

VERMONT SUPREME COURT
SPECIAL ADVISORY COMMITTEE ON
RULES FOR ELECTRONIC FILING

MINUTES OF MEETING, June 5, 2020

The Committee meeting was convened (via “Teams” video conference) at approximately 9:36 a.m. Present/participating were Chair Justice John Dooley, Judges Kate Hayes, David Fenster, Tom Durkin and Beth Mann; Chasity Stoots-Fonberg; Tari Scott; Jeff Loewer; Teri Corsones; Eric Avildsen and Su Steckel. Liaison Justice Beth Robinson, Court Administrator Pat Gabel, Committee Reporter Walt Morris, and Andy Stone (Mr. Stone, briefly) were also present. There were no absences.

1. Opening; Announcements; Approval of Minutes. Justice Dooley indicated that as anticipated at the last Committee meeting in December, the primary purpose of the present meeting would be to identify and consider any post-promulgation issues which have arisen in implementation of the 2020 VREF. Draft minutes of the Committee meetings held on March 8, October 16, November 8 and December 9, 2019 prepared by Reporter Morris were unanimously approved on motion of Tari Scott, seconded by Judge Kate Hayes.

2. “Coordination” Meetings with Chairs and Reporters of Other Advisory Rules Committees.

Chair Dooley indicated that the first of a series of meetings with other Advisory Committees leadership had been held with Civil Rules (Allan Keyes and Kinvin Wroth) on May 21st. Dooley indicated that discussion had focused on processes by which both VREF and Civil Rules committees could be and remain in effective communication on proposed rules of mutual interest. In the May 21st meeting, it was noted that since a number of significant Family, Probate and Criminal procedural rules adopt provisions of the civil rules by reference, effective inter-committee communications with Civil were especially important, and that review and development of rules pertinent to electronic filing vested in the civil rules, to address unique needs of practice in that division, would still be needed. Specific issue areas identified go to filing and service, “elevated” access to electronic case records by attorneys, and efficient methods of “gatekeeping” filings of litigation documents for which protective orders against public disclosure are sought (ex., for trade secrets, business processes, financial information). And of importance, to rules governing the non-electronic filing that will continue to occur, even though the case management system, and the bulk of filing, move to electronic mode. Allan suggested that an approach similar to the federal system, in which there are “local” rules supplementing general procedural rule, be considered, applicable to each of the divisions. Justice Dooley requested that the Civil Rules committee consider a review of the 2020 VREF in relation to the body of the civil rules, and provide recommendations of priorities for amendments to VREF (or civil amendments that would implicate the VREF). Civil Rules Chair Allan Keyes indicated that the request would be considered at the next committee meeting.

2. Identification, Review, Discussion, and Decisions re: Post-Promulgation Amendments of 2020 VREF.

In advance of the meeting, Chas Stoots-Fonberg and Andy Stone had prepared a marked-up version of the 2020 VREF with suggestions of text and presenting issues that warranted review and possible revision. With reference to that document, Committee Chair Dooley lead the Committee through a section-by-section discussion of these issues and suggested revisions of text and Reporter’s Notes. As the discussion progressed, there were additional comments raised by Committee members as to sections that might warrant revision.

These were as follows:

Rule 1:

At the outset, Teri Corsones raised an issue as to the provision of 1(f) which authorizes the Court Administrator to approve of alternative means of filing of certain documents by certain filers to the electronic case file. This is described in the accompanying Reporter's Note as authorizing "bulk" filings by state's attorneys of certain documents for many cases, notably informations and affidavits in advance of block-scheduled arraignments. This has apparently appeared as an issue in the Windham-Orange-Windsor roll out. Tari Scott and Jeff Loewer indicated that this is a systems capability issue that is being worked on with the state's attorneys, who have a data management system that is not easily compatible with the judiciary's CMS. Jeff Loewer emphasized that the issue is on its way to resolution and has an interim resolution via a direct link to Odyssey File and Serve. A systemic solution is contemplated; but at present, it is not correct to say that 1(f) has been invoked by the Court Administrator. Committee consensus was that this issue is to be followed, but no amendment of the rules is necessary to address it at this time.

Rule 3(b)(1) (When Non-Electronic Filing is Permitted)

Some ambiguity exists as to this subdivision, which exempts from the requirement of efileing "self-representing litigants" who have "not filed electronically in the specific case". Are non-lawyer government agency personnel who file documents with the court in the course of their official responsibilities required to efile? These would include such personnel as DCF caseworkers filing disposition reports; DOC officers filing presentence investigation reports; OCS staff filing financial and child support calculation documents and draft orders; and others. The Committee consensus was that such governmental personnel have always been contemplated as efilers, and certainly not subject to exemption. To clarify their status as mandatory efilers, the Committee decided that an amendment to Rule 3(b)(1) should be recommended, adding the phrase, "who is not filing on behalf of a state agency", to establish that such personnel are not provided an exemption from efileing as "self-represented litigants".

Rule 3(b)(3) (Non-electronic filing permitted by the Court "...to protect confidentiality or for other good cause; Clarification to permit filing of handwritten stipulations)

This exception as promulgated authorizes non-electronic filing to protect confidentiality "or for other good cause". The Reporter's Note provides as an example of where good cause might be found cases in which nonlawyers are representing a business. However, greater clarity is suggested to expressly authorize non-electronic filing of such documents as a handwritten stipulation, or marked up printed stipulation, finalized at court premises at or in connection with case proceedings, where parties and the court seek to have closure of the issue or merits without delay. After discussion, the Committee concluded that a new express exception for nonelectronic filing of such documents should be added, to authorize nonelectronic filing of handwritten or marked up stipulations, with court permission (these would then be scanned into and made part of the electronic record by court staff).

Rule 3(d)(2) (Duration of Nonelectronic Filing by Self-Represented Litigant)

This subdivision as promulgated requires that a self-represented litigant who commences efileing in a case must continue to efile throughout the duration of the case. The issue presented is whether a self-represented litigant should have opportunity to withdraw from efileing. Andy Stone's comment suggested that this bar to withdrawal should be reconsidered, since

enforcing it has been and will continue to be an impossibility, warranting at least some guidance in the rule for when and under what conditions a self-representer should be permitted to withdraw from efilings status. Su Steckel expressed the view that from the attorney perspective with a self-representer on the other side, it is critical to know when eservice will suffice and when non-electronic service by mailing is required, as well as visits to the post office for mailing/receipt of mail, during pandemic times. She would not amend the existing rule. Eric Avildsen took the opposite view. He indicated that there are a significant number of cases in which VLA and allied attorneys enter limited appearances and filings, then withdraw from representation, leaving clients without the ability to continue case participation electronically. In these circumstances, parties who become self-representers must have the option of withdrawing from efilings to have access to justice. After discussion, the consensus of the Committee was that self-representers should be permitted to withdraw from efilings status, *provided* that notice to the court and other parties was provided of current and accurate subsequent contact address for purposes of service by others, and provision of notifications from the court. A revision of 3(d)(2) to this effect is to be drafted, for consideration at next meeting.

Rule 4. (Registering Process; Responsibilities (Clarification of Registration Status to File and Serve Electronically-“Individual User” vs. “Firm Registrant”; Odyssey and Portal Registration).

Chas and Andy had indicated in their comments that confusion has been experienced as to when an efiler may register as an “Individual User” vs. a “Firm” registrant in the Tyler/Odyssey system, and when registration in the Portal and authorization for specific elevated case record access is necessary. In addition, there have been issues as to efilers from governmental agencies, and whether they can register as an individual, or must register within a “firm” registration. Chas indicated that regardless of status, registration is required to efile documents; however, in order to access filings by *other* parties in a case—to see the entire case file—an efiler must also register in the Portal, and receive approval for elevated access. Both are required. An additional issue, specific to attorneys, is whether attorneys must include on each filing their “bar” (attorney license) number, or their “ERN” (ecabinet) number. The Vermont-specific information on the website refers to “bar” number, and this is what should be used. As to this issue, while it was agreed that the “bar” number was necessary to link and access attorney filings, there was no specific amendment to 4(a) agreed to to require this. In discussion, it was suggested that two other approaches would be to address “bar” number in a Reporter’s Note, or deal with the issue through administrative policy guidance and manuals.

However, on the issue of electing “user status” in the process of registration, the Committee consensus was to add specific text to 4(a) providing that in registration, an efiler must elect user status (choose the appropriate role), whether that is as an independent user, or as part of a “firm” registration. Such an amendment will be drafted, with further clarification of the process in the accompanying Reporter’s Note. The discussion of independent and firm registration status lead to consideration of whether it was necessary to have a definition of “firm” to clarify who would be filing in that user status. Consensus was to have a definition added to Rule 2, employing language consistent with Tyler/Odyssey terminology, to clarify the meaning of “firm” as used in 4(a). This, to specifically include governmental agencies and law enforcement entities as “firm” filers. Individuals with responsibility/authority for making case filings would file under the umbrella of a “firm” registration managed by a firm administrator. The authorized filer would have their own filing status, but file under the firm’s registration. Eric Avildsen described Vermont Legal Aid’s use of the Tyler firm registration—the administrator establishes the firm account; each attorney then registers with the system, providing their bar number, and indicates that they are registering to efile within the firm’s account number. When attorneys are authorized by the “firm”—VLA—their bar numbers are linked to the firm account. For organizations registering as firms *without* attorneys (which could include business entities), Andy has created a specific guidance document with instructions. The specific text of the proposed amendment will be considered by the Committee at next meeting.

A separate issue discussed in context of the Rule 4 amendments was the scope of access provided to anyone who chose to use the portal to view case information without portal registration, credentialing, and approval for elevated access. This relates to Rule 4(c) Jeff and Chas clarified that one can log into the Portal at the courthouse as an “anonymous” user, but the case information provided in this way is very limited. The Court Administrator is considering means of expansion of accessible case information, balancing system capabilities with security concerns, concerns for confidentiality, and prevention of data “scraping”. The Committee decided that clarification of the means of access is warranted, with the addition of the phrase, “or documents not accessible over the internet” to the existing first sentence of 4(c), to be made to the text.

Rule 5. 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 the opportunity 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 rules. There were no particular amendments identified, and no substantive action with respect to filing or service, taken as a result of the discussion. However, Justice Dooley indicated that if there were any proposed amendments of VREF that would relate to time deadlines or calculation of time, they should be provided to the Advisory Committee on Rules of Civil Procedure for review and comment to assure consistency.

Rule 5(g) (Separate Filing of Components of Criminal History Record Information)

This rule requires that criminal history information be filed in three separate categories: (1) records of Vermont convictions and sentences; (2) records of convictions and sentences in other jurisdictions; and (3) any other criminal history information (ex. Bail information; police incident reports; “rap sheets”; and records of dispositions other than convictions. Judge Hayes indicated that in the WOW roll-out, the State’s Attorneys are filing all criminal history information in confidential status, because they are unable to “sort” this information given the limitations of their case management systems, and present incompatibility to the judiciary’s electronic case management system. She, Jeff Loewer, and Chasity Stoots-Fonberg all indicated that there had been close and continuing work with the State’s Attorneys to resolve this issue. Jeff indicated that the problem would be resolved to enable compliance with the rule, as well as the SA’s ability to “bulk file” arraignment documents consistent with Rule 1(f); and that the present process is recognized as interim only. At present, a public request for review and copy of a record of conviction directed to the clerk as to a particular case would be considered as going to publicly accessible information, unless compelling reason were otherwise presented.

Rule 7(a)(5) (Format of Documents; Certification of Compliance with Public Access Rules)

The rule requires that the filer provide a “certification of compliance” with PACR “by the method specified in these rules”. Andy Stone’s written comment was that this provision is unclear and appears to suggest that a certification is separately required for each document in a filing. The Odyssey practice is that many documents may be aggregated in a filing “envelope”; the filer only clicks the

certification (submission agreement) button once for all documents in the envelope.¹ David Fenster suggested that clarification might be provided in a Reporter's Note, without amendment of the rule, to the effect that "the rule contemplates that the certification requirement is satisfied by checking the submission agreement." Judge Hayes commented that since 7(a)(5) applies to both electronic and nonelectronic filing, there should be a paper certification form available for non efilers to comply with the certification as well. Chas indicated that a team was working on development of that form for use by non filers. Apart from the discussion, and development of a paper form, no specific amendment to this provision of the rules was recommended.

Rule 8 (Exhibits)

Andy Stone's written comment was that a common question was "whether attorneys have an obligation to efile exhibits prior to the hearing or may submit them in hand at a hearing." The Committee consensus was that this was highly variable, depending on particular case circumstances, and whether a judge had made an order or request for pre-filing. And that no change in Rule 8 would be warranted.

Rule 10 (Payment of Court Fees and Efiling Fees)

There was brief discussion of the issue of fees, based upon Andy's written comment that "it was decided that all filers in the criminal division did not have to pay the Convenience Fee or Tyler Use Fee, including private counsel and even when a statutory fee is due." David Fenster asked whether this applied to a notice of appeal, or such other as related to a sealing or expungement filing, or to reopen a civil suspension.

The Committee consensus as to this particular issue was not to recommend any amendment to Rule 10, subject to further identification of particular statutory fees and their waiver or imposition in use of the efilings system, and administrative responses.

Rule 11(f) (Service; Notice of Court Orders and Other Documents)

¹ The advisement in the Vermont efilings General Policy and Procedure Guide, p. 6, states that: "OFS requires filers to check a box certifying that their filings comply with all applicable rules. It should be noted that OFS requires users to check this box for documents that are served, but not filed, though the certification applies only to documents filed with the court.

[Image of the Checkbox appears here in the Guide] *Note: Checking this box meets the requirements for a certificate of compliance under Vermont Rules of Public Access to Court Records Rule 7(a)(1) and Vermont Rules of Electronic Filing Rule 7(a)(5). Checking the box once will apply to all documents within an envelope. No separate certificate of compliance needs to be filed.* (emphasis added)

The screenshot displays a web interface for document filing. At the top, there are two dropdown menus: 'Test PLF' and 'Filing Attorney' (currently set to 'Vermont Admin'). Below these are 'Undo' and 'Save Changes' buttons. A dark banner labeled 'Submission Agreements' with a 'Need Help?' link is visible. Under this banner, a checkbox is checked, followed by a certification statement: 'I certify that I have reviewed the contents of this filing, and that the filing specifies any nonpublic record or contents, and protects those records from disclosure to the public consistent with the Rules for Public Access to Court Records. If any record or content was separated or redacted and filed as confidential, the actions taken to comply with the rules are stated in the "Comments to Court" field.' At the bottom of the interface are 'Save as Draft' and 'Summary' buttons.

The issue presented in Chas' written comment goes to method of transmission of notices, orders or other court-issued documents to efilers who are self-representing. As Chas indicated, at present there is no system capability of providing the notice to efilers self-representers electronically. In the roll-out, notices and orders are being mailed to these filers. Communications through Odyssey are being sent to attorneys by pulling attorney email addresses from their eCabinet registrations. Justice Dooley: "This is an amazing gap in functionality." Judge Hayes indicated that the need for prompt solution to enable self-representing efilers to receive notices in the same manner as attorneys is recognized, and a solution is being worked on. No specific amendment to the rule was recommended in consequence of this discussion. The status of implementation of the rule would be discussed as updates are provided.

"Clarifying" Reporter's Notes, Where no Rule Amendment is Made?

An issue that reappeared several times in the Committee's discussions of post-promulgation amendments was whether in lieu of an amendment of text in the existing rules, the accompanying Reporter's Notes could be "amended", or a new Reporter's Note incorporated as to the presenting issue, without an accompanying amendment of text of the rule. Justice Dooley and Emily Wetherell indicated that the generally-observed practice is that Reporter's Notes accompany specific amendments, and are not employed to in effect amend or edit a Reporter's Note accompanying a promulgated rule amendment. Reporter Morris indicated that while there might be some latitude for provision of clarity on a particular issue in a Reporter's Note accompanying a "new" promulgation, the clarifying Note should be closely related to the text of the new promulgation, and not just a free-standing amendment or clarification of a former Note. This is because of the importance of maintaining Notes that provide a consistent historic record of the development and changes made to procedural rules (and the reasons for them) over time. While noting the issue (rule amendment, vs. clarification in a "new" Reporter's Note), the Committee reached no final conclusion. Consensus was to revisit this, in view of the particular post-promulgation amendments that would or would not be ultimately recommended.

Before conclusion of the meeting, Court Administrator Pat Gabel provided a brief update as to the Judiciary's plans for expansion of court proceedings following CoVid interruptions. Ms. Gabel outlined the plans to move to conducting hearings via the Webex system, and anticipated trainings for judges and staff and hiring of personnel to make Webex proceedings widely available. In addition to unit-specific planning teams for resumption of operations, the Court is examining what changes established in the emergency Administrative Order 49 as periodically amended might be adopted as permanent.

Upon completion of the referenced items of business, the meeting was adjourned at approximately 11:49 a.m. The next meeting date of the Committee was established for Friday, June 26th at 1:30 p.m.

Respectfully submitted,

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

[7/10/2020]