

VERMONT SUPREME COURT
SPECIAL ADVISORY COMMITTEE ON
RULES FOR ELECTRONIC FILING

MINUTES OF MEETING, FEBRUARY 5, 2021

The Committee meeting was convened (via “Teams” video conference) at approximately 1:33 p.m. Present/participating were Chair Justice John Dooley, Judges Kate Hayes, Tom Durkin, Beth Mann, and David Fenster; Tari Scott, Teri Corsones, Su Steckel, Eric Avildsen, Chasity Stoots-Fonberg and Scott Woodward. Liaison Justice Beth Robinson, Court Administrator Pat Gabel, Committee Reporter Walt Morris, Emily Wetherell and Andy Stone were also present.

With the presence of a quorum, Chair Justice Dooley opened the meeting, noting that the sole item of business was the Committee’s consideration and approval of amendments draft of V.R.E.F. 11 to address significant issues that had arisen with regard to completion and verification of service within the electronic filing system as the “roll outs” of Odyssey File and Serve have proceeded, with implementation in the final units of the Superior Court scheduled for March 15th.¹ Judges were articulating a need for access within the electronic case record to data as to verification and completion of electronic service, and viewing of certificates of service, in instances where non efilers had been served. Attorneys were expressing concerns with respect to failed efforts and difficulties in completing electronic service, and failure of other parties to properly eserve documents as well. Clarity was being sought as to the particular means of serving parties in cases where some, but not all are efilers. A related issue goes to use of correct “service contact” email addresses, and the accumulation of attorney email addresses maintained by the judiciary, including those for the eCabinet system (which is due to be abrogated upon the last phase “roll out” of Odyssey File and Serve). Emily Wetherell indicated that she had prepared proposed amendments to deal with the “addresses” issue.²

Approval of December 18, 2020 Minutes

On motion of Tom Durkin, seconded by Su Steckel, the minutes of 12/18/20 were unanimously approved, with minor typographic edits to p.7.

PRIORITY ACTION ITEM—VREF 11 and RELATED AMENDMENTS

In advance of the meeting, five pertinent documents had been sent to Committee members: (1) a draft of proposed amendments to VREF 11 addressed to service issues, incorporating Committee suggestions from the December 18th meeting; (2) a memorandum of Justice Dooley outlining service related issues to be addressed, posing 10 questions for Committee response and action; (3) a memorandum with suggestions as to the Rule 11 draft, prepared by Teri Corsones, representing comment on behalf of the VBA; (4) a draft of amendments to VREF 2 from Scott Woodward suggesting added definitions pertinent to the Rule 11 service revisions; and (5) comments of Judge Beth Mann as to service issues and amendment of Rule 11.

¹ There were numerous other Agenda items listed; the Rule 11 amendments were assigned priority before reaching any other business. Justice Dooley did indicate if time permitted, it was important to take up proposed amendments to VREF 12 and 3(b) (Agenda Item #4) to address nonelectronic filing of original wills and related documents in probate.

² These proposed amendments would abrogate the 2010 VREF and amend A.O. 44 and 45, to clarify and coordinate email address submission and updating requirements for attorneys.

Justice Dooley introduced Scott Woodward, who would be taking Jeff Loewer's place on the Committee. Scott mentioned the definition amendments that he had suggested. He also indicated that in response to one of the "tech" issues that had been identified, filers choosing the "file only" function in Odyssey vs. "File and Serve", and thus not completing service, a configuration change can be made to default to "File and Serve", automatically taking the filer to the correct avenue to complete eservice. "File Only" would remain an election but not automatically presented to the filer. Another "tech" issue—providing a link between OFS Reviewer's Page content as to service completion and receipt and the electronic case record for viewing—would be more difficult, given the Odyssey structure as a "hosted product" that Tyler is reluctant to customize. Teri Corsones mentioned that filers have access to eservice details, and that it should be available in some form as well to the judges. Scott indicated that a shorter path would be to see if the OFS service details data can be extracted out of Odyssey, and that he is pursuing this with Tyler. Tom Durkin suggested that Vermont can't be the only jurisdiction dealing with the issue of ready confirmation of eservice. He added that it is very frustrating to have litigants in a hearing who insist that they have never received service of a document that is in issue in the proceeding.

Justice Dooley lead the Committee through consideration of the ten questions that he had posed in his memo, as related to the draft of Rule 11 amendments being considered. These were roughly grouped into four categories:

(1) implementing the **submission agreement/checkbox** for service compliance, where all parties to be served are efilers (and related, whether existing Rule 11(g)(3) should be modified to better specify the means of service certification where service is exclusively through efilings/File and Serve, and also where others are not efilers and served per Civil Rule 5);³

(2) whether a Civil Rule 5(h) certificate of service should be required in all cases for all documents served; whether 5(h) should explicitly apply to criminal cases as well; and if so, whether modified 5(h) content requirements should be modified for such cases;

(3) whether all efilers should continue to be required to serve documents through Odyssey File and Serve; if so, should the requirements for agreements for alternative service under VREF 11(d)(2) be modified to address difficulties in monitoring completion of service consistent with applicable rules; and

(4) whether clerk review and acceptance process should include a requirement of review for service compliance.

As to the first and second set of issues, (keeping the submission agreement/checkbox model for service certification in the rule, or not; modification of 11(g)(3); whether a Civil Rule 5(h) should be required in all cases) Justice Dooley indicated that in the draft, where all parties to be served are efilers, the submission agreement "checkbox" serves as a much simplified certificate of service (in contrast to the detailed requirements of a certification of service in VRCP 5(h)). As to service upon nonfilers, of course, the requirements of Civil Rule 5(h) must be met, and the applicable certificate efiled. The Committee engaged in discussion of how service appears to be working now in Odyssey, and whether attorneys have informally moved to provision of service by alternative means, either by filing an 11(d)(2) agreement or not. A range of views were expressed. Su Steckel confirmed that in her experience, service was occurring "outside" of OFS in some instances, due to the ease of just sending an email with an attachment, in view of the difficulties that some attorneys have experienced in navigating OFS. Judge Durkin stated that in his experience, as OFS has rolled out, with familiarity in using the system, users are better able to efficiently use the system and initial "glitches" have been overcome. He urged experience and training as the better

³ The draft presented to the Committee would require a certificate of service in either instance, but provided for an "abbreviated" certificate of service where all parties are served via OFS; and retained a requirement of filing of a Civil Rule 5(h) compliant certificate of service as to any parties served nonelectronically. See, 2/2/21 draft, proposed 11(g)(2) & (3).

solutions and that existing requirements should not be eliminated or “relaxed” resulting in litigants abandoning eservice, just at a time when its benefits are being seen. With the change to the “File *and Serve*” option, there should be fewer difficulties. Judges Fenster and Mann agreed with retaining the checkbox certification, and Rule 5(h) certificates of service for all who are served nonelectronically. Su Steckel urged that whatever approach is taken, that it be as simple as possible, with the fewest necessary tasks, as these can add up in burdens on law office staff. In the course of the discussion, Teri Corsones noted her perception that there has been little focus in the training sessions on the specifics of OFS service, and troubleshooting difficulties encountered in navigating the system. She urged greater focus on the service contact and public list processes in the trainings.

Judge Durkin further repeated that a primary concern of the judges was having the ability to view whether service was properly made, and for OFS, whether service was properly transmitted and received. Eric Avildsen expressed surprise that judges cannot view OFS service information, which is available to clerks on the reviewer pages, and parties as well. He suggested that determining whether eservice was properly made or not could be handled on a case specific basis, where there has been an apparent default, and is not necessary in each case, where there is no presenting issue as to failure of service. Judge Fenster suggested that the serving party as the “proponent” of valid service, should reasonably have the burden of producing information to verify service for the court’s benefit.

Returning to the specifics of the draft, Emily Wetherell indicated that the “abbreviated” submission agreement checkbox certification as to service in proposed 11(g)(2) would apply to all documents filed in the same envelope, as would a Civil Rule 5(h) certificate efiled as well where parties are not served electronically, as in the proposed 11(g)(3). In other words, multiple certificates, one for each document, would not be required. The discussion then turned to the checkbox, and its contents. Presently, the checkbox is intended to be used for compliance with Public Access Rule 7(a)(1) (which requires confidential or redacted filing of document content that is not publicly accessible). A certification of such compliance is required by VREF 5(b)(5) & (6).

Basically, a second “checkbox” would be added to the existing PACR compliance text in the submission agreement as it is visible to the user at the completion of the filing process. After extended discussion, clear Committee consensus on the “category (1) and (2)” issues in the Dooley memo was as follows:

A submission agreement checkbox certification as to service would continue to be required, and it and its contents expressly referenced in a redraft of the proposed 11(g) subsections. The submission agreement certification as to service must be used by all efilers. A Civil Rule 5(h) certificate of service would not be required where all parties are efilers and served via OFS—a checkbox entry to this effect would suffice. However, where an efiler is serving others nonelectronically,⁴ a certificate of service in compliance with Civil Rule 5 is required, and the COS must also be electronically filed.⁵

The categories of parties for whom the “additional” COS is required are to be further clarified as well.

In the course of the discussions, the Committee also considered the “category (3)” issues—whether the existing 11(d)(2) authorization for agreements for alternative service should continue, and if so whether the requirements of such should be specified. As noted, clear consensus was that all efilers must use OFS for service as the default. Eric Avildsen stated his view that upon use, and familiarity with OFS, filers would routinely conclude that it is a preferable to alternative means in that they can not only verify service completion, but whether the recipient actually opened the filing served. Judge Fenster agreed and indicated that attorneys might use the alternative agreement option very selectively, and actually decline to

⁴ Or outside of OFS, under the terms of an agreement for alternative service (see below).

⁵ The Committee did not address the issue of an explicit requirement of a COS in criminal cases, or what the specific content of the COS in such cases should be, where a party is served nonelectronically. The assumption is that prosecuting and defending attorneys in criminal cases are efilers, and are subject to VREF requirements, including as to service.

enter into alternative agreements, depending upon confidence level with an intended recipient. The clear consensus of the Committee was to continue the option of agreements for alternative service, but with specific requirements added to address problems identified in monitoring compliance with service requirements when alternative agreements (and, unauthorized alternative service without a filed agreement) are used.⁶

As to the fourth issue—clerk review for service compliance—Justice Dooley noted that while VREF 5(d)(1) makes general reference to court staff review of all electronic filings for compliance with (the e-filing rules) and Public Access Rule 7(a)(1), it does not specifically address actions for noncompliance with certificate/certification of service compliance, which under the terms of Civil Rule 5(h)(3), are expressly reserved to the judge, and not court staff. Given this reservation of authority to address service noncompliance, Justice Dooley recommended that no specific amendment to address clerk review of service compliance be made in the present promulgation but be considered as a future agenda item. The Committee consensus was in agreement.

VREF 11(f)—Court Transmission of Notices, Orders, etc. to Electronic Filers by Electronic Means

At the conclusion of the Committee discussion of the Rule 11 amendments, Chas Stoots-Fonberg raised the issue of court transmission of notices and orders to attorneys and self-representers by electronic means, and the question of what specific source of email addresses would be employed. Public service contacts? Or an alternative list? The Reporter's Notes here indicate that service of court notices "will be essentially the same as the method of service of party filings." The question implicates the state of the various attorney email addresses maintained by the judiciary, including "eCabinet" registrations, and whether they can be linked, or migrated to, the OFS public contacts list which is accessed for e-service of party filings. That was Teri Corsones' suggestion. In the interests of time, there was no further discussion of this issue, which is to be noted as a future agenda item.

Additional Definitions in Rule 2(k) and (l); Amendment of Rule 4(b)(3) (Creation of Service Contact).

The Committee agreed to the additional definitions suggested by Scott Woodward. These would amend the definition of "Service Contact" in (k) to streamline the existing text, as well as add three subdefinitions to comport with Tyler/Odyssey terminology: "Firm Service Contact"; "Public Service Contact"; and "Public Service List". Teri Corsones maintained that use of the word "service" in each of the definitions was misleading, since only the terms "Public Contact" and "Public List" appear to the e-filer on the OFS screens. In addition, "public service" could lead one to incorrectly conclude that the reference is to Public Service Board proceedings. Scott Woodward agreed to check with Tyler to see if the terms can be reconfigured on the OFS screens to include the word "service" in the captions. If so, the Committee decision was to leave the word "Service" in the referenced definitions. If Tyler cannot reasonably reconfigure, the word "Service" is to be left out of the agreed added subdefinitions in (k). The Committee unanimously also adopted the proposed definition of "Submission Agreement" in an added 2(l), with the addition of a sentence, "The submission agreement is part of the e-filing process and efilers indicate compliance using a checkbox", adapted from a suggestion that Teri Corsones made.

⁶ Drawing from the existing 11(d)(2) and the formerly applicable Civil Rule 5(b)(4), the agreement must be in writing, signed and labeled as an agreement for alternative service (to permit identification in the electronic case record); it must provide the email addresses for service of each party where the agreement is for email service; the agreement itself must be efiled, and served using the service contact of each of the parties to the agreement; and each filing served under the alternative agreement must be accompanied by an efiled certificate of service in full compliance with Civil Rule 5(h).

The Committee also unanimously agreed to an amendment to Rule 4(b)(3) suggested by Teri Corsones, to make it clear that efile registrants must create a public service contact upon registering and must immediately update their public service contact information upon any change.⁷

At the conclusion of the discussion of these items, the Committee determined that a revised final draft of proposed amendments to Rules 2, 4 and 11 incorporating the meeting's recommendations, would be prepared by the Chair and Reporter and circulated to the Committee for any final comments over a 48 hour period. If final comments warranted it, a special meeting would be called by the Chair at noon on the most convenient day to all, to address comments and agreement on a final draft for promulgation recommendation, to be transmitted to the Court.

Discussion of VREF 8 and eFiling of Exhibits

At the conclusion of the meeting, there was a brief discussion of exhibits, and issues which had arisen in electronic pre-filing of exhibits in connection with upcoming hearings. The Committee had discussed these issues at some length at the December 18th meeting, including the emergence of unit-specific protocols for exhibits filing, and the need for consistent and clear policies for efilings and treatment of exhibits, whether simply filed, or proffered, and then admitted or not. Judge Durkin indicated that issues associated with efilings of exhibits were a "terrible problem in the absence of a rule", and that the Environmental Division was in the process of issuing its own protocol.⁸ Justice Robinson stressed the need for uniformity and suggested that a Standardization Committee to be comprised by the Court take the lead in considering a uniform approach to efilings of exhibits. Justice Dooley offered his view that the best place for the lead on any approach to uniformity of exhibits filing and treatment would be the Civil Rules Committee. There were no Committee conclusions or recommendations reached, and exhibits will remain on the Agenda for future discussion.

The next regularly scheduled meeting of the Court was set for Friday, March 5, 2021 at 1:30 p.m., via Teams. Tari Scott will email an invitation and link to the meeting.

The meeting was adjourned at approximately 3:47 p.m.

Respectfully submitted,

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

[3/1/21]

⁷ The language ultimately included in the final draft was: "An efiler must create a service contact after registering, must check the "Make This Contact Public" box, and must immediately update the efiler's service contact information when changes occur." This, to clarify exactly what measures must be taken to correctly register a functioning public service contact address for provision and receipt of service from others.

⁸ Exhibit protocols already established for the Chittenden and Addison units had been circulated to Committee members in advance of the December 18th meeting.