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Sen. Alison Clarkson, Chair  
Sen. Randy Brock  
Sen. Richard Sears Jr.  
Sen. Tanya Vyhovsky

Rep. Barbara Rachelson, Vice Chair  
Rep. Thomas Burditt  
Rep. Martin LaLonde  
Rep. Tristan Roberts

## STATE OF VERMONT

### Legislative Committee on Judicial Rules

JUDICIAL RULES

MINUTES

June 19, 2023

The Legislative Committee on Judicial Rules met on Monday, June 19, 2023, beginning at 10:00 a.m. in Room 10 of the State House. The meeting was also held virtually through Zoom and streamed on YouTube.

The following members were present in person and remotely:

Sen. Alison Clarkson  
Sen. Randy Brock  
Sen. Richard Sears  
Sen. Tanya Vyhovsky

Rep. Martin LaLonde  
Rep. Tristan Roberts

Staff present:

Erik FitzPatrick  
Mike Ferrant

Legislative Counsel  
Committee Assistant

Senator Clarkson explained that the Committee would meet and hear testimony although a quorum could not be present.

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

V.R.P.A.C.R. 6(b)(9) and 11(c) (proposed September 13, 2022; reviewed by LCJR November 1, 2022; promulgated February 6, 2023; effective April 10, 2023).

Ms. Wetherell apologized that Judge Tomasi was unable to attend and explained the amendments, noting that it has always been the case that an application for a relief from abuse order is not public until the defendant has had an opportunity for a hearing. The amendment clarifies confusion that has arisen related to whether an application for an RFA is public if it has been denied by the court. In that case, the amendment clarifies that application is public if the RFA application is denied, it is not public if the plaintiff does not pursue the case, but if the

plaintiff does pursue the case then it is public after the defendant has had an opportunity for a hearing. The amendment also renames the Technology Services Center.

Representative LaLonde asked why it would not remain nonpublic after it was denied following a final hearing. Ms. Wetherell responded that at that point the defendant is aware of the allegations and has had an opportunity to appear, so the Committee felt that it was appropriate to be public at that time.

Senator Clarkson noted that the rules have been in effect since April and asked how they are working. Ms. Wetherell responded that the Court hasn't heard anything, but this was not unexpected since the amendments are only minor clarifications.

**Hon. John Treadwell, Superior Judge, Chair, Advisory Committee on Criminal Rules, Vermont Supreme Court.**

V.R.Cr.P. 26.2; A.O. 47 (proposed June 6, 2022; reviewed by LCJR November 1, 2022; promulgated June 5, 2023; effective September 5, 2023).

The rules permit video conference testimony in criminal proceedings upon agreement of parties and approval by the court. Judge Treadwell explained that the rules only apply "by agreement" of the parties, a difference from rules in other courts because of the constitutional right to confrontation of witnesses that defendants have in criminal proceedings.

Judge Treadwell said the Rules Committee had heard and responded to the concerns of the State's Attorneys. First, the concern about requiring 14 days notice of the intent to submit video conference testimony was addressed by adding the words "at trial" to clarify that the rule concerns trial testimony. Second, the Reporter's Notes were amended to clarify that this rule does not affect Vermont Rule of Evidence 807. Lastly, the key fact is that the "agreement of the parties" is required, so that if a party feels video conference testimony was harmful then that party could decline to agree to it.

Timothy Leuders Dumont testified on behalf of the Department of State's Attorneys and Sheriffs that the addition of the words "at trial" was helpful, as was Judge Treadwell's clarification that the agreement of the parties is required. The only remaining concern was subdivision (g)(5) and the question of what happens if a party withdraws from the agreement. Judge Treadwell responded that the Committee addressed this by identifying factors in subsection (g) that the court would have to consider when deciding whether withdrawal would be permitted.

Senator Clarkson noted that this appeared to be an issue that has been considered and will be monitored going forward, and Judge Treadwell agreed.

Representative LaLonde clarified that subsection (g) provides that the court "may" consider the listed factors. Judge Treadwell responded that this was because not all of the factors would apply in all cases.

V.R.Cr.P. 26(c) and (d) (proposed March 6, 2023; comments due May 8, 2023; not yet reviewed by LCJR).

