

[As approved by Committee on September 20, 2019]

**VERMONT SUPREME COURT
SPECIAL ADVISORY COMMITTEE ON
VERMONT RULES FOR ELECTRONIC FILING
Minutes of Meeting
April 18, 2019**

The meeting of the Special Advisory Committee on Vermont Rules for Electronic Filing (VREF) commenced at approximately noon at the Supreme Court in Montpelier. Present were committee members John Dooley (Chair), Judge Tom Durkin, Jeff Loewer, Chasity Stoots-Fonberg, Eric Avildsen, Esq. (phone), Susan Steckel, Esq. (phone) and Judge Kate Hayes (phone). Also present were Emily Wetherell, Esq. (phone), Andy Stone of the Project Team and Committee Reporter Judge Walt Morris (phone). Absent were committee members Judges Brian Grearson, David Fenster, and Beth Mann; Tari Scott and Teri Corsones, Esq.; and liaison Justice Beth Robinson.

The draft minutes of the April 17, 2019 Committee meeting were distributed to Committee members in advance of the meeting, but there was no discussion, or action taken, with respect to them.

Business Conducted:

The Committee continued its review of amendments to the VREF, employing a revised April 18 “C” draft document prepared by Chair Dooley incorporating changes from the April 12, 16 and 17 meetings. The Committee returned to consideration of the changes that had been made in drafts “B” and “C” to proposed Rules 11 (Service) and 5 (Procedures for Filing), and the mechanics and functioning of the Odyssey system as related to these rules. Particular focus was given to the added 11(e), which would combine a certificate of service complying with V.R.C.P. 5(h) or V.R.P.P. 5(e), as applicable, with certification that the filing is in compliance with the Rules of Public Access to Court Records. Added language in this draft subsection would also require that each document filed have a certification of compliance with VRPACR (as to redaction or segregation of non-public information in filings made). In the course of the meeting, the Committee also reviewed the text of draft amendments to Rules 8, 9 and 10.

Proposed 2019 V.R.E.F. 11 and Conforming Amendments to Rules of Civil and Probate Procedure.

As to the changes that had been made to Rule 11, reflected in draft “C”, the Committee considered the need for conforming amendments to provisions of the Civil and Probate Rules of Procedure, V.R.C.P. 5 and V.R.P.P. 5, and V.R.C.P. 79. The Chair reviewed these draft proposals of amendment, which had been circulated to the members of the Committee in advance of the meeting. The changes to Civil and Probate Rules 5 would take the existing language in 5(b)(4) that was addressed to service in e-Cabinet, and delete it in favor of a general reference to the Rules for Electronic Filing. In 5(e)(3),

a new sentence is added to provide that the time of a filing made by electronic means shall be as specified in the V.R.E.F. (that general reference is meaning to take one to V.R.E.F. 5(d)(4)). In both V.R.C.P. and V.R.P.P. 5(b)(2), there is currently the reference in the last sentence to "Service by electronic means is complete upon transmission...". That sentence would be deleted, due to the manner in which service will be made in the new system. Rule 5(h) would be amended to not require a certificate of service where all required service has been done electronically (the filer makes an entry certifying that there has been compliance with V.R.E.F. 11 with respect to service). This is similar to how the federal PACER system works. The changes to V.R.P.P. 5 are identical to those made in V.R.C.P. 5, excepting for the additional language in 5(b)(4) that applied to e-Cabinet (and not to the Probate Division).

Finally, V.R.C.P. 79(a) would be amended to comport with the promulgated amendments to the Rules of Public Access, specifying that the Court Administrator is the custodian of electronic files and records.¹

After discussion, the Committee approved of the proposed drafts of amendments to Civil and Probate Rules 5 and 79. The understanding is that the Chairs and Reporter for the two Advisory Committees will be apprised of the proposed amendments, to enable comment from the respective Committees. Judge Hayes noted that while it would be preferable to include these amendments in the package of proposed 2019 Rules for Electronic Filing, the amendments could be made if necessary at a later date. Committee consensus was that they should be included, and published for comment with the proposed 2019 V.R.E.F. rules, on the assumption that opportunity for comment by the respective Advisory Committees will be given.²

In the context of the discussions of service and V.R.E.F. 11 and 5, the question arose again as to whether a filer would be required to use the same email addresses (and process) for both filing and viewing of electronically filed documents (that are not publicly accessible). Ms. Stoots-Fonberg indicated that she would be looking at what other states are doing.

2019 V.R.E.F. 8 (Payment of Fees and Costs)

The draft "C" Rule 8(a) provides that "If an electronic filing requires payment of a fee or cost the filer must pay the fee on filing or request a waiver of the fee. Court staff will reject a filing that does not comply with this rule under Rule 4(d). The procedures in Rule 4(d) for correcting a non-compliant filing and determining the filing date apply [do not apply]." (emphasis added).

¹ The text of the existing rule provides that the clerk is the custodian of electronic (i.e., e-Cabinet) case records.

