

To: Senate Committee on Judiciary

From: Teri Corsones

Date: June 4, 2020

Re: Proposed Statutory Language – Judicial E-Filing Fees

Thank you for the opportunity to comment on the proposed statutory language. The proposed language serves three valuable purposes: it provides a mechanism to suspend the imposition of the per-use e-filing fee that has caused such controversy; it allows time for the Judiciary to work with court users whose perspective can now be taken into consideration in the decision-making process, so that together a reasonable funding alternative can be determined; and it makes clear that the Legislature has the rightful authority to approve e-filing fees going forward.

I. Suspension of Per-Use E-Filing Fees: The frequency and cumulative effects of the per-use e-filing fee, a separate charge each time an e-filing party makes a separate electronic filing in a civil, family, probate, small claims, environmental and Supreme Court case, is a radical departure from court fees historically charged in Vermont state courts. If such a court e-filing fee is suspended, it will remove many of the adverse impacts that the eFiling Fees Study Committee Report detailed.

1. First, pro se litigants will be encouraged instead of discouraged from e-filing if the per-use e-filing fee charge is removed. Pro se litigants have the option of e-filing or paper filing. If a pro se litigant has the option of paper filing, where the litigant does not have to pay \$5.40 each time a separate envelope is filed, versus paying a minimum of \$5.40 each time, it's likely the litigant will opt for the savings. The hope is that pro se litigants will e-file versus paper file, to benefit from all the advantages that an e-filing system offers. The per-use e-filing fee defeats the Judiciary's goal of having as many court users e-file as possible. Removing the per-use fee will doubtless encourage court users who have a choice to e-file.

2. Next, removing the per-use e-filing fee will remove the obstacles that the access to justice community has described. A Vermont Legal Aid attorney of 22 years wrote "The transaction fees required by Odyssey deny access to justice to self-represented litigants". [T]ransaction 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." Similarly, the Pro Bono Committee, speaking on behalf of the hundreds of private attorneys who selflessly provide low bono or pro bono representation to thousands of low-income Vermonters, wrote: "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 out to obtain right and justice, freely and without being obligated to purchase it[.]' VT Const., Ch. I, Art. 4". The Court Administrator wrote in response: "It is difficult to understand the VBA's argument here The VBA's suggestion that the extra "time" necessary to fill out a fee-waiver form will somehow significantly deter pro bono attorneys or pro se litigants is not persuasive." It's not simply the VBA's argument – it's the argument of long-time Vermont Legal Aid attorneys and private attorneys who thankfully provide pro bono and low bono representation for

thousands of low-income Vermonters (many of whom don't qualify for the fee waivers) that the per-use fee denies access to justice. That argument should be persuasive to anyone.

3. Last, to highlight just one more adverse effect of the per-use fee in light of time constraints – the E-Filing Fees Study Committee Report that's been filed details all the adverse effects - inasmuch as a litigant is at the mercy of how many separate filings an opposing party will make, to which the party is typically obligated to file a response and pay the resulting required e-filing fee, the per-use e-filing fee makes it impossible to predict the e-filing fee costs in any one civil, family, probate case, small claims, environmental or Supreme Court case. This poses real and practical problems in all those cases, and ethical problems for attorneys representing parties in those cases.

II. Involvement of Court Users in Decision-Making: The proposed legislation addresses the lack of involvement of court users in the decision-making process that led to the imposition of per-use fees with all the disadvantages that the Report details. As the Addison County Bar Association noted in its letter objecting to the Odyssey fees and fee-based court access, a letter which the majority of other county bar associations have joined, "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." The Judiciary has often emphasized transparency, collaboration and the importance of input from stakeholders. The proposed legislation will bring about transparency, collaboration and input from stakeholders by requiring the Judiciary to meet with representatives of the VBA and other court users for the purpose of renegotiating the current terms of the Tyler contract regarding e-filing charges. That will ideally include the required "User Agreement" and the unconscionable terms it contains. It will also allow a review of the figures that formed the basis for the e-filing charges – a preliminary review of those figures shows troubling inaccuracies. For example, the number of family court annual cases that was referenced in the contract at page 333 was 19,408, when in reality the figure should have been 4,845 annual cases. The Court Administrator has said that the figure was included in an rfp, but the figure was nonetheless in the contract and was apparently used as a basis for the ultimate e-filing fee that's currently being charged.

III. Legislative Oversight of E-Filing Court Fees: The proposed legislation makes clear that the Legislature has rightful oversight of e-filing court fee charges. We would suggest one added sentence to the proposed legislation, to also make clear that no e-filing fee charges may be imposed without legislative approval. We think that the proposed legislation implies as much but suggest that the following sentence at the end (in italics) would make it clear:

Sec. X. JUDICIAL E-FILING FEES

The Judiciary shall immediately suspend the imposition of e-filing fee charges in the Odyssey File and Serve system until December 30, 2020 and shall utilize funds appropriated in Sec. Y of this act to replace such fees. Further, the Judiciary shall meet with representatives of the Vermont Bar Association and other court users to determine alternatives to the current e-filing charges for the purpose of

renegotiating the current terms of the contract for the e-filing system and report on its efforts and recommendations to the Joint Fiscal Committee and Joint Legislative Justice Oversight Committee not later than October 1, 2020. Any type or amount of e-filing charge requires prior approval by the General Assembly.

Thank you again for the opportunity to comment on the proposed statutory language. We and all court users are very grateful to you for listening and responding to our many concerns about the current judicial e-filing fees.