

STATE OF VERMONT  
VERMONT SUPREME COURT  
NOVEMBER TERM, 2011

**Order Promulgating Amendments to the Vermont Rules  
of Civil Procedure and Vermont Rules of Professional Conduct**

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

1. That Rule 8(c) of the Vermont Rules of Civil Procedure is amended to read as follows (deleted matter struck through; new matter underlined):

**RULE 8. GENERAL RULES OF PLEADING**

\* \* \* \* \*

(c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall affirmatively set forth and establish accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, ~~discharge in bankruptcy~~, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

**Reporter's Notes—2012 Amendment**

The list of affirmative defenses in Rule 8(c) is amended by the deletion of “discharge in bankruptcy” for consistency with the December 2010 amendment of Federal Rule 8(c). The federal amendment deleted the phrase because under the federal Bankruptcy Code, 11 U.S.C. § 524(a)(1), (2), a discharge is not strictly speaking an affirmative defense. It voids a judgment to the extent of the debtor’s personal liability and operates as an injunction against effort to collect or otherwise affect a discharged debt. Moreover, 11 U.S.C. § 523(a) excepts several categories of debt from discharge; whether a debt is excepted must be determined on a case-by-case basis. See Advisory Committee’s Note to December 2010 amendment of F.R.C.P. 8(c)(1).

The amendment also replaces an inadvertently used semicolon with a comma.

2. That Rule 16.3(g) of the Vermont Rules of Civil Procedure is amended to read as follows (deleted matter struck through; new matter underlined):

### **RULE 16.3. ALTERNATIVE DISPUTE RESOLUTION**

\* \* \* \* \*

(g) **Confidentiality.** ~~Except as hereinafter provided, a~~All written or oral communications made in connection with or during an alternative dispute resolution proceeding conducted under this rule, other than binding arbitration, ~~are confidential and are inadmissible pursuant to Vermont Rule of Evidence 408~~ are governed by chapter 194 of Title 12 of the Vermont Statutes Annotated. ~~This subdivision does not apply to any stipulation or agreement to narrow the scope of the dispute, facilitate future settlement, or otherwise reduce cost and delay that was approved by all the parties. Parties, counsel, insurance representatives, and neutrals may respond to inquiries from persons authorized by the Supreme Court to monitor or evaluate proceedings under this rule, provided that the sources of data and opinions collected for this purpose shall be kept confidential.~~

#### **Reporter's Notes—2012 Amendment**

Rule 16.3(g) is amended to conform the rule to the Uniform Mediation Act (UMA), 12 V.S.A., ch. 194, §§ 5711-5723, adopted by Act 126 of 2005 (Adj. Sess.), § 1. For the drafters' comments, see *7A Uniform Laws Annotated* (Part III) 91 (Master Edition, 2006), <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm>.

The amendment deletes the references to confidentiality and to inadmissibility under V.R.E. 408 in favor of a single reference to the Act, which covers both. A currently proposed amendment to V.R.E. 408 would incorporate references to the UMA and the present amendment of V.R.C.P. 16.3(g). Section 5715(a) of the UMA creates a privilege against discovery or admission in evidence of a “mediation communication”; the privilege is embraced in the saving of statutory privileges in V.R.E. 501 (a). The privilege may be exercised by a party to refuse to make or to prevent any disclosure, by a mediator to refuse to make any disclosure and to prevent anyone else from disclosing a communication by the mediator, and by a nonparty participant to refuse to make, or to prevent disclosure of, a communication by the nonparty. 12 V.S.A. § 5717(b). Section 5715(c) provides that otherwise discoverable or admissible evidence or information is not rendered inadmissible solely because disclosed or used in a mediation. Other exceptions to the privilege are set out in 12 V.S.A. § 5717, significantly narrowing the exceptions to inadmissibility in V.R.E. 408. The separate reference to confidentiality in Rule 16.3(g) is deleted as superfluous, because § 5720 of the Act provides that mediation communications are confidential (that is, are not to be disclosed outside of a proceeding) “to the extent agreed to by the parties or provided by law.”

