with the clerk under subdivision (e) of this rule.

(4) *Sending by Electronic Means.* For units and divisions in which the Court Administrator has not directed that electronic filing be implemented under 2020 Vermont Rule for Electronic Filing 1(d), this paragraph applies.

(A) Documents must be sent by electronic means if required by the 2010 Vermont Rules for Electronic Filing.

(B) Documents may be sent by electronic means when not required by the 2010 Vermont Rules for Electronic Filing if the sending and receiving parties agree to electronic transmission in a writing filed with the court that specifies the type of electronic transmission to be used.

(C) The sender of any document by electronic means under this rule must follow any applicable standards regarding electronic transmission of confidential documents.

(D) Any e-mail address or addresses used under subparagraph (A) or (B) must match those that the attorney or party has registered under the judiciary's electronic filing system, and

the registration information must be provided in all pleadings and other papers served or filed by the attorney or party.

(E) All attorneys and parties must immediately notify other attorneys and parties of any e-mail address change during the pendency of the action or proceeding.

(F) Service by electronic means is complete upon transmission, provided that such service is not effective if the party making service learns that the attempted service did not reach the party to be served.

(5) Service by Electronic Means. For units and divisions in which the Court Administrator has directed that electronic filing be implemented under 2020 Vermont Rule for Electronic Filing 1(d), if the 2020 Vermont Rules of Electronic Filing require a method of service for the document being filed, the filer must use that method of service and not the methods of service specified in paragraph (4).

(e) Filing With the Court Defined.

(1) The filing of documents with the court as required by these rules shall be made by filing them with the clerk of the court, except that a judge may permit them to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) Filing may be accomplished by delivery; by sending the papers by ordinary first-class mail or by third-party commercial carrier addressed to the clerk; or by sending by electronic means, if required or permitted by the 2010 or 2020 Vermont Rules for Electronic Filing or, if not required or permitted by those rules, with the court's prior approval.

(3) Filing by mail or, commercial carrier, ~~or electronic means~~ shall not be timely unless the material filed is received within the time fixed for filing. Filing with a judge may be accomplished by any method permitted by the judge. The time of filing for an electronic filing is as specified in the 2010 or 2020 Vermont Rules for Electronic Filing.

(4) A document filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a notarized statement accompanying the document stating the date the document was deposited in the institution's internal mailing system. The notarized statement establishes a presumption that the document was deposited in the institution's internal mailing system on the date shown in the statement. The presumption may be rebutted by documentary or other evidence. Nothing in this rule precludes other evidence of timely filing such as a postmark or an official date stamp showing the filing date of the document.

(5) Unless otherwise provided in the 2010 or 2020 Vermont Rules for Electronic Filing, the ~~The~~ clerk shall not refuse to accept for filing any document presented for that purpose solely because it is not presented in proper form as required by these rules.

(f) Form of Papers and Documents.

~~(1)~~ All original papers shall be eight and one-half by eleven inches in size, indorsed with the name and docket number of the case, the court and county where pending, the name of the paper, and the name and address of the person or attorney filing it and shall comply with applicable format provisions of the 2010 or 2020 Vermont Rules for Electronic Filing.

~~(2) A paper served or filed electronically in compliance with this rule is a written paper or in writing for purposes of these rules.~~

(g) Separation of Nonpublic Data. The filer must separate nonpublic data as required by Vermont Rule for Public Access to Court Records 7. ~~Social Security Numbers. Before filing~~

~~any paper containing the social security number of any person, the filer shall redact the social security number unless the social security number is specifically requested by the court or is required by law.~~

(h) **Certificate of Service.** Except as provided in any applicable provision of the 2020 Vermont Rules for Electronic Filing, every ~~Every~~ document filed with the court after the complaint, and required by this rule to be served upon a party, must be accompanied by a certificate of service. The certificate may be incorporated into the final page of the document being served, or may be on a separate form. It need not be in any special format so long as it contains all the required information. Multiple documents may be filed with one certificate of service. The certificate must meet the following requirements:

(1) *Signing.* The certificate must be signed by the party's lawyer or an authorized employee of the lawyer, or by a self-represented party, subject to the obligations of Rule 11.

