

To: Senator Dick Sears, Chair
Joint Justice Oversight Committee

Senator Ann Cummings, Chair
Joint Fiscal Committee

From: Teri Corsones, Esq., VBA Executive Director

Date: November 11, 2020

Re: Response to State Court Administrator's Report pursuant to Sec. A.20 of Act 120

Following is a synopsis of court users' general reaction to the Court Administrator's Report (Report). The synopsis concludes with a legislative proposal designed to achieve an equitable and sustainable alternative e-filing fee model and designed to require the Judiciary to engage with court users in order to arrive at solutions to certain of the most critical Odyssey operational issues. The synopsis is followed by brief comments about each section of the Report. We hope that this court users' perspective is helpful to the Joint Justice Oversight Committee and to the Joint Fiscal Committee.

1. There is a significant disconnect between the Report's description of court users' experience with the Odyssey File and Serve system and court users' actual experience. In contrast to the Report's suggestion that the installation has been a "great success" "with no major system flaws reported", the attached verbatim narrative responses to a survey that was distributed in September attest to the myriad of issues that continue to plague court users. Notably, the narrative responses aren't included in the Report, or in the "Act 120 Review Findings Report Version 0.1" (BerryDunn Findings) prepared by the consultant whom the Judiciary retained to meet with court users in lieu of meeting with court users themselves. The BerryDunn Findings do, consistent with the narrative responses, reflect over thirty "Usability Opportunities for Improvement" based on court users' feedback that was largely critical of many aspects of the Odyssey implementation.

2. Act 120 provided a four-month opportunity for the Judiciary to meet with court users to discuss ways to improve court users' experience; the Judiciary delayed the first meeting until the end of the third month. Although Act 120 was signed into law on June 30, 2020, and the VBA had formed groups of court users in early July to immediately start to work on the Legislature's directive to report on recommendations to improve the rollout and improve court users' experience with the system, the Judiciary's consultant did not schedule the first meeting with court users until September 23, 2020, after the Legislative Committee on Judicial Rules sent a letter urging the Judiciary to afford court users the opportunity to offer feedback on an on-going basis (and to delay rollout of the system until the system's flaws were addressed, which latter recommendation the Judiciary rejected.)

3. The Report's proposed solutions are to, primarily in the future, "explore", "examine" and "study" critical issues that have been adversely impacting Vermonters' access to justice since the e-filing launch in April. The VBA court user groups were informed that the purpose of the meetings was not "solutional", but was for "information-gathering", only. The VBA respectfully suggests that the only way to address the myriad of problematic issues that still remain with the Odyssey File and Serve system is for the Judiciary to interact with court users in a solutional way. The Report fails to offer solutions

beyond promises to set up several committees that will, for the most part, not even begin work “until the NG-CMS system is fully rolled out across the state”. That timeline is slated for mid-late 2021. Critical e-filing issues that court users continue to experience and that directly impact access to justice for Vermonters in the court system must be addressed sooner than that.

4. Given the Judiciary’s reluctance to engage with court users in a solutional manner, court users propose that the Legislature require the Judiciary to meet with court users, including law enforcement and agencies that regularly appear in court, to immediately seek solutions to certain critical issues, and to report to the Legislature on the results. Once the Judiciary, through its consultant, finally began meeting with court users on September 23, no meetings were scheduled with law enforcement. The consultant only met with two persons with OCS at the last minute, only met with one person from DOC, and scheduled no meetings with DCF representatives. It’s imperative that the Judiciary meet with representative groups of court users who can best inform solutions to critical on-going operational issues. Those issues include inordinate delays in processing and serving e-filed documents, clearing up the “service contact” debacle that continues to impact effective due process, ensuring consistency and standardization regarding grounds for rejecting e-filings, devising a mechanism for ensuring that emergency filings are promptly presented to judicial officers, and ensuring access to accurate case information by all stakeholders entitled to access. Public safety, due process and access to justice considerations are otherwise in jeopardy.

5. The alternative e-filing fee review confirmed that the current per envelope fee is untenable and unsustainable. With respect to the “per envelope” e-filing fee that prompted the Legislature’s initial inquiry into the Odyssey system, the BerryDunn Report specifically found: “[I]nterested stakeholders indicated that the originally designed fee-per-envelope model is untenable and unsustainable”. And, “[m]ost participants agreed that the per envelope model currently used by the Judiciary is not tenable or equitable.” If nothing else was made clear from all of the information that led to A.20 of Act 120, including the mechanism to suspend the per envelope fee through December 30, 2020, the Judiciary should have been working with Tyler since June 30, 2020 to have ready an alternative e-filing fee model as of December 31, 2020.

6. The Report does not indicate an intent to implement an alternative e-filing fee on December 31, 2020; the original “per envelope” e-filing fee will apparently be reinstated on that date. It was hoped that the 30-page E-Filing Fees Report that was prepared for the Senate Judiciary Committee in May that led to Section A.20 of Act 120, along with the substantial materials compiled by the Alternative E-Filing Fee Court Users Group that was created specifically to respond to the Legislature’s directive to examine alternatives to the current e-filing charges, would motivate the Judiciary to do just that. Instead, the Report offers only to “explore those areas where the Judiciary and Tyler Technologies may jointly consider amending the contract in order to enable Tyler to respond to the Judiciary’s identified needs and/or the BerryDunn findings.”

7. Court users propose that the Legislature impose a per case e-filing fee in lieu of the per envelope fee. Since the Judiciary appears unwilling to voluntarily pursue modification of the per envelope e-filing fee structure, court users urge the Legislature to take steps similar to what it did in Act 120 – suspend the per envelope fee and provide for an alternative mechanism to fund the \$450,000 per year expenses that the per envelope fees were projected to cover. The Alternative E-Filing Fee Court Users Group recommends that the alternative mechanism consist of a \$13.50 per new case fee. The \$13.50 fee is based on figures that the Judiciary and Tyler themselves unilaterally contracted for – 2.5 envelopes per case times a \$5.25 per envelope fee.

Following is text for a proposed bill designed to achieve an equitable and sustainable alternative e-filing fee and designed to require the Judiciary to meet with court users in order to arrive at solutions to the most critical of the current Odyssey operational issues:

Preamble: All fees imposed by the Judiciary should be subject to legislative oversight, including filing fees and fees associated with electronic filing. Any fees collected related to electronic filing in excess of the amount due to Tyler Technologies, or any other provider, to cover the cost of operating the system should be subject to the same legislative oversight that governs other revenues of the state.

The cost of per use electronic judicial filing fees shall be covered by a one-time filing fee of \$13.50 assessed when a new cause is electronically filed, to be added to the court filing fees for new causes otherwise assessed pursuant to 32 V.S.A. §1431. Any per use or per envelope electronic filing fees are suspended, effective immediately.

The Judiciary shall meet with representatives of the Vermont Bar Association and other court users, including law enforcement and state agencies active in the courts, to address and find solutions for critical operational issues currently associated with the Odyssey File and Serve system. The Judiciary and the Vermont Bar Association shall report the results of their meetings to the Joint Legislative Justice Oversight Committee not later than December 30, 2020.

Court users' brief comments, section by section, to the Report:

I. INTRODUCTION

The statement that the Odyssey installation “has been a great success” is not borne out by court users' experience with the system. Court users appreciate the need for and the potential benefits of an electronic filing system. However, learning to navigate the Odyssey system has been a confusing, cumbersome and unnecessarily time-consuming process due to inadequate training materials and insufficient support resources. Court users sympathize with court staff who have been overwhelmed by the demands placed on them to cope with the pandemic, to scan in thousands of cases and to attempt to respond to Odyssey inquiries for which they themselves have received limited training. Also, judicial officers have lamented that it now “takes 25 clicks” to accomplish formerly straight-forward and routine processes

II. REQUEST FROM THE LEGISLATURE

This section of the Report merely re-states Section A-20 of Act 120.

II. (sic III.) REPORT

The statement in this section that the NG-CMS implementation “has been successful by any measure” ignores all of the evidence to the contrary. The Legislature afforded the Judiciary the opportunity to meet with court users, persons actually using the system, to sit down and point out where the system was working, where it wasn't, specifically why it wasn't working, and how it could be improved. Court users from a wide array of disciplines were prepared from early July to volunteer however much time was needed to tackle the list of issues and check off how each could be addressed. Instead, we were told

that our court user group should only include practitioners, and that the Judiciary would reach out to law enforcement and state agencies regularly interacting with the courts. Our long-awaited first meeting was limited to two hours in late September. A meeting with law enforcement was never scheduled. A meeting in October with two representatives from OCS was only scheduled after OCS submitted a letter to the VBA requesting that the OCS concerns with Odyssey be included in the VBA court user group concerns, because the CAO had not responded to a request to meet with OCS. A meeting with DCF representatives was never scheduled.

III. ACTION PLAN

This section of the Report is divided into two primary categories: “E-filing Usability” and “Alternatives to the current e-filing ‘per envelope’ use charge”.

E-Filing Usability: The Report includes “Standardization”, “Training” and “Communication” sections. Much of the discussion indicates that the Judiciary is “exploring” or “in the process” of addressing the many usability issues, versus resolving them. Finite Judiciary resources are cited as the reason for many of the issues, and “resources now devoted to implementation can be re-deployed to operations if Judiciary resources are adequate to permit such a redeployment”. In other words, no promises are made that the operational issues will be fully addressed even after a full roll-out.

Standardization: The Judiciary proposes that a “Standardization Committee” will be set up, that will make recommendations to the CAO, who will consult with the Chief Trial Judge and with the Chief of Trial Court Operations, to make decisions that don’t require policy decisions from the Supreme Court. No timeline is offered for when a standardization decision will be made. The fact that the Committee “will include in its deliberations input from Rules Committees, Oversight Committees, internal stakeholders and external stakeholders” indicates that it will not be a nimble or straight-forward process.

A “Judiciary Change Advisory Board” to address technology issues is also proposed, but only after the NG-CMS “is fully rolled out across the state”. The timeline for a full roll out is presently mid-late 2021.

The Judiciary proposes that the Interim CIO and external project manager “will guide the creation of a comprehensive inventory of and proposed ways to address common usability issues with Tyler Technologies . . .” Court users refer to the attached “Summary of VBA Court Users Group/Berry Dunn Meeting on 10/19/20” that includes an inventory of usability issues that continue unresolved.

Training: Initial training resources consisted primarily of Tyler webinars that did not address docket specific processes and that court users did not find useful or instructive. Written training materials consisted of a 200+ - page Tyler manual that was considered too long and detailed to be of value. The Judiciary eventually provided several docket-specific user guides and Vermont-specific FAQ’s, which have been helpful to court users.

The Judiciary proposes an “interim support model” in response to a common complaint that court users are often “bounced around” between Tyler and the Judiciary, when court users have functionality questions that the training materials don’t answer. The interim model “involves only two levels (Tyler and one Judiciary employee) within which the e-filer questions will be answered without ‘bouncing around’”. Although court users appreciate this effort to address support issues, they seriously question

whether a single Judiciary employee for the entire state is sufficient to respond to the many questions that court users have, and which questions will only increase as the system is rolled out state-wide.

Regarding the training of Judiciary staff, the Judiciary explained that the pandemic severely impacted its ability to train employees and judges. This was one of the reasons that the Legislative Committee on Judicial Rules strongly recommended that the rollout be delayed. As noted above, the Judiciary rejected the recommendation.

The Judiciary now proposes a support model for Judiciary staff that will include one or more project team members for “Tier 2 support”, but only after the full rollout. Ironically, the Report cites the “highly technical review” that clerk review and approval of filings requires, given “the complexity of the application of the Public Access to Court Records Rules and E-Filing Rules in the determination of whether a filing should be accepted or rejected, and the need to have those standards and rules applied consistently across the state”. Inconsistent and incorrect rejections of e-filed documents is one of the biggest complaints that court users cite. Although the Judiciary acknowledges the “highly technical review” that’s required, the Judiciary doesn’t plan to provide support to Judiciary staff for this review until after the full rollout.

Another critical concern court users voice is the lack of resources for low income litigants to take advantage of the advantages that e-filing offers filers. The Judiciary is now only “working on” a Guide and File system designed for self-represented litigants, with no target date for its availability.

Communication: The Judiciary acknowledges that it “does not currently have dedicated communications resources that have the expertise/additional capacity to meet communications expectations expressed by court users”. The Judiciary is “exploring” ways to make changes. It acknowledges that it “will need to develop a ‘next-stage communications plan’ for engagement with external stakeholders, including law enforcement and other non-attorney users”. Ironically, the Report notes that “communications will not be effective without direct interaction between the Judiciary and users of the system.” Yet when the Legislature directed the Judiciary to meet with court users, a long delay in setting up even an initial meeting with practitioners and no meetings for law enforcement and DCF personnel resulted.

Alternative e-filing fees: The outcry about per envelope fees is what initially led to the Senate Committee on Judiciary to bring to light the myriad of reasons that the per envelope model is wrong for Vermont, including significant adverse impacts in the areas of access to justice, pro bono and low bono legal services, barriers to self-represented litigants, ethical implications, disparate treatment of represented parties, the impossibility of projecting court costs, the potential for abuse, and the discouragement of pro se litigants from e-filing. The BerryDunnReport terms the per envelope fee “untenable and unsustainable.”

Yet the Report continues to reflect a tone deafness to the clear need to change the per envelope model. Despite the clear recommendation of the Alternative E-Filing Fee Court Users Group, consisting of experienced trial practitioners from all parts of the state who studied the 1200 page Tyler contract and alternative models across the country, for a per case fee instead of a per envelope fee, the Report pays short shrift to the recommendation, attributing it to a “focus group discussion”.

Nor does the Report reflect an intention to have in place an alternative e-filing fee model when the current suspension of the per envelope fee ends December 30, 2020. Despite the Legislature’s directive to the Judiciary to examine alternatives to the current e-filing charges, the Judiciary has not. It remains

fixated on the much discredited per envelope fee and promises only to review the BerryDunn findings and e-filing data between April 2020 and October 2020 (which data will not be at all instructive given the fact that the courts were closed down for two of the months and operating in a very limited capacity for the balance). Astonishingly, the Report then states: “Thereafter, if the analysis indicates that a better option is preferred, then the Judiciary will consult with Tyler regarding a possible renegotiation of the contract with Tyler regarding the File and Serve service.”

Court users are at a loss as to how to make their position on the e-filing fee issue more clear. They implore the Legislature to implement a per case fee in lieu of the per envelope fee. Given this experience with the Judiciary imposing court e-filing fees without the input of court users or the Legislature, court users also implore the Legislature to resume its rightful role in overseeing court filing fees for Vermonters attempting to exercise their constitutional right to use the state court system.