SENT VIA EMAIL TO WALTER.MORRIS@VERMONT.GOV

April 12, 2019

Hon. Walter M. Morris, Jr.
Vermont Supreme Court
109 State Street
Montpelier, VT 05609-0801

RE: Order Abrogating and Replacing the Vermont Rules of Public Access to Court Records and Abrogating the Rules Governing Dissemination of Electronic Case Records and Rule 77(e) of the Vermont Rules of Probate Procedure

Dear Judge Morris,

I'm writing on behalf of the New England First Amendment Coalition, the region's leading advocate for press freedom and open government.

NEFAC, a non-partisan non-profit organization, is led by some of the most esteemed attorneys, journalists and publishers in New England. Its Board of Directors includes Michael Donoghue, former reporter for the Burlington Free Press; Lia Ernst, attorney for the ACLU of Vermont; and Todd Smith, publisher of the Caledonian Record. The coalition also works closely with representatives from the Vermont Press Association, VTDigger, New England Newspapers (Bennington Banner, Brattleboro Reformer and Manchester Journal), and the Stowe Reporter Group.

The following comments are in response to the proposed rules on public access to electronic court records. Overall, we applaud the court's effort to provide such access to its records. This type of accessibility is crucial to an informed citizenry and an accountable government. While we recognize the enormity of moving such a large body of records online, we have several major concerns with the rules as they are written. In addition to the rule-specific comments that follow, we urge the court to address these general questions currently unanswered:

Remote Access | Under the proposed rules, it appears remote access is entirely discretionary. While implementing a new state-wide system may initially be challenged by the varying resources at each courthouse, it is imperative that each court is ultimately required to provide remote access. As currently drafted, Rule 4(b)(2) states that such access "may" be provided without any guidance on the circumstances that must exist before the public can be denied the most valuable benefit of the new online judicial records system. We suggest making explicitly clear in the rules that all courthouses are required to provide remote access unless certain specific exemptions apply.

Timing | The rules do not specify the maximum amount of time allowed between a record being filed and that record being available remotely. This is an issue being heavily litigated throughout the country, particularly as it concerns the release of civil court documents. In 2017, for example, Courthouse News Service, a California-based wire service that reports on litigation filed throughout the country, sued the state of Vermont for unreasonably delaying the release of all lawsuit filings. NEFAC urged the Attorney General's Office at the time not to defend the practice and this court ultimately changed its policy to allow the public immediate access to documents once they are filed.[1] We urge you to adopt the same policy for online accessibility.

Duplication of Records | The rules do not currently require a mechanism within courthouse terminals that would allow users to email (preferred) or print records. While this may seem a minor logistical issue, the value of digital record accessibility is significantly diminished if there lacks a convenient and cost-efficient way to make copies of records that can be taken by the user or accessed elsewhere.

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[1] http://nefac.org/news/nefac-applauds-vermont-decision-to-make-lawsuit-filings-immediately-available-to-public/

Duties of Court Staff | As a general matter, the proposed rules could serve court staff — and the public — by better explaining the administrative process needed to file records and make them accessible. For example, Rule 7(a)(3) addresses the responsibilities of court staff but leaves it to the court administrator to establish certain procedures. For the sake of consistency between courts and setting protocols that can be expected by the public, we suggest you provide more guidance to administrators and other staff on how to best put the rules to practice.

In addition to these broader concerns, we offer the following suggestions regarding specific rules:

Rule 4(b) | The meaning of "case-by-case basis" is not clear: is the intention to provide the public access to records sorted by docket number, to have individual courts determine what is publicly accessible, or have access subject to review of individual records? If the latter, there should be a presumption of openness that discourages secrecy. We suggest clear guidelines that outline the specific circumstances that would warrant a member of the public being prevented from using a terminal. In addition, records should be provided as prescribed by these rules, not left to the discretion of individual court administrators.

Rule 4(b)(1) | The current rule refers to "each unit that has electronic filing," implying that some courthouses may not utilize electronic filing or there lacks a requirement to do so. For the public to realize the maximum benefit of a digital records system, each courthouse should be required to permit electronic filing and establish a procedure to digitize paper records when filed.

Rules 4(b)(2), 5(e) and (f) | Rule 4(b)(2) and the accompanying Reporter's Note explain that 12 V.S.A. § 5(a) prohibits remote access to criminal case records unless the exceptions in § 5(a) or (b)(2) apply, and the Note states that these exceptions are addressed in Rule 5(e) and (f). However, Rule 5(e) and (f) address only two of the exceptions identified in the statute: access by criminal-justice and public-purpose agencies. Left unaddressed is § 5(b)(1)'s exception for "court schedules of the Superior Court, or opinions of the Criminal Division of the Superior Court." Current, but not archived, court schedules are already available online, but opinions of the criminal division are generally not. The rules should make these critically important public records remotely accessible.

Rule 6(f) | Clarification is needed. The reference to 1 V.S.A. § 318 may be interpreted as a three-business-day allowance to provide case records, the same deadline provided in the state's public records law. Instead, the rules should be clear that contemporaneous access to those records is required.

Rule 6(h) | Rather than allowing a decision to be made "as soon as possible," a specific deadline for the appeal should be set. As NEFAC and its fellow amici argued in *Courthouse News Service v. Yamasaki*, a case involving timely access to newly filed civil complaints, "[i]n today's news cycle, where stories build upon each other and are updated by the minute online, it is important that the first news stories about a lawsuit be accurate and complete, with as much information as possible derived from official, primary sources."[2] Just a few days can separate a news story based on judicial records getting the attention it deserves and that same story being neither timely nor of interest to Vermonters.

Rule 9(a)(1) | In addition to parties and "other interested persons," the general public should also be notified in advance of hearings. Every Vermonter has an interest in knowing what records may be disclosed or sealed after their original filing and designation.

Thank you again for the opportunity to submit these comments. If our organization can be of further guidance, please let me know. This endeavor is a critical component to the public's right to know and we look forward to an online records system that provides as much transparency as possible.

Sincerely,

Justin Silverman
Executive Director

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[2] http://nefac.org/news/nefac-calls-for-immediate-access-to-civil-court-complaints-in-ninth-circuit/