

[As approved by Committee at February 5, 2021 meeting]

VERMONT SUPREME COURT  
SPECIAL ADVISORY COMMITTEE ON  
RULES FOR ELECTRONIC FILING

**MINUTES OF MEETING, December 18, 2020**

The Committee meeting was convened (via “Teams” video conference) at approximately 9:35 a.m. Present/participating were Chair Justice John Dooley, Judges Kate Hayes, Tom Durkin and David Fenster; Tari Scott; Teri Corsones; Su Steckel and Eric Avildsen. Liaison Justice Beth Robinson, Court Administrator Pat Gabel, Committee Reporter Walt Morris, Emily Wetherell and Andy Stone were also present. Chasity Stoots-Fonberg and Judge Beth Mann were absent.

With the presence of a quorum, Chair Justice Dooley opened the meeting, noting that the Committee had not met since July 10<sup>th</sup>, when amendments to V.R.E.F. 3(b) and 4 had been approved.<sup>1</sup> He indicated that efforts to recruit a Criminal Division attorney with Odyssey experience to join the Committee were underway. Among candidates identified are some who have experience with federal PACER and efilings practice as well. The plan is to have an additional member in time for the next Committee meeting. Justice Dooley also noted that among uncompleted tasks, promulgation of electronic filing rules for appellate proceedings remained. Emily Wetherell indicated that she was in the process of reviewing the existing Rules of Appellate Procedure to identify provisions that would warrant revision to address electronic filing, or amendments to the VREF rules.

**APPROVAL OF MINUTES.**

Upon Motion of Judge Durkin, seconded by Judge Fenster, the minutes of the July 10, 2020 Committee meeting were unanimously approved.

**REPORTS:**

**--Re: Efilings, and the Appellate Rules:** Emily Wetherell reported that a group has been working on configuring Odyssey for an appellate module, in anticipation of appellate ECM and efilings. Ms. Wetherell has been reviewing the existing V.R.A.P., and highlighting areas in which amendments to comport with Odyssey must be made, or would be advisable. One presenting issue is whether efilings-related amendments should be housed in the relevant appellate rules sections, or within the 2020 VREF, or a separate body of electronic appellate filing rules. Chair Dooley indicated that he will be comprising a subcommittee for review of appellate efilings rules, to prepare recommendations for consideration by the VREF Committee.

**--Re: Coordination of VREF with particular practices, needs of Civil, Criminal, Family and Probate Divisions and their respective procedural rules:** Chair Dooley indicated that since the last meeting, he and Reporter Morris met with Probate Judge Jeff Kilgore and probate rules Reporter Wroth on September 22<sup>nd</sup>, and that some VREF rules amendments, related to Rule 12 and “original” nonelectronic documents, had been identified for consideration on the present meeting’s agenda. It was hoped that Judge Kilgore could join the meeting later to share in the discussion. A

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<sup>1</sup>These amendments were promulgated on an emergency basis, effective July 15, 2020, with a post- promulgation comment period ending on September 15, 2021.

subcommittee of Civil Rules is meeting as well to consider “coordination” amendments that might be warranted in the civil or electronic filing rules. As of the date of the meeting, that subcommittee had not reported the results of its review for consideration by either Civil Rules or VREF committees.

## ACTION ITEMS: REVIEW OF PROPOSED AMENDMENTS

The principal item of business was Committee consideration of potential revision of **VREF Rules 11(g)(1) and (2) (to add a requirement of Certificates of Service in Odyssey efilings)**. However, several other items were addressed, including amendments of **VREF 3(b)(1) (Exemptions from Efiling for Certain Non-Governmental Entities Which Make Case-Related Filings)**<sup>2</sup>, and **VREF 12/3(b) (Non-electronic Filing and Retention of Nonelectronic documents where Required by Law)** These were taken up, with Committee action on each as follows:

