



Vermont Bar Association
139th Annual Meeting Seminar Materials

**Upcoming "Day is a Day" Time Counting
Changes, Civil & Criminal Rules Update, &
Civil Procedure Year in Review**

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Hilton Burlington
Burlington, VT

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Day is a Day Changes

Overall Points to Remember

- All time periods, unless specifically designated as a business day, are calendar days so intermediate Saturdays, Sundays, and legal holidays are counted in the time period
- When the last day of a time period is a Saturday, Sunday, or legal holiday, the deadline is determined by continuing to count in the same direction the time period runs. So, if it is a forward-looking time period, you count forward to the next day that is not a Saturday, Sunday, or legal holiday. If it is a backward-looking time period, you count backwards to the first day that is not a Saturday, Sunday or legal holiday
- Any time the clerk's office is inaccessible, the extension continues forward (no matter how the time period is counted) until the office is accessible.
- Time periods are changed to numbers divisible by 7
- Except **30-day time periods are unchanged**
- In general
 - 3 days becomes 5
 - 5 and 6 days become 7
 - 7 remains 7
 - 10 and 15 days become 14
 - 20 days become 21
 - 45 and 41 days become 42
- Time periods that were changed and do not conform to these general changes are listed specifically below for each subject matter area.

Civil Rules Changes

Special Notes:

- The two-day notice period for a motion to dissolve a TRO obtained without notice is retained in view of the exigent circumstances likely present, V.R.C.P. 65(a)
- Additional Time for Certain Kinds of Service. V.R.C.P. 6(e), still have 3 additional days when party is required to act within a particular time after being served and service is made by mailing, leaving with the clerk, or sending by electronic means
- In several instances 10 days became 28 days to be consistent with federal rules on motion practice

Specific changes that do not conform to the general changes.

Rule	Former Time Period (did not include weekends or holidays)	New Time Period (counts every day)
V.R.C.P. 50(b) & (c)- Renewal of Motion for Judgment as a matter of law after trial 52(b)- Motion to amend findings 59(b), (d) & (e)- Time to file motion for new trial, Grant of new trial sua sponte by court, and Time to file motion to alter or amend	10 days after entry of judgment	28 days after entry of judgment Conforms to the new federal standard for motion practice, which was extended from 10 to 28 days
V.R.C.P. 53(e)(2)- Time for party to file written objection to master's report	10 days	21 days Amended for consistency with F.R.C.P. 53(f)(2)
V.R.C.P. 59(c)- When motion for new trial is based on affidavits, Time for opposing Party to file opposing affidavits and to extend time for good cause	Time to file opposing affidavits was 10 days Could seek extension of additional 20 days	Time to file opposing affidavits now 14 days Can seek extension of additional 14 days Total time period will not exceed 30 days.

Appellate Rules Changes

Specific changes that do not conform to the general changes.

Rule	Former Time Period (did not include weekends or holidays)	New Time Period (counts every day)
V.R.A.P. 4(b)(7)- Time within which Rule 60 motion must be filed to toll appeal period	10 days	28 days Conforms to changes in V.R.C.P. 50 and 52
V.R.A.P. 4(c)(1)- Time to file motion to reopen	7 days of receipt of notice of order	14 days
V.R.A.P. 5(b)(7)(C), 5.1(b)(4), 6(a)(6) - Time to file response to motion for permission to bring interlocutory, collateral final order, or discretionary appeal	5 days	14 days
V.R.C.P. 6(d)- Time to file affidavit opposing motion	1 day before hearing	7 days before hearing
V.R.A.P. 11(a)(2), (b)(1)- Time for superior court to forward record and to transmit appeal	15 days	14 days
V.R.A.P. 27(a)(3)- Time to file a response to a motion	7 days	14 days
V.R.A.P. 33.1(b)(2)- Time to notify Court of appearance by video	3 business days	7 days
V.R.A.P. 33.1(b)(3)- Time for nonincarcerated party to request to present oral argument by telephone	3 business days	7 days
V.R.A.P. 39(d)(2)(B)- Time to request review of unnecessary matter	7 days	14 days
V.R.A.P. 45.1(e)- Time for party to respond to attorney's motion to withdraw	7 days	14 days

Things that remain the same

- Time for the State to file an appeal in a criminal case remains 7 business days, V.R.A.P. 4(a)(2), V.R.A.P. 5(b)(5)(A)

Criminal Rules Changes

Specific changes that do not conform to the general changes.

Rule	Former Time Period (did not include weekends or holidays)	New Time Period (counts every day)
V.R.Cr.P. 12.1- Time for providing notice of alibi, insanity , or expert testimony on mental illness	10 days prior to trial	28 days prior to trial
V.R.Cr.P. 45(e)- Time to file affidavit opposing motion	1 day before hearing	7 days before hearing

Things that remain the same

- Time for the State to move to modify a sentence remains 7 business days, V.R.Cr.P. 35(c). See 13 V.S.A. § 7042(b), as amended by 2017, No. 11, § 29.

Probate Rules Changes

Specific changes that do not conform to the general changes.

Rule	Former Time Period (did not include weekends or holidays)	New Time Period (counts every day)
V.R.P.P. 6(c)- Time to file affidavit opposing motion	1 day before hearing	7 days before hearing
V.R.P.P. 52(b)- Motion to amend findings 60(c)- Time to file motion to alter or amend	10 days after entry of judgment	14 days after entry of judgment NOTE: In the initial order, this was changed to 28 days after entry of judgment to conform to the civil rules changes, but the probate rules committee subsequently decided to make it 14 days. The 14-day period will go into effect on January 1, 2018.
V.R.P.P. 66(e)- Time to file written objection to allowance of account so can be heard at hearing	3 days	7 days

Family Rules Changes

Specific changes that do not conform to the general changes.

Rule	Former Time Period (did not include weekends or holidays)	New Time Period (counts every day)
V.R.F.P. 4.3(b)(2)(C)- Time for obligor to request hearing	10 days of receiving notification	20 days Consistency with 15 V.S.A. § 783(a)(4)

Environmental Rules Changes

Specific changes that do not conform to the general changes.

Rule	Former Time Period (did not include weekends or holidays)	New Time Period (counts every day)
V.R.E.C.P. 4(c)(1), (3) – Following issuance of an emergency order, time for respondent to request hearing, and time for court to schedule hearing after filing	5 days	5 business days Conforms to 10 V.S.A. § 8009(d)

Day is a day list of changes to Civil Rules, grouped by time limits.
[Highlighting indicates a change in forms]

NEW 28-DAY DEADLINE FOR POST-TRIAL MOTIONS.

JUDGMENT AS A MATTER OF LAW IN ACTIONS TRIED BY A JURY Rule 50 is amended for consistency with the current federal standard for motion practice, which was extended from 10 days to 28 days.

NEW TRIALS; AMENDMENT OF JUDGMENTS Rule 59(c) is amended to extend its 10-day time period to 14 days. Rules 59(b), (d), and (e) are amended for consistency with the new federal standard for motion practice, which was extended from 10 days to 28 days. The 20-day time period in Rule 59(c) is reduced 14 days so that the total time for filing and serving affidavits may not exceed 30 days.

FINDINGS BY THE COURT Rule 52(b) is amended for consistency with the current federal standard for motion practice, which was extended from 10 days to 28 days.

DEADLINES CHANGED FROM 3 DAYS TO 5 DAYS.

SUMMONS TO TRUSTEE FOR EARNINGS Form 2B is amended to extend its 3-day time period to 5 days.

TRUSTEE PROCESS Rule 4.2(j)(3) is amended to extend its 3-day time period to 5 days.

DEFAULT Rule 55(b)(4) is amended to extend its 3-day time period to 5 days

DEADLINES CHANGED FROM 5 DAYS TO 7 DAYS.

APPEARANCE AND WITHDRAWAL OF ATTORNEYS Rule 79.1(b) is amended to extend its 5-day time period to 7 days.

ATTACHMENT Rule 4.1(b)(2) is amended to extend its 5-day time period to 7 days .

ENTRY OF JUDGMENT Rule 58(d) is amended to extend its 5-day time period to 7 days.

FINDINGS BY THE COURT Rule 52(a) is amended to extend its 5-day time periods to the 7 days.

PLEADINGS ALLOWED; FORM OF MOTIONS Rule 7(b)(4) is amended to extend its 5-day time period to 7 days.

REPLEVIN Rule 64(b)(2) is amended to extend its 5-day time period to 7 days.

USE OF DEPOSITIONS IN COURT PROCEEDINGS Rule 32(d)(3)(C) is amended to extend its 5-day time period to 7 days.

Day is a day list of changes to Civil Rules, grouped by time limits.
[Highlighting indicates a change in forms]

**DEADLINES CHANGED FROM 5 OR 6 DAYS TO 7 DAYS &
FROM 10 DAYS TO 14 DAYS.**

DEPOSITIONS UPON ORAL EXAMINATION. Rules 30(b)(1) and (5) are amended to extend their 5- and 10--day time periods to 7 and 14 days .

