

[As Approved at Committee Meeting on June 5, 2020]

**VERMONT SUPREME COURT
SPECIAL COMMITTEE ON RULES FOR
ELECTRONIC FILING (VREF)**

**Minutes of Meeting
March 8, 2019**

The meeting of the Special Committee on Rules for Electronic filing commenced at approximately 9:00 a.m. at the Supreme Court in Montpelier. Present were Acting Committee Chair Kate Hayes; and members, Susan Steckel, Teri Corsones, Eric Avildsen, Judges Tom Durkin, David Fenster, and Beth Mann, and Committee Reporter Judge Walt Morris. Also present was Justice Beth Robinson, who serves as Committee liaison to the Supreme Court. Committee Chair Justice Dooley was absent due to a calendar conflict; Judge Hayes chaired the meeting at Chair Dooley's request. Members Jeff Loewer, Tari Scott, and Chasity Stoots-Fonberg were also absent; Andy Stone attended and participated in the meeting on behalf of Ms. Stoots-Fonberg.

At this meeting, in addition to general discussions of the "shape" and functioning of the Odyssey electronic filing system, the Committee engaged in a substantive review of proposed Rules 1 (Applicability; Effective Dates; Title); 2 (Who Must File Electronically; Exceptions) and 3 (Registered Filers).

1. Judge Hayes opened the Committee meeting. Various announcements followed. Reporter Morris briefly reviewed the Special Committee charge and designation. He also reminded Committee members of a Public Hearing to be held on March 11th at 3:00 p.m. on the comprehensive amendments to the Vermont Rules of Public Access to Court Records (which also would abrogate the existing Vermont Rules Governing Dissemination of Electronic Case Records), and invited any interested members who are not also members of the Public Access Committee to attend.

2. **Judicial Bureau; Initiation of Electronic Filing; Emergency Rules Promulgation.**

Judge Hayes reported that in view of the anticipated launch of electronic filing in the Judicial Bureau, she, Judge Fenster and Hearing Officer Howard Kalfus had begun examining the prospect of an emergency rules promulgation of amendments to the Vermont Rules of Electronic Filing to cover procedures just in this docket. Reporter Morris indicated that the issue of emergency rules for the Judicial Bureau had been discussed at the Special Committee's last meeting, on February 15, 2019, and that it was hoped that the work of the Special Committee would be far enough along to a final draft of proposed amendments that could be reviewed and adopted by the Supreme Court in time for initiation of electronic filing in the Judicial Bureau, even though the amendments intended to be of general applicability would be subject to publication and comment prior to promulgation. Judge Fenster agreed that if such were the case, the task of implementing emergency amendments for the Bureau would be much simpler, and likely result in a fully consistent later promulgation of rules of general applicability.

In context of discussion of plans for launch of e-filing in the JB, Judges Fenster and Hayes indicated that as to e-filing generally, the legislature was currently considering a bill that would adopt provisions of the Uniform Sworn Declarations Act, that would in pertinent part standardize practice for electronic attestation of sworn documents that presently require oath and signature before notary. Such electronic attestation would be in the form of a check box with precedent language indicating that by clicking the box for entry, the filer/declarant is swearing that the content provided is given “under pains and penalties of perjury”. Judge Fenster indicated that in order for this alternative to be enforceable, another provision of the present bill would amend the perjury statutes, and elements of the offense of perjury, to expand perjury to false attestations made in sworn documents, with attestation given via electronic means. Tari Scott is following the legislation and will keep the Committee advised on developments.

3. Committee Review of Draft Proposal of Amendments to Existing (2010) V.R.E.F.

Reporter Morris lead a discussion and section-by-section review of the proposed amendments to the Rules for Electronic Filing that had been considered by the subcommittee at its January 11 and February 4, 2019 meetings, with changes recommended following the first full Committee meeting held on February 15, 2019. A memorandum outlining the proposed text of each section, changes from the existing rules, and changes if any following February 15th was circulated to Committee members in advance of the meeting. The discussion, recommendations and edits of March 8th were as follows:

Rule 1. Applicability; Effective Dates; Title.

The amended rule addresses the implementation of effective dates for *required* electronic filing, in unit and divisions of the Superior Court and the Judicial Bureau. The Court Administrator issues a directive for implementation, with reasonable advance notice, no later than 30 days before effective date. For the Judicial Bureau launch, electronic filing applies to all cases filed after the specified date, *unless otherwise specified* by the Court Administrator. Finally, the rule provides that the Court Administrator may authorize *some or all filings of a specified type of filer in a specified type of case* to be transmitted electronically to the electronic case file rather than through the e-filing portal. (Ex. DCF disposition reports; DOC presentence investigation reports; the information and affidavit in criminal cases.)

The Committee discussed the adequacy of advance notice of 30 days prior to implementation, referencing experience with the federal PACER system and state experience with implementation of e-filing in the E-Cabinet courts and the Environmental Division. It was the consensus that the present provision for no less than 30 days advance notice was adequate, coupled with advance education notice as to requisites of the system, and anticipated Bench Bar meetings in each of the units. The Committee also discussed the types of electronic filing that would occur outside of the electronic case file, and the state agencies that would be authorized to make such filings. Again, current experience was referenced, including DCF direct electronic transmission of case plans and Disposition Reports, and anticipated such use by other state agencies making routine filings in the future. Sue Steckel suggested that it would be helpful to clarify the status of such direct filers, whether “parties” to a case or not, either in the text of the rule or in a Reporter’s Note. Ultimately, the

Committee consensus was to leave the existing draft language of proposed Rule 1 unchanged.

Rule 2. Who Must File Electronically; Exceptions.

Reporter Morris indicated that the amendments of the discussion draft here delete most of the text formerly applicable in the e-Cabinet rules. Three categories of filers were identified in the draft—parties; filers seeking party status; and a number of individuals who may be required to file reports with the court—masters, receivers, GALs, neutrals required to file a report, all as in the former rule—with the addition of Parent Coordinators.

All filing must be by electronic means, subject to exceptions stated in subdivisions (b) and (c). Under (b), which makes only minor revisions from the current Rule 2(b), documents *may* be filed by non-electronic means: if filer is self-represented, unless electing to e-file; if non-electronic filing of the document or information is permitted by court to protect confidentiality or for other good cause; if filer is excused by court when extraordinary circumstances make e-filing not feasible; if non-electronic filing is expressly permitted by the VREF rules, or another applicable rule of procedure; or if the document cannot reasonably be scanned and e-filed because of size, shape, or condition. These exceptions are all in the existing rule. A reference to the Civil Division (e-Cabinet) in existing subsection (b)(6) is deleted.

Under 2(c), documents *must* be filed by *non-electronic* means when expressly required by VREF or another applicable rule of procedure; or after court order, upon finding that the filer has abused the system, as indicated in the text in further detail. Reference in existing 2(d) to direct filing with the court via electronic means other than through the court's e-filing portal is deleted.

As to proposed 2(a), the Committee discussed how to draw in “institutional filers” who must provide documents such as juvenile disposition reports (DCF) and pre-sentence investigation reports (DOC) to the court per statute. Justice Robinson suggested that there be added text incorporating state institutional filers within the meaning of “party” as used in the rule. However, after discussion the Committee concluded to delete reference in 3(a) to categories of filers; to simply provide that subject to the exceptions of 2(b) and (c) (filers and filings that are exempted from e-filing), “all documents filed” (regardless of who is filing) must be efiled.

In discussion of Section 2(b), Committee members noted several questions and points as to documents that may be filed by nonelectronic means. For example, what would be the treatment of large “documentary” exhibits, such as a large map, or photograph, or chart with markings affixed by a witness, and then admitted as an exhibit? What about a marked up stipulation? How would that be treated as to either physically providing it to the court when finalized, as opposed to requiring that such be transmitted electronically? And, since the rule was addressing an exception for “atypical” documents in Subsection 2(b)(5), should there be reference to physical exhibits? Committee members briefly discussed how physical exhibits are treated by and held by court Clerks now. Andy Stone indicated that the Odyssey system has the capability to number and track exhibits submitted electronically. There were no specific proposals to address these issues. Beyond the Committee's noting the text of the proposed exceptions permitting nonelectronic filing, the issues were left for further review.

Apart from the deletion of the references to categories of filers in 2(a), there were no other changes recommended as to the draft language of proposed Rule 2.

Rule 3. Registered Filers.

The amendments here significantly reorganize and delete sections of the existing rule. Proposed Rule 3(a) specifies the procedures and requirements for registration to file. Two categories of registration are identified—for *filing*, and for *viewing* files remotely via the established access portal. Registration to e-file would constitute consent to receive electronic service or notice that a filing has been made in the particular case. The filer must specify an email address as part of the registration.

The Committee discussed whether there should even be a requirement of registration only to view files that are otherwise publicly accessible (subject to the constraints of 12 V.S.A. § 5, which restricts remote access to criminal and family division files). The conclusion reached was that in view of general access that will be available either through public portals at each court location, as well as via public internet portals that may provide remote access to civil division files at a future date, a requirement of registration to view publicly accessible files is neither necessary nor desirable. And, registered efilers will have remote access to electronic case records in their own cases via Odyssey. References to registration to *view* efiled case records are thus to be removed from this section of the draft.

The Committee also discussed an issue presented as to the number of email addresses that may be employed by any registrant, notably lawyers and law firms. Apparently, the NG-CMS (Odyssey case management and efilings) is not capable of permitting multiple email addresses to be used by a registrant. This is a departure from the e-Cabinet experience, and concern as to this was again expressed by Teri Corsones on the part of the VBA. A restriction on the number of email addresses that could be employed by an attorney, or a firm with multiple attorneys, with a number of them working on the same cases, would be burdensome unless either the system could be modified to accept multiple email addresses, or another clear “work around” were developed to permit a firm’s internal distribution of notices in from Odyssey, as well as circulation of efilings made from within the firm to Odyssey. Judge Fenster inquired as to where the Judiciary acquires attorney email addresses in present practice. There was following brief discussion of Administrative Orders 44 (requiring licensed attorneys to provide email addresses for receipt of documents by email) and 45 (authorizing provisions of notices of hearing and other court documents to attorneys by email), and the practices under eCabinet. This (number of email addresses) was an issue unresolved at the March 8th meeting. Teri Corsones indicated that she will make inquiry of other efilings jurisdictions as to their procedures, as well as seek input from the bar as to possible solutions.

Rule 3(b) carries forward much of the existing rule applicable to attorney registrants. “Attorney” includes not only those licensed to practice in Vermont, but legal interns and attorneys appearing pro hac vice. As under the existing rule, attorney license number must be included on all filings, and email address must be sent. The provision of the existing rule which permits multiple registrations “to facilitate the practice of law from multiple offices” is deleted. However, proposed 3(d) authorizes an attorney to permit an associated attorney or

assistant to file documents under the registered attorney's name and view documents as well. The registered attorney is responsible for all filings and any misuse of the system.

As with the provisions of 3(a), the potential burdens of these changes upon law practice were noted as matters of concern. Su Steckel stated that she, and many others, now employ standard forms used in common case types. To have to include an attorney license number on each and every form filed imposes a new requirement in the category of burdens that should be avoided if possible. She and Teri Corsones will examine alternatives to the proposed requirement of an attorney license number on each filing, to report at a future meeting.

The draft 3(c) deletes reference in the existing rule to attorneys *pro hac vice*, since this is now covered in 3(b) and this section now refers exclusively to registration by represented *parties* and self-representers.

Former 3(f), dealing with specific rights of access by judges, court staff, and other authorized court personnel, is deleted as unnecessary. See proposed V.R.P.A.C.R. 5(a), which addresses specific rights of access by judicial officers and court staff.

4. Demonstration of Odyssey Platform and its Capabilities; Distinctions Between the Publicly Accessible and "Registered Filers Only" Portals and Content (Andy Stone).

Before proceeding to a discussion of the proposed amendments of V.R.E.F. 4 (Procedures for Electronic Filing), the Committee requested that Andy Stone provide an orientation to the current state of the Odyssey Platform, its capabilities, and the differences between general public access via electronic means, and access that would be restricted to Registered Filers Only.

Mr. Stone displayed the various screens that would be utilized for either manner of access to the Case Management System and the records therein, both the public portal and the e-filing site. There were a number of questions posed in the course of Mr. Stone's presentation: What are the differences between e-filing under the current e-Cabinet program and Odyssey? Mr. Stone briefly outlined these. When does a filed document move from filed status to accepted and accessible status? Mr. Stone explained how this would occur after Clerk review for non-public matter consistent with the Public Access rules, and what that process would look like on the Odyssey screens. There was a return to significant discussion of registration of email addresses and use of Odyssey. Would a law firm be able to use multiple email addresses? How would the system handle recognition of the responsible counsel of record? What is the process for change of email address? Justice Robinson indicated that she did not see where there was opportunity to create a different email address. Judge Hayes indicated that in all likelihood, upon change of email address, the user would need to re-register. Andy Stone affirmed that in his understanding, one could not have two current email addresses at the same time. Both Judge Hayes and Mr. Stone indicated that there are regular meetings with the vendor, Tyler Technologies, and that the issue is one that can be further discussed. Further to the Committee's discussion of proposed Rule 1 implementation process, Judge Hayes again mentioned that as part of e-filing start-up in the Judicial Bureau and the units, there would be on-going training and education for judiciary staff, the bar and members of the public.

4. Action Steps Going Forward:

--Justice Dooley and Reporter Morris will incorporate the edits and amendments coming from this meeting into the final draft proposal that is evolving. In the interim until next Committee meeting, they will continue to explore issues that have surfaced, and provide suggested further amendments, including but not limited to the questions of

--At the next scheduled meetings, the Committee will continue its efforts to draft a final proposal of VREF amendments, to be forwarded to the Court for publication. The goal is to see promulgation of VREF amendments to accompany the proposed PACR amendments, in time for launch of the NG-CMS.

5. Next full Committee Meeting date(s):

The next full Committee Meeting was scheduled for Friday April 12th, 2019 at 9:00 a.m., Supreme Court Building, Montpelier. However, given the need for expedience, Judge Hayes will undertake to schedule one, if not two interim meetings, from noon to 1:30 p.m., to facilitate judge member attendance at up to 3 Committee working sessions, without disrupting established court schedules.

6. Adjournment: The meeting was adjourned at approximately 12:40 p.m.

Respectfully submitted,

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