### 1. **VREF 11(g): Service of Electronic Filings; Requiring Certificates of Service.**

A draft of proposed amendments to VREF 11(g) establishing a certificate of service requirement in efilings was circulated to the Committee in advance of the meeting.<sup>3</sup> Also provided were comments as to Odyssey eservice issues from Judge Helen Toor, on behalf of trial judges, and Attorney Jordana Levine, reflecting views of the bar. Many perceived eservice issues are set forth in these comments. Two basic issues were presented: (1) accessing information as to which parties were served, when and at what addresses in the electronic filing system<sup>4</sup>; and (2) inability to confirm that electronic service was actually completed by the system (and whether the recipient actually received (or “opened”) the documents sought to be served. Related to these two issues, a rules-compliance “Checkbox” associated with efilings and contemplated by VREF 5(b)(5) & (6) and VRPACR 7(a)(1) has apparently never been activated, and such certifications are not being provided by efilers. And, in many instances, lawyers are apparently defaulting to service via email outside of OFS, without filing agreements for such as required by VREF 11(d)(2). This alternative service data is not reflected in the electronic case record (“ECR”).<sup>5</sup>

A separate issue (not considered at length) concerned service of hearing notices and other notifications from the court.<sup>6</sup>

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<sup>2</sup> The discussion of 3(b) also extended to a request for efilings exemption for Qualified Domestic Relations Orders (QDROs) prepared and filed by an attorney as a service to lawyers and litigants, who does not appear as counsel for either party in the related proceedings.

<sup>3</sup> This draft would amend 11(g)(1)(A) by now requiring that when filing is made exclusively through the electronic filing system, the filer must file a certificate of service, and specifies the mode of filing of this document: “as an attachment to the lead document, notwithstanding the provisions of V.R.C.P. 5(h) and V.R.P.P 5(e), which authorize incorporation of the certificate into the final page of the document(s) being served.” This is deemed necessary to assure that upon clerk review of the filing, the certificate is identified as a separate document entered into the electronic case record, and viewable there.

<sup>4</sup> Actually, Odyssey “File and Serve”.

<sup>5</sup> Note that the April 13, 2020 amendments of A.O. 49, ¶ 6(c), in divisions and units where electronic filing (via eCabinet or Odyssey File and Serve) is not implemented, served to facilitate service by email, or other alternative means, subject to specified conditions including a written agreement filed with the court. This provision of the emergency rule is no longer applicable in all but the units in the last phase of the Odyssey roll out. And OFS will be implemented in those remaining units in mid-late March 2021, when the VREF will be fully applicable in all units.

<sup>6</sup> Andy Stone stated that the “court notices” issue (see, VREF 11(f)) would be best addressed through staff training and business practices, rather than a rules provision.

There was extensive discussion of the technical features and capabilities of the Odyssey “File and Serve” program (“OFS”), its relationship to the electronic case record (“ECR”), and the judiciary portal (through which the ECR may be accessed to view all filed case documents). In the initial promulgation of Rule 11, it had been assumed that Odyssey would automatically provide access to eservice information in the electronic case record, obviating the need for a certificate of service.<sup>7</sup> Hence the provision of 11(g)(1) that “When service is made exclusively through the electronic filing system, the efiler need not file a certificate.” But ready access to OFS eservice data in the ECR has proven not to be the case. Comments from the bench and bar show strong support for now requiring a certificate of service for efilers.

Justice Dooley indicated that as to the second basic issue—verification that electronic service was completed and received—there was not full realization when Rule 11 was cast that the Odyssey electronic case management/record (ECR) and File and Serve (OFS) were two separate systems that were only partially integrated, preventing ready access to service data in the ECR. Andy Stone explained that there *was* a “work around”, via the OFS “Reviewer Site; Review History” pages to enable viewing of eservice completion and receipt data, but that this was a lengthy process with many steps, and not practical. Judge Durkin confirmed this take (difficulty of tracking service completion data) and the need for a better approach. Su Steckel added her concern that lawyers should not have to certify that service has in fact occurred, when they don’t know, and can’t verify that that is the case. Justice Dooley remarked that the situation is similar now in the nonelectronic world, the certificate details what measures were taken to place service “in motion”, with no ability to assure that service is in fact “completed”.<sup>8</sup> As to the service issues generally, Judge Hayes remarked that as with other Odyssey issues, the frequency of errors has appeared to diminish as lawyers, judges and court staff become more familiar with use of the system. And, while not resolving the issue of manner of service and its effective provision, all efilings upon acceptance and entry are observable to parties in the ECR, via the judiciary portal, if they check.

