

[As Approved at Meeting on February 3, 2023]

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON
RULES FOR ELECTRONIC FILING

MINUTES OF MEETING, OCTOBER 28, 2022

The Committee meeting was convened (via video conference) at approximately 1:33 p.m. Present/participating were Committee Chair Justice John Dooley, Judges Tom Durkin, David Fenster and Megan Shafritz; Tari Scott, Teri Corsones, Su Steckel, Chasity Stoots-Fonberg, Laura LaRosa, Marcia Schels, David Koeninger, Jordana Levine and Steven Brown. Committee Reporter Walt Morris and Emily Wetherell were also present. Judge Kate Hayes, Elizabeth Kruska, Michele McDonald, Laurie Canty, and Liaison Justice Nancy Waples were absent.

1. Reports/Announcements:

This was the first meeting of a newly-comprised, standing Advisory Committee on Rules for Electronic Filing, per the Court's July 11, 2022 Administrative Order No. 53 and Administrative Appointments Order of October 21, 2022. Consistent with the Court's orders, retirements, or resignation, a number of former members of the Special Advisory Committee transition out of service, and new members are appointed. Transitioning out: Tari Scott (and Laurie Canty, her successor as Chief of Trial Court Operations); Scott Woodard; Teri Corsones, Esq. (now serving as Court Administrator), and Eric Avildsen, Esq., retiring Director, Vermont Legal Aid. New members: Judge Megan Shafritz (replacing Judge Elizabeth Mann); Laura LaRosa, Program Manager, Trial Court Operations; Michele McDonald (Court Operations Manager, Caledonia Unit); David Koeninger, Esq., Director, Vermont Legal Aid; Jordana Levine, Esq. (Defender General designee); and Steven Brown, Esq. (States Attorneys and Sheriffs Department designee). Committee Chair John Dooley invited a round of introductions of all members. He also thanked Tari Scott for her long service to the Committee, and recognized her presence at the meeting

2. Approval of the April 22, 2022 meeting minutes.

Reporter Morris briefly noted that the minutes of the last Committee meeting (4/22/22) had already been approved after post-meeting member poll and were now posted on the Court's website.

ITEMS OF OLD BUSINESS CONSIDERED:

3. Adoption of OFS efilng For PRB Hearing Panel Cases.

Emily Wetherell provided a report on the efforts of a subcommittee (consisting of Justice Dooley, herself, Reporter Morris, PRB Chair, and PRB-experienced practitioners) that had engaged in review of the Rules of the Professional Responsibility Board in anticipation of adoption of OFS/VREF filing and case management in lawyer discipline cases that reach the Hearing Panel stage. This subcommittee had met on June 25 and August 26, 2021, identifying specific PRB procedural rules warranting amendment to comport with any adoption of

OFS/VREF.¹ The review did extend to the particular text of amendments that could be made to comport with OFS/VREF.² Ms. Wetherell first noted that Odyssey functioning involves three data system products: (1) OFS case management (internal to the judiciary); (2) OFS efilng (external, with a “conduit” linking into the case management program; and (3) a Public Portal (for pushing information out/providing external access). Ms. Wetherell indicated that in the course of the subcommittees meetings, two issues were identified, unique to present PRB practices, that presented challenge to integration of the VREF rules for purposes of Hearing Panel cases: (1) the PRB has kept, and continues to keep identifying information as to complainants confidential, and not accessible to currently-posted case/complaint information; and (2) the PRB already has provision for publication and public access to active disciplinary cases reaching probable cause stage on the PRB’s website. The complication, Justice Dooley observed--for purposes of public access--is that while active pending case information and decisions in which ethical violations are found, as well as documents in pending hearing panel cases are accessible, if a respondent attorney prevails in a hearing panel case, the record of any proceeding is then returned to confidential status. After the August, 2021 meeting, the PRB was to engage in further consideration of these issues in relation to adoption of the VREF (and OFS) for its hearing panel cases.

Ms. Wetherell indicated that while the number of subject cases is relatively few (in comparison to the caseloads in the Superior Court divisions) the PRB is one of the last adjudicative entities not employing OFS. Thus, the effort to consider adoption of OFS there. Ms. Wetherell reported that she attended a PRB meeting on September 27th, 2022 to clarify the specific issues that have been identified, and it appears that the PRB is now in a position to develop a proposal which meets the particular needs identified by the PRB while adopting OFS for the subject cases may be forthcoming. An update will be provided to the Committee as to any PRB proposals related to the subject amendments.

4. OFS; Issues with Civil Case Auto-Acceptance Process³ (Multiple (and unwarranted) charging of Tyler system user fees to an already registered efiler, due to OFS bypass from pre-acceptance review; *Status Report*).

This issue was brought forward for Committee consideration on April 22nd, at the request of Chasity Stoots-Fonberg. The basic problem is that certain efilers in Civil Division cases—mostly entities/individuals making a number of case filings were being charged multiple and unwarranted Tyler OFS user fees. Since the Judiciary does not control this aspect of OFS fees assessment, any correction and refunds for unwarranted charges is difficult, and much delayed. The Committee has concluded that given the specific nature of the problem, a rules amendment is not the course of action, but an administrative/technology matter. Ms. Stoots-Fonberg provided an update as to the problem, indicating that since initiation of the “auto-acceptance” process for civil filings, there have been approximately 1,000 instances of unwarranted fees, and refunds ultimately secured. She continues to work with Tyler Technologies staff in an effort to secure an end to the multiple-charging problem, and will provide the Committee with status reports as to any developments, as warranted, at future meetings.

¹ See, Administrative Order No. 9, Permanent Rules, Professional Responsibility Program.

² These included PRB Rules 13, 15-18, 20-27.

³ This Agenda item was noticed to Committee members and added at request of Chair Dooley on April 22nd, in advance of the meeting that took place on that date.

5. **V.R.E.F. 12 and 3(b); Proposed amendments of V.R.P.P. 5 and 78**—Exemption from efilings for wills in Probate Division and other original “paper” documents for which non-electronic filing may be mandated by specific provision of statute.⁴ (*Status report* on recent action of Probate Rules Committee re: proposed V.R.P.P. 78).

At the April 22nd meeting, the Committee endorsed a draft of amendments of V.R.E.F. 12 and 3(b), with recommendation for publication and comment. While not having jurisdiction, the Committee expressed some comments to be forwarded to the Probate Rules Committee as to certain of the text of proposed V.R.P.P. 78, but no objections to the accompanying proposed amendment of V.R.P.P. 5, and addition of V.R.P.P. 78 (which particularly addresses procedure for nonelectronic filing and retention of certain original (“paper”) testamentary documents and vital records in the Probate Division). In the interim, the Probate Rules Committee met again, and made some further revisions of the proposed V.R.P.P. 78, in response to the comments forwarded to them.

Reporter Morris indicated that this has resulted in yet another draft of the package. The most current draft was circulated to Committee members in advance of the meeting. Reporter Morris pointed out that as to V.R.P.P. 78, edits had been made to include the term “certified copies” in references to vital records (the earlier drafts from Probate Rules had required the nonelectronic (i.e., “paper”) filing of the original of a vital record; original vital records are ordinarily retained by the lawful public custodian, and not ordinarily released, hence the edits to recognize certified copies). In this redraft there were no changes made to the proposed amendments of V.R.E.F. 3(b) or 12 in the version approved on April 22nd.

At the conclusion of the discussion, on motion of Tom Durkin, seconded by Kate Hayes, the Committee again unanimously approved of the V.R.E.F. 12 and 3(b) amendments for publication and comment; and on motion Tom Durkin seconded by Chas Stoots-Fonberg, unanimously approved of reporting to the Probate Rules Committee and the Court in the same transmittal no objections to the proposed amendments of V.R.P.P. 5 and 78, for purposes of publication and comment. After publication, the respective committees in interest will have opportunity to again review the proposals, prior to any promulgation recommendation.

