

SUPPLEMENT TO THE AGENDA BOOK

**ADVISORY COMMITTEE
ON
CIVIL RULES**

**Washington, DC
April 9-10, 2015**

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CIVIL RULES APRIL 2015 AGENDA SUPPLEMENT

Rule 5(d)(3): e-Filing

This memorandum supplements the materials on e-filing that appear at pages 212-215 of the agenda book for the Committee meeting on April 9-10, 2015.

The alternative sketch of Civil Rule 5(d)(3) that appears here was worked out in collaboration with representatives of the Criminal Rules Committee – the Committee Chair, Judge Raggi, Judges Feinerman and Lawson, and Reporters Beale and King. Professor Capra carried forward as Reporter Emeritus for the recently disbanded all-Committees Subcommittee on matters electronic.

Judge Oliver and Clerk Briggs represented the Civil Rules Committee in the conference call. Judge Campbell joins them in recommending that the Committee recommend publication of the revised Rule 5(d)(3) and Committee Note set out below.

First, a bit of background to explain the purposes of this alternative. Present Rule 5(d)(3) authorizes local rules that allow electronic filing, and provides that "[a] local rule may require electronic filing only if reasonable exceptions are allowed." Many local rules address e-filing by pro se litigants. A recent count by the Administrative Office found that 36 districts permit nonprisoner pro se litigants to request permission to e-file, while 48 districts do not permit nonprisoner pro se litigants to e-file. 59 districts explicitly bar pro se prisoners from e-filing. The Northern District of Texas requires pro se litigants to conventionally file the complaint, but permits e-filing of later papers. Two districts allow pro se prisoners to e-file through a special program. (Less formal programs also are experimenting with e-filing by pro se prisoners.)

Past discussions of the proposal to make e-filing mandatory, with exceptions, devoted substantial attention to pro se litigants. The potential difficulties that will be encountered by pro se litigants, and that in turn will be visited on courts and other parties, were recognized. But two related considerations counseled against including an explicit exception for pro se litigants in rule text. The fundamental belief was that e-filing can be as useful for a pro se litigant as for other litigants, substantially reducing costs and expediting the filing process. A subsidiary belief was that an explicit rule provision might need to be revisited soon in response to rapid advances in the availability of electronic means for filing and in the sophistication needed to engage in e-filing. The drafts in the agenda book leave the burden of providing exceptions or exclusions on the local rules process: "But paper filing must be allowed for good cause, and may be *required* or allowed for other reasons by local rule."

The Criminal Rules Committee discussed these issues and studied the Civil Rules drafts at its March meeting. Acting on a thorough report by a subcommittee, and on advice of their district clerk liaison, they were concerned that serious problems would frequently result from e-filing by criminal defendants and by incarcerated persons seeking relief under the Rules Governing § 2254 and § 2255 proceedings. The Appendix to this memorandum is a memorandum prepared by Professors Beale and King outlining those problems. They fear that these problems are so serious and will occur often enough that a national rule allowing exclusions or exemptions only according to local rules will impose a substantial burden on local rulemaking in all districts.

It well may be that problems with e-filing by pro se litigants will arise more frequently, and be more severe, in criminal prosecutions and in proceedings for post-judgment relief than in civil actions. These litigants often experience severe disadvantages, among them lack of ready (or even any) access to electronic systems while incarcerated. It may be particularly difficult to provide them the training needed to navigate the CM/ECF system. That prospect could be relied on to support adoption of different provisions in the Criminal Rules and the Civil Rules. Although uniformity among all sets of rules is desirable when addressing common topics, differences in context often justify differences in rule text.

The considerations that underlie the alternative Civil Rules proposals in the agenda book, however, are not compelling. The burden placed on local rules can be reversed, without great cost and indeed with potential benefit. Instead of requiring e-filing by pro se litigants absent excuse or exclusion by local rule, the national rule can exclude pro se litigants from e-filing unless authorized by local rule. That approach is reflected in the alternative draft set out here. It can be supported by noting that it will build directly on present local rules, which take different approaches. Courts that now allow e-filing by pro se litigants in some circumstances may come to broaden the practice if experience shows that will work. Those that now exclude it may come to allow it, moving in response to experience in other districts and to local circumstances. The national rule might come to be revised eventually as e-filing by pro se litigants becomes a general practice, but it may be urged that revision is not likely to be needed in the next few – or even several – years.