FORECLOSURE OF MORTGAGES AND JUDGMENT LIENS Rule 80.1 is amended to extend its 6- and 10-day time periods to 7 and 14 days

**PROCEDURES FOR IMMOBILIZATION OR FORFEITURE HEARINGS
PURSUANT TO 23 V.S.A. § 1213C** Rules 80.7(c)(2)(C) and (d)(1)-(3) are amended to extend their 5- and 10-day time periods to 7 and 14 days

DEADLINES CHANGED FROM 10 DAYS TO 14 DAYS.

PARTIES PLAINTIFF AND DEFENDANT; CAPACITY. Rule 17(c) is amended to extend its 10-day time periods to 14 days.

INSURER'S NOTICE OF SUBROGATION CLAIM Form 15 is amended to extend its 10-day time period to 14 days.

CLASS ACTIONS Rule 23(f) is amended to extend its 10-day time period to 14 days.

COMPLEX ACTIONS. Rule 16.1(b) is amended to change its 10-day and two-week time periods to 14 days.

INJUNCTIONS Rule 65(a) is amended to extend its 10-day time periods to 14 days . Consistent with V.R.C.P. 65(b)(4), the two-day notice period for a motion to dissolve a TRO obtained without notice is retained in view of the exigent circumstances likely present in such a case.

JURY TRIAL OF RIGHT. Rules 38(b) and (c) are amended to extend their 10-day time periods to 14 days.

OFFER OF JUDGMENT Rule 68 is amended to extend its 10-day time periods to 14 days.

ORDERS AGAINST STALKING OR SEXUAL ASSAULT Rule 80.10(e) is amended to extend its 10-day time period to 14 days.

DEADLINES CHANGED FROM 15 DAYS TO 14 DAYS.

GENERAL PROVISIONS GOVERNING DISCOVERY Rule 26(f) is amended to change its 15-day time period to 14 days.

MOTION DAY Rule 78(b)(1) is amended to change its 15- and 10-day time periods to 14 days.

PROCEDURE IN EXPEDITED ACTIONS Rule 80.11(e)(3)(B) is amended to change its 15-day time period to 14 days.

Day is a day list of changes to Civil Rules, grouped by time limits.
[Highlighting indicates a change in forms]

**DEADLINES CHANGED FROM 5 DAYS TO 7 DAYS OR
FROM 10 OR 15 DAYS TO 14 DAYS & 20 DAYS TO 21 DAYS.**

AMENDED AND SUPPLEMENTAL PLEADINGS Rule 15(a) is amended to extend its 10- and 20-day time periods to 14 and 21 days.

APPEALS FROM THE PROBATE DIVISIONS Rules 72(a) and (f)(1) and (2) are amended to extend their 5-, 10- and 20-day time periods to 7, 14, and 21 days.

JUDICIAL BUREAU PROCEDURES Rules 80.6(c)(3), (e)(1) and (5), and (l)(1) are amended to change their 5-, 10-, 15-, and 20-day time periods to 7, 14, and 21 days.

DEFENSES AND OBJECTIONS Rule 12 is amended to change its 10-day, 20-day, and 50-day time periods to 14, 21, and 49 days.

DEADLINES CHANGED FROM 20 DAYS TO 21 DAYS.

SUMMONS Form 1 is amended to extend its 20 day time period to 21 days.

SUMMONS AND COMPLAINT AGAINST THIRD-PARTY DEFENDANT Form 22 is amended to extend its 20-day time period to 21 days.

APPEALS FROM DECISIONS OF GOVERNMENTAL AGENCIES Rule 74(b) is amended to extend its 20-day time period to 21 days.

CALENDAR; ASSIGNMENT; CONTINUANCES; DISQUALIFICATION Rules 40(a)(1) and (b) are amended to extend their 20-day time periods to 21 days.

COMMENCEMENT OF ACTION Rule 3 is amended to extend its 20-day time period to 21 days.

DISCOVERY BEFORE ACTION OR PENDING APPEAL. Rule 27(a)(2) is amended to extend its 20-day time period to 21 days.

MASTERS. Rule 53(d) is amended to extend its 20-day time period to 21 days. Rule 53(e) is amended for consistency with F.R.C.P. 53(f)(2).

NATURALIZATION OF ALIENS Rule 80.2(a) is amended to extend its 20-day time period to 21 days.

PROCEDURES IN THE SUPERIOR COURT, CRIMINAL DIVISION, FOR ENFORCEMENT OF MUNICIPAL PARKING VIOLATIONS Rule 80.9(b)(3) is amended to extend its 20-day time period to 21 days.

PROCESS Rule 4(g)(3)(g) **Service by Publication** is amended to extend its 20-day time period to 21 days.

STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT Rule 62(a)(3)(A)-(B) is amended to extend its 10-day and 20-day time periods to 14 and 21 days.

