

# VERMONT BAR ASSOCIATION AD HOC E-FILING FEES STUDY COMMITTEE

## REPORT TO THE BOARD OF MANAGERS ON THE JUDICIARY'S NEWLY IMPOSED E-FILING FEES AND CHARGES

### Introduction & Designation

The present Committee was formed by designation of the Vermont Bar Association's Board of Bar Managers on April 24, 2020, following the Board's receipt of numerous complaints from practitioners following the April 20, 2020 introduction of the Vermont Judiciary's new electronic Odyssey "File and Serve" system in the Windsor, Orange, and Windham Units. The majority of the complaints centered on the imposition of a new e-filing fee and credit card charge for each filing or "envelope" an attorney files in every civil, family and probate case within the system.<sup>1</sup> Other complaints involved the fact that the e-filing fees and charges were collected in criminal cases and in at least two relief from abuse cases.

The Committee was charged with reviewing the substantive concerns of attorneys expressed to date; the ethical implications of the new fees and charges; and the training materials and information provided by the Judiciary and Tyler Technologies (the software designer), in conjunction with the introduction of the new system. From this review, the Committee was asked by the Board of Bar Managers to present its findings and to make recommendations to the Board of Bar Managers at its Board meeting on May 15, 2020 as to what position and action the Vermont Bar Association should take with regards to the new e-filing fees and charges.

The Committee appreciates the need for an updated case management and e-filing system to promote efficiency for court users and the Judiciary. It is also appreciative of the Legislature for funding the implementation of a modern case management system integrated with an electronic filing system.

However, based on the information gathered, the Committee concludes that the Judiciary's decision to implement the particular type of e-filing charges that it has, is fraught with significant issues.

1. The imposition of the new fees represents a radical departure from fees historically charged in the Vermont court system.
2. There was insufficient notice to the bar regarding the imposition of these new fees.
3. The Committee has also learned that the Judiciary had other options for assessing e-filing charges when it entered into its contract with Tyler Technologies, and did so without

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<sup>1</sup> As noted later, this charge is not imposed on a per-filing basis but on each group of filings, but this charge is uniform whether the filing is a notice of appearance, a motion for summary judgment, or a letter to the court notifying it that the parties have reached a stipulation. In each case, a \$5.25 fee is imposed to transmit the electronic filings to the court. Only if separate filings are joined (such as a notice of appearance with an answer) would one e-filing fee cover both filings.

involving the Legislature or the bar in the decision-making process, despite an often-stated emphasis on transparency, collaboration and the importance of input from stakeholders.

4. Serious concerns about access to justice ramifications, Constitutional and ethical implications, the impossibility of projecting court costs and the disparate treatment of represented parties have been voiced.
5. It has also become clear that the overall goal of encouraging electronic filing and a paperless court system will likely be thwarted by the Judiciary's decision to force anyone e-filing to pay an e-filing fee of \$5.25 and convenience fee with each separate e-filing. Pro se litigants have the option of filing with paper or e-filing. Logically, pro se litigants will very likely opt to paper file in order to avoid paying the e-filing charges each time that they separately e-file a court document.

The Committee makes recommendations to the Vermont Bar Association Board of Managers below. Numerous documents were reviewed by the Committee in preparation of this report. The Committee will make any referenced document available upon request.

### **Background & Initial Concerns**

The Vermont Judiciary has long-planned to develop and implement a 21<sup>st</sup> century electronic case management system to replace its aging VTADS legacy-docketing system.<sup>2</sup> Throughout this project, the Vermont Bar Association has supported the Judiciary's goals and has agreed with the intent and purpose of a unified electronic case management system. This includes the VBA supporting the Judiciary's efforts in 2015 to obtain funding from the Legislature for both its essential functions and for the next generation-case management system (NG-CMS) as the Judiciary sought to replace its aging existing system.

In 2017, the Judiciary began implementing the Odyssey case management system with its private vendor, Tyler Technologies of Texas. The role of creating, modifying, and implementing the NG-CMS system lay exclusively with the Judiciary. All project management and oversight teams overseeing the work were comprised of only Judiciary employees. Information about the new system and its dissemination, was primarily accomplished through a series of updates issued on the Judiciary website.<sup>3</sup> In none of these communications is information about the new e-filing fee or costs explained in detail.

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<sup>2</sup> Jeffery Loewer, Next Generation Case Management System, Project Brief – Exploration Phase (2015), at <https://www.vermontjudiciary.org/sites/default/files/documents/CMS%20Project%20Brief.pdf>; see also Vermont Judiciary, Next Generation Case Management System at 3 (2016), at <https://www.vermontjudiciary.org/sites/default/files/documents/VT%20Judiciary%20Project%20Charter%20V1%2000%202016-0331-1626%20-%20signed.pdf> (detailing the history of the Judiciary's case management systems up to 2016).

<sup>3</sup> The current site only offers NG-CMS updates back to March of 2019. <https://www.vermontjudiciary.org/about-vermont-judiciary/next-generation-court-case-management-system>.

In June 2019, the Judiciary introduced the new Odyssey case management system in the Judicial Bureau. It began public outreach to the bar about the new system, which was intended to go live in Windsor, Orange, and Windham Superior Courts at the end of 2019. At that time, the training materials offered did not include a clear explanation or details about the e-filing fees associated with the e-filing process, or indicate that a fee would attach to each and every filing submitted by the e-filing users.

On April 20, 2020, the Judiciary rolled out the Odyssey e-filing system, referred to as Odyssey File and Serve, in Windsor, Orange, and Windham counties. As of that date, any attorney representing a party in any docket in those three counties was obligated to create an e-filing account and could only file documents through this system. Even at this unveiling, no clear information was provided to members of the Bar about the e-filing fees and charges for each filing made through the system.<sup>4</sup>

### *Response from Members of the Bar<sup>5</sup>*

The Vermont Bar Association immediately began receiving numerous comments and concerns about the per-use e-filing fees and charges associated with the new Odyssey “File and Serve” system from a variety of practitioners when the system first went live on Monday, April 20, 2020.

The comments illustrated that the imposition of fees on each filing that an attorney makes represents a significant and substantial sea change in the practice of law in Vermont. Prior to April 20, 2020, no lawyer practicing in Vermont had ever been required to pay a fee simply to file a document within an existing case. This was true for lawyers using the federal court’s CM/ECF system, the Vermont Public Utility Commission’s epuc system, or even the Vermont Judiciary’s legacy eCabinet electronic filing system. In each of these cases, filing documents, replies, certificates of service, notices, letters, certain motions and settlement documents has had no fee or cost associated with the filing. With the introduction of the Odyssey system, the Judiciary has unilaterally changed this and has imposed a substantial cost increase on each and every civil, family, probate, and Supreme Court case or appeal where the party has retained an attorney.

The first complaint to the Bar came on April 20, 2020 from Bradley Myerson, an attorney from Southern Vermont, who raised strongly worded concerns about the existence of new per-use e-filing fees that his clients would now be charged simply for the right to file necessary pleadings in certain existing cases. Shortly after the Myerson letter, the Defender General listserv, which is used by hundreds of criminal defense lawyers across the state in both public defense and private

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<sup>4</sup> To clarify terms that will be used throughout, we will be using the phrase “per-use e-filing fee” to encompass transactional per-use e-filing fee and related costs and charges, which are incurred with each envelope filed through the Odyssey File and Serve system.

<sup>5</sup> This section describes initial reactions from members of the Bar. Included in this report are several letters drafted by various county bar associations, divisions within the Bar Association, and other attorneys expressing their formal concerns around the e-filing fee system.

practice, received a large number of reactions from members about the required per-use e-filing fees. Attorneys expressed uniform concern and surprise about the newly introduced per-use e-filing fees.<sup>6</sup>

Concerns raised by attorneys ranged from surprise to more serious question surrounding access to justice. For example, a practitioner in Windham County agreed to represent several clients in related Relief From Abuse<sup>7</sup> order cases on a *low bono* basis. The attorney entered her one-page notice of appearance for these clients and was charged \$5.25 in each case for simply entering her appearance in the cases. Because of the emergency nature of the matter, the attorney paid the fees. She immediately became concerned that requiring attorneys, like her, to shoulder such costs will deter them from providing representation in these vital cases. It may also deter or complicate representation of clients on a *pro bono* or *low bono* basis.

Statewide, as attorneys have begun to learn about the per-use e-filing fees, they have raised additional concerns to the Bar. Because the Odyssey File and Serve system is mandatory only for attorneys and is optional for self-represented litigants, attorneys are concerned about potential abuses of the system. Unrepresented litigants or litigants of unlimited means can drive up the cost of litigation for a represented party knowing that each response or filing will require a \$5.25 per-use e-filing fee and accompanying credit card charge. Attorneys are also concerned about their abilities to give clients accurate estimates of litigation costs. It is not always predictable at the outset of a case how many filings there may be. Thus, attorneys will be hampered in their abilities to provide predictable cost estimates to their clients.

The overall reaction of attorneys comes down, in large part, to notice. It has become clear from the widespread response from members of the Bar that notice about the per-use e-filing fees was insufficient and largely missing from the various education, communications, and roll-out materials produced and promoted by the Judiciary.

#### *Lack of Clear Communication Materials*

This issue is only magnified when looking at the contract for the Odyssey File and Serve system. The Vermont Judiciary and Tyler Technologies executed this agreement on June 30, 2017. In it, the Judiciary and Tyler Technologies negotiated a \$5.25 per-use e-filing fee. Although the Judiciary began telling the Bar *that* a new electronic case management and electronic filing system was coming, no mention or details about a per-use e-filing fee and credit card charge were provided until just prior to the 2020 rollout.<sup>8</sup>

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<sup>6</sup> This concern was well-founded as all criminal filings should have been exempt from these fees under the Judiciary's contract with Tyler Technologies.