(2) *Contents.* The certificate must:

(A) certify that the document has been served upon every other party to the case;

(B) state the manner of service (mail, personal delivery, or other service authorized by this rule);

(C) state the name and address of each person or entity served; and

(D) state the date of the mailing or other means of delivery.

(3) *Noncompliance.* If a document that requires a certificate of service is filed without one, the judge may issue an order:

(A) suspending the running of the time for response by the other party or parties until the filing of a proper certificate of service,

(B) declining to act on the filing until a proper certificate is filed; or

(C) ordering that the filing will be deemed withdrawn if no certificate is filed by a date certain. The lack of a certificate of service shall not be a basis for the clerk or the judge to refuse to accept the filing, or to return the document to the filer.

Reporter's Notes—2020 Amendment

Rule 5(b)(4) was adopted to make the rule consistent with the 2010 version of the Vermont Rules for Electronic Filing Rules when they were adopted to implement the experimental eCabinet system of electronic filing. See Reporter's Notes to the first 2017 Amendment to this rule. This system was implemented in civil and small claims cases in certain counties and in the Environmental Division. See Reporter's Notes to 2020 Vermont Rules of Electronic Filing Rule 2 (list of counties, divisions, and types of cases where eCabinet is used). The eCabinet system will remain in use in those counties, divisions, and types of cases until the new case management system is rolled out in those counties and in the Environmental Division. As a result, Rule 5(b)(4) will remain in effect until that time. Once the new system has been rolled out in all places where eCabinet has been in effect, Rule 5(b)(4) will no longer apply and the 2020 Vermont Rules of Electronic Filing will govern the subject matter of this rule as specified in Rule 5(b)(5). To fully implement the transition, the language of the last sentence of Rule 5(b)(2) is moved to Rule 5(b)(4)(F) so it will not apply when eCabinet is no longer used.

New Rule 5(b)(5) provides that in units and divisions where the Court Administrator has directed that efilings commence, the 2020 Vermont Rules for Electronic Filing control the method of service.

These amendments were made necessary by the method of post-commencement service that is part of the new electronic filing system and required to be used for electronic filers by 2020 V.R.E.F. 11(d)(1) unless parties agree to a different system. Under the new electronic filing system, a filer directs the system to make service on other electronic filers, and the service consists of a notice that the filing was made and directions on how to view that filing. Under the former eCabinet system, now contained in the 2010 Vermont Rules for Electronic Filing, service on an electronic filer was by emailing a copy of the filing. Rule 5(b)(4)(A), (B), (C), (D), and (E) details that method of service.

Rule 5(e)(3) is amended to make clear that the time of filing an efile is controlled by the applicable provision of the Vermont Rules for Electronic Filing and not by the civil rule. There is a distinction between the date of filing and the date of service when documents are efiled and notice of the filing is sent through the efile system as required by 2020 V.R.E.F. 11(d). As noted in 2020 V.R.E.F. 5(c)(1), the date of filing is the date the filing is submitted to the efile system. The date of service may be later because the system will not serve a document until it has been reviewed and accepted. See Reporter's Notes to 2020 V.R.E.F. 11(b).

Rule 5(e)(5) is amended to make clear that the applicable version of the Vermont Rules for Electronic Filing controls whether an efile can be rejected.

Rule 5(f)(1) is amended to clarify that the filer must comply with the applicable version of the Vermont Rules for Electronic Filing. Rule 5(f)(2) is repealed as no longer necessary.

Rule 5(g) is amended to cross-reference to the Vermont Rules for Public Access to Court Records, which as recently amended, specifies how to file documents to conform to the substantive requirements.

