Supreme Court of Vermont
Office of State Court Administrator

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MEMORANDUM

TO: Sen. Dick Sears, Chair
Senate Judiciary Committee

FROM: Patricia Gabel, Esq., State Court Administrator

DATE: May 21, 2020

RE: E-filing Use Fee

Dear Senator Sears and members of the Senate Judiciary Committee,

On May 15, 2020 (six days ago), the Vermont Bar Association submitted to the Supreme Court a Report that the VBA also forwarded to the Senate Judiciary Committee. This Report makes certain observations and asks the Vermont Judiciary to take certain action. The Supreme Court referred the matter to the State Court Administrator's Office, and members of the NG-CMS project team are reviewing this Report.

The VBA Committee declined during its deliberations to receive information offered by Judiciary designees to help inform its work, and the Board of Bar Managers, likewise, did not reach out to those designees before issuing its Report. As a result, it is only now that informal discussions are taking place between the Executive Director of the VBA and the members of the project team most knowledgeable about the issues on which the VBA has focused.

We look forward to continued discussions with the Vermont Bar Association in order to improve communication and understanding and to continue to learn from our pilot electronic case management system and e-filing program in the Windsor, Windham, and Orange region so that we can apply that learning to the next roll-out of the system.

While this review and these discussions are ongoing, I am sending this letter as a summary response in light of the calendar of the Senate Judiciary Committee and its agendas. Our review is not completed, so this summary response can only be an interim response. This summary response also addresses several of the concerns raised by Committee members at its last hearing

concerning Odyssey File and Serve, the e-filing system implemented as part of our Next Generation Case Management System, and the associated e-filing use fee.

The one important point that has been obscured and needs to be emphasized is that e-filing reduces the cost of litigation for lawyers in an amount that is clearly greater than the cost of the per envelope (not per document) use fees charged. The biggest part of that savings is not having to turn an electronic file into a printed paper document and transmitting that document through the mails or by any other means. Savings occur fully only if every lawyer e-files. Otherwise, the paper document has to be generated and served on those attorneys who don't e-file.

The VBA position seems to be that those who get the savings should not pay at all for the costs associated with receiving and processing e-filed documents. That's equivalent to saying that there should never be court filing fees – which have been adopted by the legislature. The position is that all costs of the judicial system should be borne by the taxpayers. Given the savings that lawyers will realize from e-filing, it is reasonable to ask lawyers pay at least part of the costs that produced those savings.

While the VBA memorandum is exceptionally long, its principal claims may be succinctly summarized as follows:

- Notice of the Judiciary's plan to implement a e-filing use fee was inadequate.
- The Judiciary lacked authority to implement the e-filing fee.
- The e-filing fee violates equal protection of the law by invidiously discriminating against attorney-represented litigants.
- The e-filing fee will impede access to the courts by pro bon or low bono litigants.
- Alternative funding sources for the e-filing system would be superior to the use e-filing fee.

I will address in brief each of these claims in turn.

Notice

I have explained in my earlier filings with the Committee, and need not repeat in detail here, that the Judiciary provided ample notice and trainings to the Vermont bar on the subject of the new e-filing system and the accompanying e-filing use fee. Since my last appearance before the Committee, we have continued to find additional examples. I have also recently reviewed, and made available to the VBA, minutes from several meetings of the Special Advisory Committee on Rules for Electronic Filing of which the VBA was a permanent member. These show extensive discussion of the e-filing use fee in meetings in April 2019, more than a year before it was implemented. A further meeting in September 2019, following circulation of the Rules for comment, expressly addressed an attorney's objection to the $5.25 use fee publicized at a meeting of the Windham bar.

The record leaves no room for doubt that the leaders of the VBA and members of the Vermont bar in the pilot region were adequately apprised of the e-filing system and use fee.

The extended NG-CMS project team has been particularly blind-sided by these claims because the team relied on what it thought was its partnership with the VBA in communicating to and receiving communication from lawyers about the development of the NG-CMS project, including the Judiciary's approach to E-Filing. The VBA Executive Director and a member of the Judiciary, who is also a long-standing member of the VBA Board of Bar Managers, were both charter members of the E-Filing Rules Committee, and the minutes of those meetings reflect their attendance and active participation in the discussions of the Committee. The Judiciary member who is also a member of the VBA Board of Governors is a member of the Working Board of the NG-CMS Project Team. The minutes of a meeting of the Working Board from October of 2018 expressly refer to discussions of the e-filing use fee, and the comment of this VBA leader is recorded in the minutes as follows: "thinks bar will be fine with this—wants it now!"

The NG-CMS project team is now reviewing its means of communications with lawyers regarding the project to ensure that this communication puts more emphasis on direct communication with lawyers, as well as communication with a broader spectrum of associations, organizations, and groups to which lawyers belong, to ensure that appropriate communication reaches the intended recipients.

Judicial Authority

A clear understanding of the respective spheres of legislative and judicial authority in the area of rulemaking and the creation of court fees is essential. Unfortunately, the VBA memorandum sows only confusion.