Andy Stone indicated that one frequent source of service “defects” is that lawyers are just using the “Filing” function, and not “File and Serve”. They are just not clicking the correct box to initiate the eservice function. When the proper steps are invoked to initiate eservice (“File and Serve”), the system functions as it should. Judge Durkin stated that even if that aspect of the technology is correctly used by the eserver, that still doesn’t solve the problem of being able to determine who, at what email address, and in what manner, the intended recipient was served. There is clearly a need to cure the absence of this information in the ECR. Judge Fenster agreed that it was important for judges and lawyers to have this information in a readily viewable certificate of service.

The discussion turned to what experience the 30 judicial systems using Tyler Odyssey have had with effectiveness of OFS, and what rules have been implemented by others as to eservice and requiring certificates of service (or not). Justice Dooley indicated that some jurisdictions have adopted no rules at all with respect to electronic filing, viewing it solely as a technology function. Others that have rules and have done a fairly good job (ex., Idaho, Minnesota), have rules that are not as comprehensive as the VREF. Pat Gabel stated that the Court Administrators have a Tyler “users group” that may be a source for information about how other jurisdictions are addressing

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<sup>7</sup> In the drafting process, the Committee was aware that certificates of service are not required in the federal, “PACER” electronic filing system, and had assumed such as to Odyssey.

<sup>8</sup> Albeit, certifying that a document has been served by placing it, postage prepaid in the U.S. mail differs from discerning what OFS has actually done.

these issues. Andy Stone and Teri Corsones agreed to help with an effort to articulate targeted questions that might be submitted to this users group to secure any helpful information. Justice Dooley indicated that time was of the essence, to enable any rules amendments or systems alteration in time for the final roll out of Odyssey ECM and efilings in the Franklin-Grand Isle-Lamoille-Washington-Caledonia-Essex-Orleans (“ICEWOLF”) units. He, Reporter Morris, and others will work together on this information request, consulting with other advisory committees as pertinent as well, in hopes of a turn-around as soon as possible.

Justice Dooley asked if there could be a random “data run” of efiled cases to determine relative numbers of correctly completed vs. incorrect attempts to serve. Consensus was that this would be too burdensome at this time, given all of the other obligations of the Project Team and implementing clerk staff.

Justice Robinson shared her observation that there appeared to be two basic views reflected in the Committee discussion: one, that the systems are not functioning as they should, despite efforts of our users; and two, that for the most part, the systems are functioning as expected, but that users are not taking the time to familiarize with the system requirements, and correctly following the necessary procedures. There was acknowledgment that on the second point, continued and perhaps more practice focused training should be provided, and the Court Administrator is proceeding with plans for such focused training for the bar. On the subject of Odyssey user guides (there are a number of these provided on the Court’s website) the guide materials pertinent to service might be reviewed and amended as necessary. And, to points raised by Judges Hayes and Fenster, with increased familiarity with system requirements, the efiler experience with successful filing and service is significantly improved.

Despite the acknowledged need for training and effective user guides, consensus was that the Committee must (1) continue to examine whether a “shortcut” link can be established by Tyler in Odyssey to permit access via the electronic case record to eservice transmission and receipt data housed in the File and Serve Reviewer’s pages; and (2) complete the proposed amendments to Rule 11 to address current issues.

Given the wide-ranging discussions that ensued, and the action steps ultimately agreed to, the Committee did not have opportunity to focus upon the specific text of the draft as it was presented. A number of suggestions were yielded, which will inform revisions to the proposed amendments of Rule 11 to be considered at the next meeting.

### **Action Steps on Certificate of Service Issues Going Forward**

- a. Justice Dooley, Reporter Morris and Emily Wetherell will prepare a redraft of proposed amendments to VREF 11 to respond to and incorporate comments and suggestions from the general Committee discussion.
- b. Justice Dooley and Reporter Morris will communicate with others in interest as appropriate to develop focused questions that may be submitted to the Court Administrators’ Tyler users group for information on other jurisdictions’ treatment of eservice verification and certificates of service
- c. Dooley and Morris will explore with Scott Woodard, Project Manager, whether Tyler can provide a “shortcut” or link, from the electronic case record to service completion and receipt data housed in the File and Serve Reviewers pages.

- d. It would be helpful to have coordinate training opportunities for users on the eservice issues that have arisen, as well as review of pertinent sections of user manuals for clarity as to Odyssey eservice requirements.

