

VERMONT SUPREME COURT
SPECIAL ADVISORY COMMITTEE ON
RULES FOR ELECTRONIC FILING

MINUTES OF MEETING, December 9, 2019

At the request of Committee Chair Justice Dooley, a Committee meeting was convened to consider proposed revisions of VREF rules 9 (Signatures) and 12 (Official Record), which had been identified as necessary following transmittal of the proposed VREF rules to the Court with recommendation for promulgation on November 15, 2019. The meeting commenced at approximately 12:03 p.m., with members both present and participating by phone. Present/participating were Chair Justice John Dooley, Judge Kate Hayes; Chasity Stoots-Fonberg; Tari Scott; Jeff Loewer; Teri Corsones. Liaison Justice Beth Robinson, Walt Morris, Committee Reporter and Andy Stone were also present. Absent were Eric Avildsen, Su Steckel, and Judge Beth Mann.¹

1. Opening; Announcements. Justice Dooley explained that in the course of close final review of the proposed VREF rules that had been approved by the Committee on November 8th with recommendation for promulgation, the need for revision of parts of two of the proposed rules (9 and 12) had been identified. Reporter Morris and Emily Wetherell prepared a memorandum which included these proposed revisions, which had been sent to Committee members via email on December 4, 2019.

2. Report on Meeting of Legislative Committee on Judicial Rules, December 6, 2019.

Justice Dooley reported that he, Judge Morris and Emily Wetherell had attended the LCJR meeting, and provided an overview presentation of the proposed 2020 VREF rules. While there were some questions presented by LCJR members, such as when service is deemed to occur in electronic filing; manner of notification of filers of filings that are not accepted and the reasons why; and how certain after-hours electronic filings (such as search warrant applications and RFA complaints and orders) would be treated in the new system, there were no substantive objections expressed as to the proposed rules.

Senator Clarkson expressed concern that while informational assistance and accommodation to self-representing parties was certainly appropriate, system features should not have the unintended consequence of dissuading people who should consult with attorneys in complicated matters from not doing so, and proceeding without counsel to their detriment. In the context of commenting on the LCJR meeting, Emily Wetherell indicated that the Court had provisionally approved of promulgation of the 2020 VREF rules, subject to resolution and review of the issues that had been identified as to Rules 9 and 12, and noticed for Committee resolution at the present meeting.

3. Review, Discussion, and Decision re: Draft Revisions of Rules 9 and 12.

The proposed revisions were needed to address issues with the provision of Rule 9(c)(2) related to the filing of documents that are required to be signed and notarized, particularly nonelectronic filing of

¹ Prior to the meeting, members Mann, Steckel and Avildsen indicated that while they were unable to attend the reading, they had each reviewed and approved of the proposed revisions of Rules 9 and 12 under consideration that had been circulated to Committee members in advance.

such documents, and the interaction of that provision to Rule 12(b), under which all paper filings are scanned and converted to electronic form as the official record, and are thereafter *not retained* by the court.

As the memorandum sent to Committee members indicated, under Rule 9(c)(1), signed and notarized documents may be scanned and filed electronically (the nonelectronic versions thus being retained by the filer), thus no issue is presented as to preservation or retention of the paper copies of such documents. However, the promulgation draft text of Rule 9(c)(2) requires that nonelectronic filers file “the *original*” of the signed and notarized document. The issue being what happens, other than disposal of such original nonelectronic documents after scanning and conversion to electronic form?

For most signed and notarized paper filings using court forms (such as IFP, PD applications and affidavits of income/assets in Family Division), this would not present a problem. If filed at the clerk’s window, once scanned, the paper document can be immediately given back to the filer’s possession. Even if the filer did not receive the document back, there would be no unique need to keep the original paper (which could be reproduced from the electronic record, if necessary, or the document could be redone, if needed.) But a problem was identified in that nonelectronic filers might, however rarely, simply file (especially if filing by mail) a sworn paper document that is of unique use and value apart from the pending case, and that such uniquely valuable documents could be lost to the filer. Examples of such documents were provided in an addition to the redrafted Reporter’s Notes.

The suggested changes would help prevent loss of a paper filer’s unique signed and sworn documents, and provide a simple process for filing--the filer either presents the document at any court location for scanning into electronic format, retaining the original, or sends a paper copy to the court for filing, again retaining the original. In either case, retention must be for the two year/case closure period prescribed by 9(c)(1)(B).

There would be no need for the filer to either register as an efiler (which is not required of self-representers) solely to preserve an original sworn document, or try to scan and transmit the scan by some other electronic means (such as an email, which we do not want).

While Rule 12(b) (court scans in paper filings and does not retain) applies to all paper filings, 9(c)(2) only applies to documents requiring approval or verification by notary. The universe of subject documents that are of concern is thus not that great.

The text of the proposed revisions of Rules 9 and 12 (with suggested clarifying Reporters Notes) was as follows:

“RULE 9. SIGNATURES

* * * * *

(c) Documents Requiring a Notary.

(1) *Electronically Filed.* Electronically filed documents that would otherwise require the approval or verification of a notary must be filed by one of the following methods:

(A) in accordance with 4 V.S.A. § 27b; or

(B) The original—signed and attested as provided in the applicable rules of procedure or other provisions of law—must be scanned and efiled by the efiler. The efiler must retain the original of the document available for inspection by the signers or the court until the longer of two years from

the date of e filing or final disposition of the action, including the disposition of all appeals or the running of the time for appeal.

(2) *Nonelectronically Filed.* ~~A nonelectronic filer must file the original of the signed and notarized document.~~ To nonelectronically file a document that requires the approval or verification of a notary, the filer must sign and the document and have it notarized as provided in the applicable rules of procedure or other provisions of law. The filer is not required, however, to submit the original. If the original is not filed, the filer must retain the original of the document available for inspection by the signers or the court in the manner and for the duration specified in subparagraph (c)(1)(B). The filer may either:

(A) At any court location, present the original to be scanned into electronic format by court staff and retain the original; or

(B) Make a paper copy of the original, send the copy to the court for filing, and retain the original.

Reporter's Notes—2020

* * * * *

The procedure for filing a document signed under oath is provided in Rule 9(c). There are two methods for e filing. An e filer may follow the procedure set out in 4 V.S.A. § 27b that states the e filer may file “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.’ ” 4 V.S.A. § 27b(a). Alternatively, an e filer may have the document notarized and e file a copy and retain the original or electronic copy of the filing for the duration of the litigation or a period of two years, whichever is longer, in case a dispute arises.

A nonelectronic filer must have the original document signed and notarized but is not required to submit the original for filing. The filer may either bring the document to any court location for court staff to scan into electronic form or make a photocopy of the original and send it to the court for filing, such as by mailing. If the original is not filed, the nonelectronic filer must retain the document in the manner and for the duration specified in subparagraph (c)(1)(B) herein. Caution should be used in nonelectronic filing of the original of any signed and notarized document because under Rule 12(b), the court is not required to maintain a nonelectronically filed paper document after it has been converted to electronic form. This may not be of concern for paper documents routinely submitted in proceedings on court forms such as applications to proceed in forma pauperis, or for assignment of counsel, or affidavits of income and assets in the family division. However, this may present particular concerns as to preservation of an original signed and notarized document that is of use and value extrinsic to a case in which it may be filed. See Reporters Notes to Rule 12(b).

RULE 12. OFFICIAL RECORD; CERTIFIED COPIES

(a) **Official Record.** If an electronic version of a document exists in the electronic case management system, it is the official record regardless of whether the document was electronically filed or nonelectronically filed and converted to electronic form.

(b) **Maintaining Nonelectronic Document.** Unless otherwise provided, the court is not required to maintain a nonelectronically filed paper document after it has been converted to electronic form.

(c) **Certified Copies.** Certified copies may be issued in the conventional manner or in any manner authorized by law.

Reporter's Notes—2020

Under Rule 12(a), irrespective of whether a paper version of a document exists, the electronic version, whether efiled or scanned from a paper version, is the official record. This enables the court to destroy the paper version of records. While some documents are created and filed solely for purposes of the pending case, filers—particularly those who are filing on paper—should not file the original version of an important document that is of extrinsic use or value apart from the case in which filed, for any reason, including as an attachment or exhibit. For example, the original paper rental lease that is the subject of litigation should not be filed. Similar documents would be a will, trust document, power of attorney, deeds of conveyance of interests in realty, sworn financial statements prepared for commercial use, and the like. The paper document may be scanned and destroyed and, thus, become unavailable to the filer in the future. Paper filers may file a copy of the document or present the original in person at a court facility for scanning and return.”

After brief discussion of the proposed changes, on motion of Teri Corsones, seconded by Judge Hayes, the Committee unanimously approved of the proposed revisions of Rules 9 and 12 for promulgation by the Court.²

4. Discussion of Service Issues under Rules 5(e) and 11(b).

The Committee then engaged in a brief discussion of when service and filing are deemed to occur in electronic filing, and the Odyssey system in particular. As a general matter, it was recognized that service upon a recipient is deemed to occur on the date when a filing is accepted by the clerk, and notice of the filing is automatically generated to registered parties. For any deadline imposed on a filer, the date of filing is when it is submitted, subject to the provisions of Rule 5 including for correction and assignment of a filing date for timely correction. The date of service may be later, because the system will not serve a document until it has been reviewed and accepted. Committee consensus was that experience with filing and service as electronic filing is rolled out would serve to inform any needs for revision, either in the Odyssey system functions, or provisions of the procedural

² The Committee adopted and approved of the proposed revisions that had been previously circulated, without any changes. The Court promulgated the 2020 VREF Rules as final on December 10, 2019, effective March 2, 2020.

rules. There were no particular amendments identified, and no substantive action with respect to filing or service, taken as a result of the discussion.

Upon completion of the referenced items of business, the meeting was adjourned at approximately 12:45 p.m. A next meeting date of the Committee was not established.

Respectfully submitted,

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