The revised approach can be adopted with either of the alternative approaches to e-signatures reflected in the agenda book. This version works with the "constitutes the signature" approach:

(3) *Electronic Filing and Signing.*

- (A) All filings, except those made by a person proceeding without an attorney,¹ must be made² by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.
- (B) A person proceeding without an attorney may file by electronic means only if permitted by local rule or by court order.
- (C) The act of electronic filing constitutes the signature of the person who makes the filing. A paper filed electronically is a written paper for purposes of these rules.

Over-and Underline Version

~~(3) *Electronic Filing, and Signing, or Verification. A court may, by local rule, allow papers to be filed*~~

- ~~(A) All filings, except those made by a person proceeding without an attorney, must be made, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule. A local rule may require electronic filing only if reasonable exceptions are allowed.~~

¹ Different ways of referring to pro se litigants are possible. One obvious alternative, using fewer words, would be "except those made by a person proceeding pro se." Or "a person not represented by an attorney." A more positive approach might be "All filings made by an attorney must * * *." One reason for "a person proceeding without an attorney," as shown in text, is that it seems to speak to a situation addressed in one circuit rule: an attorney who appears pro se as a party. The attorney appearing on his own behalf may not be admitted to practice in the district court, or indeed may not be admitted to practice anywhere. At least some participants believe it is better to treat this attorney as any other pro se party.

² "and signed" could be included here if that approach seems the better approach to the e-signature question.

(B) A person proceeding without an attorney may file by electronic means only if permitted by local rule or by court order.

(C) The act of electronic filing constitutes the signature of the person who makes the filing. A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by a person proceeding without an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and increasing familiarity of most people with electronic communication.

The act of electronic filing by an authorized user of the court's system counts as the filer's signature. Under current technology, the filer must log in and present a password. Those acts satisfy the purposes of requiring a signature without need for an additional electronic substitute for a physical signature. But the rule does not make it improper to include an additional "signature" by any of the various electronic means that may indicate an intent to sign.³

³ Civil Rule 11(a) provides that every pleading, written motion, and other paper must be signed. Rule 5(d)(3) already provides that a paper filed electronically in accordance with a local rule is a written paper for purposes of the Civil Rules. It seems useful to carry this provision forward in this place, not Rule 11, omitting only the reference to local rules.

The amended rule applies directly to the filer's signature. It does not address others' signatures. Many filings include papers signed by someone other than the filer. Examples include affidavits and declarations and, when filed, discovery materials. Provision for these signatures may be made by local rule, but if the Judicial Conference adopts standards that govern the means or form of electronic signing, they may displace local rules.

[The former provision for verification by electronic means is omitted. Verification is not often required by these rules. The special policies that justify a verification requirement suggest that it is better to defer electronic verification pending further experience. {Local rules may address verification by electronic means.}]

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TO: Civil Rules Committee
FROM: Sara Beale and Nancy King, Reporters for the Criminal Rules Committee
RE: E-filing rules for pro se litigants
DATE: March 26, 2015

At its spring meeting last week, the Criminal Rules Committee discussed the e-filing proposal that was on the agenda for the spring meeting of the Civil Rules Committee, and whether a parallel change to the Criminal Rules would be desirable.

The Committee asked the reporters to relate its concerns about the proposed change to Professor Cooper, and to request that the Civil Rules Committee consider revising the proposed amendment to eliminate any requirement that pro se filers must e-file (absent a local rule or showing of good cause). Alternatively, if the Civil Rules Committee recommends a mandatory e-filing rule that would encompass pro se litigants, the Criminal Rules Committee would like time to prepare a proposal for amendments to the Criminal Rules and to the 2254 and 2255 Rules that could be published at the same time.

Following an informal telephone conference, Professor Cooper suggested that a memorandum summarizing the concerns of the Criminal Rules Committee would assist the Civil Rules Committee in its consideration of the e-filing rule at its upcoming meeting. We have prepared this informal Reporters' Memo for that purpose, based on our memories of the discussion last week. Please note that although this memorandum has been reviewed by Judge Raggi and the chairs of the relevant subcommittee, it has not been approved by the Criminal Rules Committee.

The Relevance of the Civil Rule to the Criminal Rules Committee

Criminal Rule 49(d) provides that a paper must be "filed in a manner provided for in a civil action." Thus any change to Civil Rule 5(d) on e-filing would apply automatically in criminal cases when the civil rule amendment takes effect. In addition, any change to filing requirements in the Civil Rules will likely affect cases filed under Sections 2254 and 2255, for which the Criminal Rules Committee traditionally has taken responsibility. Rule 12 of the Rules Governing Section 2254 Cases provides that "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Rule 12 of the Rules Governing Section 2255 Proceedings states: "The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."

Why Has the Criminal Rules Committee Requested a Carve-Out for Pro Se filers?

The Criminal Rules Committee's concerns can be grouped into three somewhat overlapping categories: (1) doubts about whether the CM/ECF system itself is ready for the challenges that pro se filing access will raise (including but not limited to pro se filers accused of

crime or in custody); (2) constitutional concerns about creating barriers to paper filing for pro se filers accused of crime or in custody; and (3) the concern that most districts will have to change their local rules to accommodate any new rule mandating e-filing for all pro se filers absent a showing of good cause or a local rule exemption.

(1) Challenges of extending CM/ECF filing to pro se litigants

The Criminal Rules Committee was concerned that courts lack experience allowing pro se litigants access to CM/ECF, a system designed for use by attorneys, who are bound by rules of professional conduct and who have received a legal education. Members were concerned that use of CM/ECF by pro se litigants was still in its experimental stages, and doubted whether it had been tested sufficiently to have addressed the following:

- Lack of training or resources for training for pro se filers, and the inability or unwillingness of pro se litigants to obtain or comply with training
- Increased burden on clerk staff to answer questions of pro se filers, particularly those who, unlike attorneys, are not routine filers.
- Mistaken filings – filers without legal training selecting the wrong title for a filing (lawyers already do this, requiring quality control protocols by clerk staff), filing things multiple times, or failing to attach required documents or attaching the wrong thing.
- Pro se filers may view corrective changes of their filing choices by clerk staff as inappropriate or malicious (not an issue if filer does not make those choices and instead papers are scanned in by staff, because then staff is naming the document, etc.)
- PACER and automatic real-time case notification subscription services that would disseminate to the public confidential or inappropriate information included in filings immediately upon filing, before clerk's office staff can screen (if filed Friday eve may be days before staff can review), and once filed may require an order of court to seal or eliminate.
- Burdens or confusion for parties who must respond to mistaken or uncorrected filings
- Misappropriation of login and password information – by accident or intentional. Anyone can use a filer's login/pw, the system provides no way to identify whether access was by the person to whom it was issued or by someone else.
- Absence of control on abuse and mistakes that is provided by legal training and rules of professional responsibility – risk of multiple filings, filings in multiple cases (under the versions of CM/ECF now in place, a person who has the credentials to file in his own case may, without limitation, file in other cases in which he is not a litigant), denial of service attacks, introduction of malware or viruses into CM/ECF and PACER systems.

Additional concerns were raised about pro se criminal, 2254 or 2255 filers using CM/ECF, a practice that appears not to have been tested anywhere. Although members discussed the efforts of one district that had started a limited program allowing electronic filing by pro se 1983 plaintiffs in custody in some corrections facilities, the Committee members were not aware of a single district that has allowed electronic filing by a pro se criminal defendant in a criminal case, a pro se petitioner in a 2254 case, or a pro se applicant in a 2255 case. In addition

to all of the general concerns listed above for pro se filers, special concerns for these cases include:

- The possibility that a filing (in the filer's case or other cases once the filer has access to the system and can file anything in any case) might reveal confidential information about victims, witnesses, and cooperating defendants, and become immediately accessible.
- The inability of parties who are in custody to file electronically or receive electronic confirmations. Many federal criminal defendants, and all state habeas petitioners, are housed in state jails and prisons unlikely to give prisoners access to the means to e-file or receive electronic confirmations. Even if some do have email access at one time, they often move from facility to facility, and in and out of custody. Committee members from various districts stated that the majority of incarcerated pro se filers in their districts would not have the ability to file electronically.
- The inability to file case-initiating documents without credit card information.
- The impact of e-filing rules on victims, law enforcement agents, and other third parties (e.g. asset owners) that file documents in criminal cases, individuals who may face similar (or different) challenges.

(2) *Constitutional concerns*

Second, in addition to the implementation concerns listed above, the Criminal Rules Committee believed that a carve-out for pro se filers would be advisable given the constitutional obligation to provide court access to prisoners and those accused of crime. The proposed amendment to the civil rule would effectively require pro se criminal defendants and pro se litigants in custody to e-file, unless they first demonstrated good cause to allow paper filing, or could point to a local rule, adopted prior to the effective date of the mandatory e-filing amendment, that permitted or required them to paper file. Members anticipated that no court would require a showing of good cause by those in custody or accused in order to avoid e-filing requirements, because of constitutional concerns. As noted in the next paragraph, members were not persuaded that existing local rules presently provide the express exemption from e-filing that pro se defendants and prisoners would need.

(3) *Reliance on local rules to exempt pro se filers, particularly those accused or in custody.*

The Criminal Committee's understanding was that most districts have not already passed local rules expressly requiring criminal and prisoner pro se litigants to use paper filing. (They haven't needed to - the current rules make paper filing the presumptive method unless local rule says otherwise.) The Criminal Rules Committee feared that adoption of the civil rule proposal would compel most districts to pass new local rules, prior to the effective date of the civil rule change, in order to continue their current practice. The Committee recognized that local rules could be adjusted to exempt from e-filing pro se criminal defendants and petitioners in habeas and 2255 cases, but there was a strong consensus that a national rule should not be adopted that

would require a revision of the local rules in the vast majority of districts. (A report on local e-filing rules for civil cases that was prepared for the Rules Office in 2013 suggests that even in *civil* cases - the report did not address local rules affecting the criminal, habeas, and 2255 cases the Committee was most concerned about -- very few districts would choose to permit pro-se prisoner e-filing. For example, of the 85 districts that had adopted local rules mandating e-filing in civil cases, all but one exempted all pro se litigants, and 59 districts explicitly barred pro se prisoners from e-filing in civil cases.)

The Criminal Committee's Request

For these reasons, the Criminal Rules Committee unanimously concluded that any presumptive e-filing rule should carve out pro se filers, at least those who are criminal defendants or in custody.

In the event the Civil Rules Committee decides that a presumptive e-filing rule that does not exempt pro se filers is appropriate for the Civil Rules, the Criminal Rules Committee wanted us to convey its hope that the Civil Rules Committee would coordinate the timing of such a change with the Criminal Rules Committee. Coordination might include a delay in publishing the proposed Civil Rule so that any proposed adjustments to the Criminal, habeas, and 2255 Rules could be drafted, and published at the same time as an amendment to the Civil Rule.

Rule 6(d) (3 added days) Committee Note

A suggestion by the Department of Justice to add language to the Committee Note for Rule 6(d) is quoted at page 191 in the agenda book. The agenda materials note that other advisory committees have shown interest in adding something along these lines to their Committee Notes.

Uniformity on this point is desirable. Without suggesting that the Committee Note should be expanded, a shorter statement may suffice. Something like this:

The ease of making electronic service outside ordinary business hours may at times lead to a practical reduction in the time available to respond. [alternative 1: It is expected that courts will allow appropriate extensions when warranted.] [alternative 2: Eliminating the automatic addition of 3 days does not limit the court's authority to grant an extension in appropriate circumstances.]

Language like this not only reduces the number of words but also – particularly in alternative 2 – is less directive.

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