Day is a day list of changes to Civil Rules, grouped by time limits.
[Highlighting indicates a change in forms]

DEADLINES CHANGED FROM 41 DAYS OR 45 DAYS TO 42 DAYS.

SUMMONS AND ORDER OF PUBLICATION Form 1A is amended to extend its 41-day time period to 42 days.

INTERROGATORIES TO PARTIES. Rule 33(a) is amended to change its 45-day time period to 42 days.

PRODUCTION OF DOCUMENTS. Rule 34(b) is amended to change its 45-day time period to 42 days.

REQUESTS FOR ADMISSION. Rule 36(a) is amended to change its 45-day time period to 42 days.

DEADLINES CHANGED FROM 60 DAYS TO 42 DAYS.

PROCESS Rule 4(l)(3)(F) **Waiver of Service** is amended to shorten the time for return of a waiver of service from 60 to 42 days **if the defendant is addressed outside any state or territory of the United States.** The existing rule allowed too much time to make this method of service feasible for timely commencement under Rule 3 in the case of a defendant outside any state or territory of the United States.



A Day is a Day

Timekeeping Under the Revised
Rules of Court Procedure



"I've completely lost track. Is it 1 million or 2 million notches to A.D.?"

How do you measure a day?

Counting Time Under the Old System

Period 10 Days and Under

- ▶ Excludes intervening Saturdays, Sundays and legal holidays
- ▶ When the period ends on a Saturday, Sunday, or legal holiday, go to the next working day

Period 11 Days and Over

- ▶ Count every day
- ▶ When the period ends on a Saturday, Sunday, or legal holiday, go to the next working day



Under old system, if time period starts on Thursday August 30...

- A 3-day time period ends on September 6, 6 days later
- A 5-day time period ends on September 8, 8 days later
- A 7-day time period ends on September 12, 12 days later
- A 10-day time period ends on September 15, 15 days later
- A 14-day time period ends on September 14, 14 days later

Problems with the Old Time Counting System



- ▶ Confusion created by difference between counting method for shorter and longer time periods
- ▶ Difficult for court staff to explain
- ▶ Difficult for self-represented parties to understand
- ▶ Periods often ended on nonworking days
- ▶ Lack of uniformity and predictability
- ▶ Shorter periods ended after longer periods
- ▶ Difference with federal time-keeping method

Counting Time Under the New System

- ▶ Count every day
- ▶ All time periods are calendar days unless stated as business days
- ▶ When period ends on nonworking day, continue to count in same direction to next working day
- ▶ Any time clerk's office is inaccessible go to next working day



Summary of Changes Made

- ▶ Time periods are changed to numbers divisible by 7
- ▶ Except 30-day time periods remain the same
- ▶ 3 days becomes 5
- ▶ 5 and 6 days become 7
- ▶ 7 remains 7
- ▶ 10 and 15 days become 14
- ▶ 20 days become 21
- ▶ 45 and 41 days become 42
- ▶ Some exceptions exist- see handout

These changes are meant to keep the actual period of time as close to the prior time as possible



If Time Period Starts on Wednesday September 6...

A 10-day time period under the old system would end on

Wednesday September 20

A 14-day time period under the new system would end on

Wednesday September 20



If Time Period Starts on Friday September 1...

A 10-day time period under the old system would end on **Monday September 18**

A 14-day time period under the new system would end on **Friday September 15**

Time Periods for Motion Practice

In several instances 10 days became 28 days to be consistent with federal civil rules on motion practice

- ▶ V.R.C.P. 50(b), (c)- Renewal of Motion for Judgment as a matter of law after trial
- ▶ V.R.C.P. 52(b)- Motion to amend findings
- ▶ V.R.C.P. 59(b), (d) & (e)- Time to file motion for new trial, Grant of new trial sua sponte by court, and Time to file motion to alter or amend
- ▶ V.R.A.P. 4(b)(7)- Time within which Rule 60 motion must be filed to toll appeal period

Conformance with Statute

- ▶ Act No. 11 of 2017 amended a number of statutory procedural time periods of 10 days or less
- ▶ 10 days became 14 days
- ▶ Other time periods were expressly changed to “business days”
- ▶ Rules that repeat statutory time periods also use “business days”
- ▶ For example

RULE 35. CORRECTION, REDUCTION AND MODIFICATION OF SENTENCE

(c) **Modification of Sentence on Motion of Prosecuting Attorney.** A motion to modify a sentence filed by the prosecuting attorney shall be made within seven business days of the date of imposition of sentence.

* * * * *

Reporter's Notes—2018 Amendment

Rule 35(c) is amended to specify that a prosecuting attorney's motion to modify sentence must be made within seven business days of imposition of sentence. Addition of the term “business” to define the running of the days is required to render the rule consistent with the provisions of 13 V.S.A. § 7042(b), as amended by 2017, No. 11, § 29.

