

STATE OF VERMONT
VERMONT SUPREME COURT
JUNE TERM, 2021

**Order Promulgating Amendments to Rules 7 and 56, and abrogating Rule 78 of the
Vermont Rules of Civil Procedure**

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

1. That Rule 7 of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 7. PLEADINGS ALLOWED; ~~FORM OF~~ MOTIONS

(a) **Pleadings.** There shall be a complaint and an answer; a disclosure under oath, if trustee process is used; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) **Motions and Other Papers.**

(1) Application. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor including a concise statement of the facts and law relied on, and shall set forth the relief or order sought.

(2) Applicable Rules. The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) Motions To Be Signed. All motions shall be signed in accordance with Rule 11.

~~(4) When a moving party wishes to request an opportunity to present evidence pursuant to Rule 78(b), that request shall be submitted with the motion to which it applies or within 7 days of service of the memorandum in opposition. Where this rule requires a motion to be in writing, the request for an opportunity to present evidence shall be in writing. The request for an opportunity to present evidence shall include a statement of the evidence which the party wishes to offer.~~

Memorandum in Opposition. Any party opposed to the granting of a written dispositive motion, including a motion for summary judgment under Rule 56, shall file a memorandum in opposition thereto not more than 30 days after service of the motion, unless otherwise ordered by the court. A memorandum in opposition to any nondispositive motion shall be filed not more than 14 days after service of the motion, unless otherwise ordered by the court. Any party may file a reply to a memorandum in opposition, including a memorandum in opposition to a motion for summary judgment under Rule 56(b), within 14 days after service of the memorandum. The court may also allow a surreply memorandum if the memorandum would assist in clarifying the issues, particularly where the party seeking to file the memorandum is addressing newly raised factual or legal arguments by the opposing party.

(5) Oral Argument. The court may hold oral argument on the motion or may dispose of the motion without argument.

(6) Evidentiary Hearings. Except for motions governed by Rule 56, the court shall provide an opportunity to present evidence if requested, unless the court finds that an evidentiary hearing is not necessary. The request for an opportunity to present evidence shall include a statement of the evidence which the party wishes to offer. When a moving party wishes to request an opportunity to present evidence the request shall be submitted with the motion to which it applies or within 7 days of service of the memorandum in opposition. A request by an opposing party for an opportunity to present evidence shall be submitted with the memorandum in opposition. When this rule requires a motion to be in writing, the request for an opportunity to present evidence shall be in writing.

(7) Fees and Costs. If a motion is heard under this subdivision (b), the court may award fees and costs to the prevailing party if the court finds that the grounds for filing or opposing the motion were frivolous.

~~(c) Demurrers, Pleas, Etc., Abolished.~~ Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Reporter's Notes—2021 Amendment

V.R.C.P. 7(b) is amended to consolidate and modernize provisions of the civil rules governing motions. Pertinent provisions of V.R.C.P. 78, which is simultaneously abrogated, are incorporated in this amendment. For clarity, captions have been added to existing paragraphs 7(b)(1)-(3) and amended or new paragraphs 7(b)(4)-(6).

V.R.C.P. 7(b)(4) is now replaced by language based on Rule 7(a)(3) of the Rules of the United States District Court for the District of Vermont and significantly narrows the reach of former V.R.C.P. 78(b)(1). The present amendment provides a procedure for responding not only to a motion for summary judgment under V.R.C.P. 56, but to all dispositive motions, including motions to dismiss for untimely service or filing of the complaint under V.R.C.P. 3, for judgment on a claim or on the pleadings under V.R.C.P. 12(b) or (c), for judgment as a matter of law under V.R.C.P. 50(a), for default judgment under V.R.C.P. 55(a) (as amended effective January 6, 2020), or any other motion that may result in dismissal of all or part of a claim without trial.

