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Rep. Sandy Haas, Vice Chair  
Rep. Thomas Burditt  
Rep. Martin LaLonde  
Rep. Linda Joy Sullivan

Sen. Joe Benning, Chair  
Sen. Becca Balint  
Sen. Alison Clarkson  
Sen. Richard Sears

## STATE OF VERMONT

### Legislative Committee on Judicial Rules

JUDICIAL RULES

MINUTES

August 3, 2020

The Legislative Committee on Judicial Rules met on Monday, August 3, 2020, beginning at 10:00 a.m. The meeting was held virtually through Zoom and streamed on YouTube.

The following members were present:

Rep. Sandy Haas  
Rep. Thomas Burditt  
Rep. Martin LaLonde  
Rep. Linda Joy Sullivan

Sen. Joe Benning  
Sen. Becca Balint  
Sen. Alison Clarkson  
Sen. Richard Sears

Staff present:

Erik FitzPatrick  
Mike Ferrant

Legislative Counsel  
Committee Assistant

The Committee unanimously approved the minutes of the December 6, 2019, meeting upon motion of Senator Clarkson, seconded by Representative Haas.

**Emily Wetherell, Esq., Deputy Clerk, Vermont Supreme Court; Patricia Gabel, Esq., State Court Administrator, Vermont Supreme Court.**

**Administrative Order 49 (promulgated March 16, 2020; amendments promulgated on multiple dates thereafter; rule and amendments effective on promulgation).**

Ms. Wetherell explained that the emergency judicial rule reflects an effort to balance access to justice and the courts with public safety during the pandemic. Changes have been made to the rule as events developed and the situation was better understood over time. For example, some changes were made permitting oaths to be taken remotely, and rules regarding attorney licensing and continuing education were relaxed. Emphasis was placed on remote hearings, use of video and audio technology, and implementing public health best practices for in-person matters. Juvenile cases and detentions were prioritized, and the bar exam was delayed.

Senator Sears expressed concern about delaying the bar exam from July to October, noting that other states have found ways to take the exam remotely. Senator Benning agreed that the delay is very concerning and suggested that there must be an alternative. Senator Clarkson also agreed, commenting that the delay is very troubling for Vermont Law School (VLS) students and their families, and she asked if the October date was definite.

Ms. Wetherell answered that the current plan is for a remote bar exam in October. She said that the Court is in close and ongoing contact with VLS, is aware of the school's concerns, and has expended the internship rule to permit graduates to continue to practice under that program until the bar exam. Ms. Wetherell also noted that the Court has permitted the Board of Bar Examiners (BBE) to agree with other states to permit their bar exams to be portable.

Senator Benning reiterated the Committee's view that the exam delay needs to be further evaluated in order to consider the approaches in other states and address the concerns of persons waiting to take the exam. Ms. Wetherell noted that the BBE had unanimously agreed to the proposal, and she said she would communicate the Committee's concerns to the Court.

Ms. Wetherell explained that the most recent amendment makes landlord-tenant proceedings consistent with the Federal CARES Act and makes it explicit that victims can be present at court hearings. Senator Clarkson asked what compliance with the CARES Act means, and Ms. Wetherell answered that documentation must be attached attesting that the filing is not precluded by the Act.

Representative LaLonde asked about the status of the case backlog in the courts during the pandemic. Ms. Gabel answered that, while precise data will take time to obtain because the Court is currently changing its case management system, overall case filings are down. Data from other states indicates that because of social isolation there may be an upswing in cases such as domestic violence, child welfare, and stalking, as well as an uptick on evictions and foreclosure cases once the current moratoriums expire.

Senator Clarkson asked if remote hearings and video conferencing are available statewide yet. Ms. Gabel said not yet since it took time for the measure to be approved in the legislative process, but now that the Governor has signed the legislation, the Court has begun ordering the hardware and hiring staff. The system must be physically implemented in each courthouse, which will require a one-week closure at each location when it is installed. The goal is to have the new system running in the BRACE region (Bennington, Rutland, Addison, Chittenden, and the Environmental Division) in early September.

**Elizabeth Miller, Esq., Chair, Advisory Committee on Rules of Evidence; Vermont Supreme Court.**

V.R.E. 807 (proposed December 10, 2019; comments due February 10, 2020). Ms. Miller presented the rule, which she had alerted the Committee about at its last meeting. The proposal was drafted by the Rules Committee in response to a Vermont Supreme Court decision that questioned whether, in cases involving vulnerable witnesses testifying remotely, the existing rule

satisfied the constitutional requirement that a defendant be able to confront his or her accusers. The Court indicated that the rule was constitutionally problematic because it did not include a standard for determining when remote testimony would be permitted.

The proposal directs courts to apply at least the preponderance of the evidence standard when determining when remote testimony should be allowed. As the Comments indicate, a party may still argue that a stricter standard should apply, and the Court might agree, but for the moment, the proposal sets a minimum.

The rule also returns to its original terminology of applying to persons with a “mental illness.” The term had been changed to “psychiatric disability” in order to comport with the General Assembly’s respectful language legislation, but in practice it was discovered that this swept in a wider arc of impairments than the original language. As a result, the Committee decided to return to the term “mental illness.” Ms. Miller explained that during the public comment period, Disability Rights Vermont had agreed on the preponderance of the evidence standard but recommended keeping the term “psychiatric disability.” The Committee declined due to the impact on a defendant’s constitutional rights.

Representative LaLonde asked how the definition of “psychiatric disability” broadens the range of witnesses who could testify remotely. Ms. Miller answered that the term “psychiatric disability” encompasses as much as a 25% broader range of conditions than the term “mental illness,” and that the Committee concluded this would infringe too much on the confrontation rights of defendants. Representative LaLonde asked if under either definition the rule’s scope would be limited by the language requiring the State to show that the witness would be traumatized by the presence of the defendant. Ms. Miller agreed that the trauma screening would always apply, but a broader range of witnesses would still be eligible for the screening if the term “psychiatric disability” were used.

Representative LaLonde asked if the Committee had an opinion on whether the preponderance standard should be addressed legislatively or by the courts. Senator Clarkson similarly asked how the Committee decides if an issue is for itself or the Legislature. Ms. Miller responded that in this case, the Court had specifically asked the Committee to consider what standard should apply, but other states have addressed that issue legislatively and Vermont certainly could as well, particularly since Vermont had passed legislation on remote witness testimony previously.

The Committee otherwise had no comments.

**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 March 9, 2020; promulgated June 12, 2020; effective August 18, 2020). Judge Kilgore and Mr. Wroth explained that the rule incorporates into the Probate Rules the exceptions to public access contained in the Rules for Public Access to Court Records. The purpose is to eliminate inconsistencies and establish uniformity instead of having separate lists of

exceptions. Representative LaLonde asked if there should be a more specific cross-reference to the Public Access rules, and Mr. Wroth answered that the reference is in the Reporter's Notes. The Committee had no objections.

V.R.P.P. 66, 80.3,74 (proposed March 9, 2020; promulgated June 12, 2020; effective August 18, 2020). Judge Kilgore explained that these rules simply conform the Probate Rules to the Vermont Trust Code and statutes concerning small estates. Senator Clarkson asked what constituted a small estate, and Judge Kilgore answered that the threshold established in statute is \$45,000.00 or less, provided that the estate contained no real estate other than a time share. The Committee had no objections.

V.R.P.P. 80.9, 80.10, 80.11 (proposed March 9, 2020; promulgated June 12, 2020; effective August 18, 2020). Judge Kilgore explained that the rules are intended to make Probate Division proceedings more efficient and consistent with Family Division proceedings with respect to guardians ad litem (GALs). The rules address appointment of and representation by GALs, including the manner in which the GAL role varies depending upon the type of proceeding involved (adoption, adult involuntary guardianship, minor guardianship, minor witness, etc.). Senator Sears expressed his appreciation for keeping the term "guardian ad litem." Senator Clarkson asked if there are enough GALs and Judge Kilgore answered that there is a great need for more of them. The Committee had no objections.

V.R.P.P. 3.1 (proposed March 9, 2020; promulgated June 12, 2020; effective August 18, 2020).

Judge Kilgore explained that the rule modernizes and clarifies terms, including no longer using the term "in forma pauperis." Instead, the term "waiver of fees" will be used if a person meets the financial qualification. The Committee had no objections.

**Hon. Walter Morris (Ret.), Reporter, Advisory Committee on Rules of Criminal Procedure; Vermont Supreme Court.**

V.R.Cr.P. 32(c)(4) (proposed October 1, 2019; reviewed by LCJR December 6, 2019; promulgated May 4, 2020; effective July 6, 2020). Judge Morris explained that this rule, which was reviewed by LCJR at its previous meeting, requires the presentence investigation (PSI) by the Department of Corrections to be provided to the parties; objections are filed in writing prior to the hearing and given to the State. In response to a request from Senator Benning, Judge Morris described PSIs in general. He explained that the proposed rule sets out requirements for the contents of and procedures for making objections both before and during sentencing.

Senator Sears observed that often information comes to light until after a PSI has been completed, and he asked if the rule would preclude consideration of that later-acquired information. Judge Morris said that it would not because the State and DOC remain able to supplement the PSI at any time before the sentence is imposed. The Committee had no objections.

**Hon. Michael Kainen, Superior Judge, Chair, Advisory Committee on Family Rules, Vermont Supreme Court.**

V.R.F.P. 4.3(f) (proposed March 9, 2020; reviewed by LCJR December 6, 2020; promulgated June 12, 2020; effective August 18, 2020).

Judge Kainen explained that there had been a split among Superior Judges as to whether Family Division judgments could be enforced by the Family Division itself or whether the judgment had to be enforced in the Civil Division. The rule, which the Committee reviewed at its last meeting, proposes that the Family Division would have the authority to enforce all Family Division judgments except mortgages, which would still need to be enforced in the Civil Division. The Committee had no objections.

V.R.F.P. 6.2 (proposed March 9, 2020; reviewed by LCJR December 6, 2020; promulgated June 12, 2020; effective August 18, 2020).

Judge Kainen explained that the rule, which the Committee reviewed at its last meeting, establishes uniform procedures for mental health proceedings such as involuntary treatment and involuntary medication. Vermont Legal Aid and the Attorney General's Office, which together handle virtually all of these cases, jointly recommended the language. Representative LaLonde asked why the discovery rules do not apply, and Judge Kainen responded that certain civil processes such as discovery are not relevant to these types of proceedings so they do not apply. The Committee had no objections.

V.R.F.P. 4.3(b) (proposed March 9, 2020; promulgated June 12, 2020; effective August 18, 2020).

Judge Kainen explained that this proposal is simply a technical revision to conform the rule to the Vermont Parentage Act. The Committee had no objections.

**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. 62(a)(3)(A) proposed October 1, 2019; promulgated February 10, 2020; effective April 13, 2020. Mr. Keyes explained that the rule, which was reviewed by LCJR at its last meeting, is purely technical and makes a punctuation change to clarify the meaning. The Committee had no objections.

Vermont Rules of Small Claims Procedure 3, 7, 9, and 10 (proposed November 7, 2019; promulgated February 10, 2020; effective April 13, 2020). Mr. Keyes explained that the rule, which was recommended by the Civil Oversight Committee and reviewed by LCJR at its last meeting, requires service by the sheriff of a small claims default judgment before it can be executed. The Committee had no objections.

V.R.C.P. 3.1; V.R.A.P. 24 (proposed March 9, 2020; promulgated June 12, 2020; effective August 18, 2020). Mr. Keyes noted that these rules had been proposed some time ago but held so that they could be promulgated simultaneously with the probate rules that the Committee considered today regarding “in forma pauperis” terminology. The two sets of rules are nearly identical and the Committee had no objections.

V.R.C.P. 26, 34, and 78 (proposed February 10, 2020; comments due April 13, 2020). Mr. Keyes explained that these proposals are intended to make the State discovery rules consistent with the Federal rules. However, the Advisory Committee has decided to withdraw the proposals at this time.

Representative LaLonde asked if the Committee had considered allowing inspection rather than copying in some circumstances, and if the 30-day time limit should be 28 days in light of the Day is a Day rule? Mr. Wroth said that since this concept is going back to the drawing board the Committee would consider the suggestion about copying. Mr. Keyes said that the Federal rules use a 30-day period and the Day is a Day rule derives from the Federal rules, so it might be better to be consistent and avoid confusion. The Committee otherwise had no comments.

**Hon. Timothy Tomasi, Superior Judge, Chair, Vermont Rules for Public Access to Court Records, Vermont Supreme Court; Hon. Judge Walter Morris (Ret.), Reporter, Advisory Committee on Rules of Criminal Procedure, Vermont Supreme Court.**

V.R.P.A.C.R. 6(b)(5) (proposed May 4, 2020; comments due July 6, 2020). Judges Tomasi and Morris presented the rule, which is intended to make the Public Access to Court Records rules consistent with Act 32 of 2019, which established categories of cases for expungement and sealing. To conform the rules with Act 32, the proposal makes clear that in multi-charge indictments where some but not all of the charges are dismissed for lack of probable cause, the expungement and sealing processes apply to the dismissed charges only.

Senator Benning observed that establishing an expungement process had produced very positive results, evidence of which is that as of this year, 18,000 Vermonter had had their criminal records expunged or sealed. The Committee otherwise had no comments.

The Committee decided to meet again later in the month to discuss the Court’s electronic filing rules and case management system, so the Committee asked Legislative Counsel to distribute a Doodle Poll in order to find a suitable date.

The Committee adjourned at approximately 12:30 p.m.

Respectfully submitted,

Erik FitzPatrick, Legislative Counsel