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Rep. Martin LaLonde, Chair
Rep. Thomas Burditt
Rep. Maxine Grad
Rep. Linda Joy Sullivan

Sen. Joe Benning, Vice Chair
Sen. Alison Clarkson
Sen. Kesha Ram Hinsdale
Sen. Richard Sears

STATE OF VERMONT

Legislative Committee on Judicial Rules

JUDICIAL RULES

MINUTES

April 14, 2022

The Legislative Committee on Judicial Rules met on Thursday, April 14, 2022, beginning at 4:30 p.m. The meeting was held virtually through Zoom and streamed on YouTube.

The following members were present:

Rep. Martin LaLonde, Chair
Rep. Thomas Burditt
Rep. Maxine Grad
Rep. Linda Joy Sullivan

Sen. Joe Benning, Vice Chair
Sen. Alison Clarkson
Sen. Kesha Ram Hinsdale
Sen. Richard Sears

Staff present:

Erik FitzPatrick
Mike Ferrant

Legislative Counsel
Committee Assistant

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

V.R.F.P. 18(d)(2) (proposed November 15, 2021; comments due January 18, 2022; not yet reviewed by LCJR).

Judge Kainen explained that the proposal clarifies that mediation can take place remotely or in person. Prior to the COVID-19 pandemic, there was a strong preference for in-person mediation, and it was presumed to be in-person. However, practice since COVID-19 established that mediation works well remotely if all parties and the mediator agree. The proposal clarifies that this option is available without requiring a motion to be filed with the court. The Committee had no comments on the proposal.

V.R.F.P. 2(a)(2), (3), 6(a), and (c)(2)(3); 6.1(a) and (c)(1); and 8(h) (proposed November 15, 2021; comments due January 18, 2022; not yet reviewed by LCJR).

The proposals conform the family rules to revisions already made to the civil rules and are purely technical in nature, revising cross-references so they accurately refer to the correct provisions. The Committee had no comments on the proposals.

Hon. John Treadwell, Superior Judge, Chair, Advisory Committee on Criminal Rules, Vermont Supreme Court; Hon. Walter Morris (Ret.), Reporter, Advisory Committee on Rules of Criminal Procedure, Vermont Supreme Court.

V.R.Cr.P. 7 (proposed April 5, 2021; reviewed by LCJR June 16, 2021; promulgated November 15, 2021; effective January 18, 2022).

Judges Treadwell and Morris explained the rule, which permits the prosecution to amend an indictment or information prior to trial if there is no prejudice to the defendant. The rule provides standards for the court to consider when determining whether to permit the amendment and permits the court to strike the amended charge without prejudice so it could be refiled. The Committee had no comments or objections to the rule.

V.R.Cr.P. 45(a)(4)(A) and (e) (proposed January 10, 2022; comments due February 14, 2022; not yet reviewed by LCJR).

Judges Treadwell and Morris explained that this proposal is identical to civil, appellate, and probate rules that already exist. The rules authorize e-mail filing for persons (primarily self-represented parties) who do not file through the Odyssey System. The proposed change to Rule 45 provides that in order to comply with time deadlines, e-mail filings must be completed by 12:00 midnight on the day the filing is due. The proposal also eliminates the extra three days that have always been added to take account of mailing time, since this is no longer necessary for e-mail filing. The Committee had no comments on the proposal.

Hon. Timothy Tomasi, Superior Judge, Chair, Vermont Rules for Public Access to Court Records, Vermont Supreme Court.

V.R.P.A.C.R. 5(c) and (d), 6(b), 9 (reviewed by LCJR October 10, 2021; promulgated February 7, 2022; effective April 11, 2022).

Judge Tomasi described the rule, which addresses rights of public access to court records for lawyers and others. In response to a question raised by Representative LaLonde when the proposal was reviewed at the previous LCJR meeting, Judge Tomasi said that the language had been reworked to make clear that any person, not just a party, could make a request for access to or to seal records. Provision was also made for making such requests on appeal. Representative LaLonde asked if notice that a motion has been made would be provided to nonparties, such as the media, by a statement in the docket. Judge Tomasi said that was correct, though the docket does not provide a lot of detail other than a statement that the motion has been made and when the hearing will be. The Committee had no other comments on or objections to the rule.

V.R.P.A.C.R. 6(b)(14) (proposed February 7, 2022; comments due April 11, 2022; not yet reviewed by LCJR).

Judge Tomasi said that this proposal is a new one based on a request from court operations staff. Currently, when juveniles are victims, they are referred to in court records by their initials only. The proposal is to continue to use the initials as a reference after the juvenile has become an adult. The Committee had no comments on 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. 66 (proposed October 15, 2021; comments due December 15, 2022; not yet reviewed by LCJR).

Judge Kilgore explained that the proposal requires more detailed inventories and accountings for decedents' estates and creates an independent review process for larger, more complex estates when it is challenging for the parties to provide a full list of assets.

In response to a question from Representative LaLonde, Judge Kilgore said that the documents were open to the public. Representative LaLonde asked why firearms were specifically listed for appraisal in the rule since that seemed to be an arbitrary and controversial listing. Judge Kilgore responded that firearms were a contentious issue because many beneficiaries have claimed that firearms have been grossly undervalued. Representative Clarkson asked whether all property could be appraised instead of singling out certain types. Judge Kilgore said this was discussed but was determined to be too invasive. Representative Burditt commented that it would be opening a Pandora's box to specify firearms because it would be seen by many as too invasive. Representative Clarkson suggested that appraising all items above a certain value might be a way to be equitable and fair to beneficiaries and decedents.

Representative Clarkson asked why the inventory was public at all, and Judge Kilgore responded that this has been the rule under the Rules of Public Access to Court records. He also noted that there had been more comments received about this proposal than for any other since he has been Chair, including comments about firearms and comments asking if the proposal was giving the public a road map to a person's assets. Representative Clarkson agreed the proposal publicizes people's assets and said she did not think inventories should be public records.

V.R.P.P. 18(d) (proposed February 9, 2022; comments due April 11, 2022; not yet reviewed by LCJR).

Judge Kilgore explained that the proposal is a purely technical correction of an obsolete cross-reference. The Committee 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. 3.1, 4, 84 (proposed October 15, 2020; reviewed by LCJR June 16, 2021; promulgated December 13, 2021; effective February 14, 2022).

Mr. Wroth said that the amendment in these rules reflect the current practice that the Appendix of Forms is now obsolete because the Forms Library on the Judiciary website is now the primary source of forms. Additionally, Rule 31 clarifies that when determining whether a litigant is indigent, it is the indigent's income that is considered, not the income of the indigent's household. The Committee had no other comments on or objections to the rule.

V.R.C.P. 56 (proposed October 15, 2020; reviewed by LCJR June 16, 2021; promulgated December 13, 2021; effective February 14, 2022).

Mr. Keyes described the rule, which consolidates and standardizes the procedures governing filing of summary judgment motions. Representative LaLonde asked if any changes were made after LCJR reviewed it at the previous meeting, and Mr. Keyes said yes, the language was amended to clarify that all responsive papers had to comply with the procedures. The Committee had no other comments on or objections to the rule.

V.R.C.P. 11(e) (proposed September 1, 2020; reviewed by LCJR June 16, 2021; promulgated December 13, 2021; effective February 14, 2022).

Mr. Keyes explained that during the pandemic declarations were permitted in place of notarizations in some circumstances so that the personal presence of a notary would not be necessary for administration of an oath. This practice has proven so useful that practitioners feel it should be made permanent, so the rule does so. However, it only applies where an oath is required by rule, rather than by statute, because the Advisory Committee concluded that the Legislature should make the decision with respect to statutory requirements. Representative LaLonde asked if there was a list of the applicable rules, and Mr. Keyes said he would forward it to the Committee. Emily Weatherall, Vermont Supreme Court Deputy Clerk, added that it might be useful to amend 4 V.S.A. § 27(b) so that it conforms to this rule. The Committee had no other comments and no objections to the rule.

V.R.C.P. 43(e), 54(d)(2)(C) (proposed September 16, 2020; reviewed by LCJR June 16, 2021; promulgated December 13, 2021; effective February 14, 2022).

Mr. Keyes explained that the rule is purely technical, updating and correcting inaccurate cross-references. The Committee had no comments and no objections to the rule.

V.R.C.P. 50(b) (proposed October 15, 2020; comments due December 15, 2021; not yet reviewed by LCJR).

Mr. Keyes said that the language of the current rule requires renewal of post-judgment motions, but in recent years, cases have departed from that requirement under certain circumstances. The proposal follows that development and permits questions of pure question of law on appeal without the filing of a motion for renewal. The Committee had no comments on the proposal.

V.R.C.P. 55, 62 (proposed December 13, 2021; comments due February 14, 2022; not yet reviewed by LCJR).

Mr. Keyes explained that the proposal requires that a default judgment be served on the defaulting party. In response to a question from Representative LaLonde, Mr. Keyes said that current law prohibits execution on a default judgment until it has been served, and the proposal expands on that to require service as a matter of course. He added that creditors commented that the proposal adds to the expense of serving a default judgment, and therefore the costs should be recoverable. The Advisory Committee agreed this was a valid point, and a subcommittee has been appointed to consider the issue. The Committee otherwise had no comments on the proposal.

V.R.C.P. 68 (proposed December 13, 2021; comments due February 14, 2022; not yet reviewed by LCJR).

While trials were suspended during the pandemic, A.O. 49 permitted offers of settlement in order to address the concern that settlements were being prevented because no trials were imminent. The proposal makes that provision permanent, permitting plaintiffs to make offers of judgement and therefore perhaps encourage settlement of cases. Representative LaLonde noted that the language might be unclear, and Mr. Keyes responded that the Advisory Committee would review it. The Committee otherwise had no comments on the proposal.

V.R.S.C. 7, 8 (proposed December 13, 2021; comments due February 14, 2022; not yet reviewed by LCJR).

Mr. Keyes summarized the proposals for small claims procedures, which clarify how to deal with contempt, make contempt discretionary with the court, and provide the debtor with more notice of a judgment. Vermont Legal Aid and the Vermont ACLU suggested changes to require service of certain documents, and these suggestions are incorporated in the proposal. Representative LaLonde asked if it is discretionary to hold a hearing even if a motion for contempt was filed. Mr. Keyes said yes, the Committee decided the judge should be able to retain discretion. Representative LaLonde expressed the view that it should be the creditor who prompts the hearing rather than it being entirely discretionary with the court.

V.R.C.P. 5, 6(a)(4), 29 (proposed December 13, 2021; comments due February 14, 2022; not yet reviewed by LCJR).

Mr. Keyes and Mr. Wroth explained that the proposal permits filing and service of documents by e-mail, and that the Probate Committee has been developing similar rules. Ms. Wetherell added that e-mail service and filing began during the pandemic through A.O. 49, and that it has been

helpful to litigants and staff. The Supreme Court therefore asked the Advisory Committees to consider making those procedures permanent, and the Court supports the proposals to do so in these rules. Mr. Keyes said that the proposal is separated into procedures for e-mail filing and service by attorneys and by self-represented litigants and that self-represented litigants will be able to check a box to be served and receive documents by e-mail. Representative LaLonde commented that he did not find any issues or have any concerns with the proposal and that it appeared helpful for pro se litigants. The Committee otherwise had no comments.

V.R.C.P. 79.1 (proposed December 13, 2021; comments due February 14, 2022; not yet reviewed by LCJR).

The proposal specifies what information must be filed by a self-represented party. The Committee had no comments on the proposal.

V.R.A.P. 25 (proposed January 10, 2022; comments due February 14, 2022; not yet reviewed by LCJR).

Mr. Keyes explained that the proposal incorporates civil rules regarding service into the appellate rules, which creates uniformity and assists pro se parties. The Committee had no comments on the proposal.

V.R.C.P. 26(e)(4) (proposed March 7, 2022; comments due May 9, 2022; not yet reviewed by LCJR).

Mr. Keyes said the proposal established procedures for supplementing expert disclosures and expert depositions, including a duty to correct or supplement discovery responses in certain circumstances. The Committee had no comments on the proposal.

V.R.C.P. 80.6(c)(4) (proposed March 7, 2022; comments due May 9, 2022; not yet reviewed by LCJR).

Mr. Keyes explained that the proposal is a purely technical correction of an inaccurate cross-reference. The Committee had no comments on the proposal.

V.R.C.P. 79.1(e) (proposed March 7, 2022; comments due May 9, 2022; not yet reviewed by LCJR).

The proposal clarifies procedures for filing a motion for admission pro hac vice supported by a pro hac vice licensing card issued by the Court Administrator. The Committee had no comments on the proposal.

The Committee adjourned at approximately 11:45 a.m.

Respectfully submitted,
Erik FitzPatrick, Legislative Counsel