<sup>7</sup> The committee has subsequently been informed that the fees do not apply in cases where the party filing the "envelope" is not obligated to pay filing fees. It is unclear whether attorneys will be charged such fees in cases where there is no statutory filing fee (such as Relief From Abuse matters) or whether they will be obligated to create a "waiver account."

<sup>8</sup> For example, the Judiciary website now has an e-filing Frequently Asked Question located within its electronic case management pages that describes the fees and charges. (See <https://www.vermontjudiciary.org/about-vermont->

As detailed further below and in the available promotional materials, the announcements and trainings regarding the system prior to rollout do not directly address the \$5.25 per-use e-filing fee.<sup>9</sup> This is mirrored in the bench-bar trainings provided in each of the three counties currently subject to the e-filing system in the 7 to 8 months leading up to the release. These materials do not list any per-use e-filing fees or information about the costs that would soon be attaching to each filing. Tyler Technologies hosted webinars on 8 different dates in March and April 2020 for Vermont participants. These programs were not widely publicized. While none of the written materials from these seminars explains or emphasizes the per-use e-filing fees and charges that would follow with the system, some presenters are reported to have only mentioned the \$5.25 fee in passing. Anecdotal reports suggest not all attendees received this information, nor information about how to create a “waiver account” for cases where e-filing fees are not required.

Attached is a table outlining all communication from the Judiciary regarding the NG-CMS Project and e-filing system. The table demonstrates the lack of clear notice to the Bar from the Judiciary as it relates to e-filing fees and associated costs. Information in the table also demonstrates the lack of available training materials or the inadequacy of materials provided by either the Judiciary or Tyler Technologies. The Judiciary website continues to be updated, and as of the writing of this report does not contain a clear schedule of fees.

The Committee asked the CAO on May 4, 2020 to provide any materials which it relies on in support of its position that reasonable notice was provided to attorneys about e-filing fee details. On May 13, the Committee received a response with one PowerPoint presentation, one notice, one Q and A, one website post, and three emails, none of which (with the exception of the last Q in the Q and A at one site, directly detailed the amount and frequency of e-filing fees).

#### *Initial CAO Response:*

The initial response from the Judiciary, via the Court Administrator’s Office, has been defensive and has sought to shift all responsibility to attorneys for needing to know about the existence of the e-filing fees.

As early as April 23, 2020, the Court Administrator stated via e-mail to the VBA Executive Director, “Tyler does not charge for e-filing of criminal filings, but a person who did not attend the trainings may not know how to ensure they are not charged.”

On April 28, 2020, the Court Administrator supplied a memorandum to the Senate Judiciary Committee in advance of testimony to be provided the following day. This document set

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judiciary/next-generation-court-case-management-system/faq). The page appears to be a recent addition. To find these answers users have to navigate five levels of the Judiciary’s website.

<sup>9</sup>These include at least two events hosted by the Vermont Bar Association at the 2019 Mid-Winter Thaw (January 2019) and the 2019 Annual Meeting (September 2019). The Vermont Bar Journal ran an article entitled “What’s New: Vermont’s New Electronic Filing System” by Andrew Stone in its Summer 2019 issue. The article covers several points about the filing system, but does not, in any way, mention the per-use fee.

forth the Judiciary's rationale for its choice in structuring the per-use e-filing fees as it did and compared the per-use e-filing fees to other jurisdictions using the same Odyssey system. This memo highlights, whether intentionally or not, the fact that the present per-use e-filing fee system was only one of several options that the Judiciary could have employed, including a one-time use fee or one-time per case filing fee.

The memorandum also sets forth who is exempt from paying such fees; this information is not readily available on the Vermont Judiciary website. This memorandum does not indicate that this information was ever provided to attorneys, or that decisions were made in collaboration with attorneys, who are, by rule, mandatory users of the system.

### **The Contract**

On May 5, 2020, the e-filing Fees Study Committee received a copy of the contract executed between Tyler Technologies and the Vermont Judiciary. The document, as provided, is 1,232 pages long. Relevant provisions of the contract are discussed below, and citations to specific provisions can be provided upon request. The Committee reviewed the contract, as did three additional attorneys who volunteered their assistance.

The Judiciary executed the contract on June 30, 2017, with an effective date of June 30, 2017, running until June 30, 2022. The key provisions for this Committee's purposes are in the Electronic Filing Agreement portion of the contract. This agreement grants two licenses: an e-filing System License to use the Odyssey File and Serve System and a Payment Processing License to use the Tyler Online Gateway Application to facilitate processing and accepting of payments through the system.

Use of the system involves three types of payments: software licensing costs, maintenance and support costs, and ongoing operational costs. The ongoing operational costs are not paid by the Judiciary, but rather are paid by "authorized users," or litigants.

The contract itself contains several provisions regarding the per-use e-filing fee of \$5.25 plus convenience fee. There is an available chart, indicating there are approximately 102,985 pleadings filed in Vermont each year. Tyler calculates that a fee would be charged in 85% of those filings (or in 87,537.25 filings). At a rate of \$5.25 per filing, the revenue generated would be \$459,570.56 [87,537.25 x \$5.25]. The contract also specifically authorizes "convenience fees" and in one section indicates a "minimum convenience fee of \$1.00..."

There is a chart within the contract setting forth the additional "convenience" fees. This includes the "Online Payment" convenience fee of 2.39% which is meant to cover the credit card processing fees. In addition to this convenience fee, there is also a 2.89% "electronic filing" convenience fee that appears to be added to the basic filing fee. The contract is unclear how or when the 2.89% electronic filing convenience fee applies. In the April 29, 2020 Senate Judiciary Committee Hearing, Senator Jeanette White referred to a \$5.60 fee, which could refer to the add-

on of the electronic filing convenience fee which amounts to approximately \$5.40 [(\$5.25 x 2.89% + \$5.25)] and then that total amount is subjected to the Online Payment (i.e., credit card) convenience fee of 2.39% or \$5.53 [(\$5.40 x 2.39%) + \$5.40].

It appears the goal in charging “authorized users” this per-use e-filing fee is to achieve the annual software subscription fee of \$450,000. There is an indication that that the Software Subscription rate increases in Years 6-10, leading to the conclusion that the per-use e-filing fee will increase each year. In addition, it appears that Tyler can increase the Ongoing Operational Costs (eFiling and Service Fees) on 30 days’ notice. In the Standard Contract for Technology Services attached to the contract as Attachment B “Payment Provisions,” the contract provides: “To the extent VT Judiciary’s actual volumes, method, type and criteria differs from this information, Contractor may modify the pricing with thirty (30) days’ prior written notice.” (Contract page 115/1232). At the May 13, 2020 Senate Judiciary hearing, Senator Sears asked CAO Pat Gabel if the e-filing fees could increase during the current contract term. She replied “No.” The exchange takes place at the 1:42:52 mark of the recorded video of the hearing, linked [HERE](#). It’s unclear how this assurance could be made in light of the aforesaid contract provision.

Significantly, the contract also contains a provision regarding the possibility of re-negotiating the per-use e-filing fees. Attachment B “Payment Provisions” provides “Use Fees shall apply for the Term of this Agreement, unless otherwise agreed to by the Parties in writing.” (Contract page 114/1232).

The contract also includes a provision that legislative action can impact the contract terms. Attachment D, Exhibit 4 “Electronic Filing Agreement” provides in section 5.3: “If the obligations imposed on either party . . . are materially changed pursuant to statute . . . then the parties shall work together in good faith to incorporate such changes in this E-File Agreement in a commercially reasonable manner.” (Contract page 90/1232).

### **Issues Related to the Judiciary’s Authority to Impose These Fees**

#### *Constitutional Sources and Issues*

Under Chapter I, Article 4 of the Vermont Constitution States, there is a guarantee that:

*Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.*

While this provision guarantees a fundamental right of access to the court system and a right to seek redress from the courts for a wide array of “injuries and wrongs,” it is not an unlimited or unbounded right. In 2011, the Vermont Supreme Court ruled that filing fees and transcript fees

do not violate this clause of the Constitution. *State v. deMacedo-Soares*, 2011 VT 56, ¶ 11 (mem.) (citing *Lewis v. Sullivan*, 279 F.3d 526, 528–29 (7th Cir.2002)).

While the general constitutionality of fees is accepted, other jurisdictions have put limitations on how these fees are applied. In Texas, any court filing or access fees must apply in a uniform manner to similarly situated litigants. *National Equitable Soc. v. Alexander*, 210 S.W. 602 (Tex. Civ. App. Austin 1919). Similarly, such fees must not be an unreasonable burden. *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1997). In Louisiana, the courts have rules that such fees must go directly to the administration of justice. *Safety Net for Abused Persons v. Segura*, 692 So. 2d 1038 (La. 1997) (fees from court cases going to a victims’ fund ruled unconstitutional as unrelated to the administration of justice).

Vermont has a likely constitutional analog to the *National Equitable Soc.* holding in its Common Benefits Clause and jurisprudence. (Chapter I, Article 7 of the Vermont Constitution). By requiring attorneys to use the e-filing system but permitting self-represented litigants the option of not e-filing, and requiring that fees be paid for use of the e-filing system, the Judiciary, arguably, has arbitrarily and capriciously created two separate classes of litigants.<sup>10</sup> In analyzing whether a governmental action violates the Common Benefits Clause, three factors are to be considered:

1. Significance of the benefits and protections of the challenged law;
2. Whether the omission of members of the community from the benefits and protections of the challenged law promotes the governments stated goals; and
3. Whether the classification is significantly underinclusive or overinclusive

*Badgley v. Walton*, 2010 VT 68, ¶21. In this case, the stated governmental goal behind the imposition of the “user fee” is to pay for the e-filing system. However, by mandating attorneys to file electronically—and attaching repetitive fees to that mandate—creates two classes of litigants. On its face, there does not appear to be a rational relationship between imposing mandatory per-use fees and the existence of an attorney in a case or to allow all self-represented litigants to opt out of said fees.

### *Statutory Sources*

The imposition of court fees is a legislative appropriation. As a general proposition, the Court cannot impose fees without authorization from the legislature. 32 V.S.A. § 1431 (providing the rates for court fees in particular proceedings and noting that they are “in lieu of all other fees not otherwise set forth in this section”).

The Court Administrator in her April 29, 2020 memo to the Senate Judiciary Committee cites to the Court’s power under 32 V.S.A. § 1403 as the basis for the Judiciary’s authority to impose the e-filing fees. This statute states in relevant part that:

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<sup>10</sup> This does not include the additional sub-classes of attorneys who are exempted from the per-use e-filing fees such as government attorneys.

(a) The Justices of the Supreme Court, under their general rulemaking power, shall establish uniform rules to govern the allowance of fees **not specified by law for services and expenses in the courts of the State**. The Court Administrator shall recommend to the Justices such alterations in the rules as he or she finds necessary. The Court Administrator shall endeavor to secure uniform allowances in the several counties and to correct deviations from the prescribed rules.

32 V.S.A. § 1403 (emphasis added). The Court Administrator has asserted in her April 29<sup>th</sup> memo that this rulemaking authority gave the Court the power to impose the per-use e-filing fees as part of its adoption of the Vermont Rules for Electronic Filing. Specifically, the Court Administrator points to Rule 10, which states in relevant part:

(a) Paying Court Fee; Correcting Failure to Pay.

(1) Electronic Filing. If an electronic filing requires payment of a court fee, an e-filing fee, or both, the e-filer must either pay the fee(s) on filing or file an application to waive filing fees and service costs. Court staff will reject an e-filing that does not comply with this rule as set out in Rule 5(d). The procedures in Rule 5(d) for correcting a noncompliant e-filing and determining the filing date apply. No advance deposit on account of future fees will be accepted.

There are two significant problems with this position.

First, Rule 10 does not appear to specifically authorize or create per-use e-filing fees or set the rate of such fees. It simply addresses the mechanics of how and when such fees are paid. The remainder of Rule 10 deals with similar mechanics. There is no section of Rule 10 or any of the Vermont Rules of Electronic Filing that authorize or delineate the imposition of per-use e-filing fees or credit card charges as part of the mandatory filing system. There is no reference to the Tyler Technology contract or a declaration that the Court is intending to create a per-use e-filing fee system. Indeed, Senator Joseph Benning made clear during the May 13 Senate Judiciary hearing that the Legislative Rules Committee is not a committee of jurisdiction to review or approve the financial impacts of a rule. The exchange takes place at the 1:22:52 mark of the recorded video of the hearing, linked [HERE](#).

The second problem with this line of authority comes from 4 V.S.A. § 27, Act 191, and the legislative history of the technology fund. Under 4 V.S.A. § 27, the Legislature expressly authorized the Judiciary to create a technology fund from existing court fees and charges for “to pay for contractual and operating expenses and project-related staffing not covered by the General Fund related to the following: (1) The acquisition and maintenance of software and hardware needed for case management, **electronic filing**, an electronic document management system, and the expense of implementation, including training.” 4 V.S.A. § 27(a). This language was added to Section 27 in 2008 through Act 192, Section 6.026.

In 2014, the Judiciary sought authority from the legislature to amend Section 27 and to add a proposed 32 V.S.A. § 1431(i), which would have given the Judiciary the authority to create an e-filing fee system by rulemaking.<sup>11</sup> This proposal, which was drafted and proposed by the Court Administrator to the Senate Institutions Committee was not accepted and was not adopted. Instead, the legislature passed Act 191, which in Section 25 added language concerning electronic filing. This section states:

#### JUDICIARY; ELECTRONIC FILING FEE

It is the intent of the General Assembly that the Judiciary be authorized to fund the licensing and operating costs of an electronic case-file and electronic filing system for all courts through, among other sources, the imposition of user fees on electronic filing or electronic access to Judiciary case records, or both. **The Supreme Court is authorized to submit to the General Assembly a specific plan for such fees, including the amount of each fee, the coverage of the fee and the user action that will trigger the imposition of the fee,** to take effect once funding for purchase of the electronic filing and electronic casefile system is secured.

Act 191 (2014), Section 25 (emphasis added). In this provision, the legislature expressly authorizes the negotiation and creation of an e-filing fee system, but it conditions such on the submission of a specific plan to the legislature for its review and approval. The unambiguous intent of this section is to put any fee system and structure before the legislature for public review and process.

Such a report or plan appears never to have been submitted to the legislature. At the April 29, 2020 Senate Judiciary Committee hearing, members of the Committee stated that they were unaware of the e-filing fee and any per-use fee system prior to the April 20, 2020 roll-out and subsequent constituent complaints. These members included a legislator/attorney who is also a member of the Senate Institutions Committee. The Court Administrator indicated that this e-filing plan had been discussed in the Senate Institutions prior to the Senator's appointment to that Committee. The Court Administrator did not point to any specific testimony. Following the hearing, the Vermont Bar Association contacted retired State Senator Peg Flory, the former chair of the Senate Institutions Committee who stated that she was unaware of any such testimony and stated that if such testimony had arisen, she would have referred the matter to Senate Appropriations.

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<sup>11</sup> See January 21, 2014 Memo from Court Administrator Patricia Gabel to the House Ways and Means Chair, Janet Ancel regarding Judiciary Fee Bill Proposal and accompanying proposed amendments to 4 V.S.A. § 27 and 32 V.S.A. § 1431. Memo available upon request.

## Notice of e-filing Fees and Charges to Lawyers

### *Substantive Concerns*

The per-use e-filing charge for each transaction is a significant change from the way in which parties and their attorneys accessed the Vermont courts in the past. Represented litigants must use the e-filing system, while self-represented litigants may choose between the e-filing system or the fee-less paper filing system. The per-use e-filing fee will in all probability result in a greater number of self-represented litigants choosing to paper file rather than e-file.

In highly charged dockets, such as landlord-tenant and family court cases, the per-use e-filing fee will likely be an additional weapon in the arsenal of the more well-heeled party, or the party who regardless of cost wishes to inflict distress, cost, and delay on the opposition. Rule 11 sanctions under such circumstances are difficult to enforce where the real motivation for pleading or filing is not readily ascertainable. Further, Rule 11 sanctions do not apply to discovery. By way of example, one family docket case involving parental rights and responsibilities in Rutland County had 148 motions filed. Assuming that each motion triggered a response and each response triggered a reply, that would total 444 filing transactions requiring the payment of a per-use e-filing fee. The cost to the litigants would be over \$2331.00.

Landlord-tenant cases provide a good example of how per-use e-filing fees for e-filing pleadings can adversely impact litigants. In the majority of eviction cases both the landlords and tenants are facing some financial difficulty (either through lack of rent needed to sustain the costs of the property or an economic hardship leaving tenant unable to pay rent). In such cases, both parties have very few disposable resources to utilize in a per-use e-filing system. In most ejectment cases, there are often motions for (1) alternate service, (2) to pay rent into court, (3) to file for a writ of possession, (4) to seek discovery for the final damage hearing, and (5) proposed final judgments. Taking a fairly representative landlord-tenant case which recently went to trial, there were 14 motions in addition to the filing of the summons and complaint. Again, assuming that each motion triggered a response and each response triggered a reply, that is 42 transactions in addition to the 2 transactions to file the complaint and answer each of which requires a per-use e-filing fee. The cost to the litigants to use the e-filing system would be over \$231.00. If one party is represented and the other is self-represented and chooses to paper file rather than e-file, then the represented party in all likelihood will have to incur not insubstantial fees and costs tacked onto the basic costs of litigation where the self-represented litigant will not.<sup>12</sup>

The per-use e-filing fees will have a significant impact on litigants in personal injury cases. These cases are typically handled on a contingency fee basis by plaintiff's attorneys, and the defense is typically funded by an insurance company. Under the present system plaintiffs can anticipate a significant number of defense motions, discovery requests and disputes, all of which

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<sup>12</sup> This cost becomes even more disproportionate given that a large number of ejectment cases involve either an agreement not to seek back-rent or with a judgment-proof debtor such that these fees, even if assignable, are not recoverable.

add to plaintiffs' costs to pursue their claims. The additional costs occasioned by the per-use e-filing fees will increase the financial advantage of the insurance backed defendant over the contingency-fee plaintiff. While this may enhance what is already perceived to be an imbalance in the negotiating power between plaintiffs and defendants, it will also result in increased cost to the plaintiffs, regardless of who is funding those plaintiffs.

An e-filing system should be readily accessible to represented litigants and self-represented litigants alike. The e-filing system should encourage the pro se litigant to utilize the system. The universal use of the e-filing system will increase the efficiency and economy of the court system. By creating an e-filing system which mandates a represented litigant to use the system but allows a self-represented litigant to opt out of the system discourages universal use of the system. The added bonus of being able to avoid the \$5.25 per-use e-filing fee by opting out of the system acts as an incentive for the pro se litigant to continue to paper file. The per-use e-filing fee imposed in the current e-filing system is at odds with a goal of the Court to encourage all litigants to e-file their pleadings.

The per-use e-filing fee taken in tandem with the requirement that all represented litigants must e-file pleadings penalizes litigants who choose to hire an attorney to represent them. These litigants will pay a per-use e-filing fee for each pleading they e-file. Represented litigants risk having their costs increased due to self-represented litigant(s) who choose to aggressively litigate their cases and avoid the per-use e-filing fees by paper filing. Self-represented litigants will not incur any fee for filing pleadings but will exact per-use e-filing fees from the represented litigant who must respond to those pleadings in order to effectively pursue their cases.

A critical weakness of the per-use e-filing fee is that it disrupts the equal playing field for litigants by introducing a financial component which neither litigant can control if both are represented, and which a represented litigant cannot control if litigating against a party that is pro se. Under this system, the costs of litigation cannot be predicted because the represented litigant is not in control of the number of filings which will occur in a given case. More concerning is that a party can utilize per-use e-filing fees as added leverage against a represented litigant. Economic leverage of this nature should not be built into the court system.

### **Access to Justice**

In addition to the issues already raised, the attorneys who provide *low bono* and *pro bono* legal services to Vermont's most vulnerable citizens have serious concerns about the financial and logistical barriers e-filing fees bring to access to justice. These concerns fall generally into three categories:

1. reduced access to pro bono and low bono services due to the cost or unpredictability of per-use e-filing fees;
2. creation of barriers that impede access to an online system for self-represented litigants; and

3. lack of clarity regarding the scope of fees in particular situations that frequently arise for attorneys providing pro bono or low bono services.

These barriers may effectively reduce the availability of *pro bono* services for Vermonters.

#### *Diversion of Limited Pro Bono and Low Bono Services*

There is already a far greater need for *pro bono* and *low bono* legal services in Vermont than supply. Increasing costs further reduces those limited resources and decreases access to competent representation. The per-use e-filing fees represent a sea change for Vermont attorneys. For the first time all attorney filings are subject to fees. This includes answers and responsive filings that have never before required the filing party to pay a fee or necessitated the filing of a waiver form. Those who need to respond to filings usually do not choose to come to the courts. Instead they are required to respond and, if represented, forced to pay for the privilege of responding to a suit started by someone else.

In many cases it is not possible to file with a waiver form—even when a litigant may qualify for a fee waiver—because the filing deadline is pending, and the attorney has very little time between entering the case and complying with the deadline.<sup>13</sup> The current waiver form frequently takes a day or longer to complete as the litigant needs to gather required income and asset information. Often there is no time to fill out the form, prepare the necessary filing, and make a filing deadline. In other cases, litigants of moderate means cannot afford a lawyer at a full fee but earn too much to qualify for a fee waiver.

Adding a \$5.25 fee to each filing to a *low bono* or modest means case will quickly use up the *low bono* grants and increase the fee the attorney will have to charge to cover a modest means case. This will have a chilling effect on the availability of representation for those needing reduced fee and *pro bono* legal services. For legal services providers who will cover filing fees for cases handled by volunteer attorneys, these fees will eat into already limited resources and very tight budgets.

For legal service providers it is essential to be able to accurately predict the costs of litigation when seeking grants to cover the costs of those services. For volunteers, predictability of costs is also essential to determine whether their practice can afford to provide *pro bono* and *low bono* services. See Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, National Public Radio (May 14, 2014), at <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>,

#### *Barriers for Self-Represented or Pro Se Litigants*

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<sup>13</sup> In such cases, there is no avoiding such a fee as even a motion for more time to file a waiver motion will in and of itself generate a per-use e-filing fee and charge.

Many in the Access to Justice community are concerned about the impact these per-use e-filing fees will have on self-represented litigants. While the Judiciary cites an average of 2.5 filings per case in the Tyler contract, many cases, particularly those that frequently involve self-represented or *pro se* litigants, far exceed that number. It is not unusual for cases in the Family Division to exceed 50 post judgment custody and child support filings, especially in cases involving domestic violence or a great deal of conflict between the parties. Foreclosure cases involve far more than 3 filings in the normal course of a proceeding. Evictions also rarely have 3 or fewer filings. Yet, the consequence for not participating can be dire. For each of these cases the per-use e-filing fees could realistically add up to hundreds of dollars and, for the person responding, may be completely unpredictable.

For example, Vermont Legal Aid provides representation for approximately 2% of the defendants in consumer debt collection cases and approximately 7% in eviction cases, not counting the limited appearances in rent escrow and debt collection clinics. In the Family Division the majority of litigants represent themselves, and the vast majority of cases involve at least one self-represented litigant.

While self-represented litigants are not required to file electronically, many would benefit from the increased access to the courts that the e-filing system provides. The ability to file after business hours and to receive filings electronically would greatly benefit attorneys and self-represented litigants alike.

### *Lack of Clarity*

Another concern brought by many *pro bono* and *low bono* service providers is the lack of clarity about when a per-use e-filing fee is assessed.

- Will it be possible to file anything in paper format at the courthouse or will attorneys volunteering for legal clinics at the court (i.e. the rent escrow clinics) need to file paperwork electronically from the conference room and pay the fee?
- What will happen in cases where attorneys appear for a limited purpose? If an attorney has entered an appearance in part of a case by using the e-filing system, does that commit a litigant representing themselves in all other aspects of the case to e-filing and the increased fees as well?
- What if a litigant doesn't have access to a bank card or credit card?
- What if a litigant does not have access to email and a computer at all? Does that also mean that they cannot access the benefits available through limited representation and must either pay for full representation or have no representation at all?

The Committee is very concerned that the per-use e-filing fee in the current e-filing system will cause an unintended decrease in the availability of *low bono* and *pro bono* legal services for Vermont residents as costs of litigation increase in unpredictable and unprecedented ways. Many issues need to be addressed before this system is rolled out statewide.

## Ethical and Professional Responsibility Concerns

In addition to other concerns noted throughout, attorneys have begun to raise ethical and professional responsibility concerns with respect to their use of Odyssey File and Serve. Because the system is mandatory for attorneys, and because attorneys are bound to practice with certain ethical obligations and considerations, this major change has caused concerns and confusion. Adding to this confusion is the timing. These issues are being raised in real time without the advantage of considering these issues in advance. Several ethical and professional responsibility issues have been raised by attorneys using the system and are noted below.

### *Cost Management*

The Odyssey File and Serve system is currently set up to require a per-use e-filing fee of \$5.25 plus a mandatory “convenience fee.” This fee is required for each envelope of filings made by a represented client, regardless of the type of filing. Because of the nature of uncertainties in litigation, it will make it difficult for attorneys to help prospective clients assess realistic costs of litigation. By their very nature the per-use e-filing fees are unknown at the start of a case. Attorneys are required to explain the basis and rate of a fee to a client.<sup>14</sup> Although attorneys can, and should, inform clients about the existence and nature of the per-use e-filing fees, it is unknown at the start of litigation *how many* per-use e-filing fees will occur over the lifetime of a case. They simply cannot accurately predict the number of per-use e-filing fees that will occur because those are, in part, dependent upon other parties and court requirements.

Also of concern is the general prohibition on advancing financial assistance to a client.<sup>15</sup> Although certain kinds of civil cases permit advancing of fees, the repayment of which may be contingent upon the outcome, these are a small portion of cases filed in Vermont courts. This could potentially be cured by the client agreeing, in advance, to repay the attorney any necessary litigation fees advanced by the attorney. However, attorneys are currently grappling with whether to create new engagement agreements to address specifically e-filing costs. Attorneys representing clients whose existing contracts prohibit e-filing costs may now also be in a position to either advance costs or to cease representation of those clients.

Represented litigants who run low on or who run out of funds are still subject to payment of the per-use e-filing fee. Attorneys may find themselves in a position that they must advance the per-use e-filing fees for any filings. Attorneys may limit their filings or responsive pleadings simply because a client has run out of available funds. This has the potential to create a direct financial conflict between attorney and client. Ironically, filing a motion to withdraw because a client has run out of funds will cause the attorney to go in-pocket to file such a motion.

Attorneys are encouraged to file efficiently by “stuffing” each “envelope” with as many electronic documents as possible in each filing. One concern identified is the potential for

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<sup>14</sup> See V.R.Pr.C. 1.5(b).

<sup>15</sup> See V.R.Pr.C. 1.8(e).

disagreement between attorney and client for use of fees through repeated per-use e-filing fees. A cost-conscious client may find themselves at odds with their attorney's advice with respect to filing motions that a reasonably diligent attorney may file or responding to motions as a reasonably diligent attorney may do. Additionally, clients may become upset with their attorney if he or she repeatedly files pleadings separately incurring additional per-use e-filing fees. Although this may come down to an issue of competence on the part of the attorney for understanding (or not) how the system works, it may be an issue outside the attorney's control if repeated filings or responses are necessary to protect the interests of the client. A client's perception that the attorney has somehow acted to incur additional costs may act to cause harm to the attorney-client relationship.

### *Abuse of the Per-Use e-Filing Fee*

Also raised as a concern is the potential abuse of the per-use e-filing fee. As the rule currently stands, e-filing is mandatory for attorneys, but is optional for *pro se* litigants.<sup>16</sup> However, once a self-represented litigant begins e-filing, he or she is required to do so for the duration of the case. Unless a litigant qualifies for a fee waiver, he or she is required to pay the per-use e-filing fee for each filing.

This has caused concern for per-use e-filing fee abuse in the following areas:

- Self-represented litigants or fee waiver-qualifying litigants filing numerous pleadings requiring responsive pleadings will force an opposing represented party to shoulder significant per-use e-filing fees.
- Litigants with significant resources may force an opposing party to incur significant per-use e-filing fees. An identified example was in civil litigation where a defendant is subrogated by an insurance company; the insurance company may have a greater tolerance for litigation fees than does an individual paying out-of-pocket.
- Use of repeated filings (and thus, additional fees) as a litigation tactic to force a party to settle or cease litigation.
- Where a *pro se* litigant chooses to use Odyssey File and Serve, a represented litigant may drive up that litigant's costs through repeated filings requiring responses.

### *Trust Accounting Concerns*

Because per-use e-filing fees must be borne by the client, the fees used to pay those funds must come from an attorney's client trust account. Professional Responsibility Board decisions from the last several years tend to show that the Board takes very seriously proper client trust accounting practices. By and large, those decisions are centered on record-keeping mistakes, not on areas of theft or intentional misdeed by the attorney. Areas of concern around the per-use e-filing fees have arisen with respect to trust accounting.

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<sup>16</sup> See V.R.E.F. 10.

### *Trust Account Record-Keeping*

The trust accounting record-keeping rules require that each deposit and each disbursement be recorded. Because the per-use e-filing fee occurs every time documents are filed, there will be numerous additional debits that will need to be accounted for and recorded. This increase in disbursement record-keeping has the potential to increase the number of mistakes made by attorneys and their law office staffs. This has the potential for encountering overdraft problems, mis-accounting by persons entering the information (whether it is an attorney or non-attorney staff), and potential harm to other clients.<sup>17</sup> This also shifts an incredible burden to law office staff (or in the case of solo or small practitioners, to attorneys) to keep up with additional fees. Although it has been represented by the Judiciary that the per-use e-filing fee is less than the cost of a courier or postage to mail/deliver a filing to a courthouse (a representation with which the Bar disagrees), that representation does not account for additional attorney or staff time required for additional record-keeping.<sup>18</sup>

### *Use of Debit Cards*

From a practical standpoint, attorneys are also left scrambling to figure out *how* to pay their per-use e-filing fees. The current configuration of the Odyssey File and Serve system requires use of a credit or debit card or an eCheck. Attorneys are understandably wary of linking their trust accounts to debit cards, and using those debit cards for online fee processing. Attorneys must be aware of all their ethical obligations, as well as potential areas of concern. Because client trust accounts hold client funds, it can be risky to link a debit card to a client trust account. This may result in complications in paying per-use e-filing fees, which may not have been something the Judiciary considered in agreeing to the imposition of these fees.

The Vermont Rules of Professional Conduct are silent as to the use of debit cards connected to client trust accounts. Understanding that Vermont lawyers had concerns about this, Vermont Bar Counsel assisted by inquiring with regulators in other states to find out if and how those states deal with this issue. Some states specifically ban linking a debit card to a client trust account. Some states do not have this specific ban, but effectively ban this action through other regulations related to client trust account withdrawals.

Bar Counsel reports that even in states whose rules do not specifically prohibit linking a debit card to a trust account, many regulators caution against doing so.

Although some states may not have an outright ban on the use of debit cards linked to client trust accounts, some banks may not permit this pursuant to their own rules and regulations.

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<sup>17</sup> This risk is increased by the credit card and convenience fees, which are not fixed sums but percentages that may shrink or grow depending on the filing and could easily be omitted in a prior calculation.

<sup>18</sup> It also does not account for the continued postage fees in cases where one or more parties have elected not to e-file.

### *Pro bono publico service*

As noted elsewhere in this report, attorneys are significantly concerned about their abilities to provide *pro bono* or *low bono* legal services if they are potentially required to pay per-use e-filing fees. Attorneys are encouraged to provide at least fifty (50) hours of *pro bono* legal services per year.<sup>19</sup> While there may be cases where a client qualifies for a fee waiver, not every *pro bono* or *low bono* client will so qualify. This leaves attorneys with the unfortunate choice of either asking a client of limited means to advance per-use e-filing fees or paying the fees themselves. This added burden may have the effect of driving qualified attorneys away from much-needed *pro bono* or *low bono* work.

### **Letters of Support**

Numerous attorneys and groups across Vermont have shared letters and emails in support of this Committee's work. Attached are some of these letters, and additional contributors' communications can be shared upon request.

The Vermont Bar Association Pro Bono Committee sent the attached letter with their members' concerns.

Attached is a letter signed by the Addison County Bar Association voicing concerns regarding this system. The Committee is authorized to state that the Windham County Bar Association, the Lamoille County Bar Association, Caledonia/Essex Counties Bar Association, and the Rutland County Bar Association have each signed on to the Addison County Bar Association letter, as representative of their memberships' positions.

Also attached is a letter from Jean Murray, Esq. from Vermont Legal Aid voicing concerns regarding the system.

### **Recommendations**

In light of the foregoing, The Vermont Bar Association e-filing Fees Study Committee makes the following recommendations to the VBA Board of Managers as it relates to the e-filing system that has been implemented in Windham, Orange and Windsor Counties, and is scheduled to be implemented statewide.

Ultimately, the Vermont Bar Association recommends an e-filing fee system that does not include a per-use filing fee, and that as long as there is a per-use e-filing fee that anyone, attorneys or self-represented parties, be permitted to file at courthouses with paper filings.

As first steps, the Vermont Bar Association recommends:

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<sup>19</sup> See V.R.Pr.C. 6.1.

1. That the Office of the Court Administrator, if feasible, immediately halt the imposition of e-filing fee charges in the Odyssey File and Serve system, investigate the use of new CARES monies to pay for the fees in the meantime until funding alternatives are secured, and postpone expansion of the system to other counties until the issues described above are addressed.

2. That the Office of the Court Administrator immediately address the issues described above and engage with the Bar and other court users to determine the best e-filing fees option for Vermont, in order to re-negotiate the terms of the Tyler contract regarding e-filing fee charges. The Legislature is to be kept informed of progress made.

3. That the Vermont Bar Association support any legislative effort that will support these recommendations.

With respect to any future plans to modify a court filing system, to avoid what has resulted from a lack of involvement of the Bar in the present instance, the Committee makes the following recommendations:

1. That the Office of the Court Administrator provide the appropriate Senate and House committees and all members of the Vermont Bar with notice and an opportunity to be heard when there is a plan to modify a court filing system and when there are different funding options available for consideration. This includes funding an e-filing system for which there are different possible funding mechanisms.
2. That the Office of the Court Administrator provide all members of the Vermont Bar with improved notice of major changes in court filing methods and procedures, such as those instituted in the e-filing systems.
3. That the Office of the Court Administrator, either directly or through third parties, provide all members of the Vermont Bar with improved notice and opportunity for training in any new filing system regardless of the counties in which the system actually will be implemented.
4. That in providing notice of changes such as those instituted in the e-filing systems for Windham, Orange and Windsor Counties, that notice of the changes and training be broad enough that lawyers who do not have an office in those counties, but who practice in those counties, likely will recognize the need to be fully trained in the new system.
5. That the Office of the Court Administrator place more intense focus on the training needed for implementing the new system, including obtaining survey information after a sample of users have engaged in the proposed training, so as to improve the quality of the training, if needed, before a full roll-out of training and before changes to the system are implemented.
6. That notice to members of the Bar and trainings highlight major changes such as e-filing charges, how the charges are imposed, the amounts imposed, and how the charges are to be collected.
7. That if imposing fees of whatever nature may be required to fund e-filing that the Office of the Court Administrator consider the effect of charges for e-filing on pro se litigants, attorneys representing clients in pro bono cases and low bono cases, parties to an action

with disparate financial status, and the various classes of litigants who appear in the Vermont courts.

8. That when the contract with Tyler comes up for re-negotiation in 2022 that a similar process of soliciting comments take place in advance of the contract re-negotiation.

Respectfully submitted,

Vermont Bar Association e-filing Fees Study Committee

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And with additional thanks to

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## Notice and Training Opportunities<sup>1</sup>

Date	Agency or Person Information Provided By	Summary of Information Provided	Notes and/or Specific Content Provided
<b>2018</b>			
In the sixteen e-mails sent from JUD_CAO Memo to Bar – there was no mention of Odyssey or the NG-CMS Project. This is from a review of e-mails received, and a review of the Vermont Judiciary website, not all e-mails received from JUD – CAO are noted on the Vermont Judiciary website.			
<b>2019</b>			
1-9-19	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
1-18-19	VBA	VBA Mid-Winter Thaw PowerPoint Presentation	Presentation power point available. Not meaningful discussion re: fees, or schedule of fees provided.
2-11-19	JUD CAO Memo to Bar	Proposed Amendment Re: Rules Governing Dissemination of Electronic Case Records; mentions new case management system and electronic filing; and Public Access	<p><b>II. PROPOSED RULE AMENDMENTS</b>            (NOTE: THE FOLLOWING AMENDMENTS HAVE BEEN PROPOSED AND HAVE NOT BEEN APPROVED BY THE SUPREME COURT.)</p> <p><i>a. <a href="#"><u>Order Abrogating and Replacing the Vermont Rules of Public Access to Court Records and Abrogating the Rules Governing Dissemination of Electronic Case Records and Rule 77(e) of the Vermont Rules of Probate Procedure</u></a></i></p> <p>The proposed Order abrogates and replaces the Vermont Rules of Public Access to Court Records and Abrogates the Rules Governing Dissemination of Electronic Case Records and Rule 77(e) of the Vermont Rules of Probate Procedure. These proposed rules cover records in both physical and electronic form and their adoption is timed to coincide with the implementation of a new case-management system that will support electronic filing and electronic case files in all dockets and all courts. In many parts, these rules retain the content of the former rules. In other parts, they amend the prior version or adopt entirely new content because of the shift to electronic case records.</p>

<sup>1</sup> All e-mails, attachments, and materials referenced can be provided upon request. In an effort to reduce the amount of information attached as exhibits, and the length of the report, these materials were not attached.

			<p>Rule 1 contains a scope, purpose, and construction statement, explaining the joint responsibility of providing public access while protecting confidentiality. Rule 2 contains definitions. Rule 3 provides a general policy to grant access and delineates the custodian of records. Rule 4 provides the means of access to physical and electronic case and administrative records. Rule 5 sets out specific rights of access and includes an appendix listing the statutes and court rules providing specific rights of access. Rule 6 sets forth the exceptions to public access for case records, the inspection procedure, denial procedure, grievances, access during appeals, and access to statistical reports. The appendix to Rule 6 lists the statutes and court rules providing restrictions or prohibitions to public access. Rule 7 relates to filing of case records and states the responsibilities of the filer and the Judiciary. Rule 8 is about administrative records. Rule 9 sets out exceptions to the general access policy and contains the method and standards for granting access, sealing, or redacting records. Rules 10-13 are adopted from the Rules Governing Dissemination of Electronic Case Records. They contain provisions on electronic-case-record compilations, electronic-case-record reports, electronic-data-dissemination contracts.</p> <p><b>There will be a public hearing on this proposed order on March 11, 2019 at 3:00 p.m. at the Pavilion Auditorium at 109 State St., Montpelier VT.</b></p> <p>Comments on these proposed amendments should be sent by <b>April 12, 2019</b>, to Hon. Walter M. Morris, at the following address:</p> <p style="text-align: center;">Hon. Walter M. Morris, Jr. Vermont Supreme Court 109 State Street Montpelier, VT 05609-0801 <a href="mailto:walter.morris@vermont.gov">walter.morris@vermont.gov</a>.</p>
4-9-19		No mention of: Odyssey, NG-CMS Project, or e-filing	
5-3-19		Order Promulgating the Rules Governing Dissemination of Electronic Case Records; mentions new case management system and	This is the Order adopting the proposed amendment above.

		electronic filing; and Public Access	
5-20-19	Anne Damone – Regional Court Clerk	Save the Date for Bench Bar/ Demonstration of new Case Management in Windsor, Orange, Windham Counties only	Attorneys not on her e-mail list for each county would not have received notice; Attorneys that don't practice in any of these counties definitely would not have received notice
6-1-19	VBA	VT Bar Journal	<p>What's New – Vermont's New Electronic Filing System, p. 27, by Andrew Stone -- Andy Stone is a Project Team Leader for the Vermont Judiciary's Next Generation Case Management System Project and a former Court Operation Manager from Windsor County.</p> <p>The article did not mention a fee per electronic filing, a fee schedule, or other specific mechanics of the new e-filing system.</p> <p>“360-degree communication with all stakeholders throughout the process is a fundamental part of the plan. In coming months, the Judiciary will be ramping up its communications with the bar and initiating a variety of other outreach efforts designed to actively engage with stakeholders across the board. There will also be expanded FAQ sections on the court's website, as well as opportunities for online training and orientation to the new system. Odyssey project leaders are also more than happy to field questions any time from interested parties. Contact information is on the Judiciary's website. Feedback and suggestions for process improvements will be not only welcomed but will be actively sought out throughout the entire transition.”</p>
6-18-19	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
6-20-19	JUD CAO Memo to Bar	Proposed Order Promulgating Rules on Electronic Filing	<p><b>There is no fee schedule attached or mentioned, only references to fees.</b></p> <p><b>II. PROPOSED RULE AMENDMENTS</b>  (NOTE: THE FOLLOWING AMENDMENTS HAVE BEEN PROPOSED AND HAVE NOT BEEN APPROVED BY THE SUPREME COURT.)</p> <p><i>a. <u><a href="#">Proposed Order Promulgating the 2019 Vermont Rules for Electronic Filing</a></u></i>  The proposed 2019 Vermont Rules for Electronic Filing are designed to conform to the upcoming new Judiciary case management system (CMS). The CMS will have electronic filing and electronic casefiles and be rolled out over time in the superior</p>

			<p>courts and the judicial bureau. Additions to these rules will be made when the new CMS is rolled out for the Supreme Court and other judiciary entities. The existing 2010 Vermont Rules for Electronic Filing, which were designed for eCabinet, will remain in effect and applicable to dockets where they are currently in use. Once the new CMS is rolled out in all the locations and dockets where eCabinet has been employed, the 2010 rules will be repealed.</p> <p>Extensive instructions will supplement the proposed rules and will often appear on screens for electronic filing and the viewing of electronic case files. The user must follow these instructions for electronic filing, service after commencement, and viewing of files. In addition to the eFiling system, the public and parties will be able to view electronic case files, either by remote access or on terminals at court houses, through a public portal. To view nonpublic documents a separate registration for that portal and approval of elevated status will be required.</p> <p>The adoption of these rules is coordinated with the adoption of extensive amendments to the Vermont Rules for Public Access to Court Records to enable, with necessary restrictions, the public and filers to view electronic case files when a filing is accepted. Those rules contain specific directions for filers to comply with requirements making certain records and information inaccessible to the public. Filers should consult the public access rules, as well as these rules, to be sure a filing complies.</p>
<b>7-1-19</b>	Anne Damone – Regional Court Clerk	Notice of Bench Bars in Orange, Windsor, Windham re: new case management system; NOT e-filing	
<b>7-10-19</b>	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
<b>7-12-19</b>		Windsor County Bench Bar re: new case management system	
<b>7-22-19</b>	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
<b>8-2-19</b>		Windham County Bench Bar re: new case management system	
<b>8-9-19</b>		Orange County Bench Bar re: new case management system	

<b>8-15-19</b>	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
<b>9-6-19</b>	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
<b>9-27-19</b>	VBA	VBA Annual Meeting PowerPoint Presentation	Presentation power point available. Not meaningful discussion re: fees, or schedule of fees provided.
<b>10-1-19</b>	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
<b>11-7-19</b>	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
<b>11-8-19</b>	Windsor County	Demonstration for Justice Partners on Judiciary New Case Management System	This demonstration was also done in Windham and Orange Counties.  Unable to locate an e-mail, if notice was sent out via e-mail; waiting to confirm that with Andy Stone. Signs were hung in the respective courthouses. There was no mention of a fee per electronic filing, nor any discussion about waiver accounts. Presentation was very much geared toward communicating that this was a work in progress, and walked through system, not focusing on each individual practice area. No materials were provided to attendees, only the agenda.
<b>12-11-19</b>	JUD CAO Memo to Bar	Order Promulgating the Rules of Electronic Filing	This is the order promulgating the rules proposed above.
<b>2020</b>			
<b>1-7-20</b>	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
<b>1-10-20</b>	Lora Evans – ODG	Save the Date e-mail re: e-filing training dates	Training Dates: 3/10, 3/19, 3/24, 4/2, 4/7, 4/16, 4/21, 4/30
<b>1-13-20</b>	Laura Larosa	Registration Open for e-filing announcement; with link to Tylerhost	It is unclear who received this information, but believe it was communicated to specific agencies to further disseminate.
<b>1-14-20</b>	Lora Evans – ODG	Registration Open for e-filing announcement; with link to Tylerhost	The information provided was not complete. For example, if attorneys and staff in a firm all registered independently, the firm would appear as multiple separate entities, and they would need to be merged. No instructions were provided re: registering an administrator, and then inviting others. Also, no mention of a fee per envelope or a fee schedule.

			<p>When you registered you were brought to a page with materials to accompany the webinar, the materials were a bare bones outline of the topics to be covered, not substantive instructional steps provided.</p> <p>The Vermont Judiciary website did not have any training materials or instruction manuals available on new e-filing system. These were not made available until after 4-20-20 roll out of the mandatory e-filing system.</p> <p>The only materials available on the Vermont Judiciary website was the PowerPoint instructional presentation for e-filing in eCabinet.</p>
1-22-20	Lora Evans – ODG	Follow-up e-mail advising that the training is approximately 1 hour long	
1-30-20	Anne Damone – Regional Court Clerk	Announcement of e-filing training dates, with link to registration	Same dates provided by Lora Evans.
1-30-20	Anne Damone – Regional Court Clerk	Same as above.	
2-11-20	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
2-28-20	Lora Evans – ODG	Registration for Public Portal Announcement and Instructions	<p>Incomplete instructions, no discussion re: requesting elevated access. Also, these instructions were sent out two days before the Public Portal went live, with no time prepare in advance.</p> <p>Attorneys in WOW counties were told that VCAS/Vermont Courts Online would be available for the first two weeks of the new case management system, and this in fact did not happen, and was not available.</p>
3-2-20		<b>Roll Out of Odyssey Public Portal in WOW Counties</b>	
3-5-20	Lora Evans – ODG	Updated Instructions re: Elevated Access	Updated instructions re: CRFAM and registering requesting elevated access. For attorneys or staff who had already registered, this created a lot of issues.

3-9-20	Lora Evans – ODG	Additional Instructions/Follow-up re: elevated access	Similar to above.
3-10-20	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
3-13-20	JUD CAO Memo to Bar	No mention of: Odyssey, NG-CMS Project, or e-filing	
3-17-20	JUD CAO Memo to Bar	Only mention is a section with “helpful links” for Updates and Information on Odyssey and NG-CMS Project	<p><b>No mention of a fee per filing, a fee schedule, or available training materials. The Vermont Judiciary website was not substantially updated until after 4-20-20, and the roll out of e-filing, with FAQ, explanations re: difference between eCabinet and Odyssey File &amp; Serve, and user manuals.</b></p> <p><b>II. MISCELLANEOUS</b></p> <p><i>a. Helpful links for Updates and Information about Odyssey and the NG-CMS Project</i></p> <p><b>For ODY Public Portal information:</b> <a href="https://www.vermontjudiciary.org/about-vermont-judiciary/public-portal">https://www.vermontjudiciary.org/about-vermont-judiciary/public-portal</a></p> <p><b>For information about the Judiciary’s new case management project:</b> <a href="https://www.vermontjudiciary.org/about-vermont-judiciary/next-generation-court-case-management-system">https://www.vermontjudiciary.org/about-vermont-judiciary/next-generation-court-case-management-system</a></p>
3-18-20	Lora Evans – ODG	Reminder and Update re: roll out of Odyssey Public Portal; VCAS and VT Courts Online still being utilized in all other counties except WOW counties	No new information provided.
3-19-20	JUD CAO Memo to Bar	Only mention is a section with “helpful links” for Updates and Information on Odyssey and NG-CMS Project	Same as notes above.

<b>3-20-20</b>	JUD CAO Memo to Bar	Updating Bar on administrative error caused when the court messaging email system was updated, incorrectly informing all members that their email subscription to the court messaging email system was unsubscribed.	
<b>3-23-20</b>	JUD CAO Memo to Bar	Only mention is a section with “helpful links” for Updates and Information on Odyssey and NG-CMS Project	Same as notes above.
<b>3-23-20</b>	Lora Evans – ODG	Information on Training Dates for e-filing	Same dates as previously provided dating back to initial announcement in January 2020.
<b>3-24-20</b>	JUD CAO Memo to Bar	Only mention is a section with “helpful links” for Updates and Information on Odyssey and NG-CMS Project	Same as notes above.
<b>3-26-20</b>	JUD CAO Memo to Bar	Only mention is a section with “helpful links” for Updates and Information on Odyssey and NG-CMS Project	Same as notes above.
<b>3-27-20</b>	JUD CAO Memo to Bar	Only mention is a section with “helpful links” for Updates and Information on Odyssey and NG-CMS Project	Same as notes above.
<b>4-7-20</b>	JUD CAO Memo to Bar	Only mention is a section with “helpful links” for Updates and Information on Odyssey and NG-CMS Project	Same as notes above.

4-9-20	JUD CAO Memo to Bar	Only mention is a section with “helpful links” for Updates and Information on Odyssey and NG-CMS Project	Same as notes above.
4-13-20	Anne Damone – Regional Court Clerk	Email with attachment called: Orange-Windsor covid FINAL 4-13-20.pdf; references roll out of mandatory e-filing in WOW counties	<p>Only message in e-mail was to “Please see attached.” The link to the Electronic Rules provided in the attachment takes you to “Page Not Found,” and at the time the e-mail was sent, the only Rules for Electronic Filing available on the Judiciary website were the 2013 Consolidated Rules. As it relates to Odyssey and the roll out of e-filing, the attachment advised:</p> <p>The delays in court hearings and other COVID-19 related orders and restrictions have not affected the plan for the beginning of mandatory e-filing for attorneys. See: the Court Administrator’s directive:  <a href="https://www.vermontjudiciary.org/sites/default/files/documents/PG-11%20-%20Administrative%20Directive%20%28Electronic%20Filing%29.pdf">https://www.vermontjudiciary.org/sites/default/files/documents/PG-11%20-%20Administrative%20Directive%20%28Electronic%20Filing%29.pdf</a> issued on March 19, 2020.</p> <p>Electronic filing will be MANDATORY for attorneys in Windham, Windsor, and Orange units on April 20, 2020. You and your staff can get training on how to use the Odyssey File and Serve system by signing up for a webinar at:  <a href="https://tylertech.egain.cloud/kb/vth5/content/PROD-22373/When-are-the-OnlineTraining-Sessions-for-Vermont-22373?query=22373">https://tylertech.egain.cloud/kb/vth5/content/PROD-22373/When-are-the-OnlineTraining-Sessions-for-Vermont-22373?query=22373</a>.</p> <p>Please sign up now! You can pre-register and be all ready to go on the date that e-filing begins if you get the training now.</p> <p>You should also get familiar with the revised e-filing rules, which went into effect on March 2, and will be fully effective here on April 20.  <a href="https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATED%2012-1019%20VREF%202020.pdf">https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATED%2012-1019%20VREF%202020.pdf</a>. You will need to register as an e-filer at a separate website for e-filing—it is not done from the portal, but from an entirely separate website created and managed by Tyler Corporation.</p>
4-13-20	JUD CAO Memo to Bar	Only mention is a section with “helpful links” for Updates and Information on	Same as notes above.

		Odyssey and NG-CMS Project	
4-20-20		<b>Roll out of e-filing in WOW Counties</b>	
4-22-20	JUD CAO Memo to Bar	Brief mention re: Odyssey Electronic Filing and Other Important Information	<p><b>No mention of a fee per filing or fee schedule provided.</b></p> <p><b>II. MISCELLANEOUS</b></p> <p><i>a. Odyssey Electronic Filing and Other Important Information</i></p> <p>Odyssey is now operational in the Orange, Windsor, and Windham trial courts and the Judicial Bureau. Electronic filing began in these trial courts on April 20, 2020 and will begin for the Judicial Bureau on April 27, 2020. Please use the following links to access the Odyssey case management programs and for more information.</p> <ul style="list-style-type: none"> <li>• <b>Odyssey File &amp; Serve.</b> Odyssey File &amp; Serve is the platform through which you will electronically file with the courts. To access Odyssey File &amp; Serve, please visit <a href="https://vermont.tylerhost.net/ofswab">https://vermont.tylerhost.net/ofswab</a> . This page contains user guides in the lower left-hand corner. They include instructions on how to register and use the File &amp; Serve. Please note that docket specific filer guides will be posted in the near future on the judiciary’s main website.</li> <li>• <b>Odyssey Public Portal.</b> The Odyssey Public Portal allows you to view your case files. To access the portal, please visit <a href="https://publicportal.courts.vt.gov/Portal/">https://publicportal.courts.vt.gov/Portal/</a>. Before you can view your case files, you must first register in the portal and then request elevated access. The Public Portal User Guide contains instructions on how to register and request elevated access. You can read the user guide via this link: <a href="https://www.vermontjudiciary.org/sites/default/files/documents/VT%20Public%20Portal%20User%20Guide%20v8.pdf">https://www.vermontjudiciary.org/sites/default/files/documents/VT%20Public%20Portal%20User%20Guide%20v8.pdf</a>. For full information on how to use the portal, please visit <a href="https://www.vermontjudiciary.org/about-vermont-judiciary/public-portal">https://www.vermontjudiciary.org/about-vermont-judiciary/public-portal</a>.</li> <li>• <b>FAQ.</b> Please visit <a href="https://www.vermontjudiciary.org/odyssey">https://www.vermontjudiciary.org/odyssey</a> for answers to frequently asked questions and updates about the project.</li> </ul>

<b>4-24-20</b>	JUD CAO Memo to Bar	CLE announcement	
<b>5-1-20</b>	JUD CAO Memo to Bar	Brief mention re: Odyssey Electronic Filing and Other Important Information	Same as noted above.
<b>5-4-20</b>	JUD CAO Memo to Bar	Brief mention re: Odyssey Electronic Filing and Other Important Information	Same as noted above.

# Addison County Bar Association

To: Chief Justice Paul Reiber  
Vermont Supreme Court  
111 State Street  
Montpelier, VT 05602  
*Via first class mail*

Therese Corsones, Executive Director  
Vermont Bar Association  
PO Box 100  
Montpelier, VT 05601  
*Via first class mail and [info@vtbar.org](mailto:info@vtbar.org)*

Patricia Gabel, State Court Administrator  
Office of Court Administrator  
109 State Street  
Montpelier, VT 05609-0701  
*Via first class mail*

Re: Odyssey Fees and Fee-Based Court Access

Dear Chief Justice Reiber, Ms. Corsones and Ms. Gabel,

We, the undersigned members of the Addison County Bar Association, write to express our shock and dismay over the fee structure imposed by the new state e-filing system, Odyssey. It is our sincere hope that this fee structure can be renegotiated in a way that does not disadvantage our clients, who are, by and large, hard-working Vermonters whose access to justice will be negatively impacted by these fees.

We were, collectively, appalled to learn that this system was brought online (through tremendous effort of the judiciary and court staff, no doubt, for whose work we are grateful) without advance disclosure of the fees to the members of the Vermont Bar Association. Attorneys will be required to submit filings through the Odyssey system, without having had the opportunity to provide meaningful comment or concern about, or for there to be negotiation of, the fee structure to which we (and, most importantly, our clients) must now submit.

We believe such fees are proportionally unreasonable, arbitrary in imposition, and penalize litigants who unluckily (but not necessarily strategically) find themselves needing to file more documents with the court – perhaps in response to a zealous opponent, court requirements, or other factors entirely outside their control.

The submission fees are unreasonable. When you consider the number of filings in a civil or family division case, \$5.25 per submission will quickly add up. Cumulatively, it will no doubt be more than the cost of stamps or attorney time to hand-deliver documents to the court. We will have to make the choice of passing the additional cost onto our clients, many of whom make humble incomes to start with, and who are less able than ever to afford such expenses in light of the global health pandemic, or absorb the expense at our own cost – at a time when we can least

# Addison County Bar Association

afford to do so. This unwelcome scheme is made exponentially worse by the pandemic, which has caused and undoubtedly will cause further economic harm to all of us and the clients we serve.

Further, the fees are arbitrarily imposed. Pro se, criminal and juvenile litigants are exempted from these fees; rightly so. But, as a result, family, civil and probate practitioners and their clients will disproportionately bear the burden of the fees for this system which is accessed by all. The use of this system in family, civil, and probate matters will result in multiple fees to users over the course of a matter before the court. It is our opinion that this fee-based system, with revenues flowing directly to Tyler Technologies, amounts to a tax on attorneys and the Vermont citizens who employ their services.

There is no legitimate reason for such fees, as the recent emergency move to electronic access to the courts demonstrates. Both during the COVID-19 pandemic and for years prior, Vermont courts have successfully made use of e-filing, through a pilot system and now directly to the courts, with no associated fees. Neither are there fees associated with other platforms: two years ago, the Vermont Public Utilities Commission instituted a free online filing system, and the federal system, PACER, which is mandatory for litigants in the federal District Courts, does not carry submission fees. Indeed, other states such as New Hampshire and Rhode Island apparently use the same Odyssey system, but negotiated different fee structures, which do not require submission fees. These fees are neither necessary nor an immutable function of online filing generally, or of this software specifically. How can we explain the reason for the fees to our clients when they see what might be hundreds of dollars of expenses on their bills, which we will not be able to reasonably estimate for them in advance? How can we explain to our existing clients with pending matters that we had no idea a fee-based submission system was even under consideration, much less that it was implemented by the judiciary without our knowledge or consideration of these very concerns and their interests?

Burdening our clients' access to justice is an insult to those who need to access the courts, and negates this principle enshrined in our state Constitution:

Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and **without being obliged to purchase it**; completely and without any denial; promptly and without delay; conformably to the laws.

Vt. Const. CH I, art. IV (emphasis added).

We wish to underscore our concern that the Vermont Court System will further implement fee-based electronic filing platforms with little to no input solicited from the legal practitioners who handle matters in the court. Odyssey is but one example of how, absent dialogue with members of the Vermont Bar, the full implications of broad-level change may result in diminished access or other harm to Vermonters and others who have the greatest need. We welcome the opportunity for a robust dialogue going forward in order to avoid unintended consequences when modernizing the courts.

# Addison County Bar Association

As part of that process, we request that the judiciary consider our concerns, on behalf of our clients, relative to this pressing issue, and renegotiate and ultimately eliminate the Odyssey submission fees.

Sincerely,

/s/ Lesley Deppman, Esq., President, Addison County Bar Association

/s/ Amy Menard, Esq.

/s/ Christopher Perkett, Esq.

/s/ Katina Francis Ready, Esq.

/s/ Benjamin Deppman, Esq.

/s/ David Venman, Esq.

/s/ Cindy Ellen Hill, Esq.

/s/ Rebecca J. Otey, Esq.

/s/ Emily J. Joselson, Esq.

/s/ Jonathan Heppell, Esq.

/s/ George Vince, Esq.

/s/ Pamela A. Marsh, Esq.

/s/ Donald (Tad) Powers, Esq.

/s/ Kevin T. Brennan, Esq.

/s/ James H. Ouimette, Esq.

/s/ Jennifer Wagner, Esq.

/s/ Devin McLaughlin, Esq.

/s/ James W. Runcie, Esq.

/s/ Eva. P. Vekos, Esq.

/s/ Andrew Jackson, Esq.

/s/ Judson E. Hescoock, Esq.

May 5, 2020

eFiling Rules Study Committee  
VBA President-Elect  
Elizabeth Kruska, Esq.  
[ekruska@gmail.com](mailto:ekruska@gmail.com)

**RE: Fees for Electronic Filing**

Dear Elizabeth Kruska:

We write on behalf of the VBA Pro Bono Committee to comment on the amendments to the Rules for Electronic Filing. Specifically, since the roll out of “Odyssey File and Serve” system in Windham, Windsor and Orange Counties there has been significant uproar from the legal committee regarding the fee structure. It appears that a fee must be paid to a third party vendor, Tyler Technologies, Inc., in the amount of \$5.25 per document plus a 3% surcharge to offset credit card fees incurred by the vendor.

As members of the pro bono committee we have a significant concern regarding how these fees will impact the ability of the members of the bar to continue doing pro bono and low bono work. Specifically, in addition to the normal filing fees associated with filing a complaint and a counterclaims, we will not be expected to pay \$5.25 per document filed with the court. In cases such as civil foreclosure cases these fees associated with eFiling could total upwards of \$500 per case. In other civil or family cases, such as landlord tenant cases and child custody determinations, where there may be protracted discovery battles these fees will become cost restrictive.

Given our ethical duty as a zealous and competent advocate providing quality legal services to clients, many members of the bar may make the decision not to provide pro bono or low bono services for fear of the undue cost involved in filing necessary documents with the court. This goes against the very framework of our legal system in Vermont.

A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civil influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

VT Rules of Prof. Conduct, Preamble [6].

Although fee waivers may be available to public defenders and contract defenders, these waivers are not available in all low bono cases. If these fees are to be passed to the client, the client may make the decision not to pursue legal action. The effect would be disastrous.

We should not support a system that enables the rich and shuts out the middle and lower classes. “[E]very person ought to obtain right and justice, freely and without being obligated to purchase it[.]” VT Const., Ch. I, Art 4.

We hope that you will consider the devastating impact on our legal system as a whole and the attorneys doing pro bono and low bono work when making recommendations to the VBA Board regarding the Odyssey eFiling fees.

Sincerely,

*/s/ Samantha Lednicky*

VBA Pro Bono Committee Members

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May 14, 2020

Elizabeth Kruska, Chair

Re: E-filing, access to justice, and self-represented litigants in the civil docket.

Dear Elizabeth,

I am writing to you in my role as an attorney at Vermont Legal Aid, where for twenty-two years I have represented well over a thousand low-income and vulnerable clients who are being sued in court.

Most of the civil docket, 70% of the civil docket, is foreclosure, eviction and collection cases. Most (70%) of the small claims docket is credit card collector plaintiffs suing unrepresented defendants. The civil docket has around 5000 cases filed each year, and, 3500 of those are foreclosure, eviction and collection against mostly unrepresented defendants. The small claims docket has around 4500 cases filed each year, and 3,150 are mostly unrepresented defendants. It is fair to say that for most of the civil docket, the plaintiffs are represented by counsel, and the defendants are not. For the tiny percentage of defendants are represented by counsel, attorneys are from Vermont Legal Aid, Legal Services Vermont or pro-bono or low bono programs; often this representation is by limited appearances.

The ability to efile has a number of advantages. Last minute filing is allowed. Successful filing is confirmed. Rule 5 service can be accomplished with the push of a button. Notarization of affidavits isn't required. E-filing litigants have access to case information.

So, a rule that says self-represented litigants may be excepted from e-filing also excepts self-represented litigants from these advantages. E-filing requirements are not fair unless or until everyone can, as a practical matter, have reliable and continuous access to e-filing.

There can be no equal access to justice without recognizing that most self-represented litigants do not have reliable and continuous access to word-processing computers and the internet. Many self-represented litigants have smart phones as their only device, and do not always have internet access, or enough data to access by cell phone lines.

Though the judiciary has made pleading forms available online, fillable forms are not accessible on all devices. Searching for on-line forms is difficult if the searcher doesn't know the exact name of the form searched for.

Once a self-represented litigant opts to efile, the rules require the litigant to continue e-filing throughout the case. Notice of hearings and orders and documents are provided by email. This

rule fails to recognize the realities facing thousands of civil litigants. Some have connectivity at some time, but not at other times. Cell service is the next town over. Internet is available in the litigant's geographical area through only one provider, and that provider is denying service.

Self-represented litigants may be able to access temporary representation through rent-escrow clinics, or limited appearances by low-bono or pro-bono counsel. Lawyers are required to efile. Because efilings rules are tied to the case, a temporary, limited representation attorney could efile, and then withdraw leaving the efilings requirement of the self-represented litigant in doubt. There is no efilings rule about the effect of a short term attorney representation on a self-represented litigant, who may not have the ability to continue to efile once the representation is concluded.

The transaction fees required by Odyssey deny access to justice to self-represented litigants. Some do not have the ability to use credit cards or other on-line means of payment; or may not have continuous and reliable access to on-line means of payment. Moreover, transaction fees impose a cost on defendants that has never existed before. In a fair system defendants should not be charged a fee for the right to defend themselves from Plaintiff's claims.

The fee-waiver rule and standards protect only the poorest of the poor (150% of poverty and supported by public assistance) from the fees. Working-class people who struggle to make ends meet will not be able to get the fees waived under the current standards in the IFP rule.

E-filing has the potential for increasing accessibility to the courts and has the potential for making court processes more efficient. But it will have the opposite effect on access to justice because the rules logistically impede, and the Odyssey transaction fees financially impede self-represented litigants from full participation in the benefits of electronic filing.

Sincerely,

Jean L. Murray  
Staff Attorney

Cc: Teri Corsones