

Supreme Court of Vermont
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To: Senator Dick Sears, Chair, Senate Judiciary Committee
Memorandum Distribution List

From: Patricia Gabel, Esq. State Court Administrator

Date: June 10, 2020

Re: Proposed Legislation on E-Filing Use Fee

Dear Senator Sears and members of the Senate Judiciary Committee,

I am writing in response to proposed revisions by the VBA to draft legislation on the e-filing use fee that I submitted to you and the VBA. A copy of the Judiciary's proposed legislation is enclosed with this memo. You will see a change in our proposed draft that conforms to a request from the VBA.

In this brief response I will address each specific VBA proposal, explaining why the Judicial Branch asserts that it is or is not sound, followed by an equally brief summary of what should be required going forward.

1. The VBA's Proposed Revisions

- In section (a)(i) the VBA has inserted language which presumes that the Judicial Branch will renegotiate its contract with Tyler Technologies to substitute a "per-case" for a "per-filing" fee effective December 31, 2020, and based on that assumption requires data from such a "per case" fee to be included in the report to the Legislature to be submitted by July 1, 2021.

The Judiciary strongly opposes this proposed revision for two fundamental reasons. First, it effectively dictates to the Judiciary that it renegotiate a binding, duly negotiated contract that considered many funding models before settling on the e-filing use fee as the most fair, efficient, economical and sustainable approach for Vermonters. Statistics to date confirm that, based on that very limited data of the early weeks, it remains the most fair, efficient, economical and sustainable approach for Vermonters; but, as I have previously testified, longer and more extensive experience with this model could change that picture. In any event, there is no evidence yet that any other model is better, so all we have is the evidence that affirms the current model. As I have noted previously and will not belabor here, such a direct legislative interference with a Judicial branch contract represents a clear constitutional violation of the separation-of-powers principle. As I have also previously written, this would be particularly egregious in this case, where it appears that the State of Vermont is purporting to nullify a valid and binding contract to which the State of Vermont is a party.

Second, the VBA proposal is based on an additional, equally unsound presumption, to wit, that a “per-case” fee is unquestionably superior to a “per-filing” fee. This is an unexamined and unjustified assumption. It ignores the fact that such a fee would fall exclusively on the filer rather than both parties. It relies on data from Rhode Island that ignores the higher volume of cases filed there and the much lower number of filers who are exempt from the fee in Rhode Island than in Vermont. The VBA appears to recognize that its suggested \$15 per case fee falls below the \$19 or \$20 per-case fee estimated by the Judiciary’s vendor, and simply assumes that “the differential could be funded in other ways” without even attempting to identify those funding sources. As noted, the Judiciary’s proposal is to wait a year for the per-filing fee to be widely implemented to determine precisely whether our initial judgments on its advantages have been justified, and to gauge the views of a wide range of system users. Substituting a per-case fee by the end of 2020 is not a sound approach.

- In section a(iii) the VBA proposes to eliminate language designed to assess the impact on access to justice of fees established by the legislature and those established by the Supreme Court because, according to the VBA, it “suggests that the Supreme Court has exclusive jurisdiction over e-filing and other use fees.” The proposed legislative text does not state or imply that the Supreme Court has exclusive jurisdiction over e-filing fees, and I have previously written about and testified about the powers of each branch in this regard. As I have stated repeatedly in earlier memoranda to the Committee, there is substantial room for both branches to work together and to cooperate in this area without unduly infringing on the powers of the

other. The VBA's proposed changes to this section are unnecessary infringements and should be rejected.

- In section (c) the VBA proposes to substitute "shall" for "is encouraged to" seek input from users of the e-filing system. The Judiciary has no objection to this proposed change.

2. Conclusion

In closing, I would like to reassert the Judiciary's commitment to continue to collaborate with all the Committees of the Legislature with relevant jurisdiction and the parties affected by the e-filing use fee to address concerns about the e-filing use fee. It is consistent with that spirit in which I have expressed my concerns with the VBA's proposed legislative revisions, which as I have noted represent a potentially unconstitutional interference with a contract duly executed by the Judiciary, and are premature in any event. The e-filing system formulated by the Judiciary as representing the most fair, economical and sustainable approach to funding the Odyssey case management system requires an adequate one-year statewide rollout, followed by a careful evaluation of the outcome by both the Judiciary and the Legislature and what we would hope would be a collaborative approach to changes that might be considered following the gathering of the relevant data.

- cc. Sen. Jane Kitchel, Chair, Senate Appropriations
Rep. Kitty Toll, Chair, House Appropriations
Rep. Maxine Grad, Chair, House Judiciary
Sen. Ann Cummings, Chair, Senate Finance
Rep. Janet Ancel, Chair, House Ways and Means
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