6. **V.R.E.F. 3(b)(1)**—Ongoing issues with exemption from efilings for certain documents filed by governmental agencies in certain proceedings, notwithstanding requirement of the rule.⁵ **OCS request for exemption from efilings of address updates for clients/Pilot project for OCS taking on service of initial case filings.**

Tari Scott reported that the issue of an OCS exemption from efilings has been largely resolved. As of September 14, most units have taken over provision of service in the Family Division in all but the West corridor. OCS is not efilings “scribed” orders, that is proposed orders for magistrate

⁴ See, e.g., 14 V.S.A. § 2 (Wills deposited for safe keeping in the Probate Division)

⁵ i.e., Tax Department providing tax clearance documents in probate cases; DAIL reports of wards’ status; Lund Home reports in adoption proceedings; OCS filings as a party vs. draft child support orders for convenience of the court; DMV filings; NGO Court-related filings, such as from Restorative Justice and Diversion programs.

entry, consistent with magistrate direction and standardized practices. These are being provided to the court via email.

However, OCS has been, and is required, to efile pleadings sought to be entered into the case record, as is any governmental entity, under V.R.E.F. 3. As at the previous meetings on January 21st and April 22nd, the Committee consensus was that no rule amendment was warranted in view of the administrative process that is being observed.

7. Staff Review/Rejection of eFilings under V.R.E.F. 5(d)(2); Review of Current Rule's Criteria for Review and Acceptance/Rejection of eFilings; Need for Clarity of an Appeal Process in event of Rejection (Request of Judge Zonay, 12/20/21). (Consideration brought forward from 1/21/22 and 4/22/22 Agendas).

The Committee continued its consideration of a number of issues related to staff review and rejection of efilings, including whether amendment of the Rule 5 criteria for efilings, and rejection of noncompliant efilings is warranted; and addressing the need for a defined appeals process to address disputes as to whether an efiling is correctly rejected or not. In discussion of response to the apparent need for a specific appeals process in event of rejection on April 22nd, Justice Dooley requested that data be provided as to the current review process, numbers of rejections and bases for rejection, and comparison of rejections from Centralized Review vs. Unit staff review.

Report on Rejection Data; Numbers of Rejections and Bases for Rejection.

Chas Stoots-Fonberg began the discussion with a report on status of efilings review and which filings are subject to centralized review (all criminal; all civil except stalking/sexual assault RFA cases; and some family).⁶ At present, there were 8 full time and 2 part time staff working in centralized review. Next, she provided data as to numbers of efilings rejections, and primary reasons for rejection, to the extent that could be determined. She stated that in the month of September, there had been approximately 31,360 efilings; of these 1,085, or .03% of the total had been rejected. Of the 1,085 rejected, 635 rejections came from Centralized Review.

As to the reasons/bases for rejection, Ms. Stoots-Fonberg indicated that very few rejections were for lack of compliance with confidentiality (V.R.P.A.C.R. 7(a)(1)) compliance, and these were located to one or two law offices. The 635 rejections principally went to errors such as inclusion of a Social Security number in an affidavit, inclusion of alleged victim names where not authorized, incorrect filer names/identification, incorrect case number (for efilings in open cases), document filed with the wrong filing code, combined filing of motions not authorized under V.R.E.F. 5(g), and “bulk” filing in a single efilings of multiple case documents. Justice Dooley asked whether the bases for rejection differed depending on whether rejection was on Centralized Review, vs. Unit-staff Review. Ms. Stoots-Fonberg indicated that there did not appear to be a difference among the division-specific filings subject to review by either Central or the units; that centralized review, and the units are using the very same standards. In her

⁶ Justice Dooley asked whether all efilings review would be moving to centralized review, or would the “mix” of centralized and unit level review continue. Chas relayed her understanding that at this point, any change in current reviewers practice was paused—in effect, that the mix of reviewers would continue.

assessment, filing-to-reviewer acceptance tends to be quicker in centralized review than in the units, given the primary focus, and standardization observed by centralized reviewers.

Need for More Data on Specific Bases of Rejection and Frequency of Each.

Justice Dooley asserted that while the Committee still needed to focus on review of Rule 5 rejection criteria generally for more specificity, as to a rejection-appeals process, and whether it should be subject to judicial, rather than administrative determination, the particular case bringing the issue forward was a criminal efilg that had included the name of a minor witness; that such issues, invoking application of the Public Access rules, might present legal complexities warranting judge, rather than administrative review. At the least, the reviewing staff are placed in a difficult position of interpreting, rather than implementing, the law. Teri Corsones' view was that either option might be considered; Megan Shafritz' opinion was that rejections should not be subject to judicial review, barring the extreme case in which the judge and parties in the course of a proceeding would necessarily have to address the issue. Justice Dooley stated that before addressing the rejection-appeals issue, it would be worthwhile to look more closely at the reasons for rejection, to best target appeals process structure to the reasons for rejection.

At this point, Laura LaRosa indicated that the Trial Court Operations Division has provided efilg review staff guidance in the form of a recently-updated document, which list some 18 criteria for rejection upon review, with suggested actions as to each category of rejection. Since Committee members did not have those criteria for review, Judge Fenster suggested that the Committee have a detailed look at the guidance factors in going forward with review of any Rule 5 amendments. Laura indicated that she would provide the document for circulation to Committee members. Steven Brown agreed that more specific information as to staff rejection criteria and suggested actions was needed; as an "end user" of OFS, he concurred that some rejection grounds were fairly clear, such as failure to comply with the technology-based requirements for a filing, but others were more complicated, bordering on, if not requiring a legal interpretation. He gave an example of an efilg of a request for a Non-Testimonial Identification Order in an existing case, and having received a rejection. The suggestion was that this involved not only a "5(g)" motion or new case issue, but that this is also an example of the need for some defined appeals process after rejection of complicated filings.

On the question of an appeals process, Teri Corsones indicated that she would provide a proposal for administrative appeal for discussion at next meeting.

VREF 5(d) and (g); Preparation of Discussion Draft of Amendments Clarifying Grounds for Rejection (and Appeal alternatives).

At the conclusion of the discussion of this item, Justice Dooley suggested that a way forward was to have him, Reporter Morris and Emily Wetherell meet with Chas and Laura to explore in more detail the staff guidance criteria; efilg rejection data, including numbers and grounds for rejection; and to prepare a discussion draft of potential Rule 5 amendments addressed to the various issues that had been brought forward (i.e. amending specific bases for rejection; post-rejection process, including appeal; and 5(g) rejections (multiple motions, seeking independent forms of relief, made in a single efilg). With information as to the "numbers" in relation to nature and frequency of rejections, the Committee will be much better positioned to consider any

amendments. The Rule 5 rejections criteria issues, and proposed amendments, will be for priority consideration at the next Committee meeting.

8. Judge (In)Ability to Effectively Determine Completion of Service/Opening of Served Document in OFS or Portal; Restoration of Requirement of a separate Certificate of Service in lieu of V.R.E.F. 11(g)(1) “Checkbox”. Request of judges (Tomasi; Gerety; Mello)

The Committee continued its discussion of this issue, begun at the April 22nd meeting. Judge Fenster again summarized the issue as two-fold: (1) judge ability to confirm issuance of notices and decisions going out from the Court; and (2) judge ability to confirm service by/among parties. As to the first issue, he indicated that judges are able to view out-going notices from the court by referencing the Odyssey “Events” tab, they are still unable to reasonably access File and Serve to verify whether service was in fact effectuated. There needs to be some form of work-around to enable judges to reasonably confirm service. Since any work-around to address the problem would involve the OFS technology and system configuration, Marcia Schels indicated that she and her staff would examine whether an avenue for judge access to service completion information can be established, and report on any developments.

9. V.R.E.F. 7(a)(7) and Prohibition of Embedded Bookmarks. Is there an alternative means of filing to permit an efilings party to provide the Court with a bookmarked document, to assist Court/party access to particular sections of a voluminous filing? (Inquiry of Kevin Lumpkin, Esq., 9/23/22)

Reporter Morris indicated that as the Committee requested, he had communicated with Attorney Lumpkin to advise that an alternative means of providing a bookmarked document to assist court and party access already existed in V.R.E.F. 3(b)(7) and depending upon the particular circumstances, 3(b)(3) and (7). Essentially, with advance authorization of the Court, such a document could be transmitted by nonelectronic means—email, or paper—*provided that* a content-identical “flattened” version of the document that had been bookmarked had already been efiled via OFS, standing as part of the electronic case record as the “original” document in issue.

10. V.R.E.F. 5(g) Requirement of Separate Filing of Motions Seeking “Independent” vs. “Alternative” Relief, and Rejection of Non-complying efilings. # 1: Request of Laurie Canty--Inquiry of Tom Paul, DSA, Caledonia Unit; # 2: Request of Chas Stoots-Fonberg—Another combined criminal filing (Canty/Fonberg).

There was brief discussion of this issue, in context of the Committee’s consideration of bases for rejection of efilings. The issue is principally presented in criminal division efilings, where both prosecution and defense have sought to file combined motions which they perceive as seeking alternative forms of relief, that are considered by reviewing staff to request independent forms of relief (thus requiring a separate filing under the existing Rule 5(g) and interpretive Reporters Notes).⁷ The Committee consensus was to carry forward consideration of this issue,

⁷ As the Reporters Notes to 2020 VREF 5(g) indicate, the requirement of separate efilings for motions requesting independent, rather than alternative forms of relief is longstanding, brought forward from the 2010 VREF. Of course, efilings under the 2020 rules did not employ OFS, and its system requirements/constraints.

for treatment with any other proposals of amendment of Rule 5 rejection criteria at the next meeting.

11. Special Advisory Committee on Remote Proceedings; Proposed Amendments to V.R.C.P. 43.1; V.R.Cr.P. 26; and V.R.F.P. 17. (Status report; Discussion of implications for VREF and VRPACR) (Morris; Wetherell)

Reporter Morris indicated that the Special Advisory Committee on Remote Proceedings, chaired by Scott Griffith, Chief of Planning and Court Services, had shared certain of the Advisory Rules Committees drafts of these amendments, which essentially deal with remote participation and presence, including provision of witness testimony, in judicial proceedings. The proposals also by reference would establish technological standards to assure meaningful participation in remote, or “hybrid” proceedings (i.e., some participants remote; some present in the courtroom). Morris indicated that none of the proposals appear to invoke electronic filing issues, but should any issues arise, he will keep the Committee advised.

12. V.R.E.F. 10(a)—Proposed Amendment to Specify that Failure to Pay Service Costs is Grounds for Rejecting an eFiling. (Teri Corsones/TCO request).

Teri Corsones suggested an amendment of V.R.E.F. 10(a) to provide clarification that a failure to pay OFS service costs is a grounds for rejection of an eFiling. At present, Rule 10 does not clearly specify that payment of service costs is a requirement of eFiling (the current references are to “a court fee” or “an eFiling fee, or both”) and thus failure to do so provides basis for rejection. There is some confusion on review as to whether an eFiling without payment of service costs should be subject to staff rejection, when such is not expressly stated in the rule. Teri presented draft language of an amendment that would add the term “service costs” throughout the text of Rule 10(a) as relevant. After brief discussion, the Committee approved of Ms. Corsones’ proposal of amendment. The Committee Reporter, in consultation with Ms. Corsones, will provide a draft in appropriate format with revised Reporters Note for Committee consideration at next meeting.

13. Adjournment:

On motion of Kate Hayes, seconded by David Fenster, the meeting was adjourned at approximately 3:40 p.m. Justice Dooley requested that a next meeting of the Committee be scheduled as soon as possible, to further review recommendations and drafts related to the V.R.E.F. 5 rejection criteria and process issues. A poll of the membership will be sent out for next scheduling.⁸

Respectfully submitted,

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

⁸ Following the poll, the next Committee meeting date was set for Friday, December 16th at 1:30 p.m.