

**PROPOSED**

**STATE OF VERMONT  
VERMONT SUPREME COURT  
TERM, 2021**

**Order Promulgating Amendments to Rules 3.1, 4, 56, and 84 of the Vermont Rules of Civil Procedure, and Abrogating the Appendix of Forms to those Rules**

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

1. That Rule 3.1(b)(2) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined, deleted matter struck through):

**RULE 3.1. WAIVER OF FILING FEE AND SERVICE COSTS**

**(b) Waiver of Filing Fee and Payment of Service Costs.** The determination whether an applicant is unable to pay the filing fee or costs of service of process shall be made by the clerk of court or the clerk's designee.

(2) If the affidavit sets forth that the applicant is unable to pay either the filing fee or the costs of service without expending ~~household~~ the applicant's income or liquid resources necessary for the maintenance of the applicant and all dependents, the entire filing fee or costs of service or both shall be waived.

**Reporter's Notes—2021 Amendment**

Rule 3.1(b)(2) is amended by substituting “the applicant’s” for “household” to achieve internal consistency of usage throughout Rule 3.1 and to provide clear and consistent guidance to the Court Administrator in the development of forms to implement the rule. The party seeking waiver of fees and payment of costs is denoted “the applicant” everywhere else in the rule. See Rule 3.1(a), (b), (b)(1), (4), (c). The retention of “household” to describe income to be counted in paragraph (b)(2) when the rule was generally amended in 2020 was inconsistent with the general purpose of the 2020 amendments and created a confusing ambiguity in the application of the rule. See Reporter’s Notes to 2020 amendments.

2. That Rules 4(b) and 4(l)(3)(D) and (H) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined, deleted matter struck through):

**RULE 4. PROCESS**

**(b) Same: Form.** The summons shall be signed by the plaintiff's attorney or, if the plaintiff has no attorney, by any Superior Judge or a judge or the clerk of the court to which it is returnable. It shall contain the name and address of the court and the names of the parties, be directed to the

defendant, state the name and postal and e-mail addresses of the plaintiff's attorney, and the time and manner within which these rules require the defendant to respond to the complaint, and shall notify defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. A summons shall comply with the format provisions of the 2010 or 2020 Vermont Rules for Electronic Filing, if applicable. The plaintiff must include with the summons a blank Answer form and a blank Notice of Appearance form conforming substantially to the forms that the Court Administrator has approved for this purpose and posted on the Judiciary website.

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**(I) Waiver of Service; Duty to Save Costs of Service; Request to Waive.**

(3) *Method.* The notice and request given under this subdivision

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(D) shall inform the defendant of the consequences of compliance and of a failure to comply with the request, by means of a form conforming substantially to Forms 1B and 1C as contained in the Appendix of Forms to these rules the Notice of Lawsuit & Request for Waiver of Service form that the Court Administrator has approved for this purpose and posted on the Judiciary website, of the consequences of compliance and of a failure to comply with the request;

\* \* \* \* \*

(H) shall include a blank Answer form and a blank Notice of Appearance form conforming substantially to the forms that the Court Administrator has approved for this purpose and posted on the Judiciary website.

**Reporter's Notes—2021 Amendment**

Rules 4(b) and 4(l)(3)(D) and (H) are amended for consistency with the amendment of V.R.C.P. 84 and the abrogation of the Appendix of Forms consistent with the Supreme Court's transfer to the Court Administrator of the authority to amend and adopt forms and publish them on the Judiciary website. See Reporter's Notes to the simultaneous amendment of Rule 84, and abrogation of the Appendix of Forms.

3. That Rule 56(b) and (c) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

**RULE 56. SUMMARY JUDGMENT**

(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 An adverse party may file a memorandum in opposition, statement of disputed facts and affidavits if any its opposition to the motion up to 30 days after the service of the motion~~

upon the party. The moving party may file a reply memorandum, if any, within 14 days. The court may also allow a surreply memorandum.

**(c) Procedures Supporting Factual Positions.**

(1) *Supporting Factual Positions.* A moving party asserting that a fact cannot ~~be or is~~ genuinely be disputed must support the assertion by ~~(A) F~~ 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 admissible materials. ~~; or Upon request, the party must provide each adverse party with a copy of the statement in an editable format that allows entry of responses to be incorporated into a single document.~~ ~~(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) A nonmoving party responding to a statement of undisputed material facts and asserting that a fact is genuinely disputed, that the materials cited do not establish the absence of a genuine dispute, or that the moving party cannot produce admissible evidence to support the fact, must file a paragraph-by-paragraph response, with specific citations to particular parts of materials in the record that the responding party asserts demonstrate a dispute, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other admissible materials. The responding party must reproduce each numbered paragraph of the moving party's statement before including the response thereto. To the extent that the responding party asserts that there are additional material facts that should be considered, the party may file a separate and concise statement of additional material facts in numbered paragraphs, with specific citations to particular parts of admissible materials in the record. Upon request, the party must provide each adverse party with a copy of its response and of any separate statement of additional facts in editable format that allows entry of replies to be incorporated into single documents.