The initial clause referring to exceptions “hereinafter provided” is deleted, because those exceptions are also deleted. Under § 5717(a)(1), the privilege does not apply to a communication included in a written agreement signed by all the parties; thus, the second sentence of the rule, stating that it is inapplicable to certain agreements “approved by all the parties,” is deleted as both under and over inclusive. The final sentence of the rule, which was intended to facilitate study of what was initially adopted as an experimental rule, is deleted as unnecessary. V.R.C.P. 81(d) recognizes the inherent power of the court to make temporary provision for experimental procedures by administrative order.

“Mediation communication” is broadly defined in § 5713(3) as an oral, written or electronically recorded, verbal or nonverbal statement made or occurring during a mediation “or for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” The Act defines “mediation” in § 5713(2) as “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.” The term should be understood as including early neutral evaluation and other nonadjudicative forms of dispute resolution provided for in V.R.C.P. 16.3(c)(2) where the ability of parties to speak freely is paramount. Cf. Comment to Uniform Mediation Act, § 2(1). Thus, the exclusion of “binding arbitration” is retained in the rule. Under § 5714, the Act applies, with certain exceptions, to a mediation required by statute, rule, or under a reference by a court or other tribunal. The privilege may be asserted in a “proceeding” defined by § 5713(8) as “a judicial, administrative, arbitral, or other adjudicative process, including related prehearing and posthearing motions, conferences, and discovery; or a legislative hearing or similar process.”

Rule 16.3(c)(6) (mediator’s report) and Rule 16.3(e)(5) (impartiality and conflicts of interest) are not amended, although they concern matters covered in 12 V.S.A. § 5718. Both sections of the rule are essentially consistent with the statute. Any differences are dictated by the fact that the rule applies to court-connected mediation in litigation that has already begun and operates within the limits of court procedure and structure.

3. That Rule 26 of the Vermont Rules of Civil Procedure is amended to read as follows (deleted matter struck through; new matter underlined):

**RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY**

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(b) **Discovery Scope and Limits.** Unless otherwise limited by order of a superior judge in accordance with these rules, the scope of discovery is as follows:

\* \* \* \* \*

(4) *Trial Preparation: Experts.*

(A) Identification and Deposition of an Expert Who May Testify.

(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions as to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party may depose any person who has been identified in an answer to an interrogatory posed pursuant to subparagraph (A)(i) as an expert whose opinions may be presented at trial.

(iii) A party may obtain by request for production or subpoena any final report of the opinions to be expressed by an expert who has been identified in an answer to an interrogatory posed pursuant to subparagraph (A)(i) as an expert whose opinions may be presented at trial, as well as the basis and reasons for the opinions and any exhibits that will be used to summarize or support them.

(B) Trial-Preparation Protection for Draft Disclosures and Certain Reports. Rule 26(b)(3) protects drafts of any disclosure of an expert that is required under subparagraph (A)(i) and drafts of any report prepared by such an expert, regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Certain Expert Witnesses. Rule 26(b)(3) protects communications between the party's attorney and any expert who has been identified in an answer to an interrogatory posed pursuant to subparagraph (A)(i) as an expert whose opinions may be presented at trial, regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed;  
or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(BD) Expert Employed Only for Trial Preparation. A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(CE) Payment. Unless manifest injustice would result, (i) the judge shall require that the party seeking discovery pay the any expert who has been identified under subparagraph (A)(i) a reasonable fee for time spent in responding to discovery under this paragraph (4); and (ii) with respect to discovery obtained under subparagraph (BD) of this paragraph the judge shall also require the party seeking discovery to pay the other party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.

#### **Reporter's Notes—2012 Amendment**

Rule 26(b)(4)(A)(i) continues to provide that the disclosure requirement of paragraph (4) does not extend to “event witnesses,” in contrast to the requirement of Federal Rule 26(a)(2)(A) as adopted in 1993, which applies to all opinion witnesses qualified and testifying as experts under V.R.E. 702, 703, and 705. The Vermont rule is consistent with the holding of *Hutchins v. Fletcher Allen Health Care, Inc.*, 172 Vt. 580, 582, 776 A.2d 376, 379 (2001) (mem.), that an expert who is an event witness should be treated for discovery purposes as an ordinary witness.

Subparagraph (A)(iii) is added to make clear that a retained or specially or regularly employed expert's final report and supporting exhibits, if not protected by new subparagraph (C), may be obtained by an opposing party through a request for production or a subpoena duces tecum under Rules 34, 30(b)(1) or (5), or 45. This provision is not found in the federal rule, because the report and supporting material must accompany disclosure of such a witness under Federal Rule 26(a)(2)(B).

Rules 26(b)(4)(B) and (C) are added to adapt to Vermont practice December 2010 amendments of Federal Rule 26(b)(4) specifying that work-product protections for the draft reports of certain experts, and most communications between those experts and deposing parties' lawyers, survive the identification of the expert as a testifying expert. Captions are provided for subparagraphs (A)-(E) for consistency with the federal rule.

Subparagraph (B) extends the trial preparation and work-product protections of Rule 26(b)(3) to drafts of any answer to an interrogatory

concerning identity and testimony of any expert identified under Rule 26(b)(4)(A)(i) and to drafts of any report by such an expert. Subparagraph (C) further extends the trial preparation and work-product protections to all communications in any form between the expert and a party's lawyer, with exceptions for communications regarding the expert's compensation or data or assumptions provided by the lawyer as a basis for the expert's opinions.

Subparagraphs (B) and (C), stating what work-product protections survive disclosure of an expert witness, are intended to allow attorneys to interact freely with testifying experts without exposing the attorney's work-product or imposing the expense of retaining both consulting and testifying experts to avoid that exposure. Even when communications are subject to the exceptions, or otherwise discoverable, the protection of Rule 26(b)(3) against disclosure of the attorney's mental impressions and the like continues to apply. See, generally, Federal Advisory Committee's Note to 2010 amendment of Federal Rule 26(b)(4).

A simultaneous amendment of V.R.E. 510 addresses the waiver of intangible work-product. Prior to its adoption, the only court rule governing waiver of work-product was V.R.C.P. 26(b), which by its terms is limited to "documents and tangible things otherwise discoverable under subdivision (b)(1)." Discovery of intangible communications was governed by the common-law principles of *Hickman v. Taylor*, 329 U.S. 495 (1947). See original Reporter's Notes to Rule 26(b).

The specific provisions of V.R.C.P. 26(b) will control over the general provisions of amended V.R.E. 510. See Reporter's Notes to 2011 amendment of V.R.E. 510. While V.R.C.P. 26(b) generally is limited in scope to the protection of "documents and tangible things otherwise discoverable under subdivision (b)(1)," V.R.E. 510 applies to waiver of both tangible and intangible work-product. However, the present amendment of Rule 26(b)(4) protects as work-product various communications with expert witnesses regardless of whether those communications are contained in documents or are in some other tangible form. Thus, to the extent a communication is protected by Rule 26(b)(4), regardless of whether it is in tangible or intangible form, that subdivision will govern. Otherwise, Rule 26 will govern only as to documents and other tangible forms of communication. Amended V.R.E. 510 will govern questions of waiver as to intangible communications other than those addressed by V.R.C.P. 26(b)(4), and to that extent modifies *Hickman v. Taylor*, *supra*.

Former subparagraphs (B) and (C) are redesignated (D) and (E) and carried forward with captions from the amended Federal Rule. New language in (E) makes clear that clause (i) applies both to retained or specially employed experts and to nontestifying experts for whom the party is also to be compensated under (ii).

4. That Rule 56 of the Vermont Rules of Civil Procedure be abrogated and replaced to read as follows:

#### **RULE 56. SUMMARY JUDGMENT**

(a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

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

(c) **Procedures.**

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (A) 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 materials; or
- (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) *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.

(3) *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.

(4) *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.

(d) **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or to take discovery; or
- (3) issue any other appropriate order.

(e) **Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or
- (4) issue any other appropriate order.