² Following the April 18th meeting, Judge Hayes did provide information about the proposed amendments to the Civil and Probate Rules Chairs and Reporter. Constructive comment was received and considered by the Special Committee, as reflected in the minutes of the subsequent Committee meetings.

The first question considered by the Committee was whether the procedures outlined in 4(d), which generally speak to rejection of a non-compliant filing, are also applicable to non-electronic filings. The plain language is applicable only to electronic filings. It was noted that existing civil (and probate) rules do not specifically address procedure upon rejection of a filing by the clerk at all (no doubt, because in the existing “paper world”, there is a personal interaction between clerk staff and filer as to the particular corrective measures, usually which documents are necessary apart from content of them, to complete a filing). The Committee concluded that the procedures for correction of a non-compliant filing would also be applicable to electronic filings that were not compliant due to failure to pay fees or request a waiver (so, the procedures of 4(d) *do* apply, and the draft is amended accordingly. However, Erik Avildsen expressed concerns that self-representing filers would be dissuaded from filings upon being “stopped” in the process at the fees juncture. The draft 8(a) does provide that “...the filer must pay the fee or request a waiver of the fee. “ This language would be construed to mean that an otherwise compliant filing is compliant, and is to be accepted, upon either payment of the fee, or the act of requesting a waiver. It was noted that the draft Rule 4(c) does reference IFP process as well (requiring compliance with the applicable rule of procedure). The Committee did not discuss at length the question of barriers to access to filing electronically related to the waiver of fees/costs issue. However, it was agreed that both the rules and the Odyssey system must facilitate access to waiver of fees and costs, and not present barriers.

In consideration of draft 8(a), the provision of 8(d) was also noted. This section would apply to non-electronic (paper) filings. It would also require payment of a fee or request for waiver, and the language prescribing consequences for non-compliance (with fee or waiver) “as specified in the applicable rule of procedure.” Some committee members questioned the meaning and placement of this section, and whether the particular rules of procedure addressed the consequences at all. Later in the Committee discussion, Andy Stone noted that there are procedural rules addressed to rejection of an IFP application, which would likely be the meaning assigned, and treatment accorded, in the context of cost/fee issues in 8(a) and (d).³

The discussion then turned to the distinction between statutory fees, and charges assessed for use of the electronic filing system. Andy Stone indicated that the Tyler/Odyssey system charges various fees for system use, that depending upon factors such as whether particular service options are requested.⁴ There is a basic fee for use, and a separate, additional “service only” fee (for up to 20 parties to be served). For certain categories of cases and filers (ex. RFAs and governmental filers) system user fees are waived altogether under the terms of the service provider contract with CAO. As to service and fees, it was noted that draft rule sections 11(a) and (b), parties may agree to waiver or acceptance of service under applicable rules of procedure, and for post-

³ See, V.R.C.P. 3.1(d); V.R.F.P. 4.0(a)(2); 9(a)(1); 15 V.S.A. § 1103(f) (no filing fee required in RFA cases); V.R.P.P. 3.1(d); Cf. 13 V.S.A. § 5236 (Assignment of Counsel).

⁴These fees and service options were also discussed in the Committee’s consideration of draft Rule 11-Service, at its meeting on April 17th. See minutes, 4/17/19, p. 2.

commencement service may agree to alternative means of service (without use of electronic service via the system).

Draft section 8(b) added provision for payment of fees and cost by “echeck”. The Committee decided to delete that reference. Payment of fees and costs for efilings would be made via credit card; filing by nonelectronic means would continue to be by cash or credit card, at the clerk’s window.

2019 V.R.E.F. 9 (Redaction)

After discussion, the decision was to eliminate this proposed rule, which states that “Rule 7(a)(1) of the Rules for Public Access to Court Records applies to all electronic documents filed in accordance with these rules.” The Committee view was that other sections of the proposed rules, such as Rules 4 and 11, make express references to compliance, and certifications of compliance with the Rules for Public Access, making the text of the proposed Rule 9 unnecessary.

2019 V.R.E.F. 10 (Access to Electronic Case Files)

As to proposed Rule 10, the Committee decision was that the content was also not necessary, since the issue of access is fully covered in the Rules of Public Access to Court Records. This Rule will be eliminated in the ensuing redraft.

2019 V.R.E.F. 12 (Definitions)

Judge Hayes suggested that the definitions suggestion be relocated to the beginning of the body of the rules. This was acceptable to all. A new definition, “Procedural Document”, would be drafted and included, to clarify the meaning of this term as it is used in Rule 11.⁵

The meeting ended with Chair Dooley’s request that the Committee reconvene the following Tuesday (April 23rd), to continue its work, with a goal of completion of a final draft to be recommended for publication by May 10th, if at all possible. He also indicated that in the next meeting, focus could also be placed on the draft Reporter’s Notes as they are completed.

The meeting was adjourned at approximately 12:55 p.m. The next Committee meeting is scheduled for Tuesday, April 23rd, at noon.

Respectfully submitted,

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

⁵ The term is employed in the existing Rules for Electronic Filing, without definition.