

VERMONT SUPREME COURT
SPECIAL ADVISORY COMMITTEE ON
RULES FOR ELECTRONIC FILING

MINUTES OF MEETING, JULY 9, 2021

The Committee meeting was convened (via video conference) at approximately 9:30 a.m. Present/participating were Chair Justice John Dooley, Judges Tom Durkin and David Fenster; Tari Scott, Teri Corsones, Su Steckel, Chasity Stoots-Fonberg, Eric Avildsen, and Scott Woodward. Liaison Justice Beth Robinson, Court Administrator Pat Gabel, Committee Reporter Walt Morris, and Emily Wetherell were also present. Judges Kate Hayes and Beth Mann were absent.

Approval of Prior Meeting Minutes.

Reporter Morris indicated that the minutes of the May 14th meeting had not been completed, but would be sent to Committee members for review, along with the minutes of the present meeting, for comment and approval at the next scheduled Committee meeting.

Amendments of the V.R.E.F. and Vermont Rules of Appellate Procedure Associated with Commencement of Odyssey eFiling and Electronic Case Management in the Supreme Court: **Review of Final Draft and Approval for Transmittal with Recommendation for Promulgation.**

Justice Dooley stated that this was the priority item of business for the meeting. He provided an update on the activity that had ensued as to these proposed amendments following the May 14th meeting. As had been indicated at that meeting, he, Emily Wetherell and Reporter Morris did subsequently attend the Civil Rules Advisory Committee meeting on May 21st, and that Committee was briefed on both the proposed V.R.E.F. amendments and V.R.A.P. amendments associated with appellate eFiling. There were no substantive changes recommended by Civil Rules; however, Civil Rules concurred in the recommendation of the V.R.E.F. Committee that a small subcommittee comprised of members of both committees meet and conduct a detailed review of the proposed amendments, in order to brief each committee following close of the comment period prior to the committees' final review and approval.¹ This special subcommittee met on June 9, 2021 and conducted a final, close review of both sets of proposed amendments; there were few edits recommended as a result of this subcommittee's review, which are reflected in the documents made available to Committee members in advance of the July 9th meeting. These went to nonsubstantive additions to terminology, grammar, and some minor revision of references to interrelated subsection numbers.

Justice Dooley described the time imperative as "very tight" and indicated that he would call for Committee approval of a final promulgation draft and transmittal to the Court with that recommendation at conclusion of the discussions at the present meeting. The Civil Rules Committee will be asked to provide its approval of the final promulgation draft of the accompanying V.R.A.P. amendments, and both will be transmitted to the Court simultaneously for the Court's consideration, with recommendation for prompt promulgation.²

¹ Allan Keyes, Jim Dumont and Bonnie Badgewick were chosen to serve for Civil Rules; Justice Dooley, Tom Durkin and Teri Corsones served for the V.R.E.F. Committee; Justice Robinson, Emily Wetherell and Reporter Morris participated in the subsequent review as well.

² The target date for implementation of Odyssey electronic case management in the Supreme Court is July 15, 2021; for Odyssey electronic *filing*, the target effective date is August 17, 2021.

The comment period had closed on July 2nd. Justice Dooley indicated that as of that date, one comment had been received from Judge Toor, asking why V.R.E.F. 7(a)(7) was amended to expressly prohibit embedded hyperlinks or internal bookmarks, in that in her view, being able to click on a hyperlink in a pleading to access a referenced document was helpful. Ms. Wetherell again explained that the Odyssey case management system could not effectuate such linkages, and that their presence created problems with electronic case record maintenance and access. In any event, the reader could independently search the hyperlink outside of the Odyssey case record, without resulting in electronic case record issues. The Committee was of the view that the amended 7(a)(7) prohibition was necessary and reasonable, and should be retained. It was noted that in addition to the 7(a)(7) amendment, the added 7(d)—relationship of the V.R.E.F. rules to form and formatting requirements in other procedural reviews—previously approved by the Committee, has been retained in the recommended final promulgation draft.

Further to the related, proposed amendments of the V.R.A.P., Ms. Wetherell highlighted the changes, mostly minor, made in consequence of the special joint subcommittee’s last review. These again, went to non-substantive edits and revisions of terminology. Committee members had some minor comments as to terminology (Justice Robinson expressed her preference as to use of either “grounds” or “ground” for appeal in V.R.A.P. 3(b)(1)(D); Scott Woodard shared his view as to some ambiguity in use of the word “data” in V.R.A.P. 10(a)(1), in contrast to V.R.E.F.’s use of “document”). Ms. Wetherell pointed out that a minor revision had been made as to V.R.A.P. 13, governing the record in direct appeals from probate and administrative agencies, to cross-reference V.R.A.P. 10(a) and delete reference to attorney eCabinet registration number. V.R.A.P. 45.1(g), also addressed to eCabinet registration requirements, was deleted. In addition, revisions were made to V.R.A.P. 10 deleting references to “In forma pauperis” and clarifying language as to provision of transcripts “without payment”. Reporters Notes were revised or supplemented as to each of the referenced edits and revisions.