(f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or
- (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to Grant All the Requested Relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or Declaration Submitted in Bad Faith.** If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

## Reporter's Notes—2012 Amendment

Rule 56, as originally adopted and amended, is replaced by a rule based almost entirely on the December 2010 amendments of Federal Rule 56. The new Vermont rule clarifies the substance and process for summary judgment and establishes uniformity with the current federal rule. The rule does not make significant changes in the standard for granting summary judgment or other aspects of present Vermont practice, except as noted below.

Rule 56(a), taken from the federal rule, combines in briefer form the provisions of former V.R.C.P. 56(a) and (b) for a motion by any claimant or defendant. It incorporates the standard for granting summary judgment from former V.R.C.P. 56(c), substituting “dispute” for “issue” of material fact, as better reflecting “the focus of a summary judgment determination” (federal Advisory Committee’s Note) and leaving the basis for the decision to new subdivision (c). The provision for partial summary judgment is consistent with former V.R.C.P. 56(a), (e). Provisions of former subdivision (a) concerning the time of filing the motion and the need for supporting affidavits are addressed in new subdivisions (b) and (c). New subdivision (a) encourages the court to give reasons for its decision on the record.

Rule 56(b) adopts the approach of the federal rule, requiring the motion to be filed within 30 days after the close of discovery in the absence of court order or a stipulation. The Vermont rule also specifies that opposition to the motion must be filed within 30 days after service of the motion. This is consistent with current Vermont practice, which uses stipulated scheduling orders to regulate timing of summary judgment motions, but changes former V.R.C.P. 56(a), (b), which permit a defending party to file at any time, and limits a claimant to any time “after the expiration of 20 days from the commencement of the action.”

Rule 56(c) adopts the provisions of the federal rule, supplemented by the requirement of former V.R.C.P. 56(c)(2) that the parties file separate statements of facts that “shall consist of numbered paragraphs and shall contain specific citations to the record.” The rule is also consistent with the requirement of former V.R.C.P. 56(e) that an opposition “must set forth specific facts showing that there is a genuine issue for trial.”

Rule 56(c)(1)(A), specifying the scope of the citable record, reflects modern practice in which motions for summary judgment are most often based on the discovery record, rather than affidavits alone. Cf. *Johnson v. Harwood*, 2008 VT 4, ¶ 10, 183 Vt. 157, 945 A.2d 875 (“Rule 56's purposes are served equally well by sworn statements other than affidavits, provided that those statements meet the rule's other

requirements.”). Reference to the “record, including...documents, electronically stored information,... stipulations,... or other materials” is broader than, but generally consistent with, former V.R.C.P. 56(c)(3), which describes the material to be considered in applying the “genuine issue” standard and with the provisions of former V.R.C.P. 56(e) for supplementation of affidavits, though it does not expressly state that “Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.”

Rules 56(c)(1)(B) and (c)(2) clarify that all asserted facts must be based on admissible evidence, a point only partially suggested by former V.R.C.P. 56(e) requiring that affidavits be made on personal knowledge and set forth such facts as would be admissible in evidence. This federal language is new to Vermont. The requirement of admissible evidence is consistent with the current practice, though not explicit in the current rule. E.g. *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 22-23, 665 A.2d 580, 585, (1995) (noting that hearsay statements in a deposition that are not supported by specific facts admissible in evidence are insufficient to defeat summary judgment motion). These new provisions together clarify that both the sufficiency of the evidence and the admissibility of the evidence may be put in issue—even if facts are undisputed. This follows current practice that a statement of undisputed facts is unnecessary where the moving party does not have burden of persuasion and is claiming there is no admissible evidence to support the nonmovant’s case. *State v. Great Northeast Prods., Inc.*, 2008 VT 13, ¶ 8, 183 Vt. 579, 945 A.2d 897 (mem.).