Judge Treadwell explained that the proposal involves the notice requirements when the State seeks to introduce evidence of other crimes, wrongs, or acts in a criminal case. The proposal requires that the notice include the purpose and reasoning for the introduction of the evidence. The proposal also corrects outdated offensive language.

Senator Clarkson asked when the rule would become effective. Judge Treadwell responded that the comment period had closed and that no comments had been received, but the rule has not yet been promulgated and there is not yet an effective date.

V.R.Cr.P. 47(b) and (c), 45(d) (proposed May 8, 2023; comments due July 10, 2023; not yet reviewed by LCJR).

Judge Treadwell explained that the proposal, for which the comment period is still open, makes criminal rules consistent with the civil rules by expressly permitting a party who files a motion to also file a reply to an opposition to the motion. The proposal also moves provisions about the timing of motions from a different rule into this rule so that they are consolidated in one place.

Senator Brock noted that this rule could not be accessed online, so Ms. Wetherell resent it.

**Teri Corsones, Esq., Court Administrator, Vermont Supreme Court;**  
**Emily Wetherell, Esq., Deputy Clerk, Vermont Supreme Court.**

Vermont Rule for Electronic Filing 5 (proposed April 10, 2023; comments due June 12, 2023; not yet reviewed by LCJR).

Ms. Corsones and Ms. Wetherell explained the proposed rules, which establish procedures for electronic filing of motions and supporting document, including provisions regarding acceptance and rejection of electronic filings and errors that can result in rejection or failed submissions. There were no comments received by the Court in response to the proposals.

Ms. Corsones described the court's electronic filing system and how filings can sometimes be rejected. The rules contain a list of 27 reasons for which a rejection could occur, such as for nonpayment of the filing fee. The proposal permits a rejected filing to be appealed to the Court Administrator, and it provides the opportunity to correct the filing issue and refile within seven days. There is a statewide initial review team at the court, after which the filings are sent to the local court clerks for review.

Senator Vyhovsky asked if allowance is made for persons who cannot afford the filing fee and Ms. Corsones answered that the rules provide for this.

Senator Clarkson asked how the rules were working and Ms. Corsones answered that it was much better. Ms. Wetherell added that there is also a provision for clerk review of filings in the Supreme Court that parallels these Superior Court provisions.

Representative Roberts asked if the filer is notified when a failed submission cannot reach the court, so that they know it failed? Ms. Wetherell said yes, the filer receives an email. There is no appeal in this situation because the system cannot accommodate it, but the 7-day correction period applies and the court has live staff to help the filer make the necessary corrections.

Ms. Wetherell explained the additional provision regarding whether independent or alternative requests for relief must be filed separately or together. Requiring filings together has been difficult to apply, so the decision was made to always require separate motions to be filed separately and to clarify the procedures for filing supporting motions.

Representative LaLonde asked if the language regarding the page number citation is clear enough, and Ms. Wetherell responded that this particular language was much discussed and the result of consensus.

**Allan Keyes, Esq., Chair, Advisory Committee on Civil Rules, Vermont Supreme Court.**

V.R.C.P. 79.1(e); V.R.Cr.P. 44.2(b); V.R.P.P. 79.1(d); V.R.F.P. 15(e) (promulgated December 12, 2022; effective February 13, 2023; not yet reviewed by LCJR; parallel Small Claims rule reviewed April 14, 2022).

Mr. Keyes explained that the proposal involved the centralized system that the Court had established for vetting out-of-state attorneys and issuing a licensing card for pro hac vice admissions. There had been some inconsistencies in practice so the proposal clarifies the rules to require that the licensing card be submitted with the motion and that this would be sufficient for admission pro hac vice.

V.R.C.P. 56(b) (promulgated December 12, 2022; effective January 1, 2023; not yet reviewed by LCJR).

Mr. Keyes explained that the proposal simply corrected an error by clarifying that a party may file a motion for summary judgment at any time until 30 days after the close of discovery. Senator Clarkson thanked Mr. Keyes for fixing the error.

**Scott Griffith, Esq., Chair, Special Advisory Committee on Remote Hearings, Vermont Supreme Court; Emily Wetherell, Esq., Deputy Clerk, Vermont Supreme Court.**

Mr. Griffith explained the history and purpose of the Special Advisory Committee on Remote Hearings, which began during the COVID emergency in the Summer of 2021 and has continued to study when remote court hearings are appropriate. Representatives from all the interested constituencies are on the Committee, which was divided into subcommittees to address policy and operations. The policy decisions are reflected in the rules being considered today, which are

intended to embody the Committee's paramount concerns of promoting access to justice and considering the complexity of the proceedings. Four hundred attorneys responded to the Committee's survey, and over 70% of them voted to continue some remote hearings and not return to pre-COVID status. Virtually all of the respondents agreed that remote proceedings saved time for them and their clients.

Senator Vyhovsky asked if the rules contained a process for a person who had difficulty with remote proceedings. Mr. Griffith answered that they do, by way of filing a motion.

Ms. Wetherell explained that there had been a rule in place for remote participation before COVID happened, but it had been based more on theory than on practice. These amendments conform the rules with the experience and practice that developed during the COVID emergency.

Ms. Wetherell explained the civil rules first, for which the rules for remote participation depend on whether it is an evidentiary or nonevidentiary proceeding. For nonevidentiary proceedings, the court will have the discretion to decide whether the proceeding is remote, in person, or hybrid. Evidentiary proceedings, on the other hand, must be held in person unless the court makes a good cause finding for it to be remote or hybrid. The rules list 14 criteria that the Court must take into account when making the finding. Ms. Wetherell added that some comments have come in and the promulgated version of the rules will be amended in some places to reflect them.

Representative LaLonde noted that a hybrid proceeding allows the participant to choose whether to be remote or in person unless the court orders otherwise and asked if the definition should specify that. Ms. Wetherell responded that the promulgated rule would address this issue. Representative LaLonde asked how a person would know what status applies in their case, and Ms. Wetherell responded that this information would be in the notice that is provided in each case. Representative LaLonde asked if this had caused any issues with people's attendance, and Ms. Corsones responded that it could but providing notice should address it by letting people know what they can do. Representative LaLonde asked whether notice should be required if participants change their mind about whether to appear at a hybrid proceedings. Ms. Wetherell responded that the Committee discussed this and decided that since the purpose of hybrid proceedings is to give people the choice, they should be able to change course at the last minute.

Senator Clarkson noted that it would be interesting to see how effective the new rules will be going forward. Senator Vyhovsky noted that how the rules are implemented will make a big difference on their effectiveness, so she wondered what training there has been. Mr. Griffith said they had fortunately received funding for the project and hired Operations Assistants (OAs) to help with implementation and provide training to judges and court staff. Overall, the participants agree that it is going well. Senator Vyhovsky said that was helpful and she hoped the training would continue and she also specifically wondered how non-lawyers would do using the system. Mr. Griffith responded that there is some evidence that non-attorneys are having more issues, so the Court is studying that issue and will make recommendations if appropriate.

Senator Vyhovsky asked if under the "good cause" standard, it is entirely up to the court's discretion whether to permit a remote or hybrid proceeding. Ms. Wetherell responded that the

court's discretion is limited by the requirement that the court "must" consider the 14 criteria before making the finding. Senator Vyhovsky noted that one omission she saw when looking at the 14 criteria was "witness safety" or "witness health" and she asked if this should be considered. Ms. Wetherell responded that the rule generally applies to civil proceedings not criminal, but in the context of stalking proceedings that issue was considered and it was decided to make those hybrid to accommodate witness concerns. Senator Vyhovsky said that she appreciated that but also had received feedback from multiple persons that domestic violence proceedings leave victims feeling unheard, so this is an opportunity to address that.

Representative LaLonde asked if the factors could more explicitly take a person's disability into account. He also noted that litigants are more likely to attend a proceeding if the judge is there, so notice about the judge's presence should be provided in advance. Ms. Wetherell responded that the Committee concluded that when proceedings are hybrid, the intent is to provide flexibility for participants to decide without notice whether to attend. She noted that for in-person proceedings when the presence of litigants is required, notice must be provided if the judge cannot attend, and the other participants are provided the opportunity to reschedule.