(3) A moving party who asserts that the nonmoving party's allegedly disputed facts are not material, are not genuinely disputed, or are not supported by admissible evidence may file a reply. Each numbered paragraph to which there is a reply, must be reproduced before the reply thereto. Similarly, a moving party who asserts that the nonmoving party's additional facts are not material or are not supported by admissible evidence, may file a reply. Each numbered paragraph to which there is a reply must be reproduced before the reply thereto. 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 new factual or legal arguments by the opposing party.

(24) 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.

(35) 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.

*(46) 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.

~~*(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**

Rule 56 is amended to clarify and spell out in detail the content of motions for summary judgment, oppositions to summary judgment motions, and motions in reply to opposition. The purpose is to separate out statements of often immaterial or nonresponsive additional facts and, to discourage the not-uncommon practice of obfuscating the terms of a reply by adding a host of such additional facts. No substantive change is intended.

Rule 56(b) is amended to provide in one place the filing times for the three principal procedural steps for which amended Rule 56 provides: The summary judgment motion, the opposition to the motion, and the moving party's reply to the opposition. That provision, formerly Rule 56(c)(5), has been incorporated here for clarity. In addition, for completeness, a provision permitting a surreply in the court's discretion has been adopted from V.R.C.P. 7(b)(4) as amended in June 2021. That rule applies generally to all motions including those for summary judgment. See Reporter's Notes to June 2021 amendment or Rule7(b).

Rules 56(c)(2) and (c)(3) have been added to make explicit the requirements that responses to the movant's statement of undisputed facts are to be provided in numbered paragraphs corresponding to those of the movant's statement, and that statements of additional facts—disputed or undisputed—are to be submitted in a separate statement, with numbered paragraphs. These provisions respond to prior concerns that nonmoving parties were causing confusion by incorporating additional material in their oppositions to the movant's statement. The detail of the provisions requires paragraph-by-paragraph responses to the movant's statement that must be preceded by paragraph-by-paragraph text of that statement. To facilitate preparation of responses, paragraphs (1) and (2), and paragraph (3) by implication, require a party, on request, to provide an opposing party with a copy of its statement in editable format to allow statements and responses to be incorporated in a single document.

4. That Rule 84 of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

## **RULE 84. FORMS**

The forms which the ~~Supreme Court~~ Court Administrator may now or hereafter approve and publish on the Judiciary website ~~incorporate in the Appendix of Forms~~ are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

### **Reporter's Notes—2021 Amendment**

Rule 84 is amended concurrently with the abrogation of the Appendix of Forms.

Rule 84 and the Appendix of Forms were originally adopted with the Vermont Rules of Civil Procedure in 1971 on the model of the 1938 Federal Rules of Civil Procedure. Those forms were intended not only to be “sufficient” but to illustrate the liberality and flexibility in pleading exemplified by the “short and plain statement” of a claim or defense called for by V.R.C.P. 8. See 1971 Reporter’s Notes to V.R.C.P. 8, 84. Federal Rule 84 and the federal Appendix of Forms were abrogated in 2015. The accompanying federal Advisory Committee’s Note says, in part,

The purpose of providing illustrations for the rules [in the Appendix of Forms], although useful when the rules were adopted, has been fulfilled.

Accordingly, recognizing that there are many alternative sources for forms, including the website of the Administrative Office of the United States Courts ..., Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated. The abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.

For at least five years, the Vermont Court Administrator’s office has been publishing new and amended forms on the Judiciary website in a “Forms Library,” which now contains a great number and wide variety of detailed forms addressing matters beyond the scope of those in the former Appendix and published in a format appropriate for electronic filing. See <https://www.vermontjudiciary.org/forms-library>.

The present amendment of Rule 84 establishes the Judiciary website as the primary source of forms but retains the authority of

the Supreme Court to approve website forms, as well as the provision for sufficiency under the rules and the standards of simplicity and brevity. In applying those standards, the Supreme Court, in the leading case of Colby v. Umbrella, Inc., 184 Vt. 1, 11, 955 A.2d 1082 (2008), using V.R.C.P. Form 9 as an example, stated that “The complaint is a bare bones statement that merely provides the defendant with notice of the claims against it. . . . Its purpose is to initiate the cause of action, not prove the merits of the plaintiff’s case.” That principle, together with the requirements of V.R.C.P. 8(a) and (e)(1) for brevity and simplicity, will serve as both interpretive and drafting guidance for continuing revision and development of forms on the Judiciary website.

5. That the Appendix of Forms to the Vermont Rules of Civil Procedure be abrogated.

#### **Reporter’s Notes—2021 Amendment**

The Appendix of Forms is abrogated to implement the simultaneous amendment of V.R.C.P. 84 establishing the Judiciary website as the location for publication and revision of Civil forms. See Reporter’s Notes to 2021 amendment of Rule 84.

6. That these rules as amended and the abrogation of the Appendix of Forms be prescribed and promulgated effective \_\_\_\_\_. The Reporter’s Notes are advisory.
7. That the Chief Justice is authorized to report these actions 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 \_\_\_\_\_, 2021.

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice