[As approved by Committee on March 5, 2021]

VERMONT SUPREME COURT
SPECIAL ADVISORY COMMITTEE ON
RULES FOR ELECTRONIC FILING

MINUTES OF MEETING, June 26, 2020

The Committee meeting was convened (via "Teams" video conference) at approximately 1:44 p.m. Present/participating were Chair Justice John Dooley, Judges Kate Hayes and David Fenster; Chasity Stoots-Fonberg; Tari Scott; Jeff Loewer; Teri Corsones; and Eric Avildsen. Liaison Justice Beth Robinson, Court Administrator Pat Gabel, Committee Reporter Walt Morris, Emily Wetherell and Andy Stone were also present. Su Steckel, and Judges Tom Durkin and Beth Mann were absent.

Noting the presence of a quorum, Chair Justice Dooley opened the meeting, noting that the principal item of business would be a review of proposed amendments of the 2020 VREF as promulgated, based upon the Committee's comments and recommended redrafting of revisions following from the June 5, 2020 meeting.

ACTION ITEM: REVIEW OF PROPOSED AMENDMENTS

The draft revisions following from the June 5th meeting were circulated to Committee members in advance of the meeting. These were taken up, with Committee action on each as follows:

Rule 2 (Definition of "Firms"-as Related to VREF 4(a) Registration Requirements):

On June 5th, the decision was made to include a new definition of "Firm", to clarify some confusions which had arisen as to registration to efile as either an "independent user", or as part of a "firm" registration, both terms employed by Tyler in the Odyssey system and its instruction manuals. The intent was to clarify in the rule that in registration to efile, users would be required to elect a user status, and what those options are. Accompanying Reporter's Notes would provide further clarification.

In discussion, the Committee determined that the added definition would not be necessary. While Justice Dooley noted that it was important to have clear direction as to user status for the various efilers who would use the system (including self-representers, solo practitioners, and non-attorney filers such as DCF, DOC, police, and other governmental filers), Andy Stone indicated that the entire registration process is automated, and with accessible user manuals, registrants will be able to sort their way to the proper registration status. "Firm" status in Odyssey does provide administrative and management advantages for large law firms and other filing organizations. However, the Committee conclusion was to remove the added definition from the proposed amendments. Reporter's Notes accompanying the proposed amendment of Rule 4(a) will suffice to provide clarification as to user registration status options.

Rule 3 (Required Electronic Filing; Exceptions-Amendment of Three Subsections):

Rule 3(b)(1) (Governmental Agencies)

The Committee approved of revised text which clarifies that filers on behalf of government agencies, including non-attorney filers, must efile. The revised text provides that "A document may be filed

nonelectronically when: …(1) the filer, who is not filing on behalf of a government agency, is a self-represented litigant who has not elected to file electronically consistent with subdivision 3(d) and has not filed electronically in the specific case."[1]

Rule 3(d)(2)-Self Representer Discontinuance of Efiling (Three options considered)

From discussion of 3(b)(1), the Committee moved to consideration of whether a proposed redraft of Rule 3(d)(2), which provides for broader authority for discontinuance of efiling by a self representer, should be approved. At the meeting on June 5, the consensus of the Committee was to have a provision authorizing a self representer who had commenced efiling to discontinue efiling "after providing notice to the court and other parties." This rule as promulgated provides that "A self-represented litigant who commences efiling in a case must continue to efile throughout the duration of the case. The self-represented litigant may discontinue efiling only after obtaining a court order of discontinuance issued for good cause shown and after notifying all other parties that the litigant will not be efiling in the future." The amendment would not require court approval of a self-representer's decision to discontinue efiling, subject to a requirement (carried forward from the existing rule) of notification of the court and other parties prior to discontinuance.

Justice Dooley indicated that if this provision were approved, the only notice of discontinuance that would be effective (and should be required) is notice to the court and parties via the efiling system. He asked what the experience had been so far with this issue (self-representers seeking to discontinue efiling after having started) in the WOW units in the Odyssey implementation to date. Judge Hayes replied that there had been no experience with this issue to date, as there have been relatively few self-representers efiling. In any event, in her view, there should be provision for less burdensome withdrawal from efiling, since if a self-representer is not capable of continuing with efiling, either due to insufficient technological ability, or lack of access to wi-fi or computer resources, they should be forced to continue in that status. Eric Avildsen repeated his concerns, expressed on June 5th, about access to justice on the part of self-representers, and the challenges generally faced by these litigants. Chas Stoots-Fonberg indicated that in the eCabinet courts, the policy observed from the outset was that once an election was made to efile, that filer was required to continue efiling for the duration of the case.[2] In his earlier written comments, Andy Stone had noted that enforcing 3(d)(2) would likely be a "practical impossibility" (suggesting that some amendment of the rule might be warranted).

Ultimately, the Committee was divided as to whether (1) the proposed amendment should be adopted (which would permit discontinuance at the election of the efiler, subject to provision of notice), or (2) the existing rule should stand, without amendment (requiring a self-representer to continue efiling, once having elected to do so, subject to good cause and court approval for discontinuance). A clear majority of the Committee voted to recommend no amendment to 3(d)(2) (Eric Avildsen being the sole dissenting vote). The text of the amendment under consideration will be deleted from the draft.

Rule 3(b)(4) (Exceptions to Efiling; "Courthouse" Stipulations)

There was brief discussion of the text of this amendment, which had been approved at the June 5th meeting. The amendment would expressly permit the non-electronic filing of stipulations, agreements,

[1] The latter phrase, "…and has not filed electronically in the specific case" was subsequently deleted in the redrafting, as duplicative of the preceding reference to 3(d).

[2] That policy is reflected in the text of 3(d)(2) as promulgated, subject to the provision for discontinuance for good cause and with court approval.

or other case documents created or finalized while parties and or counsel are present at court premises in or related to proceedings, subject to permission of the court. In discussion, Committee consensus was that this amendment was not intended to alter the authority and discretion of the court in considering the other enumerated exceptions to non-electronic filing in 3(b), including those for "good cause" ((b)(3)), or "exceptional circumstances" ((b)(5)).[3]

Rule 4(a) (Registration to Efile; Choosing "role" or filing status)

On June 5th, the Committee decided to add a requirement of choice of role or user status to this subsection in response to a written comment of Andy Stone. The text of the redraft under consideration was: "A person must register to file electronically and serve documents through the electronic filing system, and choose the appropriate role [filing status]—individual user or "firm" (which includes solo practitioners, agencies and organizational filers)". After discussion, the Committee decided to delete the text following the word "role".

Rule 4(b)(4) (Efilings by others "on the attorney's behalf")

This rule is to be amended to substitute the above phrase for the reference in the promulgated rule to "under the attorney's efiling account." A draft Reporter's Note was added at Committee request on June 5th to clarify the manner under which, in Odyssey, access to efiling would be accorded to other law office staff to file on an attorney's behalf. This note discussed the process of "firm" vs. "independent user" registration in the Tyler Odyssey system, and referenced a specific reference to a Tyler user guide. Upon further consideration, the Committee recommendation was to delete this added provision in the Reporter's Note.

Rule 4(c) (Registration to View Documents that are not Publicly Accessible; Addition of Clarification as to "documents not accessible over the internet".

On June 5th, the Committee identified a need for further clarification as to the process by which efilers, and others might secure access to case information not otherwise considered publicly accessible. Jeff and Chas had indicated that registration in Odyssey to efile provided access to those documents submitted by the filer, but not to documents submitted by other parties. In order to access those documents, the efiler would need to separately register in the judiciary portal and receive approval for elevated access. The text of the amendment adding this clarifying phrase, and the accompanying Reporter's Note were approved by the Committee with little discussion. In discussion, it was noted that even though the amendment did not technically address efiling, it was relevant to the process of access to case documents and provided helpful clarification. Judge Hayes expressed the view that the issue could alternatively have been addressed in a Reporter's Note, (although there would not have been an amendment to which a RN could refer).

Status Report: Efiling Implementation in WOW Units

At the conclusion of the meeting, there was a brief discussion of the issue of "bulk filings" under Rule 1(f) and State's Attorneys' compliance with Rule 5(g) in separation of categories of criminal history information. As indicated at the June 5th meeting, at present in the WOW courts, State's Attorneys are filing criminal history record information (largely for purposes of arraignment process) in confidential status, in that the software employed by the SAs is apparently not fully compatible with

[3] The only change in the text of the draft amendment was the substitution of "or" for "and" in the listing of the "Courthouse" documents that would be subject to non-electronic filing.

Odyssey. Justice Dooley indicated that consistent with Rule 5(g), the expectation is that records of criminal convictions (which are presumably publicly accessible) be segregated in efiling from other criminal history (records other than for convictions, which are not considered publicly accessible under federal regulation and state statutes governing the Vermont Criminal Information Center). A solution to the problem is in the offing; Jeff Loewer reported that the SAs are working to establish an interface that will permit the sorting of criminal history information in filing in the Odyssey system. Teri Corsones asked if the issue would be resolved before the next units roll out (Bennington-Rutland-Addison-Chittenden). Jeff Loewer replied that it would be.

Upon completion of the referenced items of business, the meeting was adjourned at approximately 3:18 p.m. The next meeting date of the Committee was scheduled for Friday, July 10, 2020 at 1:00 p.m.

Respectfully submitted,

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