The statement in new Rule 56(c)(3) that the court need consider only the materials cited by a party is consistent with former V.R.C.P. 56(c)(2). See, e.g., *Clayton v. Unsworth*, 2010 VT 84 ¶ 28, 188 Vt. 432, 8 A.3d 1066 (rejecting argument that party had expert testimony “available,” because none of it was before the trial court in the statement of material facts); see Reporter's Notes, V.R.C.P. 56 (noting that Rule 56 was specifically amended to make clear that facts that are omitted from such statements are not considered by the court.). The language in paragraph (c)(3) that the court “may consider other material in the record” makes explicit the discretion of the trial court to make rulings in the interest of justice, regardless of whether facts are properly cited in the required statements. See new Rule 56(e).

Rule 56(c)(4) is taken from the federal rule, with the reference to a “declaration” (an unsworn document executed subject to the penalties of perjury under 28 U.S.C. § 1746) omitted. The proposal is consistent with former V.R.C.P. 56(e) that provides, “Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would

be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”

Rule 56(d) follows the federal rule, omitting the reference to a declaration. It is consistent with former V.R.C.P. 56(f), providing for unavailable affidavits:

Rule 56(e) is taken from the federal rule. According to the federal Advisory Committee’s Note, the provision means that summary judgment can neither be granted nor denied by default under this rule. At most, facts are deemed admitted for purposes of the motion, and the merits of the motion must always be considered.

The language of paragraph (e)(2) that the court may “consider the fact undisputed for purposes of the motion” varies the deemed-admitted proviso of former V.R.C.P. 56(c)(2). Under the current rule, a party’s failure to controvert facts in a counter-statement requires that the moving party’s undisputed facts be taken as true. *Webb v. Leclair*, 2007 VT 65, ¶¶ 1-7, 182 Vt. 559, 933 A.2d 177 (mem.); *Openaire, Inc. v. L.K. Rossi Corp.*, 2007 VT 120, ¶¶ 11-16, 182 Vt. 636, 940 A.2d 724 (mem.); *Gallipo v. City of Rutland*, 2005 VT 83, 35, 178 Vt. 244, 882 A.2d 1177; *Travelers Ins. Cos. v. Demarle, Inc.*, 2005 VT 53, ¶ 9, 178 Vt. 570, 878 A.2d 267 (mem.); *Boulton v. CLD Consulting Eng’rs, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413, 834 A.2d 37; *Richart v. Jackson*, 171 Vt. 94, 97, 758 A.2d 319, 321 (2000). However under the new rule, the word “may” means the court may choose not to consider the fact as undisputed, for example if the court knows of record materials that show grounds for genuine dispute. The phrase, “for purposes of the motion,” clarifies that a party who failed to make a proper Rule 56 response or reply remains free to contest the fact in further proceedings. This would avoid such controversies as arose in *Cassani v. Hale*, 2010 VT 8, ¶ 20, 187 Vt. 336, 993 A.2d 422, as to whether an unopposed statement of undisputed material facts submitted for summary judgment is deemed admitted for all purposes including trial of any remaining issues even when the underlying motion for summary judgment is denied.

Rule 56(e)(3) requiring decision on the merits of the motion is consistent with the Court’s interpretation of former V.R.C.P. 56(e) Under the former rule, the trial court may grant judgment “if appropriate” against a nonmovant who does not respond to a motion with “specific facts showing that there is a genuine issue for trial.” The Court has said “the failure to respond does not require an automatic summary judgment; rather, two requirements must be met: (1) the supporting materials must be both formally and substantively sufficient to show the absence of a fact question, and (2) summary judgment must be appropriate in the sense that the moving party is entitled to judgment as a matter of law” *Miller v.*

*Merchants Bank*, 138 Vt. 235, 238, 415 A.2d 196, 198 (1980) (citing *Alpstetten Ass'n v. Kelly*, 137 Vt. 508, 514-15, 408 A.2d 644, 647-48 (1979)).

Rule 56(f) is taken from the federal rule. Former V.R.C.P. 56(c)(3) allows summary judgment “if appropriate” for a nonmovant, but is silent as to summary judgment on the court’s own motion or on grounds not raised by a party. The new rule requires notice and time to respond before any such action.