### **“Checkbox” Issue**

While content of the “Checkbox” could be altered to incorporate eservice certifications upon activation of this feature, Committee consensus was to defer and treatment of this issue until the text of the rule amendments, and technology questions associated with “viewing” of eservice data can be resolved.

## **2. VREF 8 (Exhibits)**

The Committee discussed whether amendments to VREF were necessary to address various issues that have arisen in the Odyssey roll-outs as to the manner and content of efilings of exhibits, the pre-filing and admission processes. As the BRACE units have moved to ECM and eFiling, presiding judges have begun to institute unit-specific protocols for how exhibits must be efiled in Odyssey, and the timing of filing in advance of proceedings. Examples of these unit-specific protocols (From Chittenden unit, and Addison unit) were provided to the Committee in advance of the meeting. The Addison protocol acknowledges the possibility that a unit-specific, “local” approach to efilings of exhibits will result in inconsistent policies and confusion, and invites policies incorporated in amendments to Rule 8, but urges that there cannot be delay in providing clarity as to efilings of exhibits. In response to Justice Robinson’s inquiry, Teri Corsones indicated that the primary concern of the bar is provision of clarity as to efilings of exhibits, and consistency of practice of the units is very important for the practitioner. Tari Scott shared her view that on issues such as this, rotation of judges tends to result in varied practices, and that uniform standards that do not vary depending upon judicial assignments are desirable. A judiciary “standardization” committee will be comprised as the final units’ roll out occurs to identify and recommend responses to the needs. Chair Justice Dooley indicated that in the articulation of the existing Rule 8, there had been extensive discussions, with the conclusion that a uniform statewide rule might not be advisable: “It was none of our business”. He acknowledged that reexamination of Rule 8 might be supported at this time by the Committee. Justice Robinson noted an “important overlay”—the Covid emergency, movement to remote proceedings, and the particular difficulties presented in management of exhibit filing and treatment in remote video proceedings, in contrast to the live courtroom (where issues can be addressed “physically”, in person). Judges Hayes and Fenster were of the view that in their experience the issues with efilings of exhibits and use of efiled exhibits in proceedings could be worked out and addressed in the particular cases. It was necessary for judges and lawyers to recognize adaptations that had to be worked with in remote proceedings, depending on the remote platform being used. Judge Fenster stated that in Webex (used for most remote proceedings) there is some latitude for treatment of exhibits that are not pre-filed. Familiarity with “screen-sharing” capabilities on the part of judge and court staff is important to work through these issues.

Justice Dooley asked if there was Committee consensus to consider a rule amendment, or whether there should be a recommendation for administrative treatment of the issues. While there was no conclusive decision, the consensus was that as to exhibits efilings in Odyssey, there should be a uniform requirement that each exhibit must be separately filed, as an attachment to a “cover sheet” (identifying each exhibit attached in the filing package) to reasonably permit access to particular exhibits as needed in the ECR. This might be clarified in an amendment to Rule 8(a) (Filing of Proposed Exhibits).

A discussion draft of such an amendment is to be provided by the Reporter.

**4. VREF 3(b) and 12: Amendments to Address Nonelectronic Filing and Maintenance of Documents Where Required by Law (In Probate Division, Wills and Like Documents )**

Judge Jeff Kilgore did ultimately join the meeting. The Committee discussed the perceived need for amendment of Rule 12 (Official Record; Maintaining Nonelectronic Document) to clarify that documents that are required to be filed and/or maintained in nonelectronic form by law are not subject to disposition/destruction after scanning into the electronic record. Simply put, 4 V.S.A. § 2 establishes a will depository in the Probate Division units, for filing and maintenance of wills and related documents in nonelectronic form. Vermont has not adopted legislation that would authorize electronic wills, and their treatment in probate, as other jurisdictions have done. The Committee recognized that there may be other types of nonelectronic documents court retention of which is governed by statute. Judge Kilgore emphasized that apart from the registry and necessary retention of nonelectronic (paper) wills there, when there is a will contest, and disputes relating to execution, it is critical to have the original, “wet signed” will document, so that physical aspects of the document, including impressions, can be examined. In other words, the will is physical evidence, having independent evidentiary value that needs to be preserved. Pat Gabel suggested that it was time to consider ways in which there are “modern” ways to preserve the essentials that underlie the Probate Division concerns about preserving the original documents. Tari Scott indicated that a larger issue also presented goes to protocols for document retention, archives placement, and eventual destruction of this category of documents—when and under what circumstances—consistent with generally applicable judiciary case document disposition practices. As to the presenting issue, the Committee agreed that there should be an added provision in Rule 12, and as pertinent in Rule 3(b) to clarify the status of nonelectronic wills and their filing in probate, and in like circumstances where filing and/or retention of nonelectronic documents are mandated by law. A discussion draft will be prepared for consideration at the next meeting.

