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STATE OF VERMONT

Legislative Committee on Judicial Rules

JUDICIAL RULES MINUTES June 6, 2019

The Legislative Committee on Judicial Rules met on Thursday, June 6, 2019, beginning at 1:00 p.m. in Room 10 of the State House in Montpelier, Vermont.

The following members were present:

Rep. Sandy Haas	Sen. Joe Benning
Rep. Thomas Burditt	Sen. Becca Balint
Rep. Martin LaLonde	Sen. Alison Clarkson
Rep. Linda Joy Sullivan	Sen. Richard Sears

Staff present:

Erik FitzPatrick	Legislative Counsel
Mike Ferrant	Committee Assistant

The Committee approved the minutes of the February 14, 2019 meeting upon a motion from Representative LaLonde, seconded by Senator Clarkson.

Hon. John A. Dooley, Associate Justice (Ret.), Vermont Supreme Court, Special Committee on Possession and Use of Recording and Transmitting Devices in Court, Vermont Supreme Court; Advisory Committee on Rules for Public Access to Court Records.

V.R.C.P. 43, 43.1; associated amendments to V.R.F.P. 17, V.R.P.P. 43(b), Administrative Order No. 47. Justice Dooley explained that this Special Committee was created by the Supreme Court to achieve uniformity in the use of technology in the court system. This proposal involves the use of audio and video technology in court proceedings; in other words, participation in testimony by phone and video. The Committee reviewed the proposed rules at its meeting on 2/24/19; no substantial changes have been made, and the Committee had no objections.

Vermont Rules for Public Access to Court Records. Justice Dooley explained that the rules have been on the books for many years but have been rewritten to adapt as the Court moves from

paper to electronic records and a new electronic court access system. The proposal increases accessibility, generally, but there are significant challenges. An estimated 1 million documents are filed in the Court each year, and the Court has no control over what the parties submit. This means anything can be filed, including documents that are not supposed to be public, and it is impossible for the Court to police all filings to make sure nothing confidential (such as medical records or social security numbers) is included.

In the context of the Court's move toward a full electronic court record system, the proposal generally permits public access to all records not restricted by statute. Access to the Records will be by kiosk in court houses, with remote access also permitted to the extent allowed by law. Consistent with most other jurisdictions, the responsibility is on the filer, not the Court, to make sure that nothing is included that is supposed to be confidential.

Senator Sears asked if social security numbers ever get through, and Justice Dooley said they do, noting that a federal study showed 98% in with redacting them.

Representative LaLonde noted that sanctions are permissive if social security numbers are included, and asked if the sanctions should be mandatory. Justice Dooley answered that with a new system there is an expectation that there will be mistakes, so they do not want to make sanctions mandatory immediately, but would move toward that approach over time as people learn the system.

Senator Clarkson asked about the cost of the program and whether a way to pay for it is built in. Justice Dooley said that there are current fees for remote access and copying that will be continued, and noted that kiosks in court actually save money because there is no need for staff time. Senator Clarkson suggested that a statewide access fee might be considered.

Senator Benning asked if the current budget contained money for statewide implementation. Court Administrator Pat Gable said there was money in the capital bill for it, noting that the Judicial Bureau was just put online this week, and that there is also a Technical Fund to cover some ongoing costs, but the program might ultimately need more resources.

Senator Sears asked how pro se litigants would be accommodated and whether pro se defendants would be given the entire file as they are now. Justice Dooley said that would continue, and that some things would likely remain on paper in circumstances such as those.

Representative Haas asked about the certification requirement, and Justice Dooley responded that it was still being discussed. For electronic filings it would likely be a box to check online, while for paper filings it would be a separate document.

In response to a question from Representative LaLonde, Justice Dooley and Staff Attorney Emily Wetherell described the public process the Court engaged in with respect to the proposal. The Court permitted time for public comment, held a public hearing for which notice was provided in newspapers, and published an article on its website.

The Committee had no objections to the proposal.

Hon. Jeffrey P. Kilgore, Probate Judge, Chair, Advisory Committee on Probate Rules, Vermont Supreme Court; Kinvin Wroth, Reporter, Advisory Committees on Civil, Probate, and Family Rules, Vermont Supreme Court.

V.R.P.P. 77(e) (proposed November 8, 2018; comments due January 7, 2019). Judge Kilgore and Mr. Wroth explained that this rule, which prohibits public inspection of will indexes during the life of the testator, is still preliminary. Discussions are ongoing with Judge Morse as to whether this should be incorporated into the general public access rules or remain as a stand-alone probate rule. Once a decision has been made, the rule will be finalized for Committee review.

V.R.P.P. 39 (proposed January 9, 2019; comments due March 11, 2019). Judge Kilgore explained that this proposal is a codification of an informal process used in some probate courts that permits the parties to agree that the Civil Division should decide an issue so the appeal can be expedited. The proposal sets out procedures for this to occur in all probate divisions.

Representative Haas asked if the process is limited to legal questions, and Judge Kilgore replied that the language does permit further facts to be developed if the parties do not object. The Committee otherwise had no comments on the proposal.

Allan Keyes, Esq., Chair, Advisory Committee on Civil Rules; Vermont Supreme Court; Kinvin Wroth, Reporter, Advisory Committees on Civil, Probate, and Family Rules, Vermont Supreme Court.

V.R.C.P. 26(b)(5)(A)(i) (proposed December 17, 2018; promulgated May 1, 2019, effective July 1, 2019; not yet reviewed by LCJR in current form; prior version reviewed by LCJR 5/16/18). Mr. Keyes described the rule, which involves the identification of expert witnesses whose identity must be disclosed in response to interrogatories. In response to a question from Representative LaLonde, Mr. Keyes and Mr. Wroth explained that after much comment from the bar, the Rules Committee settled on not requiring reports from all people who may testify as experts, but instead requiring disclosure of the names of all experts. The practice in the courts has not been uniform regarding these disclosures, and the hope is that the rule will resolve confusion, limit expense, and be consistent with federal law.

The Committee had no objections to the rule.

V.R.C.P. 23(g) (proposed January 23, 2018; comments due March 23, 2018, previously reviewed by LCJR 5/16/18). The rule contains procedures for the disbursement of residual funds remaining after satisfaction of all class action claims. Mr. Keyes explained that it originated with an ABA recommendation to disperse residual funds to needy persons, but the State Treasurer questioned whether that approach would conflict with the Unclaimed Property Act. Language

was added stating that the rule is not intended to change any practice under the Unclaimed Property Act, and the Treasurer then agreed to the proposal.

Senator Benning asked if the Treasurer's concern was incorporated into the Reporter's Notes, and Mr. Wroth responded that paper copies of the communications are retained at the Court but not expressly noted in the proposed rule.

Representative LaLonde observed that it might be helpful to have a better definition of "residual funds" since the current one does not address how to know whether the funds are unclaimed property or not. He asked whether it should be clarified in statute, and Mr. Wroth responded that there had been language in legislation addressing that question during the session this year, but it did not pass both bodies. Senator Clarkson, who is Vice Chair of the Commerce Committee, agreed to bring the issue up with that Committee.

Representative Haas noted that the Reporter's Notes may be helpful, but they do not constitute the rule. Mr. Keyes and Mr. Wroth agreed that the notes give guidance and help with interpretation but are not binding.

V.R.C.P. 55, 80.1 (proposed December 17, 2018; comments due February 19, 2019). The proposal is to remove the requirement that the court clerk take a separate step to formally enter a default judgment and instead permit the matter to proceed directly to the judge. Mr. Keyes explained that the rule was proposed by the Administrative Oversight Committee in an effort to standardize procedures.

Representative LaLonde asked if the word "infant" is an archaic term that should be modernized to reflect modern terminology, perhaps by saying "person under 18 years of age."

The Committee otherwise had no comments on the proposal.

V.R.C.P. 41 (proposed December 17, 2018; comments due February 19, 2019). Mr. Keyes explained that the proposal is a technical reorganization and updating of the voluntary dismissal rule in response to recommendations from trial judges. Representative LaLonde asked if an "answer" included a motion to dismiss, and Mr. Keyes answered no, stating that if a motion to dismiss is filed, then a voluntary dismissal can still be filed. Mr. Wroth said it would be worth exploring this question further, so the Rules Committee will do so and report back.

The Committee otherwise had no comments on the proposal.

Kinvin Wroth, Reporter, Advisory Committees on Civil, Probate, and Family Rules, Vermont Supreme Court.

V.R.F.P. 18(d) Rule (proposed November 8, 2019; promulgated February 4, 2019, effective April 8, 2019). Mr. Wroth explained that if the parties cannot agree on who the mediator should be in Family Division matters, then the Court is generally required to appoint a mediator with

comparable qualifications. The proposal requires that appointment to be made from a mediator listed with the Family Division Mediation Program unless one is not available.

Senator Sears asked what the term "domestic violence training" meant, and noted that the lack of a definition was problematic because the rule seemed to require it for appointment whether the case involved domestic violence or not.

Senator Benning agreed with Senator Sears' concern that the rule appeared to require every mediator to have domestic violence training whether or not it was relevant to the matter. He also expressed concern that use of the word "may" would permit the court to appoint a mediator without domestic violence training even in domestic violence cases. Mr. Wroth agreed that the rule should reflect that domestic violence training was required only for appropriate cases.

Representative Haas noted that the rules contained a sunset provision, which she had not seen in a court rule before.

The Committee agreed to continue discussion of the proposal at its next meeting.

The Committee adjourned at approximately 4:45 p.m.

Respectfully submitted,

Erik FitzPatrick
Legislative Counsel