Rule 56(g), taken from the federal rule, is consistent with the former V.R.C.P. 56(d) providing for an order establishing uncontroverted material facts for purposes of trial.

Rule 56(h) is taken from the federal rule, with the reference to a declaration omitted. Sanctions are made discretionary, and the requirement of notice and reference to other appropriate sanctions is new, but the rule is otherwise consistent with former V.R.C.P. 56(g)

5. That Rule 69 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

#### **RULE 69. EXECUTION**

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. No execution running against the body shall be issued to enforce a judgment in any civil action for money damages. In addition to the procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution, as provided by law, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules

Executions shall be made returnable within sixty days from the date thereof. Executions may be issued so long as the judgment remains unsatisfied, ~~but not after eight years from the date of rendition of the judgment~~ and the time limit of 12 V.S.A. § 2381(a) on issuance of an execution on the judgment has not run. ~~Actions or motions to renew or revive judgments shall not be a prerequisite to issuance of a writ of execution as long as the eight-year period has not expired.~~

The judgment creditor shall deliver to the officer levying execution a list of exemptions, which the officer shall serve on the judgment debtor, together with a copy of the writ of execution.

In the writ of execution, the clerk shall set forth the amount of post-judgment interest due per day, calculated on the full amount of principal included in the judgment at the maximum rate allowed by law. In levying execution, the officer shall collect per

diem interest in the daily amount from the date of entry of judgment to and including the date of satisfaction. If an execution is returned partially satisfied, the return shall show the date of partial satisfaction. The amount collected shall be first applied to interest accrued to that date. Interest on the portion of the judgment remaining unsatisfied shall be computed from the date of partial satisfaction and collected in the same manner on any subsequent levy of execution.

Process to enforce a judgment for the delivery of possession of land shall be a writ of possession.

### **Reporter's Notes—2012 Amendment**

The second paragraph of Rule 69 is amended for consistency with 12 V.S.A. § 506 as amended by Act No. 132 of 2009 (Adj. Sess.), § 8, effective May 29, 2010, to provide that actions on judgments or for their renewal or revival must be brought “by filing a new and independent action on the judgment” no later than eight years after its rendition. The amended statute codified the Supreme Court’s decision in *Nelson v. Russo*, 2008 VT 66, 184 Vt. 550, 956 A.2d 1117 (mem.), holding that Vermont’s common law recognized only an action for that purpose. Despite the reference to “motions to renew or revive judgments” in Rule 69 and the provision of Rule 81(b) for obtaining the relief formerly available by writ of scire facias by “appropriate action or motion” under the Rules of Civil Procedure, the Court held that the rules did not provide an appropriate procedure for such a motion.

The amendment, consistent with *Nelson* and the amended statute, eliminates “motion” as a means of seeking revival or renewal of a judgment. The amendment also substitutes a general reference to the limit imposed by 12 V.S.A. § 2381(a) on issuance of an execution for the former reference to the present statutory eight-year period. The latter change is intended both to recognize the statutory source of that period and to avoid the need for a further amendment in the event of a subsequent statutory change.

The final sentence of the paragraph is deleted as superfluous in light of the language added by the amendment. By virtue of 12 V.S.A. § 2381(a), no action or motion is necessary to seek execution on a judgment within the present statutory eight-year period. That section as amended in 1979 essentially repealed the common-law “year and a day” rule under which, even within the eight-year period, execution could not issue on a judgment that was more than a year old until the judgment had been renewed in an action brought for that purpose. See *Koerber v. Middlesex College*, 136 Vt. 4, 383 A.2d 1054 (1978). However, as the Court recognized in *Nelson*, 2008 VT 66, ¶ 7, quoting *Koerber*, 136 Vt. at 9, 383 A.2d at 1057, “a ‘judgment creditor can start the limitation period anew by

bringing an action upon the judgment' within the [eight-year] limitation period.”

6. That Rule 1.10(a) of the Vermont Rules of Professional Conduct and its Comment be amended to read as follows (deleted matter struck through; new matter underlined):

**Rule 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the ~~prohibited~~ disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm in a matter in which the disqualified lawyer did not participate personally or substantially, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

### **Comment**

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10(b).

\* \* \* \* \*

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires in language adapted from Rule 1.11 that a lawyer disqualified under Rule 1.9 be one who “did not participate personally and substantially”

in the matter giving rise to the conflict and that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[711] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[812] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that rule, and not this rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

## Reporter's Notes—2012 Amendment

Rule 1.10(a) of the Vermont Rules of Professional Conduct is amended to incorporate in slightly revised form an amendment of ABA Model Rule 1.10(a) adopted in February 2009. The amended rule permits screening of lawyers whose former representation, or whose former firm's previous representation, of a client would bar the lawyer's present firm from representation. Simultaneous ABA amendments to the Comments to Model Rules 1.10 and 1.0 are also adapted for Vermont.

The amendment reflects growing awareness that large law firms face difficult or intractable conflict issues when an attorney proposes to move from one such firm to another under the present strict rule that all such prior conflicts are imputed to all lawyers in the new firm. There are now several relatively large Vermont firms that are increasingly in this position. A realistic screening procedure facilitates freedom of movement by individual lawyers. Without such a procedure, a lawyer wishing to move from one Vermont firm to another may be denied his or her choice simply because of the unamended Rule 1.10. Large firms unable to hire a particular lawyer can always hire someone else. The one most impacted by the prohibition of the rule is the individual lawyer. A recent survey indicates that 24 states have adopted a screening rule.

Amended Rule 1.10(a)(2) has three salient provisions: (1) Screening of a disqualified lawyer must be timely, must extend to any participation in the matter involving the conflict, and must receive no part of the fee that the firm receives from the matter. (2) Any affected former client must be given prompt written notice that will enable the client to evaluate the degree of compliance with the rule and pursue objections to the representation. (3) The screened lawyer and the firm must provide periodic certifications of compliance to the client upon request and upon termination of the screening. Additionally, amended V.R.Pr.C. 1.10(a)(2) provides a further safeguard, adapted from the existing screening provisions of Rules 1.11(a)(2), (d)(2)(i) concerning lawyers moving between government and private practice and not found in the Model Rule: The prohibition to which screening will be applied must arise out of a matter "in which the disqualified lawyer did not participate personally and substantially."

New Comments [7] and [8] added by the amendment emphasize that client consent is not required but that compliance is to be measured by the three provisions summarized above, that screening is defined in Rule 1.0(k), and that the rule does not prohibit compensation of the screened lawyer under a general employment agreement not tied to the matter in question. Comment [7] also emphasizes the effect of the Vermont

substantial-participation qualification described above. New Comments [9] and [10] elaborate on the notice and certification provisions of the rule.

7. That Comment [8] to Rule 1.0 of the Vermont Rules of Professional Conduct be amended to read as follows (new matter underlined):

\* \* \* \* \*

### **Rule 1.0 TERMINOLOGY**

#### **Comment**

\* \* \* \* \*

#### *Screened*

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

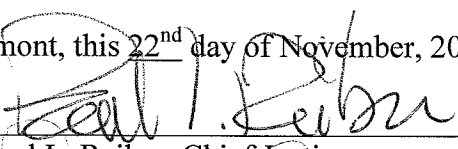
#### **Reporter's Notes—2012 Amendment**


The amendment to Rule 1.0, Comment [8], implements the simultaneous amendment of Rule 1.10 to the list of rules to which the definition of screening applies.

8. That these rules, as amended, are prescribed and promulgated to become effective on January 23, 2012. The Reporter's Notes are advisory.

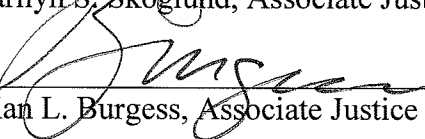
9. That the Chief Justice is authorized to report these amendment to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 22<sup>nd</sup> day of November, 2011.

  
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Paul L. Reiber, Chief Justice

  
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John A. Dooley, Associate Justice

  
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Marilyn S. Skoglund, Associate Justice

  
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Brian L. Burgess, Associate Justice