Rule 5(h) is amended to provide that the necessity for a certificate of service with an electronic filing is controlled by 2020 V.R.E.F. 11(g) if it is applicable. Where service is by efilers using the efile system, a certificate of service is no longer necessary under 2020 V.R.E.F. 11(g)(1).

2. That Rule 79(a) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through).

RULE 79. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN

(a) ~~Electronic Case Files; Civil Docket.~~

~~(1) *Electronic Case Files.* For cases that have been filed under the Vermont Rules for Electronic Filing, the clerk shall maintain all files and records as provided in those rules.~~

~~(2) *Civil Docket.* The clerk shall keep the civil docket and shall enter therein each civil action to which these rules are applicable. Actions shall be grouped upon the civil docket as follows: (1) Civil cases. (2) Small Claims cases. Actions shall be assigned consecutive file numbers within each group. The file number of each action shall be noted on the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket. These entries shall be brief but shall show the nature and subject matter of each paper filed, writ issued or order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word “jury” on the docket assigned to that action.~~

Reporter’s Notes—2020 Amendment

Rule 79(a)(1) is removed because the custodian of records is now controlled by Vermont Rules for Public Access to Court Records 3(c), effective July 1, 2019.

3. That Rule 5(b), (e), and (f) of the Vermont Rules of Probate Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(b) **Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the party or attorney or by mailing it to the last known address of the party or attorney or, if no address is known, by leaving it with the register.

(1) *Delivery.* Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the office of the attorney or party with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(2) *Mailing.* Mailing of a copy within this rule means: sending by ordinary first-class mail; or sending by third-party commercial carrier; and, if required or permitted by the Vermont Rules for Electronic Filing, transmission by electronic means. Service by mail or by commercial carrier is complete upon mailing or delivery to the carrier. ~~Service by electronic means is complete upon transmission, provided that such service is not effective if the party making service learns that the attempted service did not reach the party to be served.~~

(3) *Leaving With the Register.* Leaving a copy with the register within this rule means delivering or mailing the copy to the register by any means permitted or required for the filing of papers with the register under subdivision (f) of this rule.

(4) Service by Electronic Means.

(A) For units and divisions in which the Court Administrator has not directed that electronic filing be implemented under 2020 Vermont Rule for Electronic Filing 1(d), service may be accomplished by electronic means. Service by electronic means is complete upon transmission, provided that such service is not effective if the party making service learns that the attempted service did not reach the party to be served.

(B) For units and divisions in which the Court Administrator has directed that electronic filing be implemented under 2020 Vermont Rule for Electronic Filing 1(d), if the 2020 Vermont Rules of Electronic Filing require a method of service for the document being filed, the filer must use that method of service and not the methods of service specified in this subdivision.

(e) **Certificate of Service.** Except as provided in any applicable provisions of the 2020 Vermont Rules for Electronic Filing, every Every document filed with the court after the original petition, and required by this rule to be served upon a party, must be accompanied by a certificate of service. The certificate may be incorporated into the final page of the document being served, or may be on a separate form. It need not be in any special format so long as it contains all the required information. Multiple documents may be filed with one certificate of service. The certificate must meet the following requirements:

(1) *Signing.* The certificate must be signed by the party's lawyer or an authorized employee of the lawyer, or by a self-represented party, subject to the obligations of Rule 11.

(2) *Contents.* The certificate must:

(A) certify that the document has been served upon every other party to the case;

(B) state the manner of service (mail, personal delivery, or other service authorized by this rule);

(C) state the name and address of each person or entity served; and

(D) state the date of the mailing or other means of delivery.

(3) *Noncompliance.* If a document that requires a certificate of service is filed without one, the judge may issue an order:

(A) suspending the running of the time for response by the other party or parties until the filing of a proper certificate of service,

(B) declining to act on the filing until a proper certificate is filed, or

(C) ordering that the filing will be deemed withdrawn if no certificate is filed by a date certain. The lack of a certificate of service shall not be a basis for the register or the judge to refuse to accept the filing, or to return the document to the filer.