**5. VREF 3(b)(1): Exemptions from Efiling for Certain Non-Governmental Entities which Make Case-Related Filings.**

The July 2020 amendment to Rule 3(b)(1) clarified that governmental agencies which are required to submit reports and other case documents must efile and are not excepted from efilings as “self represented litigants.” These documents include, but are not limited to, presentence investigation reports (DCF); disposition reports in juvenile cases (DCF) and other case-related reports required by law, typically filed by non-lawyer officials or staff members, whether the agency is a party and represented by counsel in a case, or not. In response to continued inquiries on behalf of certain state agencies and non-profit organizations providing case-related services, seeking exemption from efilings, the Committee considered whether additional express exceptions from efilings should be added to Rule 3(b).

Tari Scott indicated that while the focus of the Rule was to include a requirement that agencies that conduct business regularly with the courts be required to efile (OCS, DCF, DOC, Domestic Violence advocates, law enforcement agencies, and diversion and pre-trial services programs), there is a community of less-frequent agency/NGO filers who, while making case related filings, seek exemption from efilings on grounds that it is burdensome to them. She stated that diversion programs, which are supported and funded by DOC, are efilings. The category of less-frequent agency/NGO filers (including restorative justice/community justice programs allied with DOC, or supervised

visitation centers tied to Parent Child Centers; Lund Home) often do not have attorneys on staff, even if they have recourse to an allied agency attorney for advice. One presenting issue is identifying whether an entity (ex. Tax Department; DMV) is *required* to file a document/report with the court, or whether the practice is discretionary, and not required. In response to Justice Dooley’s question, Ms. Scott indicated that such infrequently filed documents could be received nonelectronically and scanned into the case record. However, the challenge is to identify and provide clear guidance as to when an entity is to be considered an “infrequent” filer and thus exempted from the requirement of efilg that is applicable generally to governmental agency filers. Pat Gabel indicated that even if an interim exemption from efilg were accorded to this population, it would be better if efilg is the default requirement.

There was no ultimate conclusion or recommendation; the Committee requested that the Reporter provide a concept amendment for discussion that would address the concerns of infrequent agency/NGO filers, while not undermining the general requirement that governmental agencies efile, and that administrative remedies be explored for future discussion as well.<sup>9</sup>

#### **6. VREF 3(b)(1): Exception for Non-electronic Filing of QDROs**

This issue was brought forward by an attorney whose practice involves preparation and filing of Qualified Domestic Relations Orders in the Family Division on behalf of lawyers and their clients. The attorney requests that an exemption to permit nonelectronic filing of QDROs be added. Judge Fenster noted that in a particular case (not as a matter of general practice), a judge could authorize a nonelectronic filing under the Rule 3(b)(3) “good cause” exception. While recognizing the value of the service that the attorney provides in a complex area of practice not engaged in by many practitioners, and that the attorney does not technically appear as counsel for a party in the referenced proceeding, after discussion the Committee concluded that in preparation and filing of QDROs, the attorney is providing legal services in filing, and a recommendation for amendment for this exception would not be proposed at this time.

Upon completion of the referenced items of business, on motion of Judge Kate Hayes seconded by Judge Tom Durkin, the meeting was adjourned at approximately noon. No next meeting date of the Committee was scheduled, but will be, after circulation of an availability poll of members.

Respectfully submitted,

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

[2/4/2021]

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<sup>9</sup> An example of administrative approach to exemption is provided in the December 4, 2020 Court Operations directive that permits OCS “scribed” (draft) orders in child support cases, provided as a courtesy to the court and parties, to be filed via email outside of the OFS system. Note that this exemption does not apply to documents filed by OCS in party capacity as such. Such pleadings must be efiled. Note also that such filings are arguably also authorized under VREF 3(b)(4) or 7(a)(Format of Documents), although the “fit” is not precise.