Additional Time for Certain Kinds of Service “The Three-Day Rule”

- ▶ There are 3 additional days when party is required to act within a particular time after being served and service is made by mailing, leaving with the clerk, or sending by electronic means (if allowed by rules)
- ▶ This applies in all divisions by virtue of V.R.C.P. 6(e), V.R.A.P. 26(c), V.R.Cr.P. 45(e), V.R.P.P. 6(d)

Appellate Rule Changes

- ▶ Time for the State to file an appeal in a criminal case is 7 business days, V.R.A.P. 4(a)(2), V.R.A.P. 5(b)(5)(A). This complies with 2017, No. 11, amending 13 V.S.A. § 7403(e)
- ▶ Time for filing a Rule 60(b) that will toll appeal period is changed from 10 days to 28 days to conform to the changes in V.R.C.P. 50 and 52
- ▶ Time to respond to a motion is changed from 7 to 14 days in V.R.A.P. 27
- ▶ Time to respond to a motion for interlocutory appeal, collateral final order appeal, or discretionary appeal is changed from 7 to 14 days in V.R.A.P. 5, 4.1, and 6

Transition

- ▶ Changes have been promulgated and will be effective **January 1, 2018**
- ▶ Changes apply to time periods that start or are set after the effective date
- ▶ Time periods that begin before January 1, 2018 will continue to be counted under the old method
- ▶ Time periods set after January 1, 2018 will use the new counting method

For More Information

- ▶ Handout Provided
- ▶ Go to the Judiciary Website and read the orders
<https://www.vermontjudiciary.org/attorneys/rules/promulgated>
- ▶ Ask!

Practice Tip

Vermont Rules for Electronic Filing in State Court

By Lynn Wdowiak, RP®

All attorneys licensed in Vermont are required to register on the electronic filing system. VT R Elec Fil Rule 3(b) requires attorneys to register at least one current e-mail address, but the attorney can register two additional email addresses.

In an electronic filing case in Vermont Superior Court, [Rutland and Windsor Civil Divisions only], when you serve documents [not including *original notice of an action or proceeding*, and other specific documents listed in VT R Elec Fil Rule 11(a)] to registered filers, all email addresses listed for an attorney must receive copies of all documents that are served on the attorney of record, i.e. the additional registered email addresses. You can find an attorney's registered emails at <https://efiling.eservices.crt.state.vt.us/Common/UIPages/ViewFilers.aspx> or go to the main eCabinet page and look for "Utilities" and "View Registered Users." All email addresses for an attorney should also be listed on all electronic filings by that attorney also, generally in the signature block or on the Certificate of Service.

(b) An attorney licensed to practice law in the State of Vermont and in active status must register on the electronic filing system website . . . An attorney registered under this subdivision may submit up to two additional e-mail addresses. All e-mail addresses submitted will be listed on the Judiciary website. The attorney's license number and **all e-mail addresses submitted** must be listed on all electronic filings by that attorney. The addresses submitted are the addresses to which **all service, notice, or other communication submitted must be sent**. The attorney must report any change in the information and e-mail addresses submitted forthwith by amendment to the electronic filing system registration. The Court Administrator may permit an attorney on request to submit one or more additional registrations that the attorney shows are required to facilitate the practice of law from multiple offices with independent staffing and technology systems.

VT R ELEC FIL Rule 3(b). (Emphasis added.)

The Vermont system is not like the federal electronic filing system. When documents are filed in the current Vermont eCabinet system, the documents are only filed with the court. The system does NOT also serve the documents on the registered filers; the filer must serve the documents by email to all registered email addresses.

As my mentors tell me, "let interesting rules of procedure be decided on someone else's cases." You don't want to be the paralegal/legal assistant involved in the first case that decides service of a document wasn't proper because the rules were not followed!

Recent Civil Rule Amendments now in effect, Oct. 2017

Order	Summary	Link
<p>1. Order Promulgating Amendments to V.R.C.P. 1, 26, 34(b), 37(f), and 55(c)</p>	<p>These amendments to the civil rules incorporate or adapt recent changes to the federal rules.</p> <p>The amendment to Rule 1 is intended to encourage increased cooperation among the parties by clarifying that parties as well as courts have a responsibility to achieve “the just, speedy, and inexpensive determination of every action.”</p> <p>The amendment to Rule 26 <u>redefines the scope of discovery</u>. Discovery must now be relevant to any party’s claim or defense, as opposed to being reasonably calculated to lead to the discovery of admissible evidence. A proportionality requirement has been added, saying that discovery may now only be obtained if it is “proportional to the needs of the case” as defined by five factors.</p> <p>The amendment to Rule 34(b) requires the grounds for objection to be stated specifically consistent with the requirement that an <u>objection must state whether materials are being withheld</u>.</p> <p>The amendment to Rule 37(f) clarifies the consequences for <u>failing to preserve electronically stored or other evidence</u></p> <p>This Order was promulgated on July 14, 2017, effective September 18, 2017.</p>	<p>PROMULGATED VRCP1 26 34(b) 37(f) 55(c)-DiscoveryRules.pdf</p>