The amendment also codifies Vermont trial court precedent recognizing the trial courts' inherent discretion to allow a surreply memorandum if the memorandum would assist in clarifying the issues, particularly where the party seeking to file the memorandum is addressing new factual or legal arguments by the opposing party. See New England Youth Theatre, Inc. v. Env'tl. Compliance Servs., Inc., No. 138-4-12 Wmcv, 2013 Vt. Super. LEXIS 8, 2013 WL 1866895 (Vt. Super. Ct. Feb. 26, 2013)

(Carroll, J.); Town of Colchester v. Vt. Dep't of Taxes, Nos. S0861-10 CnC, S0933-10 CnC, S1524-10, CnC, 2011 Vt. Super. LEXIS 56, 2011 WL 8472917 (Vt. Super. Ct. Aug. 25, 2011) (Toor, J.); In re Town of Colchester, No. S0933-10 CnC, 2011 Vt. Super. LEXIS 13, 2011 WL 346535 (Vt. Super. Ct. Jan. 28, 2011) (Toor, J.).

The 30-day response period for all dispositive motions provides consistency with the existing response period for motions under V.R.C.P. 56(b) in response to a summary judgment motion. The response period for nondispositive motions, as well for motions under new V.R.C.P. 56(c)(5), responding to a Rule 56(b) response, is 14 days.

New paragraphs 7(b)(5) and (6) replace former V.R.C.P. 78(b)(1) and (2). Paragraph (5) gathers provisions concerning oral argument from both former paragraphs, placing them in a time frame related to the provisions of amended V.R.C.P. 7(b)(4). Similarly, paragraph (6) brings together provisions concerning the presentation of evidence from former V.R.C.P. 78(b)(1) and (2) that may arise outside the context of a summary judgment motion and makes clear their relationship to V.R.C.P. 56.

New V.R.C.P. 7(b)(7), carrying forward the final sentence of former V.R.C.P. 78(b)(2), is separately set forth to make clear that it applies to both nonevidentiary and evidentiary hearings. In applying paragraph (7), courts should be mindful of the guidance set forth in the Reporter's Notes to the original adoption of this language in a 1979 amendment adding V.R.C.P. 78(b): "If the motion is heard and the court finds that the losing party's grounds were frivolous, it may impose costs and other sanctions. The provisions of Rule 37(a)(4) will serve as a guide to the court in this situation. As in current practice under that rule, the appropriateness of sanctions should be determined at the hearing on the motion, rather than in a separate hearing." (Emphasis added.)

Former V.R.C.P. 7(c) is deleted. It stated, "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used." The passage of 50 years since its promulgation has effectively eliminated from the professional toolbox of most current members of the bar even the ghosts of the terms that it sought to abolish.

2. That Rule 56(c)(5) of the Vermont Rules of Civil Procedure be added to read as follows:

RULE 56. SUMMARY JUDGMENT

(c) Procedures.

(5) *Reply*. The moving party may file a reply to a memorandum in opposition within 14 days after service of the memorandum.

Reporter’s Notes—2021 Amendment

V.R.C.P. 56(c)(5) is added to make clear that a reply to a memorandum in opposition to a motion for summary judgment, as provided in the simultaneous amendment to V.R.C.P. 7(b)(4), is available. See Reporter’s Notes to that amendment.

3. That Rule 78 of the Vermont Rules of Civil Procedure be abrogated.

Reporter’s Notes—2021 Amendment

V.R.C.P. 78 is abrogated. Former Rule 78(a) required the Presiding Judge of each superior court to establish “motion days” at regular intervals. The rule is no longer consistent with practice in the superior court as currently constituted. Former paragraphs 78(b)(1) and (2) have been revised and reorganized in new V.R.C.P. 7(b)(5) and (6), added simultaneously. See Reporter’s Notes to that rule.

4. That these amendments be prescribed and promulgated, effective on August 9, 2021. The Reporter’s Notes are advisory.

5. 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 7th day of June, 2021.



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

William D. Cohen, Associate Justice