

To: Senate Committee on Institutions  
From: Teri Corsones, VBA Executive Director  
Re: Reopening of Judicial Branch  
Date: January 6, 2022

Thank you for the opportunity to comment on the Reopening of the Judicial Branch. It's my understanding that the Committee intends to gather an overview of issues facing the courts as a result of the pandemic, including the impact of the backlog and how the Legislature can best support the recovery. I note that many of the witnesses scheduled are involved in Criminal Division cases and know that they will provide an excellent overview of the situation in the Criminal Division. I've therefore asked for feedback from practitioners in the other Divisions in the Vermont Superior Court – the Civil, Probate and Family Divisions. Verbatim responses from the Chairs of the related substantive law sections, as well as written comments from other practitioners are attached to this Memo, for your information. This Memo summarizes those written responses and otherwise includes information on topic from other individual practitioners.

### **Civil Division**

Landlord/tenant, foreclosure and collection cases comprise approximately 70% of Civil Division cases. The balance of Civil Division cases (breach of contract, personal injury, property damage, etc.) cases are sometimes called Rule 16.3 cases because they're subject to Rule 16.3 mediation requirements and oftentimes are on a jury trial calendar.

- **Jury Trial Cases.** For Rule 16.3 cases the absence of civil jury trials has resulted in a sizeable backlog because jury trial cases have largely sat for nearly two years' time. Attached are comments from Greg Weimer, Chair of the VBA Practice & Procedure Section, who indicates that "the best thing going forward would be to move along jury trials as safely and as quickly as they can be scheduled." He offers documentation for civil jury trial safety protocols from the U.S. District Court, which has apparently heard a number of civil jury trials during the pandemic. The Vermont Judiciary has also worked to provide guidance for safely conducting civil jury trials (which have slowly resumed in recent months) and has encouraged parties to agree to 6-person jury panels in civil cases. The current rules require 12-person jury panels whether the case is criminal or civil. There has been resistance to agreeing to 6-person civil jury panels. Also attached are comments submitted in support of a proposal that would require 6-person jury panels in civil jury trials. Testimony was taken in the House Judiciary Committee last session regarding this proposal; its proponents point to the fact that the pandemic continues to adversely impact court processes as evidence of the need for the change.

- **Landlord/Tenant Cases.** According to practitioners in the eviction docket, the anticipated flood of cases after the moratorium on evictions ended in July 2021 has not occurred largely due to the rental assistance monies that have been made available. Attached are written comments from both the landlords' perspective and the tenants' perspective to that effect. Because most hearings are remote, though, fewer cases can be scheduled at a time and not as many cases are processed in a day, compared to pre-pandemic days. Another consequence of the pandemic's effect on eviction cases is that a number of landlords sold their rental properties, sometimes because they had tenants who refused to cooperate in the rental assistance programs so the landlords had no rental income during the moratorium period, or sometimes because landlords simply took advantage of increased property values. A shortage of rental housing stock is a large problem for tenants. A substantial increase in eviction cases is anticipated when rental assistance monies eventually end.

- **Foreclosure Cases.** According to foreclosure practitioners, there hasn't been a flood of foreclosure cases after the foreclosure moratorium also ended in July 2021. Lenders made concerted efforts to work with borrowers, and according to a practitioner who represents community bank lenders as well as low-income borrowers, and serves as a foreclosure mediator, he's seen few new foreclosure cases, and indicates that the old foreclosure cases continue to move along slowly, but because of inactivity on the lenders' part versus a clogged docket. Attached are written comments that indicate that more foreclosure activity is anticipated soon, though, given a rule that expired January 1 that made it procedurally more burdensome to file a new foreclosure case. There are also new VHAP monies for delinquent homeowners, for which program applications will be accepted soon.

### **Probate Division**

Attached are comments from Mark Langan, Chair of the VBA Probate Law Division, who indicates that for a number of reasons unique to the Probate Division, switching to remote hearings through the use of Webex largely allowed probate cases to move forward during the pandemic. He noted that there are no jury trials in the Probate Division, and that most hearings involve a small number of people that can attend by Webex. (One small note - I have a pro bono emeritus license that allows me to represent only pro bono clients. In one of those cases my clients had no computer or ability to connect to their probate hearing via Webex, so I went to their apartment and we connected via my phone on speaker.) Attorney Langan also noted that whereas many probate hearings are uncontested, if there are contested cases involving the use of exhibits, the same challenges that have been cited about exhibits evidence in a remote hearing are present. There are far fewer of those types of cases in the Probate Division versus the Civil or Family Division, however.

### **Family Division**

The Family Division has suffered greatly during the pandemic. Attached are comments from Penny Benelli, Chair of the VBA Family Law Section. She indicates that the Family Division had a backlog of cases before the pandemic hit. Since then, she indicates that the system has been

overrun, and that “the current backlog is far greater than I have ever seen in my 35 years of practice”. Attorney Benelli attributes the backlog to several factors, including the period of time when no hearings were scheduled at all, and then the fact that fewer hearings have been able to be scheduled since remote hearings became the norm. She estimates that it generally takes twice as much time to conduct a hearing remotely as it took in-person, pre-pandemic “just because there is so much more to do with remote hearings, and they are virtually always slowed down by technology”. She also notes the loss of court personnel as a critical factor contributing to the backlog in the Family Division, citing examples of trained staff leaving for a variety of reasons and being replaced by untrained personnel. She references numerous processing errors that have resulted. Lastly, Attorney Benelli cites a lack of judges. She indicates that in the Windsor Family Division a judge has been borrowed one day a week since September to hear all divorce, parentage and post-judgment enforcement and modification cases (except those concerning child support) in the Windsor Family Division.

Regarding what can be done to address the situation, Attorney Benelli recommends that the Legislature better fund the court system: “provide the money to update the ventilation the courts need; fund the new equipment and new technology to keep the courts 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.”

### **General Recommendations**

I note that the Access to Justice Coalition made specific proposals in the last session to alleviate certain aspects of the backlogs; whatever funding is available for those proposals would be very helpful. Comments were also received that reduced court hours in the Grand Isle Unit remain an access to justice issue, and the opportunity for public testimony in that regard was requested. Lastly, practitioners have, until the pandemic and the onset of Odyssey, served as acting judges and acting magistrates in a number of dockets, including small claims, child support, domestic and rfa dockets. Given the backlog situation, a recommendation is to re-enlist experienced practitioners to serve as acting judges to move cases in those dockets, and to free up judicial officers to hear other cases in the process.

### **Summary**

The bar appreciates your interest in its input about the many issues facing the courts as a result of the pandemic. Regarding the Civil Division, increasing the number of civil jury trials is recommended as the single best way to alleviate current backlogs in the Civil Division. Related to that is a recommendation that the Legislature examine a proposal to reduce the number of jurors from 12 to 6 in civil jury panels, hearing from both sides and deciding what is best. Regarding the Probate Division, seek to ensure that the remote hearings that have allowed

probate matters to be heard are accessible to all litigants. Regarding the Family Division, heed the specific funding recommendations to address un-precedented backlogs in Family Division cases. Increasing funding for Access to Justice proposals and re-enlisting lawyers as acting judges are also recommended.

We hope that this information is helpful to the discussion. Thank you again for the opportunity to comment.