STATE OF VERMONT
VERMONT SUPREME COURT
FEBRUARY TERM, 2021

Emergency Order Amending Rules 2, 4, and 11 of the 2020 Vermont Rules for Electronic Filing

Pursuant to the Vermont Constitution, Chapter II, § 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 2 of the 2020 Vermont Rules for Electronic Filing be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 2. DEFINITIONS

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(k) **Service Contact** means ~~an efiler-designated case-specific email address at which the electronic filing system will notify an efiler-designated recipient that an electronic filing has occurred in the case to meet the responsibility of the efiler to serve other parties~~ a person for whom an email address and other identifying information has been entered into the efiling system as a designated recipient of service on case filings from other parties through the efiling system.

(1) *Firm Service Contact*. A Firm Service Contact is a Service Contact associated in the efiling system with an attorney, organization, or law firm and is available only to users within the firm to add to a case for service.

(2) *Public Contact*. A Public Contact is a Service Contact listed on the Public List for purposes of electronic service that other electronic filers must use for service.

(3) *Public List*. The Public List is a directory of service contacts for system users that those users have created and made publicly available for other users to select for service.

(*l*) **Submission Agreement** is how an efiler certifies compliance with provisions of the efiling rules including, but not limited to, Rules 5(b)(5) and (6) (compliance with Rules for Public Access to Court Records) and Rule 11(g)(3) (Service). The submission agreement is part of the efiling process and efilers indicate compliance using a checkbox.

Reporter's Notes—2021 Amendment

The definition of "service contact" is amended to clarify, and provide a better understanding of, the types of service contacts that are used to make electronic service, and the source of the "public list," which is the primary reference for securing and using another party's email address for service and other case-related communications. The "public list" consists of a directory housed within the electronic filing system, of attorneys and other users who are registered efilers, and their email addresses created and made publicly available by the user as a service contact, and updated, in accordance with Rule 4(b)(3) and 5(b)(7).

A definition of "submission agreement" is added. A submission agreement is how efilers certify compliance with the electronic filing rules when a document is filed. These certifications include, but are not limited to, those of Rule 5(b)(5) and (6) (to certify compliance with V.R.P.A.C.R. 7(a)(1) as to protection of nonpublic records) and amended Rule 11(g)(3) (certifying compliance with service requirements). The submission agreement appears on the system page for each efiling, employing certification "boxes" that must be checked by the efiler to comply with certification. The submission agreement certification does not supplant the efiler's obligation to complete additional actions, if any, that are prescribed by the applicable rules. See, e.g., Rule 5(b)(5) and (6) (incorporating obligation to take, and describe, specific actions to protect against disclosure of nonpublic information in the filing per V.R.P.A.C.R. 7(a)(1)), and Rule 11(g)(2) (circumstances requiring additional filing of a certificate of service complying with V.R.C.P. 5(h) or V.R.P.P. 5(e)).

2. That the Rule 4(b) of the 2020 Vermont Rules for Electronic Filing be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 4. REGISTERING PROCESS; RESPONSIBILITIES

(a) **Registration Process**. A person must register to electronically file and serve documents through the electronic filing system, and choose the appropriate type of registration—independent user, or user with an existing firm.

(b) **Obligations and Responsibilities**.

(1) Registering to electronically file and efiling a document in a case constitutes consent to receive electronic service by notice that a filing has been made.

(2) An efiler is responsible for all documents filed or served under the efiler's account.

(3) An efiler must create a service contact after registering, must check the "Make This Contact Public" box, and must immediately update the efiler's service contact information when changes occur ~~is responsible for updating registration information, including service contacts~~.

(4) An attorney may permit an associated attorney or other person authorized by the attorney to file and view documents on the attorney's behalf. The attorney is responsible for all such filings and for any misuse of documents that are viewed or downloaded.

(c) **Registration To View Documents That Are Not Publicly Accessible**. To view nonpublicly accessible portions of the electronic case file or documents not accessible over the internet, persons—including those with specific rights of access pursuant to Rule 5 of the Rules for Public Access to Court Records—must separately register with the public-access portal, providing verification of their specific right of access.

Reporter's Note—2021 Amendment

Rule 4(b)(3) is amended to clarify that an efiler must enter a current service contact email address as a condition of registration, and to further require immediate updating of a changed service contact address. This assures effective service via the efiling system File and Serve function.

3. That the Rule 11 of the 2020 Vermont Rules for Electronic Filing be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 11. SERVICE

(a) **Personal Service**.

(1) *Nonelectronic Service*. Whenever personal service is required by rule or statute, or a specific nonelectronic method is authorized for commencement of an action, the person making service must do so nonelectronically.

(2) *Return of Nonelectronic Service*. Any required return of nonelectronic service must be filed electronically in accordance with Rule 3(a) unless otherwise provided in Rule 3(b) or by the applicable rules of procedure. A party's waiver or acceptance of service of original process, given in accordance with the applicable rules of procedure, must be electronically filed if Rule 3(a) applies.

(b) **Service in General**. When Rule 11(a)(1) does not apply, the person making service must do so in accordance with this rule.

(c) **Discovery**. An efiler may, but is not required to, serve discovery requests or responses, which are not required to be filed with the court, on an efiler using the electronic filing system.

(d) **Service of Electronic Filings Between eFilers**.

(1) *Service Through Efiling System*. ~~Absent an agreement under paragraph (2), service~~ Service of electronic filings between efilers must be effected using the electronic filing system by choosing File and Serve and selecting the party from the Public List at the time of filing, unless there is an agreement under paragraph (2).

(2) *Exception to Service Through Efiling System by Agreement*. Electronic filers may agree on an alternative ~~or supplementary~~ method of service for a particular document or case if: ~~the agreement is~~

(A) the agreement is in writing, is signed by the parties to the agreement, and is clearly labeled as an agreement for an alternative method of service;

(B) the agreement provides the email addresses for service of each party to the agreement where service is by email;

(C) the agreement has been filed and served in the electronic filing system using the service contact of each of the parties to the agreement; and

(D) each filing served pursuant to the agreement is accompanied by a certificate of service that complies with paragraph (g)(2) of this rule.

(e) **Service of Nonelectronic Filings or Service on Nonefiler**. Service of a nonelectronically filed document or on a party who is either not an efiler in the case or has failed to provide service contacts must be made by the means specified in the applicable rules of procedure.

(f) **Notice of Court Orders and Documents**. The court will transmit any notice, order, or other document issued by the court to electronic filers by electronic means. Notice to parties who are not electronic filers will be provided by the means specified in the applicable rules of procedure for circumstances where these rules specify no alternative means.

(g) **Certifying Compliance with Service Requirements ~~and Certificate of Service~~**.

(1) *Certifying Service Using Submission Agreement*. ~~*Certificate of Service Not Required.*~~ All efilers must certify compliance with service requirements by completing the submission agreement described in paragraph (g)(3) and contained within the efiling screens. Failure to certify compliance accordingly will prevent completion of the efiling process. ~~When service is made exclusively through the electronic filing system, the efiler need not file a certificate of service.~~

(2) *When Additional Filing of a Certificate of Service Is Required*. An efiler must file a certificate of service complying with V.R.C.P. 5(h) or V.R.P.P. 5(e), as applicable, describing and certifying service on any of the following persons:

(A) a party who is not required and has not elected to efile in the case;

(B) a party who has failed to provide a service contact; or

(C) a party with whom the efiler has an agreement for an alternative method of service under paragraph (d)(2). ~~*Certificate of Service Required*. When one or more persons must be served nonelectronically pursuant to subdivision (e), the efiler must submit a certificate of service complying with V.R.C.P. 5(h) or V.R.P.P. 5(e), as applicable.~~

(3) *Content of Submission Agreement for Service*. Completion of the submission agreement is subject to the obligations of V.R.C.P. 11. The submission agreement must provide that for any filing that must be served, the efiler has either:

(A) completed service by using "File and Serve" and choosing the service contact from the Public List; or

(B) filed a certificate of service complying with paragraph (2) of this subdivision. ~~*Certifying Compliance in eFiling System*. To complete electronic filing of a document the efiler must certify, subject to sanctions under V.R.C.P. 11(b), that: (A) the efiler is not required to serve the document; (B) the efiler has served all electronic filers with service contacts through the electronic filing system; or (C) the efiler has served all persons not served through the electronic filing system as provided in subdivision (e) and has submitted a certificate of service compliant with V.R.C.P. 5(h) or V.R.P.P. 5(e).~~

Reporter's Notes—2021 Amendment

Rule 11(d) is amended regarding how to serve parties who are efilers and how to employ any alternate method of service among efilers. Amended paragraph 11(d)(1) clarifies that service of electronic filings between efilers must be made using the electronic filing system by choosing the "File and Serve" function at the time of filing and selecting the party from the Public List, unless there is an efiled, written agreement among the parties for alternative methods of service, consistent with the requirements of amended paragraph 11(d)(2). Election of the "File and Serve" function specified in the rule, as necessary to enable the system to complete the service transmission. Selecting only "File" or using the "courtesy copy" field to enter opposing party's email address is not considered service; courtesy copies are not tracked, and receipt is not verifiable.

Amended paragraph 11(d)(2) continues to allow agreements among efilers for alternative methods of service, and further prescribes the conditions of such agreements. Subparagraph (A) requires that the agreement must be in writing, signed by the parties, and clearly labeled as a separate agreement for an alternative method of service. Under subparagraph (B), the agreement must provide the email addresses for service of each party to the agreement where the alternate service method is by email. Under subparagraph (C), the agreement must be filed and served in the electronic filing system using the service contact of each of the parties to the agreement, prior to any service by the agreed alternative means. And, under subparagraph (D), each filing served pursuant to the agreement must be accompanied by a certificate of service that complies with Rule 11(g)(2).

The reference to agreements for a "supplemental" method of service in the former subparagraph (d)(2) is deleted. Parties are not precluded from separately providing copies of documents to be served by other means as a matter of courtesy, or to provide actual notice of a filing; however, as indicated above, such supplemental transmission does not comply with required service obligations or trigger the reply date otherwise available to the responding party under any applicable rule.

Consistent with existing subdivision (c), service via the electronic filing system of discovery requests or responses (which are not required to be filed with the court per V.R.C.P. 5(d))

remains within the election of the serving party, who may choose to employ alternative means instead consistent with V.R.C.P. 5(b).

Subdivision (g) is amended to clarify certification of compliance with service requirements in efiling via a submission agreement, as well as to detail circumstances in which a separate certificate of service, complying with either V.R.C.P. 5(h) or V.R.P.P. 5(e), is required. Amended paragraph (g)(1) requires that all efilers must certify compliance with service requirements in a submission agreement, as set forth in paragraph (g)(3) and contained in the efiling process. Where all parties are efilers who are served via the system File and Serve function, the (g)(3) submission agreement contemplates the filer's certification that all parties are efilers with service contacts, and served through File and Serve, by checking the indicated submission agreement box. Where not all parties are efilers, the additional requirement of a certificate of service per subparagraph (g)(2) applies. A failure to make the certification will prevent the efiling from occurring, since the efiler will be precluded from advancing beyond this step.

Amended paragraph (g)(2) addresses the efiler's obligation to file an additional certificate of service, apart from the required submission agreement certification. An additional certificate of service, complying with V.R.C.P. 5(h) or V.R.P.P. 5(e) as applicable, is required when serving: (A) a party who is not required to efile and has not elected to efile; (B) a party who has failed to provide a service contact; or (C) a party with whom the efiler has an agreement for an alternative method of service under subparagraph (d)(2).

Where multiple documents are simultaneously filed and served and subparagraph (g)(2) is applicable, one certificate of service referencing them all may be filed as an attachment, in the same efiling "envelope," in the manner authorized by V.R.C.P. 5(h) and V.R.P.P. 5(e).

Revised paragraph (g)(3) prescribes the content of the required submission agreement certification as to service. The certification details that, for any filing that must be served, the efiler has included a certificate of service complying with paragraph (g)(2), and that any remaining parties have service contacts and have been served through the system File and Serve function. The certification of the submission agreement is subject to the obligations of V.R.C.P. 11 (as was the case with the service certification requirement of the former paragraph (g)(3)).

The amended paragraph (g)(3) refers to "any filing that must be served," meaning that authorized ex parte filings are not subject to the service certification requirement (although post-filing service requirements may be governed by the specific requirements of an applicable procedural rule, then invoking the service and certification requirements of Rule 11).

4. That the rule as amended is prescribed and promulgated effective March 15, 2021. The Reporter's Notes are advisory.

5. That the Court finds that this emergency amendment must be promulgated without resort to the notice and comment procedures set forth in Administrative Order 11 because the amendment seeks to provide necessary clarifications as to procedures for electronic filing and confirmation of service of documents upon parties via ready access to the electronic case record in the judiciary's electronic filing and case management systems, which are being implemented on a phased basis in all units.

6. That the Court Administrator is directed to send the rule as amended out for comment pursuant to Administrative Order 11, with comments to be made to the Special Advisory Committee on the Rules for Electronic Filing. The Advisory Committee is directed to review any comments received and advise the Court whether the amendments should be revised or made permanent.

7. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 22nd day of February 2021.

Signed by the Vermont Supreme Court

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice