[As Approved at Committee Meeting on November 8, 2019]

VERMONT SUPREME COURT
SPECIAL ADVISORY COMMITTEE ON
RULES FOR ELECTRONIC FILING

MINUTES OF MEETING, SEPTEMBER 20, 2019

The meeting commenced at approximately 1:00 p.m. Present were Committee Chair Justice John Dooley; Teri Corsones; Jeff Loewer Judges Kate Hayes, Tom Durkin (phone), and David Fenster; Tari Scott; Chasity Stoots-Fonberg; and Eric Avildsen (phone). Also present were Supreme Court liaison Justice Beth Robinson; Andy Stone of the Court Administrator's Office—NG-CMS Working Group; and Committee Reporter Judge Walt Morris. Absent were Judge Beth Mann and Susan Steckel. Adam Angione, Northeast Bureau Chief of Courthouse News Service, was also present.

1. Opening; Announcements. Chair Dooley opened the meeting by noting that given the Court Administrator's obligation under the proposed rules to provide at notice and instructions on how to efile at least 30 days prior to implementation date, the proposed rules should be promulgated as final no later than February 1, 2020. Judge Hayes provided clarification, indicating that while prompt final promulgation was still viewed as necessary, the implementation schedule had become a bit more flexible, with the case management system in place in the Judicial Bureau as of June 1, 2020.

2. Approval of Meeting Minutes. On Motion of Judge Hayes, seconded by Teri Corsones, the meeting minutes of April 12, 16, 17, 18 and May 17 were unanimously approved, with one correction to the May 17 minutes, paragraph 6.[1]

3. Review, Discussion, and Responses/Actions Taken in Consideration of Public Comments Received on Proposed Rules.

The proposed 2019 Vermont Rules for Electronic Filing (VREF) were published for comment on June 19, 2019. The comment period closed on August 19, 2019. In chronological order, comments were submitted from six sources: Judge Helen Toor (7/26/19); Michael Kennedy, Esq. (7/29/19); Kevin Lumpkin, Esq. (8/6/19); William Kraham, Esq. (8/8/19); Adam Angione, Northeast Bureau Chief, Courthouse News Service (8/13/19); and Vermont Legal Aid, Inc. (Maryellen Griffin, Esq.)(8/16/19). At its meeting on September 20th, the Committee considered each of the comments, referencing a memorandum outlining the substance of each comment by Rule number, and the text of the draft that was the subject of each comment.

[1] In the second to last sentence of ¶ 6, the language, "Judge Fenster indicated "that the Committee should address concerns that this may constitute unauthorized practice of law", was substituted for the language of this sentence in the draft presented.

The Committee's discussions, responses, and actions taken are as outlined in the attached Memorandum, incorporated herein by reference, that will accompany transmittal of the proposed rules with recommendation for promulgation. As a result of the Committee's review, a number of edits and clarifying modifications were made to the proposed rules. There were a number of clarifying additions made to the draft Reporters Notes as well. These edits and modifications are as noted in detail in the Memorandum.[2]

At the conclusion of the Committee's review, Chair Dooley indicated that he and Reporter Morris would work with Emily Wetherell to prepare final versions of the rules proposal and accompanying Memorandum of Comments Received and Committee Responses for final Committee approval at a subsequent meeting of the Committee. Target date for completion of this final work was about one week (the week of September 23-27). It was agreed that in the interests of full Committee participation and prompt final review, this meeting could be convened by telephone conference.

4. Passage of S. 105 (Act No. 77, 2019 Adj.Sess.); Revision of proposed Rule 9 (Signatures) to incorporate text of § 4 of the Act.

This Agenda item was addressed in the course of the Committee's general review of Rule 9, and modifications consistent with the statutory amendment were made.

5. Report on Idaho Rule requiring text searchable PDF format (2019 VREF 7(b).

Chair Dooley indicated that he had been unable to secure any further information as to the means by which the Idaho filing system addresses searchable PDF formats. The Committee determined to make no changes in the draft of subparagraphs 7(a)(1) or 7(b). Subparagraph 7(a)(1) contains an exception to permit the Court to otherwise order that a particular document be filed in a format other that specified in 7(b).

6. NG-CMS; Clarification of Fees and Costs and Waivers of Fees and Costs.

The proposed rule 10(d)(2) provides that "Whenever a statute exempts a particular filer from paying a court filing fee, that filer will also not be required to pay an efiling fee." The Committee concluded that this provision would exempt those qualifying for IFP status, or other statutory indigency-based or official duty waiver (such as assigned counsel) of payment of fees and costs, from payment of efiling fees.

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[2] **PLEASE NOTE: The following memorandum records the discussions had, and the Committee decisions made on September 20th, as to the final draft proposal, in consideration of the public comments received. The Committee met twice following the September 20th meeting (on October 16th and November 8th). Certain of the decisions referenced in the memorandum were revisited by the Committee at these subsequent meetings. Any changes are as noted in the final memorandum accompanying the ultimate proposal recommended for promulgation, and the minutes of the October 16th and November 8th meetings.**

Upon completion of the referenced items of business, the meeting was adjourned at approximately 4:38 p.m.

Respectfully submitted,

Walter M. Morris, Jr.
Superior Court Judge (Ret.)
Committee Reporter

Memorandum: 2019 VREF Comments Received and Committee Responses/Actions Taken Upon Review of Comments on September 20, 2019. [Attached to and Incorporated by Reference in Minutes of VREF Committee Meeting held on September 20, 2019—see note, *supra.* as to subsequent Committee meetings and revisions]

2019 Vermont Rules for Electronic Filing (VREF)
Proposed Promulgation of 2019 VREF Rules
Public Comments Received; Responses/Actions Taken Upon Review of Comments.

Following is a summary of the comments received, with reference to the rules proposed for promulgation in numeric order, with the responses, and actions if any, taken by the Special Advisory Committee on Rules for Electronic Filing upon review at its meeting on September 20, 2019. Complete copies of all of the comments received are included in the record of promulgation transmitted to the Supreme Court for its consideration.

At the outset, we note that there were a number of helpful edits, restyling, and errors suggested by commenters that have been incorporated into the final draft recommended for promulgation, without further reference made here.

Rule 1: Title; Applicability; Effective Dates.

No comments; but see, **VLA** comments, infra. re: Utilizing the Court's Self Represented Litigants Committee as to the process of efiling implementation and implications for self-representers.

Committee response: VLA requested that the Court's Self Represented Litigants Committee be engaged in the process of assessment of problems faced by self represented litigants as the electronic filing system is rolled out through the units of the Superior Court, and that the Advisory Committee on Rules for Electronic Filing working with the Self Represented Litigants Committee "focus on developing and implementing solutions to the problems identified such that electronic filing poses no barrier to any Vermonter seeking access to the courts." The Committee agreed that priority should be accorded to addressing these concerns, both in rules

promulgation and implementation of electronic filing. It was noted that self-represented individuals are not required by the proposed rules to file electronically at all; and in response to comments by VLA, Judge Toor, and Will Kraham, changes are made in proposed Rule 6 to address correction of non-complying non-electronic filings in a manner that facilitates self representing litigants' understanding of the reasons for rejection of a filing, and the specific measures needed to successfully file.

The committee will monitor the initial rollout of efiling and welcomes comments in light of the experience of users with the software. It fully expects that there may be a need for further refinement of these rules in light of the experience. We encourage proposals of modification from the self-represented litigants and VLA in light of the experience with the efiling software.

See response entry, below as well.[3]

Rule 2: Definitions.

Rule 2(j) (definition of "Personal Service") (p. 5) **(Judge Toor):**

"I suggest that the words "hard copy of the" be added so this reads "Personal Service means actual delivery of the hard copy of the notice or process to the person to whom it is directed." Otherwise, since these are rules for electronic filing, it may be unclear whether actual delivery means by electronic means."

Committee response: We agree with the comment and added suggested language. The wording is slightly different than that suggested.

Add definitions of "Rejected" vs. "Filed" documents for purposes of Rule 7 format requirements (pp. 16-17). (See comments as to Rules 5(d) and 6(c))—(**VLA)**:

"We suggest that the Rules define "rejected" documents, as distinct from "filed" documents. It is also critical that the Rules mandate a consistent and fair process for addressing rejected documents. Our state constitution, in both of the articles cited above, specifically prohibits any unecessary delay in accessing justice. The addition of tightly-drawn and narrow non-electronic filing requirements runs the risk of increasing the number of "rejected" filings. This will create, at a minimum, increased delay as litigants correct the deficiency, and at worse, a denial of access to the justice system.

The proposed rules greatly expand the Clerks' discretion to reject submitted filings. For example, a self-represented litigant who staples their filing or who fails to write legibly on all pages could find her filing rejected. "Failure to follow the [requirements] can result in the rejection of a filed document." V.R.E.F. (proposed) 7

We ask that the term "rejected" be defined in Rule 2 to make clear that the document shall be considered filed and that the Clerk must so accept it for the nonelectronic file, although the document will not be added to the electronic case management system until a corrected and compliant version is filed."

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[3] Justice Robinson presently serves as Chair of the Court's Self Representing Litigants Committee. She indicated that apart from any changes the Committee might make to the rules draft, the Self Representing Litigants Committee can certainly follow the promulgation through the process of administrative implementation.

Committee response: The Committee determined not to add specific definitions of the terms "rejected" and "filed" documents, in favor of treatment of these terms and the concerns raised in the context of the rule subsections in which they appear.

Rule 3: Required Electronic Filing; Exceptions.

Rule 3(b): Nonelectronic Filing Permitted.

I believe that paper documents should always be accepted for filing; it is a simple matter for court staff to scan the paper document and upload the PDF file to the electronic case file-the federal court staff do it routinely. I anticipate that attorneys will avail themselves of the electronic filing option due to its benefits and convenience, and that paper filings will be the exception rather than the rule, but I think it is a mistake to prohibit the filing of paper documents. Many of us have had the experience of hand writing a motion or stipulation while in the courthouse and filing the paper document in court. **(Will Kraham, Esq.).**

Committee response: As the commenter acknowledged, electronic filing is a more convenient and less labor-intensive method of filing in the court for lawyers, litigants and court staff. Accordingly, Rule 3 requires lawyers to file electronically unless there is a reason why electronic filing of a particular document is not feasible, in which case paper filing is allowed. As an example, the practice referred to in the comment—scanning of handwritten documents such as stipulations entered into at the courthouse—would be covered, and authorized, under paragraph 3(b)(3), which permits court authorization for nonelectronic filing "for other good cause". The Committee recommends no change in this provision.

Rule 3(b)(3): Nonelectronic filing to Protect Confidentiality. (p.6).

Reading Rule 3(b)(3), it seemed to me that when a document is required to be filed under seal (or portions of it to be filed under seal, with a redacted public-facing copy) that would likely be accomplished by nonelectronic means, as one of the reasons for nonelectronic filing is to "protect confidentiality." Later on though, in Rule 4(c), there seemed to be some distinction between publicly accessible pleadings and non-publicly accessible pleadings. This led me to two thoughts. First, it may make sense to clearly spell out what to do if an e-filer needs to file something under seal. Can it be filed electronically but non-publicly? Does it need to be filed nonelectronically, and if so does Court permission need to be obtained in advance? Second, it may also make sense to add definitions for "publicly accessible portions of the case file" and nonpublicly accessible ones, as I wasn't clear on the difference between them. **(Kevin Lumpkin, Esq.).**

Committee response: These issues are already addressed in provisions of the proposed electronic filing rules, or in the Rules of Public Access to Court Records, in that they are incorporated by reference as to the prescribed process of sorting or redacting of nonpublic information. In addition, the Odyssey system will provide information to the filer as to sorting/redaction in the process of navigating to file. No change is made to this provision, but a brief clarifying reference is added to the Reporters Notes.

Rule 4: Registering Process; Responsibilities.

Rule 4(b)(4): Use of efiling account by "associated attorney or legal assistant". (p. 8).

This rule refers to an "associated attorney or legal assistant" being able to access an efiler's account. I thought it might be worth expanding the latter part of that phrase to something like "staff," as at least my firm defines "legal assistant" differently than "paralegal." **(Lumpkin).**

Committee response: The suggestion is adopted, by striking reference to "legal assistant" in favor of reference to "other person authorized by the attorney".

Rule 5: Procedure for Electronic Filing.

Rule 5(b)(3)(Mailing address and email address on documents filed.) (p.10)

"…add that the filers must give us their phone numbers, not just mailing and email addresses. When hearings have to be cancelled, or reset at the last minute, calling is the best way to let someone know. In addition, when the opposing party is pro se, they do not have a bar directory with all the phone numbers and should have easy access to the opposing attorney's number. Conversely, if the efiler is a pro se party we (and the opposing parties) cannot look up their number in the bar directory, so we need them to give it to us. **(Toor).**

Committee response: The Committee discussed this comment at length; it determined that filer telephone numbers should not be required, and no change is made. A party or lawyer telephone number is typically received when a notice of appearance is filed, and this would continue to be the practice. It was also noted that in certain cases, such as in relief from abuse proceedings, access to a litigant's contact phone number can present issues of personal security.

Rule 5(c)(1): Filing Time (p. 10).

Impact on Attorney Well-Being. **(Michael Kennedy, Esq.)**

Noting that both Delaware and Massachusetts have amended their electronic filing deadlines from 11:59 p.m. to 5:00 p.m., in order to facilitate attorney wellness, "it might make sense to consider a 5:00 p.m. deadline in Vermont." (citing an order of the Delaware Supreme Court "…extension of the filing deadline has contributed to a culture of overwork that negatively impacts the quality of life for Delaware legal professionals without any corresponding increase in the quality of their work product or the functioning of the judiciary.")

Committee response: In discussion of this comment, the Committee recognized that attorney well-being is a significant issue, as evidenced by the on-going efforts of the Vermont Bar Association to provide awareness and resources to address it. However, the Committee noted that the availability of an additional "filing window" after typical business hours also has strong support among the bar. In addition, there is potential conflict with the definition of "day" in the recently adopted "Day is

a Day" procedural rules for calculation of time.[4] No change is made to this subsection.

Rule 5(d)(1)(Court Staff Review for Compliance with VREF and Rule 7(a)(1) of the Rules for Public Access to Court Records) (p.10).

Comments of **Courthouse News Service/Adam Angione (CNS):**

"With the adoption of the Vermont Rules for Public Access to Court Records on May 1, 2019, Vermont has carved out its position as one of only two states in the entire country that place redaction responsibility with the clerks. The other state, Florida, added that responsibility to clerks' staff in 2012, and it decimated the prompt, same- day press access to new court records that had for decades been a hallmark of the Florida court system.

* * * *

Once Florida joins the rest of the country in removing redaction from the workflow of its intake clerks, the Vermont Proposed Rules for Electronic Filing will only intensify Vermont's isolation. Rule 5(d)(1) is particularly detrimental to press access and, if Florida is any indication, most likely the Court's budget.

* * * *

In New York, where they use an in-house e-filing system, all 47 e-filing counties provide public access to new court filings as soon as they are submitted by the filer. The e-filing interface requires that the filer click on one of two radio buttons, indicating whether a document contains personal information or not. Redacted documents or new filings that do not contain personal information are immediately sent to a review queue upon submission, where members of the press and public can look at those documents before they have been processed or accepted into the case management system by a clerk.

Elsewhere in the nation, courts using Tyler's Odyssey software in Georgia, Nevada and California provide pre-processing, on-receipt access to new civil filings through a password-protected press review queue. It's the same end result as in New York, but Tyler, the same vendor providing Vermont's new e-filing and case management system, provides the review queue as a component of its e-file manager.

Even Florida is considering a New York-style review queue as part of its potential plans to relieve court clerks of their redaction duties. The Florida queue would provide access upon receipt through the state's e-filing portal.

Of course, a press review queue in Vermont wouldn't have to be accessible over the internet. With statewide access to accepted e-filings already envisioned as part of Vermont's Next Generation Case Management System project, a press review queue could easily be set up at computer terminals in local clerk's offices throughout the state. And with Tyler's expertise in deploying the press review component of its software, it would only take the flip of a switch to provide contemporaneous access to new e-filings.

When the press is pushed back behind processing, the practical effect is that most newsworthy filings, particularly those filed later in the day, will be yesterday's news by the time they are made

[4] See, V.R.C.P. 6(a)(4); V.R.P.P. 6(a)(4); V.R.Cr.P. 45(a)(4). These rules all define "last day" for purposes of electronic filing as ending at midnight.

public. The natural result is they will either go unreported by the press, or a savvy plaintiff will leak the new complaint to a favored outlet on the day of filing, knowing the complaint will be in effect sealed by the court until the next day.

We would therefore urge the courts in Vermont to adopt rules that promote timely access to new civil e-filings, instead of codifying rules that will inevitably result in delayed access. By removing the language in the proposed Rules for Electronic Filing that puts the responsibility for redaction on the clerks, Vermont would fall in line with the national standard and be one step closer to joining dozens of other courts around the country that are providing the press with immediate access to new e-filings."

Committee response: The Committee noted that in adoption of the amended Vermont Rules for Public Access to Court records, the Court had determined as a matter of policy that court staff would review electronic filings for redaction compliance, those rules having been promulgated as final on May 1, 2019, effective on July 1, 2019. Courthouse News did not comment on those rules during the comment period or at the public hearing held on March 11, 2019. The provisions of Rule 5(d)(1) incorporate by reference, and are controlled by, VRPACR 7(a)(1), so the process of recommending amendment and/or deletion of the current rule prescribing staff review of electronic filings for redaction compliance is vested in the Advisory Committee for Rules of Public Access to Court Records in any event. In discussion, it was also noted that 12 V.S.A. § 5 precludes remote electronic access to criminal, family and probate court records, and that review of publicly accessible court records, including in civil cases, would be available at court-located kiosks. The Committee recommends no change in the proposed Rule 5(a)(1).

Rule 5(d): Court Staff Processing (p.10)

"This provision allows a filing that is not "accepted" to be corrected within 7 days (or a longer period for good cause). When corrected, the original filing date controls: "When an original or corrected filing has been accepted, the date and time of filing for all purposes under the applicable rules of procedure are the date and time that the original filing was submitted." Id. § (d)(4). I like this because it protects inadvertent errors from causing a claim to be lost due to a missed deadline, but I see it as ripe for misuse. I would suggest adding language at the end of the sentence such as the following: unless a judge finds that the original filing was knowingly submitted in insufficient form for the purpose of extending an otherwise applicable deadline." **(Toor).**

Committee response: The Committee determined not to add the suggested language to Rule 5(d), concluding that such a circumstance (intentionally insufficient initial filing) would likely be the subject of attorney "Rule 11" sanctions, or otherwise subject to sanctions upon motion of a party, or the court's own motion.

Rule 5(f)(1), (2): Motions (Requesting Alternative vs. Independent forms of relief; Separating Motions and responses; Supporting material) (p. 11)

"Under Rule 5(f)(1)-(2), motions seeking alternative forms of relief may be filed as one document, but motions seeking independent forms of relief need to be filed separately. Imagining how this would work in practice, I wondered how that would apply to motions that seek multiple forms of related relief. For example, a motion to exclude evidence improperly withheld during discovery might seek (1) exclusion of the evidence; and (2) attorneys' fees. I suppose those would be "independent" forms of relief,

because the filer would want to get both, not just one or the other. I might be overthinking this, but it could be worth exploring an example or two in the Reporter's Notes." **(Lumpkin).**

"Rule 5(f)(1)-(2): I don't understand the distinction made here between "alternative forms of relief" and "independent forms of relief." They seem to be the same thing. (For the record, I am VERY happy about the next section, which does not allow the same document to serve as both a *response* to a motion and a *new motion*!)" **(Toor).**

Note: As to these two comments, and explanation of the distinctions between forms of relief, please refer to the Reporter's Notes to the proposed 2019 VREF, p. 14.[5]

Committee response: Excerpts from the referenced explanatory Reporters Notes from the 2010 VREF, which do specifically address the distinction, are added to the Reporters Notes to the 2019 promulgation.

Rule 5(f)(4)(D)(1) (Format of Supporting Material)

Comment of Judge **Toor:**

"I do not understand this section discussing electronic and paper page references matching, but when I raised this at the Civil Rules meeting the lawyers on the committee seemed to, so perhaps it is not an issue."

Committee response: No response necessary.

Comment of **VLA:**

Clarify (In)applicability of certain provisions of Rule 5 to nonelectronic filers (pp. 10-11)

"Rule 5, "Procedures for Electronic Filing", appears to be directed to electronic filers and electronically-filed documents. However, the various provisions of Rule 5 apply many of its provisions to "filers" and "filings", despite the definitions of the terms "efiler" and "efiling" in Rule 1. The failure to use those terms makes it is unclear which provisions are actually only applicable to electronic filers and electronically filed documents. A number of the requirements of Rule 5 should not be applied to self–represented, non-electronic filers, for example, certification requirements related to the RPACR and the rules on the manner of submitting motions."

Committee response: Throughout the rule, clarifying references to "**e**filing" are added to provide clear indication of which provisions apply only to efiling, which apply also to nonelectronic filing.

[5] "Rule 5(f) continues the substance of 2010 VREF 4(g) with respect to how motions and supporting materials must be filed. Rule 5(f)(1), (2) and (3) coincides with 2010 VREF 4(g)(1), (2) and (3). Rule 5(5)(4)((A), (B), and (C) coincides with 2010 VREF 4(g)(4) but is displayed in separate subdivisions for clarity. Filers should consult the Reporter's Notes accompanying the 2011 amendments to the 2010 VREF 5 for further explanation of the intent and meaning of the 2011 amendment that added these requirements."

Rule 6: Nonelectronic Filings.

Rule 6(c) (Correcting noncompliant nonelectronic filings) (p. 15)

The Rule on correcting a noncompliant filing should be consistent between Rule 5 and Rule 6 **(VLA):**

> "Here is the language of Rule 5(d) for electronic filing and of Rule 6(c) for nonelectronic filing.
>
> Rule 5(d)
> (2) *Accepting or Rejecting a Filing*. Court staff will electronically notify the filer either that the filing has been accepted or that it cannot be accepted until specified actions required under these rules have been taken.
> (3) *Correcting a Filing*. A filer may submit a corrected filing within 7 days after receiving the notification if the filer follows the instructions for filing a correction on the electronic filing system. The court may extend the time for correction for good cause. Court staff will accept a corrected filing if all requirements of those rules and the instructions for correction have been met.
>
> Rule 6(c)(2) *Need for Correction*. If a filing does not comply with these rules or the Rules for Public Access to Court Records, the document will not be scanned, and the filer will have an opportunity to correct the filing in a manner provided for other conventionally filed documents.

Rule 6 should be amended to make clear that nonelectronic files will also receive instruction from the court staff about how to correct their filing so it can be scanned; and to provide the same seven-day period to make such correction.

Finally, both rules should be amended to require that, in the event the noncompliant filing is not corrected or withdrawn within the seven days allotted, before any dispositive action is taken, such as dismissing a complaint or striking an answer, a Judge must review the action of the clerk. *See* V.R.E.F. (proposed) 5(d)(3) and 6(c)(2). In the interests of justice, significant lattitude is currently provided as to the form and manner of filings presented by self-represented litigants; the move to Electronic Filing should not be used to curtail or restrict access to the justice system in Vermont."

Comments of Judge **Toor** re: Rule 6(c)(2)(p. 15):

"Rule 6 says that paper filings will be scanned, but that ones that do not comply with the rules will *not* be scanned. See §§ 6(a)-(b). It then says that "the filer will have the opportunity to correct the filing in a manner provided for other conventionally filed documents." Id. § (c)(2). I am concerned that this means that paper filers will not get the same benefit that electronic filers get when filing a non-conforming document. The latter get seven days to correct it and the earlier filing date controls. (See item 3 above). We should be tracking these paper filings the same way, so the filers get the same benefits."

Committee response: The Committee spent considerable time discussing these comments, which invoke significant concerns pertaining to Access to Justice. The comments are addressed to non-electronic filing post-adoption of the electronic filing rules. The Committee considered that filings in these cases would entail immediate if not ultimate personal interaction between a non-electronic filer and court staff, allowing for contemporaneous discussion of what is needed to complete a non-electronic filing. In other words, a filer would not be thwarted in an attempt to file without having opportunity to discuss the issue in person at the clerk's window.

The comments also focused on the seven day "correction window" provided to

electronic filers, suggesting or requesting that a similar window be expressly provided to non-electronic filers. In discussion, the Committee ultimately concluded that a specific seven day window in Rule 6(c)(2) might actually serve to *take away* more beneficial provisions of existing applicable procedural rules and practices for correction of non-conforming non-electronic filings. In other words, non-electronic filers presently, in practice, are accorded significant latitude and court staff informational assistance in the process of completing their filings. To prescribe a seven-day limit on correction of such filings would actually serve to provide a shorter window of time than is presently observed in practice to permit correction of filings. To address these concerns, the Committee determined that an addition will be made to the Reporters Notes to this rule, indicating that the amendment is not intended "to either expand, or contract, existing procedural recourse for correction of (non-electronic) filings. It is anticipated that correction of such filings will be addressed in the case-specific circumstances, consistent with rules of procedure applicable to the case in issue."

Insofar as the comments requested that there be specific notice that a filing is noncompliant, and of the specific actions needed for correction, the Committee agrees, and adds reference in Rule 6(c)(2) to a requirement that notice of rejection, and the reasons for rejection, will be provided to the filer.

As to the above comments, see also, suggestions of Judge Toor for a staff procedural guidance memorandum ("Processing Defective Filings") and form to be provided to litigants whose filings have been rejected, advising as to reasons for rejection and measures required to correct non-compliance. In its discussions, the Committee noted and assumed that the Court Administrator's Office would definitely issue procedural guidance documents for staff, as well as forms to provide notice and advice to litigants of specific means to correct filings and secure acceptance, as part of the process of implementation of the new case management system. Judge Toor's suggestions, and draft advisement form, are included in the record of the present promulgation recommendation.

As to the request (VLA comment) that prior to dismissal or other dispositive action upon any filing that is deemed to be noncompliant by court staff, a judge must review the proposed action, the Committee concluded that due to the practical demands of review, processing, correction and ultimate entry of voluminous and various filings in the clerk's offices, such a requirement would be infeasible, and not warranted. In any event, unusual circumstances surrounding an attempted filing would likely be brought to the judge's attention by the clerk and addressed consistent with the applicable rules of procedure. The Committee determined not to adopt this suggestion.

Rule 6(c)(3) (Assigning a Case Number) (p.15)

Comments of Judge **Toor:**

"This says a case number (what we now call a docket number) will be assigned to a new filing. All well and good EXCEPT when the new filing is something that we would now be holding in some sort of

suspense file. A classic example is the answer that is filed prior to the complaint being filed. (This happens when a plaintiff starts the case by serving first and filing later under V.R.C.P. 3). We now hold these answers (after date-stamping them) until the corresponding complaint is filed, and then open the case and assign a docket number. Sometimes no complaint is ever filed (I presume because the parties settled the claim) so the answer is never docketed at all. Other items are treated the same way, such as unintelligible filings that cannot be treated as complaints: they are held for a period and then disposed of. I attach a memo on the recommended handling of such items that was recently distributed on behalf of the Civil Division Oversight Committee.

The new system needs to have some sort of "suspense file" or "holding file" where we can keep both paper and electronic documents that do not yet (and may never) need a docket number. I am unclear whether it will even be possible for someone to file an answer electronically if no complaint has been filed, but there needs to be some way to address that situation."

Committee response: Under present practice, this issue is addressed administratively, and the "early" responsive pleading is held in a pending file until the commencement (filing) requirement is completed. This practice would not change, as the electronic case management system has the capability of continuing to do so. The Committee determined to add clarifying Reporters' Notes to proposed Rule 6(c)(3) to expressly address this issue, and these have been added to the draft.[6]

Note that this comment was made to Rule 6(c)(3) which addresses non-electronic filing. The same issue arises in electronic filing. As a result, language is added to the Reporter's Notes to Rule 5 to address the issue as it is discussed in the Reporter's Notes to Rule 6.

Rule 6(d) (Appeals by Permission) (p. 15)

Comment of Judge **Toor:**

"Why are interlocutory and discretionary appeals required to be filed electronically once the new system is in effect? What about the pro se filers who do not opt in? I am concerned that we are moving down a path toward limiting public access to the courts."

Committee response: This provision is deleted from the draft recommended for promulgation.

Rule 7: Format of Documents.

Rule 7(c) (Format Requirements for Nonelectronic Documents) (p. 17)

The format requirements for nonelectronic documents should be removed **(VLA):**

[6] "...in such cases, a responsive pleading may be filed prior to fiing of the summons and complaint. Such pleadings will be retained in the system administratively, in a "holding" file, pending filing of the summons and complaint, upon which, the case will be opened and a case number assigned." Identical language was also added to the Reporters Note accompanying Rule 5(b)(5).

"We ask you to remove all, or as many as possible, of the format requirements for nonelectronic documents listed in Rule 7(c). These create a barrier to justice for many unsophisticated self- represented litigants. The text of the rule is as follows:

> (c) Format Requirements for Nonelectronic Documents. A nonelectronically filed document must:
> (1) be clearly legible, with all text visible and dark enough to be readable on a scanned image;
> (2) be formatted as required by the applicable rules of procedure;
> (3) be printed on white paper;
> (4) not be secured by staples;
> (5) use exhibit separator pages instead of exhibit tabs; and
> (6) contain a certification that it complies with Rule 7(a)(1) of the Vermont Rules for Public Access to Court Records.

It is reasonable and desirable for the Clerk's office to encourage people to file in a way that does not create an excessive administrative burden on the clerks. For example, the Court can (and does) provide form pleadings to encourage people to file in an efficient manner. However, mandating requirements like legibility and color of paper by rule, with the penalty for noncompliance being that the document will be rejected, is too harsh and violates the Constitutional requirement that the Courts remain open and impartial. Vt. Const., ch. 1, art. 4 and ch. II, art. 28."

Comment of Judge **Toor:**

"Rule 7(c): This sets limits on paper filings, such as that they must be on white paper and be scannable, and have a certification of compliance with the Rules for Public Access. I see three issues here. The first is that some exhibits that may be attached to a filing (whether a pleading or a motion), such as contracts in small fonts or old wrinkled and creased photos, are not going to meet these requirements and cannot be made to. Rule 8 addresses this issue for exhibits offered or admitted "into evidence," but attachments to pleadings and motions are not covered by that rule.

The second issue is that we often get hand-written filings that would not meet the requirements here, such as ones written in pencil on yellow paper. What will happen to those? If the person is at the counter and the document is short we could perhaps offer them white paper and a pen and have them rewrite it, but that will not work for the 25 page handwritten diatribe or for things that come in by mail.

The third issue is how the heck will Inmate No. 275643 in Mississippi, or grandma who can barely see or hear up in the Kingdom but is being evicted and needs to file an answer, know what the Rules for Public Access are and whether their filings are compliant? And if they file by mail without such a certificate and we send them a letter saying they need to file one before we docket their filing, many weeks may go by, they may never get us the form, and they may be defaulted or otherwise have urgent matters delayed.

I am extremely concerned about the unfairness of forcing a square peg into a round hole here, making the process more important than the substance. We need to ensure that pro se parties, especially those who often already face significant challenges financially, emotionally, and geographically, have access to the court system and feel they are being treated fairly. **We should accept any filings we get in these situations and treat them as Rule 8(c) treats exhibits that cannot be scanned. "** (emphasis in original document).

Committee response: In consideration of the comments, a number of the formatting requirements for non-electronic documents in the draft are removed. These included (c)(3)(white paper); (4) no staples and (5)(exhibit separator pages). The requirements of legibility, formatting as required by applicable rules of procedure, and certification of compliance with VRPACR 7(a)(1) are retained. An

addition is made to the Reporters Note, reflecting these deletions, but recommending that filers remove staples from documents to facilitate scanning by court staff.

Rule 8: Exhibits.

Rule 8(a)(Filing of Proposed Exhibits)(p. 18)

Comment of Judge **Toor:**

This rule says that any exhibit OFFERED in evidence will be "added to the electronic casefile." First of all, why would we enter ones that were offered but not ADMITTED into evidence? That is not how the rules of evidence work! Particularly if the document is excluded for reasons having to do with embarassing personal information, financial information, trade secrets, prior criminal convictions, etc., why on earth would we make them now part of a publicly available file? This could also add a huge amount of material that we would otherwise not deal with at all, such as in a recent case I had that involved whole categories of documents that I excluded at trial. Only exhibits that are ADMITTED should go into the system, as is the case with paper files now.

Committee response: The Committee determined to add the qualifying language "…unless the offer is withdrawn". In addition, the Reporters Notes explain that the rule is intended to reflect the policy that if a document is "offered into evidence" and not later withdrawn, it should be made a part of the electronic case file for purposes of appellate review of the decision to reject the offer.

Rule 9: Signatures.

Rule 9(a)(2) (Content of Signature Block)

Comment of Judge **Toor:** Same as to Rule 5(b)(3): "Let's get phone numbers on the signature blocks."

Committee response: Addressed above, Rule 5(b)(3). No change.

Rule 9(a)(4) (Stipulations as to merits) and 9(b) (Multiple Signatures)(p.19)

"Under Rule 9, I wasn't clear on the procedure for signing for opposing counsel in a routine document like a discovery schedule or stipulated motion to extend time. Rule 9(b)(1) seems to suggest that multiple electronic signatures are only permitted where the other signers are "other parties or counsel aligned in interest with the filer." Obviously two litigation opponents aren't going to have aligned interests, so that would suggest that Rule 9(b)(2) applies, and any stipulated motion would need to be hand-signed. As a matter of policy, I might suggest that for routine motions where attorneys often sign for one another – stipulated motions to extend time or stipulated Discovery/ADR schedules – the efiler be permitted to sign electronically for opposing counsel." **(Lumpkin).**

Committee response: The Committee discussed and decided that the efiling rules do not change current practice of how and when one attorney can represent opposing counsel's assent to a motion. The Committee initially suggested a comment in the Reporter's Notes. No change is made to the proposed rule because it addresses a question of

substance (when can an attorney sign for another attorney) as opposed to mechanics of efiling.

Rule 9(c) (Documents Submitted Under Oath)(p. 19)

With passage of S. 105 (Act. No. 77, 2019 Adj.Sess.), this subsection is amended to reflect the statutory text of new 4 V.S.A. § 27b, Electronically Filed Verified Documents.[7] However, the statute contains exceptions to the authorized procedure, and documents may be created under the former method as it was contained in the proposed rule as it went out for comment. To deal with these situations and others, the redrafted rule allows use of either of the two options.

Rule 10: Payment of Court Fees and EFiling Fees.

Comments of Will **Kraham:**

"I have been using PACER (Public Access to Court Electronic Records) and the CM/ECF (Case Management/Electronic Case Files) electronic filing system in federal court for years. As a CJA Panel attorney, I pay no fees for viewing documents (the normal fee charged is $0.10 per page, capped at $3.00 per document). More importantly, the federal court does not charge any fee for electronically filing any document; further, paper filings are always accepted in lieu of electronically filing. I receive automated electronic notification from the court of all filings in any case where I have entered an appearance, and can inspect the filed document(s) once without charge."

"…I understand from presentations in Windham that the "efiling fee" paid to the vendor will be $5.25 per "envelope", plus an approximate 3% surcharge to offset any credit card fee incurred by the vendor. I believe that it is a mistake to charge for filing documents, and I question whether a mandatory fee paid to a vendor, and not the State, would withstand a legal challenge.

Should the vendor[8] make money from a Vermonter's constitutional right to seek justice in our courts? (*citing Vermont Constitution, Ch. I, Art. 4*). A filing fee paid to the state[9] is a completely different animal than an artificial fee paid to enrich a Delaware corporation with its principal office located in Texas whose stock is traded on the NYSE."

Committee response: Proposed Rule 10(d)(2)-Exemptions--provides that "Whenever a statute exempts a particular filer from paying a court filing fee, that filer will also not be required to pay an efiling fee." Thus, as examples, any filer

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[7] "(a) A registered electronic filer in the Judiciary's electronic document filing system may file any document that would otherwise require the approval or verification of a notary by filing the document with the following language inserted above the signature and date:
I declare that the above statement is true and accurate to the best of my knowledge and belief. I understand that if the above statement is false, I will be subject to the penalty of perjury.
(b) A document filed pursuant to subsection (a) of this section shall not require the approval or verification of a notary.
(c) This section shall not apply to an affidavit in support of a search warrant application or to an application for a nontestimonial identification order."

[8] The total compensation for the CEO of Tyler Technologies , Inc. was close to 20 million dollars last year.

[9] See State v. de Macedo Soares, 2011 Vt. 56, ¶ 11, 190 Vt. 549, 551, 26 A.3d 37, 41 (2011).

qualifying for IFP status, or indigency for assignment of counsel, or in relief from abuse/protection order proceedings, would not have to pay any efiling fee.

This comment questions the appropriateness and constitutionality of charging for electronic filing, with the proceeds going to the vendor who provides the electronic filing system. The Vermont Judiciary after an open competitive process selected Tyler Technologies to provide a case management and electronic filing product that provides electronic filing through a Tyler Technologies portal that is funded on a fee for service basis. The purpose of these rules is to establish the procedures for electronic filing using that system. It is beyond the scope of these rules to redetermine the choice of system and provider. It is also beyond the scope of these rules to determine the constitutionality of the funding system. Rule 10(d)(2) does, as noted, provide exemption from payment of efiling fees for those qualifying for IFP and other statutory, indigency-based waiver of fees and costs.

Rule 11: Service.

Rule 11(f) (Notice of Court Orders and Documents)(p. 24)

Comment of Judge **Toor:**

"Rule 11(f): A minor point, but this refers to notices and orders being "filed" by the court. The usual terms are "issued by" or "entered by" the court. One does not think of the court "filing" documents. "

Committee response: The word "Issued" is substituted for "Filed" in Rule 11.

Rule 12: Official Record; Certified Copies.

No comments were received addressing this Rule.

Other Comments, Not Directed to a Specific Section of the Proposed 2019 VREF.

--Utilize the Court's Self-Represented Litigants Committee **(VLA):**

"We request that the Proposed Rules be referred to the Court's Self-Represented Litigants Committee to address the issues self-represented litigants are likely to face as the system of electronic filing is implemented. This is a big change in our judicial system. It is difficult to anticipate all the problems self-represented litigants will face as the system changes. We need to acknowledge that it will be impossible to come up with all of the necessary solutions at the outset.

For this reason, we request that the Committee be asked to gather and analyze the data about the problems self-represented litigants are facing as the electronic filing system is rolled out so that the Rules can be amended before additional counties are brought on-line. This should include gathering the complaints from litigants, opposing parties, judges, clerks, community groups and others about how the electronic filing is affecting self represented litigants. It should also include analyzing the data about how often and why filings – both non electronic and electronic – are not accepted into the electronic case file for

failure to comply with the rules. *See* V.R.E.F. (proposed), 5(d)(2) and 6(b).

The Committee should be asked to focus on developing and implementing solutions to the problems identified such that electronic filing poses no barrier to any Vermonter seeking access to the courts."

--The Constitutional Rights of Access to Justice:

The Rules for Electronic Filing, as promulgated and/or implemented, should never have the effect of impeding the Constitutional right of every person to have free and uninhibited access to the courts, and to justice, "freely, without being obliged to purchase it, completely and without any denial; promptly and without delay; conformably to the laws." Vermont Constitution, Chapter I, Article 4 (also, Chapter II, Article 28). **(Kraham; VLA)**

--Providing a Press Review Queue, If not Remotely, at Court Kiosks.

See, Comments of **CNS,** supra. on Rule 5(d)(1) and PACR Rule 7(a)(1) redaction compliance.

Committee responses: See responses, modifications, suggestions made in response to all comments concerning Access to Justice Issues, and the responses to comments about Rules 5(d)(1) and VRPACR 7(a)(1).

Comments re: Conforming Amendments to VRECP; VRCP; VRPP; VRFP and VRAP.

These proposed conforming amendments were published for public comment at the same time as the proposed 2019 VREF, with the same comment closing date (8/19/19).

No public comments were received expressly addressed to these conforming amendments.

Draft: 10/1/19 [1:39 p.m.]