

Compilation of Written Comments – VBA Memo to Committee on Senate Institutions

Civil Division

Jury Trial Cases

I don't think I have much in the way of original thoughts to add regarding the civil docket that we haven't touched on when we discussed the importance of restarting jury trials. Without a smooth transition back to jury trials, civil cases tend to languish as parties lack incentive to resolve them through settlement discussions, or mediation. Time tends to favor the defense. Without a trial date on the horizon the parties don't feel any external pressure to resolve cases. As the old saying goes the knowledge that you will be hung in the morning tends to focus the mind. I don't see the current court procedures regarding covid as an undue burden on the parties or counsel. In fact, most towns in the area all have a mask mandate now, so it's more of the same.

I tried a case in Federal Court in Burlington this summer and the procedures were relatively benign. Only two people were allowed at counsel table. Counsel were masked at the table. When they addressed the jury or the court from the podium masks were not needed as the podium was surrounded by a plexi-glass screen. When witnesses testified they wore face shields so the jury and counsel could see facial expressions. During jury draw 11 potential jurors sat in the box with empty seats between them and wore masks. Eighteen other potential jurors sat in the gallery with spaces between them. Conferences with the court to challenge jurors or for legal issues during trial took place in the petit jury room with adequate space between parties, the judge and the reporter. I have attached the final rules and seating chart for that trial to this email for your information.

I guess this is a long winded way of saying the best thing going forward would be to move along jury trials as safely and as quickly as they can be scheduled. Let me know if you have any questions. Thanks.

-Greg

Thanks very much for undertaking to collect information on "Reopening the Judicial Branch." I do think it's important that we move fast as is safely possible to get the Courts going full speed again. I have seen, and suffered from the facts of the very slow moving civil docket.

As you will no doubt recall, last year I was an advocate for H. 417, a bill that would reduce the size of juries in civil proceedings to six persons. The proposal is very important in terms of getting civil jury trials up and running on a regular basis in our state courts. Obviously, bringing large groups of people together indoors remains a serious problem because of COVID. Even before the pandemic, jury trials were relatively rare, but their importance in terms of driving civil docket cannot be overemphasized. Without the likelihood that a jury trial will occur, at least one party in most cases is very happy to let things rest. Civil jury trials drive settlements and settlements clear the civil docket.

Of course, reducing the size of juries from 12 to 6, would not solve every problem required to get jury trials moving. But it would have a huge positive impact. A very large number potential jurors need to be called from which to select a group of twelve jurors (and often two more alternates). Reducing the size

of the jury to six cuts that large number of people needed in half, reduces the risk of spreading COVID, and expands the number of courtrooms that can be used for jury drawings while maintaining social distance.

My own read of the House Judiciary Committee (which I acknowledge may or may not be accurate) was that there were two reasons that the Committee did not move the bill forward. One was the perception that, if adopted as a statute, the legislation might prove to be unconstitutional. This view rests on a rather thin reed, *dicta* from *Lincoln v. Smith*, 27 Vt. 328, 358-9, a Vermont Supreme Court decision issued in 1855, which contains thinking that is plainly inconsistent with modern views. (Applied literally, *Lincoln* would prevent women from serving on our juries!). I do not believe that this concern should prevent the Legislature from moving in a direction that will get civil jury trials moving as soon as possible.

The second, and probably the more important reason, was the assertion, confidently asserted by opponents of the bill, that, by September of 2021, our COVID problems would have disappeared. Those opponents were confident but dead wrong. And as the eminent epidemiologist/sociologist, Yale Professor Nicholas A. Christakis testified to the community, it was perfectly predictable that setbacks would occur with COVID nineteen in the fall of 2021. And it's also predictable, as Professor Christakis testified, that even after the pandemic is over, COVID will become an endemic and continue to frighten a significant portion of our population. That means it will continue to make it difficult to gather large groups of people together.

For all these reasons, I continue to believe that the Legislature should adopt H. 417, or some similar legislation, and reduce the size of civil juries to six persons. I attach a copy of my memorandum of May 7, 2021, to the Chair and Members of the House Judiciary Committee, to provide some more detail on these issues.

I urge you to bring this idea to Sen. Benning's attention. If the Senate Judiciary Committee chooses to take up this suggestion, I would be eager to testify in favor of it.

Let me finish by acknowledging that I speak only for myself on this issue.

Best wishes,

Rich Cassidy

Eviction Cases

Based on what I have seen in the last 6 months, most Landlords took advantage of the VERAP funds when tenants had a non-payment of rent issue, especially now that the law does not foreclose the Landlord from the possibility of evicting the tenant. Landlords were less inclined to utilize VERAP funds when they were completely foreclosed from evicting tenants if they accepted funds from the program. Consequently, I have seen less evictions now that a Landlord still has the option to evict a tenant.

It is not my impression that there is a backlog for rent escrow hearings at this time. Most recently, I filed a case on December 2, and received a rent escrow hearing notice for Jan. 12. This is a little longer than it was pre-pandemic (6 weeks instead of 4), but I attributed it more to the holidays than any backlog.

When tenants don't take advantage of rental assistance programs (or are denied), they are generally evicted. I have had a few of these, and they are very cumbersome, with high dollar value back rent (6 months + unpaid rent) because of the moratorium and people believing VERAP funds may be coming when they are not. I have only had a few evictions in the last year, but they are not basic non-payment of rent evictions. As I said, they are usually high dollar value back rents, units that are sublet/abandoned, turned into transient drug houses etc.-- they involve a lot of time and legal funds on behalf of the landlords. So my overall take-away is that the VERAP funds are great for regular nonpayment of rent cases, but that what is rising to the top for evictions are some very unfortunate situations, both for the landlord and the tenant.

In general, the eviction court seems to be working pretty well. There is no backlog as far as we can tell. Jean has some numbers if you need them, but essentially, when the moratorium was in place, evictions were down because there was no point in filing unless it was an emergency. However, since the moratorium has been lifted, the courts are handling the cases pretty much as before. New filings are essentially level with dispositions – so nothing is building up.

I can't tell you what that means for the start to finish timeline of a typical case, but I don't think there is any delay being caused by unmanageable volume.

The VERAP program has lots of flaws and is slow getting money to tenants. However, the courts have been reasonably flexible in working with tenants who have applied and are waiting for their funds to be paid. As with many things, Courts can be more accommodating when there is a lawyer to explain the VERAP delay than when tenants try to explain on their own.

Things are getting better, people are getting money deposited and court stipulations are helping release VERAP funds when they are uploaded to applications. Rent assistance has been hugely helpful at maintaining some tenancies and eliminating money judgments in no cause cases. The problem is that even though there is money for back rent, prospective rent and money to move, there is so little housing stock that tenants still sometimes have nowhere to go even with financial resources. We think there has also been an uptick in no cause cases contributing to this problem.

Foreclosure Cases

There are over 500 residential foreclosure cases currently pending across the state. The moratorium was lifted and then starting in August the CFPB implemented a temporary COVID-19 procedural rule that required servicers to jump through additional hoops to file a foreclosure before January 1, 2022. That rule applied to all residential foreclosures, whether federally backed or not, so my sense is there were not a ton of new foreclosures filed between August and end of December. We're anticipating a new wave of filings as the rule has expired and many folks who were in COVID-19 forbearances are now beyond their 12 months of assistance. VHFA's Homeowner Assistance Program has not yet started

accepting applications, but their call center is now accepting calls in anticipation of the program opening soon. VHAP will provide grants of up to \$30,000 to delinquent homeowners who are under 150% AMI and have at least a loose COVID related hardship (e.g., increased expenses).

Probate Division

In terms of my experience with dealing with the probate courts, I have found that it has managed quite well during the pandemic through the use of WebEx. I attribute this to the fact that we do not have jury trials in probate court. Most hearings involve a small number of people that all can attend by WebEx. Many hearings are uncontested and, therefore, WebEx works quite well. Accordingly, the probate court is not as hindered as the Superior Court which has more live trials and juries.

In terms of contested hearings, many of them are disputes about the law and not about the facts. To the extent the probate court has contested cases and there is a dispute about the facts or evidence has to be submitted through live testimony, it is more challenging especially if you want to surprise the witness with a document.

I conducted a will proving hearing but the Will is not a "surprise document." It was filed with the court. Everyone saw it. The witnesses were able to look at the same document as had been circulated to all of the parties. Those hearings go on quite well with WebEx.

I can imagine (but have not had this happen yet) that a witness is on the stand and you want to surprise them with a document which impeaches their previous testimony. I am not sure how this is done or could be done at a WebEx hearing. It probably could be done but lacks the timing and cadence (and drama) that a live hearing facilitates.

So, all in all, the probate courts have weathered the pandemic storm quite well through the use of WebEx in my opinion (at least in comparison to the Superior Court and probably the Family court).

Best Regards,

Mark

Family Division

To the Vermont Legislature:

I understand that the Vermont Senate is taking up the issue of Reopening the Judicial Branch, which will include dealing with the effects of COVID upon it and the current case backlog burdening the judicial system. I am an attorney practicing in Chester, Vermont. I have been Chair of the Vermont Bar Association Family Law Section for over 14 years. My practice has been focused on family law for almost three decades, and it is currently limited exclusively to family law. Because I live in Chester, I practice primarily in Windham and Windsor counties, but have been quite involved in Orange county as well since both shortly before and during the pandemic. I have also had occasional cases in Bennington and Rutland counties, but none during the pandemic. Although my practice is geographically limited, I am in frequent contact with family lawyers around the state. Even before COVID, courts varied by staff,

judges, and local practice, and our practice in them had to vary as well to accommodate those differences. I am not writing about those issues, as I see them to be solely within the purview of the judiciary. But there are system-wide issues I have observed myself and which I have heard about from other attorneys which I am hoping the legislature can address.

Since COVID, court practice has changed dramatically. The most important change has been that, after a pause in early 2020 when there were virtually no hearings of any kind, all court proceedings have been remote, by Webex video or audio. I understand that there may have been a few exceptions where something involving divorce, parentage, child support or relief from abuse has been in-person, but I have done many such hearings in each of these dockets since the pandemic struck, and I have not set foot in a courthouse since mid-March 2019. Nor do I expect to do so again anytime soon.

Webex hit at just about the same time as the court began using the Odyssey system, which came out first in April 2020 in Windham, Windsor and Orange counties and is now used statewide. Both came with significant issues and the double-whammy was extremely disruptive to family court practice. These comments are not aimed at the Odyssey system, however, as those issues are being addressed separately.

Handling remote hearings presented a very strong learning curve for most of us. To this day, I cannot think of more than two or three remote hearings that have gone off without technological problems with one or more of the judges, a party, an attorney, a witness, or the court itself. During one probate hearing this summer, when a technological glitch arose, the judge commented that she was not surprised, as she had never had a remote hearing without one. Some of the glitches were serious and hearings had to be cancelled and rescheduled; sometimes they were simpler and just cost the parties and the court precious hearing time, resulting in a party's reduced ability to present his or her case properly or yet another hearing scheduled to complete the one that was interrupted. We had to learn to efile exhibits ahead of time, with the timeline varying then and now by judge. Before COVID, we brought our exhibits to court with us and introduced them there for the first time. But one cannot simply present a bank statement to a witness who is miles away, essentially on TV or on the telephone, and question him or her about it. So the courts have had to create ways to introduce exhibits remotely, largely by trial and error, which made for many very confusing hearings. All of the trial and error and the inevitable technological problems have led to its taking longer now to have the same kind of hearing we used to be able to do in less time in person. I estimate that it is now typical to ask for two or more hours for an hearing we used to be able to handle in one hour, just because there is so much more to do with remote hearings, and they are virtually always slowed down by the technology.

Many of us--including the courts--have had to buy new equipment to be able to participate in these hearings. And because this was new to almost all of us, time-consuming screw ups during court proceedings were routine. Once it became apparent that we were in for this remote system for a long time, however, one of the best things that the court did to help these remote hearings be more successful was to hire IT personnel to stand by and monitor each proceeding. Once we had these folks available, they saved many a hearing by fixing problems as they arose. I have been lucky to have had a dedicated IT person in each of my remote hearings in Windham, Windsor, and Orange counties. I recently learned, however, that they are not available in all family courts. They should be.

The family court system had a backlog of cases before the pandemic hit. Since then, however, it has been overwhelmed, and the backlog is currently far greater than I have ever seen in my 35 years in

practice. Much of it is due to the loss of so much hearing time when COVID struck and the courts shut down, and much of it is due to the delays and problems created by the remote process. But even more, I think, is due to the loss of court personnel since the pandemic hit. Court offices were--and still are--understaffed. Offices were left nearly empty or even closed temporarily by COVID. Courthouse staff was cut in half and/or rotated, because there was not enough room for them to be working safely in the same place at the same time. Some worked from home. Trained staff left and were either not replaced, or replaced by untrained personnel. The result was--and to a varying extent continues to be--a mess: filings not being properly recorded by the court; notices of hearings not going out; service not being properly made by court staff; motions filed and being ignored; orders being signed by judges but not being issued for weeks or more; and communication with court personnel being difficult at best and sometimes impossible.

And to complicate all of this, there are not enough judges to go around to staff each family court. The court in which I have most of my cases is the Windsor Family Division. Since September, it has not had an assigned family court judge. The division borrows judges a day a week from other units to fill the gap. In Windsor, that amounts to a judge one day a week--on Thursdays--to hear *all* divorce, parentage, and post-judgment enforcement and modification cases (except those concerning child support). Sometimes, cases get farmed out to the judge in the civil division. But the civil division judge already has a full docket, and delays inevitably result: I am currently waiting for a decision in a divorce as to which the final hearing ended in April, and all final documents were submitted in May, 2021, more than seven months ago. In another example, the Windsor Family Division recently issued an order in one of my cases to the clerk to set a two-hour final hearing in a divorce that did not involve children. When I called about that scheduling, I was offered a one-hour time slot by the clerk, and told that if we really needed two hours, we were looking at waiting 8 months to get a date. We took the hour. The Orange Family Division issued an order in late October, 2021 in a parentage case in which the final hearing began in December 2019. I have a hearing coming up tomorrow in a case that began in the summer of 2020--and I consider us extremely lucky to be have been put on the calendar this early. These are not outliers. This is the way it is going now. When I get new cases in now, I warn my clients that, unless they can settle the matter by agreement, it will likely take at least two years to get even a simple divorce.

I appreciate the Legislature's willingness to help the courts reopen. I do not see the Legislature's role as micromanaging how to handle cases or mandating court processes, however. What the Legislature can do is fund the court system: provide the money to update the ventilation the courts need; fund the new equipment and new technology to keep the court operating; provide the money to hire the IT personnel, the court staff and the judges that the system desperately needs; and provide the funds for the training these folks need to be able to do their jobs competently. Without this influx of funding, I see no way the court system is going to be able to navigate the changes forced upon it or exacerbated by COVID to provide the service that Vermont families deserve from the judicial system.

I will end with a comment about the general practice of family law these days. There was a dearth of action when the pandemic hit, and nothing was going on in the courts. But things then and since were going on in the homes of families all over Vermont. People were shut up together, out of work, stressed and unable to interact with the outside world, and domestic abuse was on the rise. Once the courts opened up again, cases came swarming in. It took a while for relief from abuse cases to catch up, but they have. Almost every new divorce, parentage, or modification case I have taken on since

early 2020 has involved some form of domestic abuse. In my 35 years of doing this, I have never seen so many cases involving abuse--some very serious--at the same time. The courts have been very good about setting hearings in actual relief from abuse cases, but those cases which involve less physical threat, but still a serious level of life-disrupting emotional and/or financial abuse, do not get the time or attention they need. Hearings in those cases are often delayed for months or even up to a year. The result is stressed out parents, stressed out children, and stressed out attorneys. Family law has never been as hard to practice in the decades I have been at it: it is exhausting, both emotionally and physically. I hope that the Legislature will find a way to do what it needs to do: fund the equipment, supplies, personnel and training that the judiciary needs to be able to get back on its feet, get its work done, clear up the backlog, and get the system back to working to serve and protect Vermont families involved with the judiciary system.

Respectfully submitted this 5th day of January, 2022

Penny Benelli