As explained in my earlier memorandum to the Committee, as well as in an accompanying Memo today, the Judiciary possesses statutory and constitutional authority to enact a use fee in the first instance.

There is, to be sure, some scope for both judicial and legislative action in the area of rulemaking and fees. Thus, the General Assembly has expressed a clear intent to "review . . . Judicial Branch fees, and to require that any such fee be created solely by the General Assembly," 32 V.S.A. § 601. The fees that raise revenues for the State are approved in this fashion.

At the same time, the Legislature has also expressly recognized the Supreme Court's broad discretion "under their general rulemaking power . . . [to] . . . establish uniform rules to govern the allowance of fees not specified by law for services and expenses in the courts of the State." 32 V.S.A. § 1403 (emphasis added).

Therefore, there is no doubt that the General Assembly itself has stated clearly and unequivocally that the Supreme Court's "general rulemaking power" (which is set forth in

chapter II, section 37 of the Vermont Constitution) encompasses the authority to establish fees not otherwise "specified by law," that is, not inconsistent with existing statutes.

Thus, the Supreme Court may, and indeed has, authorized fees not otherwise provided by statute. For example, the Court by Administrative Order has authorized the Court Administrator to provide for the payment of transcript fees, see A. O. 19, and the Court Administrator, under her broad authority for "all fiscal operations" of the courts, A.O. 3, has in turn entered into contracts with transcription services requiring appellants to pay the service vendor directly for the transcripts within limits specified in the contract. See V.R.A.P. 10(b)(7) and Reporter's Notes to the 2013 Emergency Amendment. Another example is the informational services provided by the independent Vermont Information Consortium through agreements with numerous Vermont governmental agencies, as well as the Judiciary, Using a transaction-based fee model payable directly to the vendor, VIC provides access to civil case record information through Vermont Courts Online. These direct transactions between authorized vendors and recipients of services do not raise revenue for the State, and the Judiciary neither receives, processes, nor spends those funds.

The circumstances here are analogous. The Judiciary's contract with Tyler Technologies authorizes direct payment of a e-filing use fee—a fee that is not otherwise "specified by law"—and the requirement is memorialized in the Electronic Filing Rules promulgated by the Court and reviewed by the legislative Committee on Judicial Rules. See Vt. Rules for Electronic Filing, Rule 10 (providing for payment of "court fees and e-filing fees" and setting forth payment exemptions). The VBA's assertion that the Rules for Electronic Filing did not authorize the use e-filing fee is erroneous. Rule 10 expressly references the e-filing fee and the explanatory notes to the Rule state that it "addresses . . . a fee to make an electronic filing . . . through the electronic filing system imposed by the electronic filing system vendor."

As noted, the Vermont Supreme Court's power to make and promulgate rules governing the administration of the courts finds express recognition in the Vermont Constitution, Chapter II. Section 37, and 32 V.S.A. section 1403 expressly acknowledges the Court's power to enact fees under its residual constitutional rulemaking authority. Furthermore, case law has recognized that courts must retain the "inherent judicial power" to "charge and collect reasonable filing fees" for their operations or risk being rendered "ineffectual." Blackjack Bonding v. City of Las Vegas Municipal Court, 14 P.3d 1275, 1280 (Nev. 2000). Similar holdings have recognized the Judiciary's inherent power to charge and collect reasonable attorney registration fees, even in the absence of enabling legislation, pursuant to the court's core responsibilities for attorney licensing and discipline. See, e.g., Board of Overseers of the Bar v. Lee, 422 A.2d 998, 1003 (Me. 1980) (holding that the Supreme Judicial Court "has inherent power not only to regulate attorneys . . . but also to impose . . . such registration fees as are reasonably required to enable the Court to carry out its responsibilities").

As noted, there is overlap between the legislative and judicial branches in the area of rulemaking, court administration, and the enactment of court fees. Rules adopted by the Supreme Court may be revised by the Legislature, Vt. Const. Ch. II, § 37, and arguably Court-enacted filing fees may similarly be revised so long as they do not undermine the Judiciary's capacity to carry out its essential functions. As discussed below and in earlier Committee hearings, the e-filing use fee in question was chosen by the Judiciary because, based on the information available at the time of contracting with the vendor, it was the most efficient and economic model available to implement E-Filing. Any future changes considered by the Court or the Legislature must maintain that capacity.

Equal Protection

The VBA's memorandum suggesting that the e-filing Rules somehow discriminate unconstitutionally between represented and unrepresented litigants could not be more erroneous.

The Rules draw no distinction for purposes of payment of the e-filing use fee between represented and unrepresented litigants. Subject to exemptions not at issue here, everyone who uses the e-filing system—whether represented or not—is subject to the e-filing use fee requirement. This is worth repeating. Represented litigants who electronically file must pay the e-filing use fee. Self-represented litigants have a choice. They can either continue to file the way they file now, or they can electronically file. If they choose to electronically file, they must pay the e-filing use fee.

The Supreme Court early on determined, however, that—unlike trained attorneys—pro se litigants may lack the background or sophistication necessary to comply with the various other requirements and procedures necessary to effectuate an e-filing, which include steps to register with the system and to ensure that documents are properly formatted. Therefore, it determined that self-represented litigants may continue to file paper records. However, if they choose to e-file, they are subject to the e-filing use fee.

The decision to allow pro se litigants to choose to continue to file paper records was a perfectly reasonable one and does not remotely represent an arbitrary or capricious decision in violation of the federal or state constitutions.

Access to Justice

It is difficult to understand the VBA's argument here. It readily acknowledges the Supreme Court's holding that a filing fee that otherwise makes reasonable accommodation for the indigent does not infringe the constitutional right to access justice. State v. Macedo Soares, 2011 VT 56, ¶ 11, 190 Vt. 549 (mem.). The e-filing Rule expressly exempts anyone who is otherwise generally exempt from payment of court fees, including those who cannot afford it or who obtain a waiver. Rule 10(d) and Reporter's Notes. 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.

Alternative Funding Models

It was important to establish a sustainable funding model for e-filing, one that would continue to pay for the service after our implementation is complete. We chose and contracted for a per-envelope-filed use fee, based on actual volume filed through the system and paid by the users of the service, directly to the vendor. This allowed the Judiciary to avoid paying yearly fees to the vendor, likely based on estimated volume, as part of our software maintenance. The per submission fee, rather than a much higher per-case fee, made sense given the estimated low average number of filings per case based on national information. Having no identified source of revenue for these costs, and no indication of how e-filing would be used or adopted in Vermont, made paying a flat yearly fee an unacceptable risk to the Judiciary, and contrary to the direction provided by the legislature to ensure that this project would be sustainable. Additional risk is also associated with yearly fees through the danger of paying for unused e-filing services if our project was delayed.

While our Technology Fund will be able to fund NG-CMS software maintenance costs in the short term, provided that legislative policy changes and the reduction of traffic tickets issued do not impair it, the Tech Fund could not assume this added burden. This use fee was set for a short-term, until 2022, allowing us to evaluate it against actual early system use in Vermont.

Conclusion

It is a fundamental principle of our form of government that the "Legislative, Executive and Judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the others." Vt. Const., ch. II, sec. 5. Of course, the fiscal powers of the Legislature—the power to tax and to appropriate—are well understood. Less appreciated, though no less fundamental, are the powers of the Judiciary derived from the Constitution. These include not only the traditional adjudicative functions—the power to resolve disputes—but equally the power to make rules and to administer the courts—the power, that is, to conduct the business of the Judiciary. Vt. Const. ch II, secs 30, 37. In this regard the courts' responsibility to carry out its core responsibilities is the equal of the other branches.

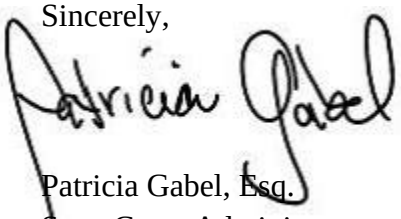
To be sure, the separation of powers required by the Constitution is not "absolute." Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (199). As the Supreme Court has observed, the demands of modern governance require "of necessity . . . a certain amount of overlap." Id. Therefore, for each branch to be effective, the fiscal power of the Legislature and the judicial power of the courts must be exercised in a "spirit of reciprocity and interdependence." Brown v. Owen, 206 P.3d 310, 317 (Wash. 2009). It requires, as the U.S. Supreme Court has stated, a certain "measured cooperation." Loving v. U.S., 517 U.S. 748, 774 (1996).

As discussed, this governmental interdependence is reflected in those constitutional and statutory provisions that empower the Court to enact rules and court fees necessary to the Judiciary's operations while preserving the legislative opportunity for subsequent review.

As the Court's power is to some extent conditional, however, so too is the Legislature's. The constraints are two-fold. First, it is well settled that the United States Constitution "prohibits states and their subdivisions from passing laws which impair the obligation of contracts." Burlington Fire Fighters Ass'n v. City of Burlington, 149 Vt. 293, 297 (1988). This does not absolutely bar the Legislature from enacting statutes that may incidentally affect existing contractual obligations so long as they are reasonably necessary to serve important public interests. Id. However, the courts have cautioned that this legislative leeway is much more narrow with respect to State contracts. The law is "not so deferential when the state's legislation . . . impairs the obligation of its own contracts." Association of Surrogates v. New York, 940 F.2d 766 (2d Cir. 1991) (invalidating New York statute that conflicted with payment obligations under collective bargaining agreement where "other policy alternatives [were] available").

The Legislature should not take action that will intrude upon the continued operation of the Judiciary's new case management system, the Judiciary's ability to meet its contractual and financial obligations, or ultimately the Court's constitutional responsibilities to administer justice.

Sincerely,



Patricia Gabel, Esq.
State Court Administrator

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