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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

June 16, 2021

The Legislative Committee on Judicial Rules met on Wednesday, June 16, 2021, beginning at 10:00 a.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. Walter Morris (Ret.), Reporter, Advisory Committee on Rules of Criminal Procedure, Vermont Supreme Court.

V.R.P.A.C.R. 6(b); Rules 4(c) and 10 of Vermont Rules Governing Qualifications, List, Selection, and Summoning of All Jurors; V.R.Cr.P. 24(a)(2); V.R.C.P. 47(a)(2) (proposed September 14, 2020; reviewed by LCJR December 8, 2020; promulgated April 14, 2021; effective June 14, 2021).

Judge Morris explained that the proposals add an exception to the Rules on Public Access to Court Records by establishing that prospective jurors' answers to juror questionnaires are generally confidential and not public unless good cause is shown. However, access is permissible for parties and their attorneys. The rules were only promulgated yesterday, so there is not yet any experience in how they will work in practice.

Judge Morris noted that Representative LaLonde had asked what other states do when the Committee first saw the proposed rules in December. In some states the policy is not clear, but 29 states appear to follow the approach of maintaining confidentiality of juror information.

Senator Sears asked what would constitute good cause for the release of juror information. He expressed concern about that issue because of the need to keep some information confidential to protect jurors. Senator Clarkson agreed about the need to protect juror privacy and safety and observed that it is a difficult issue.

Judge Morris agreed with the concerns and noted that they had to be balanced with the right of public access and the promotion of jury service. He said that the rules contained some examples of good cause, such as gathering research for scholarly articles. He also noted that in extraordinary circumstances anonymous juries could be used, but that should not be a common practice.

Senator Benning reiterated the question he asked at the December meeting about whether pro se litigants would still have access. Judge Morris answered that they would, as the rule does not restrict access to attorneys only. He also said the court explains the process beforehand to pro se litigants, and that if necessary, a protective order could be fashioned to ensure that the confidentiality rules were adhered to.

Representative LaLonde raised another question that had been asked in December about whether other persons working for attorneys, such as investigators or other attorneys at the same firm, would have access. Judge Morris said they would because the comments made clear that “associates” of attorneys would also have access.

The Committee had no other comments and no objections to the rules.

Emily Wetherell, Esq., Deputy Clerk, Vermont Supreme Court.

V.R.F.P. 2(a)(2) (promulgated March 8, 2021; effective May 12, 2021; not yet reviewed by LCJR).

Ms. Wetherell explained that this proposal is simply a technical revision eliminating references to the term “in forma pauperis” and replacing it with the term “waiver of filing fee and service costs.” The Committee had no comments and no objections to the rule.

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

V.R.Cr.P. 11(a)(3) (proposed October 7, 2020; reviewed by LCJR December 8, 2020; promulgated April 5, 2021; effective June 7, 2021).

Judge Morris explained that the rule establishes a procedure for preserving a post-conviction relief (PCR) challenge for post-conviction review. Judge Morris noted that when the rule was

first presented to LCJR in December, Representative LaLonde and Senator Benning were concerned that the rule required the State to agree in order to preserve the right to appeal. In response to that concern, Judge Morris explained that there will be a new proposal coming soon that will create an alternate procedure that permits appeal without consent of the State. Representative LaLonde and Senator Benning thanked Judge Morris and the Committee for this response, and the Committee had no objections.

V.R.Cr.P. 7 (proposed April 5, 2021; comments due June 8, 2021; not yet reviewed by LCJR).

Judge Morris explained that the proposal concerns amendment of the indictment or information prior to trial, which has always been a matter for the court's discretion when requested by the prosecution. Generally, whether the request is granted depends on whether the amendment would cause delay or prejudice and whether it is a surprise to the defendant. There is more leniency allowed for amendment pretrial, whereas the rule permits the defendant to move to strike "late stage amendments." 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. 73 (proposed January 5, 2021; promulgated April 5, 2021; effective June 7, 2021; not yet reviewed by LCJR).

Judge Kilgore and Mr. Wroth explained that the proposal is a response by the Probate Rules Committee to 14 V.S.A. § 118, which the General Assembly passed to permit referral of a Probate Division matter to the Civil Division with the consent of the Civil Division in order to conserve judicial resources. Judge Kilgore explained that the rule limits referral to will construction proceedings because the statute is embedded as the last section of the wills chapter. This suggests that it was likely intended to be for will proceedings only, so that parties who wanted a jury trial could move the proceeding to the Civil Division. The Committee had no comments and no objections to the rule.

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. 80.1(f) (proposed December 7, 2020; promulgated March 8, 2021; effective May 12, 2021; not yet reviewed by LCJR).

Mr. Keyes explained that the rule is purely technical, updating a cross-reference to V.R.C.P. 55, which describes required procedures in default proceedings against a minor or incompetent person. The Committee had no comments and no objections to the rule.

V.R.C.P. 80.5(e) (proposed October 7, 2020; reviewed by LCJR December 8, 2020; promulgated March 8, 2021; effective May 12, 2021).

Mr. Keyes explained that this rule was also purely technical, updating the for reproduction of video in DUI cases to conform with the amended statute. The Committee had no comments and no objections to the rule.

V.R.C.P. 7(b), 56(c), and 78 (proposed January 5, 2021; comments due March 8, 2021; not yet reviewed by LCJR).

Mr. Keyes described the proposals, which consolidate and modernize procedures governing filing of motions, including extending the response time for dispositive motions from 14 to 30 days and addressing procedures for oral argument and evidentiary hearings. In response to the comments received from the bar, the Committee proposed a new draft to the Court that consolidates rules regarding motion practice, clarifies unclear language, and establishes criteria for when a surreply memo may be filed. The new language is not reflected in the current rule, but Representative LaLonde clarified that LCJR would have an opportunity to review that language when the rule is promulgated, and Mr. Keyes agreed. The Committee had no other comments.

Hon. John A. Dooley, Associate Justice (Ret.), Vermont Supreme Court, Chair, Special Advisory Committee on Rules for Electronic Filing;

Hon. Walter Morris (Ret.), Reporter; Emily Wetherell, Esq., Deputy Clerk, Vermont Supreme Court.

V.R.A.P. 1, 3, 4, 5, 5.1, 6, 9, 10, 11, 12, 13, 14, 21, 24, 25, 26, 27, 28, 30, 30.1, 31, 32, 34, 39, 44, 45, 45.1 (proposed June 21, 2019; comments due August 19, 2019; not yet reviewed by LCJR).

Justice Dooley explained these changes to appellate rules that are being made in order to accommodate electronic filing and the electronic case management system, which are scheduled to be implemented in the Supreme Court in August 2021. Last year, LCJR looked at rules to accommodate e-filing in the trial courts, and those rules are no fully implemented and in effect. These rules address e-filing in the Supreme Court, which was not addressed in prior versions.

Justice Dooley established a committee of attorneys who practice frequently in the Supreme Court, and this committee reviewed the e-filing rules to determine what changes would be necessary for Supreme Court practice. The committee met several times and sent its proposals out for comment from the bar; so far, only one was received.

Senator Clarkson noted that the implementation of the e-filing rules was very rocky and asked for an update. Justice Dooley responded that there had not been sufficient training on the new systems, so more was added during and between the roll-outs at various Vermont Bar Association and attorney events, which helped a lot. He was also concerned about the communication channels between the Court, the Legislature, and attorneys, which has also been improved with the assistance of the VBA. He observed that there is an inevitable degree of difficulty with such a large systemic change as the bugs are worked out, and this is now in better

shape. The Court asked to have a VBA member appointed to the drafting committee, which also helped a lot.

VBA Executive Director Teri Corsones commented that training materials have improved, as have the lines of communication. The VBA established a court-users group that will result in continued modification and improvements by providing a way for users to give feedback. Ms. Corsones thanked Justice Dooley for being responsive and making helpful recommendations.

Senator Benning noted a specific issue: currently, the court's docket numbers allow the user to view the year, month, and court of the filing. The new numbering system in the e-filing system does not provide this information, which makes practice very difficult. He asked if that request could be passed along, and Justice Dooley answered that it would be.

Senator Sears asked about filing fees under the contract with Tyler Technologies, specifically who must pay the costs as a result of some parties being exempted from paying the fees. Justice Dooley responded that some parties are exempted from paying fees (the State, prosecution and defense, parties in forma pauperis), but he did not think that this affects the fees paid by other parties. Ms. Corsones noted that as a practical matter, litigants who are not exempted are paying the fees that otherwise would have been paid by those who are. Senator Sears said it is a matter of where the costs are imposed, and in situations like this the costs are likely borne by those who are not exempted and have to pay the fees.

The Committee had no other comments and no objections to the rule.

Vermont Rules for Electronic Filing 1, 3, 5, 6, 7, 10 (proposed June 21, 2019; comments due August 19, 2019; not yet reviewed by LCJR).

Ms. Wetherell explained that the changes make the rules for electronic filing applicable to the Vermont Supreme Court, with limited exceptions for factors unique to Supreme Court practice. She noted that in addition to the usual efforts to solicit comments from attorneys and litigants, there was a bench/bar meeting last week to provide education and a forum for feedback.

Ms. Wetherell described how the changes to the appellate rules fell into four categories: (1) changes directly related to the implementation of e-filing at the Supreme Court; (2) changes required because the Court is moving from paper files to electronic files; (3) amendments needed to conform with current practice; and (4) changes regarding public access. She then detailed the specific types of rule changes in each category.

Representative LaLonde asked whether the term "printed case" is confusing since the materials are electronic now. Ms. Wetherell responded that practitioners felt the term should be retained because it is so well known, and that definitions and other specifics were added in an effort to provide clarity.

Justice Dooley explained that the appellate e-filing rules generally require conformance with the public access rules. Information that is confidential under rules or statutes either should not be filed or should be redacted.

Senator Clarkson raised a concern about cyber security and asked what protections exist for these records if there is hacking or a breach. Justice Dooley answered that the Court has experts on this issue and he would take the question to them.

The Committee had no other comments and no objections to the rule.

Vermont Rules for Electronic Filing 2, 4, and 11. These rules were not on the agenda, but they were distributed to the Committee earlier in the week, and Judge Morris presented them. They address concerns and confusion arising from the initial implementation of the electronic filing rules, and they provide clarification about who must be served, methods of service, procedures for certification of service, and how contacts are created in the Odyssey System.

Representative LaLonde noted that the phrase “in forma pauperis” is no longer used, so the Court may wish to consider whether to conform it with the new terminology. The Committee otherwise had no comments.

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

Respectfully submitted,

Erik FitzPatrick, Legislative Counsel