Ms. Wetherell next described the rules regarding remote proceedings in the Family Division, which are very much like the civil rules, so the policies that the Committee just discussed will generally apply to family proceedings as well, with some exceptions for particular cases and some minor modifications. For example, in juvenile and youthful offender cases the agreement of the parties will be required for remote proceedings, which is the same approach as in the criminal rules.

Senator Sears asked if delinquency and youthful offender proceedings would be remote, and Ms. Wetherell responded that substantive matters would be in person unless the parties agreed to remote proceedings. CHINS and TPR proceedings would allow remote participation upon a finding of good cause. Senator Sears expressed concern about permitting remote proceedings even by agreement of the parties in juvenile and youthful offender cases because young people often understand the proceedings better if there is personal participation of the parties.

Mr. Griffith and Ms. Wetherell next turned to the rules regarding remote participation in proceedings in the Probate Division. They explained that the rules were extremely similar to the civil rules, with one primary difference: in the Probate Division the default procedure is remote, and in-person and hybrid proceedings are permitted by motion, which is the opposite of the in-person default approach in the Civil Division. The distinction is based on the more common appearance of pro se parties and the wider geographic areas covered by the Probate Courts.

Judge Kilgore noted that it will be very easy for parties to request hybrid proceedings, so that will be helpful. Judge Ertel explained that the different constituencies on the Rules Committee (judges, attorneys, probate registers) all supported this approach and agreed that the current practice of remote hearings is working very well.

The Committee had no comments on the probate rules.

**Hon. Jeffrey P. Kilgore, Probate Judge, Chair, Advisory Committee on Rules of Probate Procedure, Vermont Supreme Court; Hon. Judge Joanne Ertel (Ret.), Reporter, Advisory Committee on Rules of Probate Procedure, Vermont Supreme Court.**

V.R.P.P. 80.10(c)(3) (emergency rule promulgated December 12, 2022; effective January 1, 2023; not yet reviewed by LCJR). Judge Kilgore and Judge Ertel explained that this is a technical correction clarifying that objections to the appointment of a guardian ad litem must be made within 10 days of the appointment. The Committee had no comments on the rule.

V.R.P.P. 66 (proposed August 17, 2022; reviewed by LCJR November 1, 2022; promulgated April 10, 2023; effective July 3, 2023). Judge Kilgore explained that the rule expands the inventory procedure to include such elements as a more detailed description of the items in the estate. This version of the rule is the same as the one the Committee reviewed last time, though the previous version of the rule was revised in response to Committee comments. Senator Clarkson thanked Judge Kilgore for making those changes, and the Committee otherwise had no comments.

V.R.P.P. 5.1 (proposed May 8, 2023; comments due July 10, 2023; not yet reviewed by LCJR). Judge Kilgore explained that generally a fiduciary must obtain a license to sell before selling estate property. The proposal expands the list of who must receive notice after the property is sold. The Committee had no comments.

V.R.P.P. 40(d)(3) (proposed May 8, 2023; comments due July 10, 2023; not yet reviewed by LCJR). The proposal establishes a procedure for filing a motion to disqualify a probate judge. The Committee had no comments.

**Hon. Jeffrey P. Kilgore, Probate Judge, Chair, Advisory Committee on Probate Rules, Vermont Supreme Court; Emily Wetherell, Esq., Deputy Clerk, Vermont Supreme Court.**

Vermont Rules for Electronic Filing 3(c), 12; V.R.P.P. 5(e), 78 (proposed April 10, 2023; comments due June 12, 2023; not yet reviewed by LCJR). Judge Kilgore and Ms. Wetherell explained that the proposal is a joint effort of the Committees on Probate Rules and on Electronic Filing that clarifies which documents must be paper filed as opposed to electronically filed in the Probate Division. The originals must be “wet signed,” meaning they have the original signature. At the conclusion of the proceeding, the originals are returned to the fiduciary so that the court does not need to retain them indefinitely.

Senator Clarkson asked if the court retained an electronic copy, and Judge Kilgore answered that it did. The Committee otherwise had no comments.

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

Respectfully submitted,  
Erik FitzPatrick, Legislative Counsel