

Supreme Court of Vermont
Office of State Court Administrator

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MEMORANDUM

TO: Sen. Dick Sears, Chair, Senate Judiciary Committee
Memorandum Distribution List

FROM: Patricia Gabel, Esq., State Court Administrator

DATE: May 21, 2020

RE: Authority of Supreme Court of Vermont to establish e-filing use fee by contract

Dear Legislative Colleagues:

At a hearing of the Senate Judiciary Committee on May 13, 2020, there were a number of statements made both by a witness and by the Committee Chair that potentially misrepresent, however inadvertently, the respective spheres of constitutional authority of the branches and thereby undermine the longstanding interbranch comity that has existed in Vermont, particularly between the Judiciary and the General Assembly. I am circulating this memorandum to address these statements and, hopefully, correct any misunderstandings.

There was a comment at the hearing that two statutes, 32 VSA 601 (providing for legislative authority over court fees) and 32 VSA 1403 (providing that the Supreme Court may enact fees not otherwise provided by law under its general rulemaking authority) seem to be in conflict with each other. In fact, the statutes are entirely in harmony with each other and consistent with the respective constitutional powers of the judicial and legislative branches properly understood, the distinction resting in part on the taxing power of the Legislature and the regulatory power of the Judiciary. Each time I have appeared before the Senate Judiciary to address this topic (May 22 will be at least the third time), I have emphasized the difference between a fee that requires legislative authority and a fee that can be imposed by the Supreme Court pursuant to its constitutional administrative and regulatory authority.

An example of the former is legislative authority that the Judiciary unsuccessfully sought in 2014 to impose a fee to be collected by the State as revenues, deposited by the Judiciary into a special fund held by the Judiciary, and expended by the State to purchase a new electronic case management system. This is fundamentally different from the constitutional authority of the Judiciary to contract for an e-file use fee to be charged by a third-party vendor for services provided by the vendor to the user, which does not raise State revenue, is not processed or received by the Judiciary, and is not expended by the Judiciary to pay Judiciary expenses or costs. The Judiciary ultimately received capital funding for the purchase of the electronic case management system. The E-file use fee was negotiated by the Judiciary at a completely different time for a completely different purpose.

This is where the fact that the Judiciary does not receive and spend the money is important. The Judiciary cannot spend money without an appropriation or some sort of legislative authorization. In essence, this means the Judiciary would need legislative approval to accept the money. In the case of the e-file use fee, the money is exchanged between the filer and the vendor, Tyler Technologies. The Judiciary is acting only as a regulator to ensure that the cost is reasonable. That is exactly the circumstance in the example of trial transcripts provided by a third party vendor that I have mentioned in previous correspondence with this Committee and the fees charged by the Vermont Information Consortium for access to court records through Vermont Courts Online.

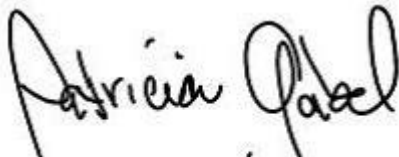
I recommend that all who are interested in the Legislature's guidance to the Judiciary with respect to the Court's adoption of an electronic case management system listen to the tapes of the Senate Institutions Committee hearings at which discussions took place between the Judiciary and the Committee regarding the electronic case management system between 2015 and 2017, when the Committee on more than one occasion emphasized to the Judiciary that any ongoing funding to support the electronic case management system must be sustainable in a way that does not have the Judiciary coming back to the Appropriations Committees on an annual basis to seek funding to cover maintenance fees, license fees, and other annual costs. Although I have not reviewed those tapes, I well remember those discussions, and we have implemented the new case management system in accord with the guidance we received from the Committees that supported our funding.

The comments and innuendo expressed at the May 13 meeting that the Judiciary "went around the legislature," that it sets a "bad precedent," that it was a "mistake," and that it should "never happen again" misunderstand the applicable law and the facts. These comments inaccurately and unfairly miscast the Supreme Court's proper exercise of its well-established constitutional

power, not to mention the authority clearly granted to it by an express statute enacted by the Legislature, as an inappropriate power grab. These kinds of inter-branch accusations erode trust and undermine the ability of the branches to collaborate in the interests of the people of the State. They also undermine confidence in our governmental institutions and the important checks and balances—properly understood--that underlie our form of government.

I look forward to working with your Committees and the General Assembly to improve communications and understanding, particularly at this time when all three branches must work together well in the interests of the people of the State to weather very stormy seas.

Sincerely,



Patricia Gabel, Esq.
State Court Administrator

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