Order	Summary	Link
<p>2. Order Promulgating Amendment to V.R.C.P. 5(h)</p>	<p>Rule 5(h), as added effective September 21, 2015, is amended to clarify and make uniform the <u>procedures for certificates of service</u>.</p> <p>The amendment clarifies that a certificate of service may be incorporated in the document filed or be on a separate page and may embrace multiple documents.</p> <p>Further, the amendments to paragraph (3) clarify that a document filed without a certificate should be accepted for filing, subject to compliance with the order of the judge concerning the filing of a proper certificate.</p> <p>This Order was promulgated on July 14, 2017, effective September 18, 2017.</p>	<p>PROMULGATED VRCP5(h).pdf</p>
<p>3. Order Promulgating Amendments to V.R.Cr.P. 30 and V.R.C.P. 51(b)</p>	<p>This Order makes contemporaneous conforming amendments to Rule 30 of the Vermont Rules of Criminal Procedure and Rule 51(b) of the Vermont Rules of Civil Procedure.</p> <p>The amendments to V.R.Cr.P. 30 and V.R.C.P. 51(b) clarify those circumstances in both criminal and civil trials in which <u>objections to proposed jury instructions fully articulated at a charge conference may be preserved</u>, without the necessity for their reassertion after the court's reading of the instructions and prior to the jury's retirement for deliberations.</p> <p>This Order was, promulgated on February 6, 2017, effective April 10, 2017,</p>	<p>Order Promulgating Amendments to V.R.Cr.P. 30 and V.R.C.P. 51(b)</p>

Order	Summary	Link
<p>4. Order Adding Rule 4(f) to the Vermont Rules of Appellate Procedure</p>	<p>New Rule 4(f) provides that <u>deposit of a notice of appeal in the internal prison mailing system can constitute timely filing</u> and requires use of a prison “legal mail” system if available.</p> <p>The rule also explicitly creates a rebuttable presumption that the filing is timely if accompanied by a notarized statement showing deposit in the institution's internal mailing system on or before the last day for filing.</p> <p>This Order was promulgated on January 9, 2017, effective March 13, 2017.</p>	<p>Promulgation Order Adding Rule 4(f) to the Vermont Rules of Appellate Procedure</p>
<p>5. Order Promulgating Amendments to V.R.C.P. 43(f), V.R.P.P. 43(e), and V.R.Cr.P. 28</p>	<p>The amendments make clear that the requirements in actions of all divisions of the Superior Court for court provision of <u>interpreter services for persons with limited English proficiency (LEP), hearing impairments, or other disability</u> resulting in the need for interpreter services comply with federal law.</p> <p>Contemporaneous conforming amendments have been made to Rule 43(e) of the Vermont Rules of Probate Procedure, Rule 28 of the Vermont Rules of Criminal Procedure, and Rule 43(f) of the Vermont Rules of Civil Procedure.</p> <p>This Order was promulgated on January 9, 2017, effective March 13, 2017.</p>	<p>Order Promulgating Amendments to V.R.C.P. 43(f), V.R.P.P. 43(e), and V.R.Cr.P. 28</p>
<p>6. Order Amending Rule 5 of the Vermont Rules of Civil Procedure</p>	<p>The amendment to Rule 5 establishes procedures for <u>service and filing of documents under the rule by electronic means</u> in all divisions and units of the superior court.</p> <p>This Order was promulgated on December 15, 2016, effective February 20, 2017.</p>	<p>Promulgation Order Amending Rule 5 of the Vermont Rules of Civil Procedure</p>

VBA CIVIL AND APPELLATE PROCEDURE UPDATE 10/13/17

James A. Dumont

Summary. The Court has addressed many important civil/appellate procedure issues since last October: 1) Cramer v. Billado, the first SCV published opinion to address “tack orders” under VRCP 4(d)(i); (2) Paige v. State and In re Appeal of Dezaræ Durkee, addressing in depth the “capable of repetition but evading review” exception to mootness; (3) Taylor v. Town of Cabot, updating the four-factor test for preliminary injunctions and stays pending appeal; (4) Couture v. Trainer, expanding the SCV’s 1839 ruling that absolute immunity protects all in-court statements so that it now applies to all made preliminary to proposed litigation; and Hermitage Inn Real Estate Holding Co. v. Extreme Const., LLC., explaining whose duty it is to invoke arbitration when a court case has been filed notwithstanding an arbitration agreement and whether court proceedings must be dismissed or stayed as well as the standard for setting aside entry of default based on “good cause” rather than “excusable neglect” and In re MS, also addressing the distinction between “good cause” and “excusable neglect.”