(f) **Filing With the Court Defined.**

(1) *In General.* The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the register or the judge. Filing may be accomplished by delivery; by sending the papers by ordinary first-class mail or by third-party commercial carrier addressed to the register; and, if required or permitted by the 2020 Vermont Rules for Electronic Filing, transmission by electronic means. Filing by mail or, commercial carrier, ~~or electronic means~~ shall not be timely unless the material filed is received within the time fixed for filing. Filing with a judge may be accomplished by any method permitted by the judge. The time of filing for an electronic filing is as specified in the 2020 Vermont Rules for Electronic Filing. The register shall not refuse to accept for filing any document presented for that purpose solely because it is not presented in proper form as required by these rules.

(2) *Document Filed by an Inmate.* A document filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing.

If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a notarized statement accompanying the document stating the date the document was deposited in the institution's internal mailing system. The notarized statement establishes a presumption that the document was deposited in the institution's internal mailing system on the date shown in the statement. The presumption may be rebutted by documentary or other evidence. Nothing in this rule precludes other evidence of timely filing such as a postmark or an official date stamp showing the filing date of the document.

(g) **Form of Papers.** Unless otherwise specified in the 2020 Vermont Rules for Electronic Filing, all ~~All~~ original papers shall be eight and one-half by eleven inches in size, endorsed with the name and docket number of the proceeding, the court and probate district where pending, the name of the paper, and the name and address of the person or attorney filing it.

(h) **Separation of Nonpublic Data.** The filer must separate nonpublic data as required by Vermont Rule for Public Access to Court Records 7. ~~**Social Security Numbers.** Before filing any paper containing the social security number of any person, the filer shall redact the social security number unless the social security number is specifically requested by the court.~~

Reporter's Notes—2020 Amendment

This rule was amended, at the same time as V.R.C.P. 5, in anticipation of electronic filing in the probate division using eCabinet, the experimental eFiling system. The system was never implemented in the probate division and never will be. The new case management system will, however, be used in the probate division when it is rolled out. The intent is to repeal sections of the rule on electronic filing for eCabinet and under the 2010 Vermont Rules of Electronic Filing and make service rules subject to the 2020 Vermont Rules of Electronic Filing as it is rolled out, as well as to the new version of the Vermont Rules for Public Access to Court Records. The specifics of the amendments are identical or very similar to the 2020 amendments of V.R.C.P. 5 and are described in the Reporter's Notes to those amendments. Those notes should be consulted to determine the intent of the drafting for these amendments.

4. That Rule 79 of the Vermont Rules of Probate Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 79. BOOKS AND RECORDS KEPT BY THE REGISTER AND ENTRIES THEREIN

(a) **Docket.** The register shall keep the docket and shall enter therein each proceeding to which these rules are applicable. Actions may be grouped upon the docket by the type of proceeding involved. Actions shall be assigned consecutive file numbers. The file number of each proceeding shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the register, all process issued and returns made thereon, all appearances, orders and judgments shall be entered chronologically in the docket on the folio

assigned to the proceeding and shall be marked with its file number. These entries shall be brief but shall show the nature and subject matter of each paper filed, writ issued or order or judgment of the court and of returns showing execution of process. The entry of an order or judgment shall show the date the entry is made.

(b) **Indices.** The court shall keep a general card index of all cases in the court as provided by law.

~~(c) **Custody of Records and Papers.** The register shall have custody of the records and papers of the court and shall maintain them as provided by law.~~

~~(d)~~ **Other books, dockets and records.** The register shall keep such other books, dockets and records as may be required by law or by order of the Supreme Court.

Reporter's Notes—2020 Amendment

Rule 79(c) is deleted because the custodian of records is as specified in V.R.P.A.C.R. 3(c), effective July 1, 2019. Former Rule 79(d) is now 79(c).

5. That these rule as amended are prescribed and promulgated effective March 2, 2020. 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 10th day of December, 2019.



Signed by the Vermont Supreme Court

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice