

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

VERMONT SUPREME COURT
SPECIAL ADVISORY COMMITTEE ON
RULES FOR ELECTRONIC FILING

MINUTES OF MEETING, OCTOBER 16, 2019

The meeting commenced at approximately noon. Judge Kate Hayes served as acting Committee Chair at the request of Justice John Dooley; present or participating by phone were Jeff Loewer, Tom Durkin, Su Steckel and David Fenster; Tari Scott; Chasity Stoots-Fonberg; and Eric Avildsen. Also present were Supreme Court liaison Justice Beth Robinson; Andy Stone of the Court Administrator's Office—NG-CMS Working Group; and Committee Reporter Judge Walt Morris. Absent were Committee Chair John Dooley, Teri Corsones, and Judge Beth Mann.

1. Opening; Announcements. Judge Hayes opened the meeting, indicating that its primary purpose was to review a final draft of the proposed 2019 Vermont Rules for Electronic Filing, incorporating all of the changes directed by the Committee after consideration of public comment at the meeting held on September 21, 2019.

2. Approval of Meeting Minutes. Reporter Morris indicated that he had not completed preparation of the September 21st meeting minutes. However, a complete record of the actions taken by the Committee (excepting approval of certain prior meeting minutes) was set forth in the Memorandum of Comments Received and Committee Responses that had been sent to Committee members on October 1st, and would be referred to in the course of the present meeting in reviewing the final draft.

3. Review of Final Rules Draft Prepared Incorporating Committee Revisions Made On September 20, 2019, in Consideration of Public Comments Received on Proposed Rules.

Justice Dooley, Reporter Morris and Emily Wetherell prepared a final draft of rules to be considered for promulgation recommendation, incorporating all of the changes recommended by the Committee on September 20th. This draft was circulated to Committee members in advance of the October 16th meeting, along with a Memorandum which outlined in detail the specific responses and revisions made by the Committee in consideration of each of the Comments that had been received.

Reporter Morris lead the Committee in review of the changes that had been incorporated into the final draft document. There were no significant comments or objections presented as to the revised text of Rules 1-5.¹ However, the Committee's orientation to the content of proposed Rule 6(c) (Nonelectronic Filing; Court Staff Processing of filings) changed from time of the September 20th meeting to the meeting on October 16th. The issues of treatment of non-compliant nonelectronic filings in relation to the e filing system and procedures for correction, acceptance and assigning a filing time for nonelectronic filings initially rejected as noncompliant were revisited. Significant

¹ A minor change was made to the Reporters Note accompanying Rule 5, p. 11, 1st paragraph, the word "required" in the second to last line was changed to "requested". Similarly, the sentence "This should be an increasingly rare occurrence as commencement through electronic filing becomes the norm." in the second full paragraph on p. 14 was deleted.

revisions were made altering the conclusions reached by the Committee at its September 20th meeting.

The rules that were published for comment provided that *electronically* filed documents that were rejected and corrected within 7 days would be considered filed at the time the original document was submitted. V.R.E.F. 5(d). For *nonelectronically* filed documents, the rules indicated that a filing that did not comply with the rules would not be scanned and the filer would “have an opportunity to correct the filing in a manner provided for other conventionally filed documents.” V.R.E.F. 6(c)(2). There was no specific provision for “relation back” of the filing date for nonelectronic filings to the time of original attempt to file, upon correction. The committee did not want to dictate how rejected paper filings would be treated as there is currently not a uniform procedure for this, and it was felt that nonelectronic filers in practice were accorded greater than 7 days to correct filings, and that a 7 day limitation might actually be more prejudicial to their interests.

During extensive discussion on October 16, several members of the committee expressed renewed concern over the disparity between electronically filed documents (that had the benefit of being corrected within 7 days, with date of filing recognized as date of initial attempt) and nonelectronically filed documents (that did not). Some hesitation apparently remained on the part of the committee to dictating how paper will be treated when the rules under consideration primarily govern electronic filing. However, there has been consensus to date that the electronic filing rules must contain provision for treatment of paper filings, in that all paper filings after effective date will be scanned and converted to the electronic record in any event.

The discussion included consideration of the capacity of the Odyssey system to scan rejected paper filings, retain them in holding electronic status, and later retrieve the record of documents filed but not accepted and later corrected. Based upon information provided by Andy Stone and Chas Stoots-Fonberg, the Committee concluded that the system had that capacity. The concern, and consensus, was that the “compromise” language included in the redrafted Reporters Note to Rule 6 following the September 21st meeting did not provide sufficient and specific procedural guidance for correction of rejected nonelectronic filings and “relation back” of the filing equivalent to those provided for electronic filers under Rule 5(d)(3) and (4).²

Following discussion, to address disparity concerns, the Committee decided to **add provisions in Rule 6(c)(1) and (2) requiring that rejected filings will be scanned, and held electronically pending correction and acceptance; and that notice of rejection, and the reasons for rejection, will be provided to the filer. Additional procedural protections to address rejection, correction, acceptance, and time assigned to non-compliant nonelectronic filings that are timely corrected were added to new and renumbered subsections 3 and 4. Subsection 3 in the published draft (Assigning a Case Number) was to be renumbered as 5. See pp. 16-18.**

² The redraft of Rule 6(c)(2) did not contain an express provision for timely correction of a rejected filing, and relation back of the filing date to the date of the original attempt to file. The text of the Reporters Note stated that “It is not intended that this paragraph will either expand, or contract existing procedural recourse for correction of nonelectronic filings. It is anticipated that correction of filings will be addressed in the case-specific circumstances, consistent with rules of procedure applicable to the case in issue”. The Committee consensus was that in view of the lack of uniform procedures among the units for treatment of corrected paper filings and assignment of filing dates, more specific provisions were necessary to provide opportunity for correction to nonelectronic filers to those of electronic filers.

As indicated the proposed revisions would change two things about the existing version of Rule 6. First, nonelectronically filed documents are to be scanned by court staff when they are received. This is now possible because most of the filing requirements that precluded scanning were removed, and the Odyssey system has the capability to scan, retain, and permit retrieval of documents in a pending status. Second, the 7-day provision for correction and relation back of the time of filing applicable to electronically filed documents is incorporated and applicable to rejected and then corrected nonelectronic filings under Rule 6(c)(2).

The subcommittee of Dooley, Morris and Wetherell will prepare and circulate to Committee members a final revised draft incorporating the changes directed to Rule 6(c).

Since the bulk of the meeting time was taken up with consideration of the issues associated with Rule 6(c), the Committee did not reach review of the final draft of Rules 7-12. The Rule 6(c) redraft will be considered, along with the remaining proposed Rules provisions 7-12, at a meeting to be held as soon as practicable, with the goal of prompt transmittal of a comprehensive proposal for promulgation to the Court.

Tari Scott will initiate a poll of members so that that meeting date can be set.

Upon completion of the referenced items of business, the meeting was adjourned at approximately 1:05 p.m.

Respectfully submitted,

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