To: Sen. Dick Sears, Chair, and to Senate Committee on Judiciary Members

From: Teri Corsones, Esq.

Date: May 22, 2020

Re: Response to CAO E-Filing Use Fee Memorandum

I'd like to briefly respond to the Court Administrator's Memorandum that she forwarded to you and kindly copied me on last evening. The Memorandum sets forth the Judiciary's perspective regarding five aspects of the VBA eFiling Fees Study Committee Report and Recommendations submitted on May 15. I'd like to also respectfully, but strongly, disagree with her statement in the introduction that "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." Nowhere in the Report is such a statement made or implied. In fact, one of the principal recommendations in the Report is for the Office of the Court Administrator to immediately engage with the Bar and other court users in order "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." Numerous references to the "per new case" efiling fee option as a preferable option to the "per-use" option are made throughout the Report. That would not be the case if the VBA was seeking to avoid paying any costs at all for an efiling system.

1. Notice

The frequency of the efiling fees and cumulative charges is the problem. Never before in Vermont state court history has a filing fee been assessed on each occasion that a litigant files a document or documents in a case. That is the aspect of the new system that was not clearly explained or highlighted. Neither I nor the other attorney members of the Vermont Rules for Electronic Filing Committee understood that. Neither apparently did the members of the Joint Rules Committee. Neither apparently did the overwhelming majority of attorneys who took the trainings. Having taken a live webinar training as recently as May 6 where no mention was made of the frequency of the efiling fees, it is easy to understand how the unprecedented imposition of per-use efiling fees was a shock to so many.

2. Judicial Authority

Much of the Court Administrator's defense of the Judiciary's authority to enact efiling fees comes from an effort to distinguish between fees imposed by statute (32 V.S.A. § 1431) and those imposed by rule (32 V.S.A. § 1401). It is worth noting that both statutes constitute a grant from the legislature. But focusing solely on this distinction overlooks the fact that the Legislature has spoken in this particular instance and has modified the Judiciary's rulemaking authority. Section 25 of Act 191 (2014) authorized the Judiciary to negotiate for the licensing and operating costs of an electronic filing system through the imposition of user fees, but it also mandated that the Judiciary 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. Such a step was necessary for the public process and for objective review of these fees through committee and legislative approval. The Judiciary neglected to submit such a plan to the Legislature. Had it done so, it's safe to assume that the per-use fee that the

Judiciary unilaterally selected would have been scrutinized and questioned and likely modified for all the reasons pointed out in the Report. Separate fees for transcripts or copies ordered in a very small percentage of cases are hardly analogous to efiling fees imposed each and every time that a separate document or documents are efiled in a civil, family, probate, small claims, environmental, or supreme court case. There's a reason that the Legislature should have oversight over efiling fees and this controversy is a perfect example of the adverse consequences that can occur when legislative oversight is prevented.

3. Equal Protection

Attorneys are required to efile. Their clients (including clients that an attorney represents pro bono) are therefore required to efile. In a system where every time that a separate efiling is made a separate efiling charge is imposed, it's going to potentially cost much more to efile than to paper file. The per-use fee approach introduces a financial component which a represented litigant cannot control. Under the Common Benefits Clause there does not appear to be a rational relationship between imposing mandatory per-use fees on represented litigants and permitting another class of litigants, non-represented litigants, to not only completely avoid those costs, but to be able to file documents in such a way so as to intentionally increase costs for the represented litigant.

4. Access to Justice

The Court Administrator states that it is difficult to understand the VBA's argument regarding the adverse impacts that the per-use fee has on access to justice. The VBA Pro Bono Committee stated it clearly. "Given our ethical duty as a zealous and competent advocate providing legal quality 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 . . . . Although fee waivers may be available to public defenders and contract defenders, these waivers are not available in all low bono cases. If those fees are passed to the client, the client may make the decision to not pursue the legal action. The effect would be disastrous." Similar concerns were voiced by a Vermont Legal Aid attorney of 22 years: "The fee waiver rule and standards protect only the poorest of the poor . . . 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."

5. Alternative Funding Models

The Court Administrator justifies selecting the per-use fee as follows: "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." This statement illustrates why involving court users in the decision-making process could have prevented a bad decision from being made. The per submission fee is $5.25 plus at least .15 for a total of $5.40. Rhode Island uses the Tyler system and charges a per-case fee of $17.50. How is $17.50 much higher than $5.40 x a potentially unlimited number of filings? A review of the 1232-page Tyler contract reveals that the average number of filings that the Judiciary and Tyler used for their computation is 2.5 filings per case. Any practitioner will tell you that this number is unrealistically low, even in a limited appearance case. Why would the Judiciary accept a figure based on "national information" when Vermont-specific information could have been readily available had the Judiciary involved the Bar in the decision-making process. The per submission fee is in reality much

higher than a per-case fee and selecting a per-use fee did not make sense, especially given the unrealistically low average number of filings based on unverified national information.

Conclusion

In her conclusion, the Court Administrator indicates to the Legislature that it "should not take action that will intrude upon the continued operation of the Judiciary's new case management system". It is the VBA's sincere hope that the Court Administrator recognizes the serious ramifications of the Judiciary's choice of the per-use efiling fee option, and that she responds positively to the Report's recommendations. Tyler and the Judiciary have the ability under the contract to halt the per-use fee. Should the Judiciary not work with Tyler to modify the contract to halt the per-use fee, the contract requires the parties to re-negotiate in the event of legislative action affecting the contract: "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." If the Legislature does take action, it will not be to intrude on the continued operation of the new efiling system, but to improve it.

I hope that this response is helpful. Many concerned practitioners volunteered hours of their time under challenging circumstances to thoughtfully explain the reasons for their concerns. We stand ready to work together with the Judiciary to determine the best efiling fee option for all Vermonters and are grateful to the Legislature for providing an opportunity to bring to light these issues.