TACK ORDERS -- Cramer v. Billado 2017 VT 38. VRCP 4(d)(i) allows a judge or order service by leaving the summons and complaint at the defendant’s dwelling house when the plaintiff shows that regular in-person service “cannot be made with due diligence.” Several SCV decisions have referred to service by so-called tack order, and an unpublished entry order in 2004 reversed a judgment for admitted failure to comply with the rule, but this is the first published decision on the merits on tack orders since the VRCP were adopted.

Here the trial court found that the defendant had agreed in a phone conversation with the deputy sheriff to pick up the pleadings at the courthouse and then failed to do so. The deputy had already made two trips to the house – when no vehicles were parked there – without success. This sufficed for due diligence. Defendants have no duty to travel to a process server “but when a defendant does agree to do so, a court may find that the process server’s reliance on that agreement is consistent with due diligence.”

CAPABLE OF REPETITION YET EVADING REVIEW -- In re Appeal of Dezarae Durkee, 2017 VT 49 and Paige v. State, 2017 VT 54.

Durkee addressed whether DCF could deny temporary housing assistance under General Assistance rules barring assistance where applicant has caused her own loss of housing during the prior 6 months. She had not been evicted but had left in order to avoid the eviction, which had not been caused by breach of the lease but by the landlord's decision to cease renting. DCF argued that the appeal was moot because 6 months had expired and there was no "reasonable expectation" that in the future the same legal issue would affect this applicant. The SCV disagreed, "In light of the uncontested facts that applicant is a single mother on a small income and landlords can decide to cease operating a rental unit for nondiscriminatory reasons, we find it entirely reasonable that applicant could once again be given a valid notice of termination without cause and be forced to choose whether to comply with the notice or await an inevitable court-ordered eviction."

Paige was a challenge to inclusion in the Vermont Republican presidential primary of Senators Cruz and Rubio, on the grounds that neither was a "natural born citizen" of the US. The trial court dismissed on grounds of lack of standing and that this was a political question. The SCV affirmed on different grounds, that the dispute was moot.

The CORYER exception did not apply because there was no "reasonable expectation" that the same complaining party would be subjected to the same action again. It is "mere speculation" that the plaintiff's voting rights would be affected.

Justice Robinson, joined by Justice Eaton, issued a concurring opinion that disagreed with the majority's reasoning. The "reasonable expectation" standard is a low one, because the precedents hold that reoccurrence "need not be certain or even more likely than not." The concurring opinion relied not only on Durkee and other SCV precedents – but also on Roe v. Wade, which rejected the mootness objection because "Pregnancy often comes more than once to the same woman, and in the general population if man is to survive, it will always be with us." The concurring justices vote to affirm, however, because expedited court procedures can prevent this issue from evading review.

THE FOUR FACTOR TEST IN PRELIMINARY INJUNCTIONS and STAYS PENDING APPEAL – the footnote in Taylor v. Town of Cabot, 2017

VT 92. The SCV has not addressed, until now, the modern federal jurisprudence that departs from or clarifies the four-factor test. In footnote 3, the Court says that the federal standard is encompassed within the four-factor test:

“The trial court here rightly identified the main factors guiding its review under Vermont law: (1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest.³”

“³In its entry regarding the Town’s motion for permission to take interlocutory appeal, the trial court noted that other courts have adopted slight variations to these factors. The trial court cited a recent federal district court decision from New York in which the court expanded the “likelihood of success on the merits” factor to encompass “sufficiently serious questions as to the merits plus a balance of hardships that tips decidedly in their favor.” General Mills, Inc. v. Chobani, LLC, 158 F. Supp. 3d 106, 115 (N.D.N.Y. 2016). We conclude that our formulation is functionally difficult to distinguish from the alternatives identified in the General Mills case. Insofar as our test calls for a balancing of multiple factors, including the likelihood of success on the merits, it is sufficiently flexible to allow for a preliminary injunction in cases in which the court cannot definitively conclude that the movant is likely to prevail on the merits, but the balance of other factors tips strongly in favor of an injunction. Accordingly, we maintain the formulation we adopted in In re J.G., 160 Vt. at 255 n.2, 627 A.2d at 365 n.2.”