Committee Recommendations and Actions as to Proposed Amendments.

At the conclusion of the discussions, on motion of Tari Scott, seconded by Tom Durkin, the Committee unanimously voted to approve of the recommended final promulgation draft, with transmittal to the Court for prompt promulgation to follow. There was no expression of disapproval of the accompanying amendments to the V.R.A.P. (the Advisory Committee on Rules of Civil Procedure is the proponent of these); rather, the Committee consensus was for approval and adoption of those companion amendments by the Court as well.

Reports Presented.

Various reports were then briefly presented:

Legislative Committee on Judicial Rules Meeting, June 16, 2021.

At the LCJR meeting, the amendments to V.R.E.F. 2, 4 and 11 that were promulgated on 2/22/21, effective on 3/15/21, and the package of amendments to the V.R.E.F. and V.R.A.P. associated with commencement of Odyssey efilng and electronic case management in the Supreme Court were reviewed. There were no comments as to the V.R.E.F. 2/4/11 promulgation (although a brief discussion ensued as to legislative review authority/ options for rules already promulgated by the Court). As to the V.R.E.F./V.R.A.P. package, in the course of presentations by Justice Dooley, Emily Wetherell and Reporter Morris, LCJR members for the most part had questions about the workings of Odyssey, such as assignment of case numbers, process for fee payment and waivers of fees, cybersecurity, and the contract with Tyler Technologies. Justice Dooley explained the anticipated timeline for final promulgation of the

package, and the exigency for timely implementation. At the conclusion of the discussions, there were no objections presented by LCJR members to the proposed promulgation.

Professional Responsibility Board Rules and Amendments Related to eFiling.

Justice Dooley indicated that a committee had been comprised to review the current PRB rules for any necessary and appropriate amendments of those rules, or the V.R.E.F. rules relevant to PRB procedure, in conjunction with proposed adoption of Odyssey eFiling and electronic case management at a later date. He stated that one of the pertinent issues identified was whether attorney respondents in disciplinary proceeding who are self-representing should be required to efile in Odyssey in those cases as attorneys, despite self-representing capacity under V.R.E.F. 3(a), or whether under V.R.E.F. 3(b), attorneys who are self-represented litigants should be exempted from eFiling in that capacity. It was noted that in some instances, attorneys subject to PRB proceedings may be experiencing particular disabilities that in fact make it difficult to engage in eFiling during those proceedings. Justice Dooley indicated that the PRB committee had not reached a conclusion as to the issue, and a further report would be made.³

New Jury Management Program

Reporter Morris said that the Court Administrator has announced transition this Fall to a new statewide jury management program, “Tyler Jury Manager”, from a company that was acquired by Tyler Technologies (Courthouse Technologies). Stephanie Limoge, who is responsible for state jury administration, has indicated that a committee has begun work on the details of the transition, and relationship of the new system, if any, to Odyssey electronic case management. Morris indicated that movement to the new system may present some issues as to public and party electronic access that will fall within the jurisdiction of either (or both) the Public Access or Electronic Filing rules committees.

Amendment of Administrative Order # 49, Paragraph 6(g); Proposed Amendments to VRCP 5 and 11(e).

In June 25th amendments of A.O. 49, the Court added a request addressed to the Civil Rules Committee for a proposed permanent rule for non-efiler filing (and potentially, service) by email. Under the Covid emergency orders, email filing has been authorized, and the concern was to have an operative rule for this mode of filing in place in the event that the emergency provisions of A.O. 49 were to expire. The amendments would be to V.R.C.P. 5 and 11; the Civil Rules Committee has already been working on an overall review of Rule 5 for updates, and to conform to promulgation and subsequent amendments of the 2020 V.R.E.F. Justice Robinson inquired as to whether the V.R.E.F. Committee would prefer to have the amendments be formally referred to and treated by the V.R.E.F. Committee as well, or rather to provide input via the public comment process. Since the Committee had not seen the draft proposal, consensus appeared to be to wait until publication, and to have opportunity to comment as part of that process. There was no request articulated for a formal referral.⁴

More Old Business Items:

V.R.E.F. 12 and 3(b)—Exemption from eFiling for wills in Probate Division and other original “paper” documents for which non-electronic filing may be mandated by specific provision of statute.⁵

³ The first meeting of the PRB review committee was held on June 25, 2021. The next meeting was scheduled for July 22nd.

⁴ The proposed amendments were subsequently published for comment on September 1, 2021, with a comment period closing on October 1st.

⁵ See, e.g., 14 V.S.A. § 2 (Wills deposited for safe keeping in the Probate Division)

The Committee returned to discussion of these proposed amendments, previously considered on a number of occasions. At the May 14th meeting, the Committee requested that Reporter Morris confer with Probate Rules Chair Jeff Kilgore and Reporter Kinvin Wroth as to avenues of approach to necessary amendments, that would assure that wills and related testamentary documents could be filed (and retained) in non-electronic form, both to comply with the requirements of 4 V.S.A. § 2 (the “Will Registry”) and estate administration and evidentiary needs of the Probate Division. From May 14th, the inquiry to Probate Rules was to be whether they had specific proposals of amendment that they would prefer to have; or whether it would be best to comprise a special committee from each Advisory Committee to consider a joint recommendation of amendments for approval by both committees. Reporter Morris stated that he and Judge Kilgore had communicated, and that while some general language had been suggested, Judge Kilgore was also open to consideration of a joint committee to draft and recommend rules amendments. Judge Kilgore did raise the issue in communication of where the pertinent rules amendment should be housed—in the V.R.P.P., or in the V.R.E.F.⁶ Tari Scott and Chas Stoots-Fonberg indicated that the Court Operations Division April 7, 2020 Policy Memo appeared to be addressing the issue of filing and retention of paper wills for safekeeping. The memo also provides warning to filers that other original documents such as birth certificates and powers of attorney should not be filed, as they may not be returned. Both Tari and Chas shared the view that the issues of paper filings in probate would best be addressed by rule, and not policy directive. Pat Gabel expressed her preference for development of pertinent rules via the joint committee approach. She questioned why such documents as birth and death certificates should be filed and kept in paper form in probate though (included in the probate judges’ requests), since there are other official registries for them.

After discussion, Committee consensus was to comprise a joint special committee to work with representatives of Probate Rules, to consider and recommend rules amendment to address the non-electronic documents issues unique to the Probate Division. Justice Dooley will communicate this recommendation, with suggested representatives of the V.R.E.F. Committee, to Judge Kilgore, for further action.

V.R.E.F. 3(b)(1)—Exemption from Efiling for Certain Documents filed by Governmental Agencies and NGOs in Certain Proceedings, Notwithstanding Requirement of the Rule.

The discussion of V.R.E.F. 3 and 12 exceptions from efilings was followed by discussion this other, old agenda item.⁷ Tari Scott again indicated that Court Operations has had continued inquiries and requests from infrequent governmental and NGO filers seeking exemption from the requirement of efilings otherwise imposed upon governmental agency filers by V.R.E.F. (b)(1).⁸

A concept draft had been previously provided by the Reporter which would in effect authorize the Court Administrator to establish terms for exemption of such infrequent filers from the requirement of efilings.⁹

⁶ Judge Kilgore was aware that the V.R.E.F. Committee had been considering this particular issue, i.e., “outplacement” of pertinent V.R.E.F. rules to the respective other rules of procedure as relevant, or retention of an independent body of rules in the V.R.E.F. regarding efilings, for all divisions.

⁷ See, meeting Agenda for July 9th, # 6.

⁸ Which authorizes nonelectronic filing when the filer “who is not filing on behalf of a governmental agency is a self-represented litigant...”

⁹ “A document may be nonelectronically filed when: [] the filing is made on behalf of a governmental agency, non-governmental organization, or other person or entity, who would otherwise be required to file electronically; the filing is not made in party status; and the filing is made with such infrequency that nonelectronic filing is made under terms specifically authorized by the Court Administrator for that category of document.”

After brief discussion, the Committee determined to pass this item to the next Agenda for further consideration.

V.R.E.F. 8; Filing of Exhibits; Consideration of Draft Amendments to Clarify Uniform Statewide Procedures for Efiling of Proposed Exhibits; Treatment of Admitted Exhibits; and procedures for Video/Audio Exhibits.

The current Rule 8 only briefly addresses issues associated with the filing and treatment of exhibits filed electronically. In previous meetings, the Committee has discussed the development of unit-specific exhibit filing policies established by presiding judges, and that while these are largely similar, there are some variations among unit policies for efiling and treatment of exhibits. Teri Corsones stated that disparate policies on pre-filing have been an enormous issue for the bar. Justice Robinson, in prior meetings, encouraged adoption of uniform statewide procedure as to treatment of exhibits in Odyssey. In prior discussions, Committee consensus was that the Court's Standard Practices Committee, would logically be the body to consider and recommend uniform policy for electronic filing and treatment of exhibits, and that policy, rather than amendment of V.R.E.F. 8, was the preferable approach. Tari Scott and David Fenster, both members of the Standard Practices Committee, both indicated that a group was working on standardization of exhibits policy, and that a next meeting will be on July 16th. Beyond the report and brief discussion, the Committee took no action on this item, anticipating an update at next meeting from Standard Practice Committee members.¹⁰

Adjournment; Next Meeting Date

On motion of David Fenster, seconded by Teri Corsones, the meeting was adjourned at approximately 10:48 a.m. No next meeting date was scheduled, although it was anticipated that a next meeting will be convened after the Labor Day holiday.

Respectfully submitted,

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

[10/7/21]

¹⁰ Tari Scott, David Fenster, and Tom Durkin, members of the V.R.E.F. Committee, also serve on the Standard Practices Committee.