ABSOLUTE IMMUNITY FOR PLEADINGS – Couture v. Trainer, 2017 VT

73. Appellant filed a defamation action alleging, *inter alia*, false statements in a petition for an abuse prevention order. The SCV affirmed the trial court’s determination that absolute immunity applied. 1839 precedent, Mower v. Watson, adopted absolute immunity for courtroom testimony. The SCV has now adopted Restatement of Torts 2d § 587, which provides absolute immunity for matters published preliminary to a proposed judicial proceeding as well as in the institution or during the course and as part of, a judicial proceeding “if the matter has some relation to the proceeding.”

WHAT HAPPENS WHEN A PLAINTIFF FILES SUIT IN A MATTER COVERED BY AN ARBITRATION CLAUSE; VRCP 78 FAILURE TO RESPOND; SETTING ASIDE DEFAULT ENTRY RATHER THAN DEFAULT JUDGMENT; GOOD CAUSE vs EXCUSABLE NEGLIGENCE -- Hermitage Inn Real Estate Holding Co. v. Extreme Const., LLC., 2017 VT 44 and In re MS, 2017 VT 62.

Hermitage is a Dickensian tale of over-reaching, delay and missed deadlines, which all trial lawyers should read. An incomplete summary is that the plaintiff claimed large sums under a construction contract which contained an arbitration clause – but instead of initiating arbitration brought suit and obtained an *ex parte* trustee process. Defendant’s response included counsel’s failure to comply with court orders and failure to respond to motions within the 15 days required by Rule 78, as well as objecting that there was an arbitration requirement. The trial court conditioned setting aside *entry* of default on defendant initiating arbitration. When defendant failed to do so, default *judgment* was entered for \$566,881.03. Reversed. The following is an incomplete summary:

- 1) The SCV strongly suggested but did not hold that an arbitration clause requires that the civil action be stayed not dismissed.
- 2) A plaintiff must bear the burden and expense of initiating arbitration, not the defendant who asserts the arbitration defense.
- 3) Violation of a VRCP 16.2 scheduling order can be the basis for a default judgment but an order to initiate arbitration is not a VRCP 16.2 scheduling order.
- 4) Failure to file a response to a motion within 15 days as required by VRCP 78 authorizes the trial court to rule without any opposing argument but does not authorize issuance of a default judgment.
- 5) Setting aside a default entry is governed by “good cause,” which is a more lenient standard than excusable neglect, which applies under VRCP 60(b) to setting aside a default judgment.
- 6) SCV adopts the 2d Circuit’s 3-part good cause standard under Rule 55(c) (whether the default was willful, whether the moving party has presented a meritorious defense, and whether setting aside the default would prejudice the party who secured the entry of default).

In re MS. 2017 VT 64, addressed good cause and excusable neglect in the context of a statute allowing untimely appeals to the Human Services Board for “good

cause. The SCV relied on the Reporter's Notes to VRAP 4, which may or may not be consistent with the Second Circuit rule relied on in Hermitage:

“The Reporter's Notes to the Rule clarify that “[g]ood cause refers to situations in which there is no fault on the movant's part” and give the example of “failure of the Postal Service to deliver the notice of appeal.” *Id.* Meanwhile, “[e]xcusable neglect assumes fault on the part of the movant.” *Id.*”

Other Decisions:

Depot Pizzeria v. Dept of Taxes, 2017 VT 29, reviews case law on exception to American Rule authorizing award of attorney's fees in equity as remedy for bad faith.

State v. Nutbrown-Covey, 2017 VT 26, reviews and applies law of issue preclusion.

H&E Equip. Servs., Inc. v. Cassai Elec., Inc., 2017 VT 17, the dissent asks how sworn testimony about a critical fact, based on personal knowledge, can be insufficient to create a dispute of material fact for purposes of summary judgment.

McClellan v. Hallock, 2017 VT 13, holds, over dissent, that the medical malpractice certificate required by 12 VSA § 1042(a) cannot be supplied as part of a complaint amendment under VRCP 15, and therefore the failure to include it with initial complaint can bar an action under the statute of limitations.

Estate of Lott v. O'Neill, 2017 VT 11, holding, over dissent, there is no 6th Amendment bar against a civil wrongful death plaintiff attaching the funds the defendant intends to use for her criminal defense.

LeClair v. LeClair, 2017 VT 34, holding that VRCP 15 motion to amend should be granted even if made in response to motion for summary judgment, in response to new facts which arose during the MSJ filings. Clarifies Lillicrap v. Martin, 156 Vt. 165 (1989) and Gauthier v. Keurig, 2015 VT 108, 200 Vt. 125, 129 A.23d 108.

END