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Subject Comments on Proposed Amendments to Civil Rule 5(e), Bankruptcy Rule 5005(a), and Appellate Rule 25(a) re Mandatory Electronic Filing

04-AP-005

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Mr. Secretary:

As Chair of the Access to Justice Technology Bill of Rights Committee of the Washington State Access to Justice Board I am submitting these comments on certain proposed amendments to federal court rules. These are: Proposed Amendments to Civil Rule 5(e), Bankruptcy Rule 5005(a), and Appellate Rule 25(a) re Mandatory Electronic Filing.

In brief background, the Washington State Access to Justice ("ATJ") Board was established by Order of the Washington State Supreme Court in 1994, and given responsibility to promote, enhance, and assure equal and quality access for low and moderate income persons and others who suffer disparate access barriers to the civil justice system.

Early in 2000, the ATJ Board began serious consideration of the potential consequences and ramifications of the increasing and inevitably greater incorporation and use of the new information and communication technologies (including the internet) in the justice system. After considerable study, the Board concluded that these technologies presented significant positive opportunities, but also carried with them significant problems. They could perpetuate and exacerbate existing barriers and exclusions and indeed create new ones, or they could create new opportunities and pathways to access and use of the justice system in more efficient and effective

ways. The Board determined that a set of fundamental principles to guide the planning, development and use of technology in the justice system was necessary.

As a former Superior Court Judge, with extensive experience in both private and public practice and public service, I was asked to chair this effort.

I am pleased to report that on December 3, 2004, the Washington State Supreme Court signed and entered an Order approving and adopting the Access to Justice Technology Principles. This was the result of over three and a half years of hard work by a large and diverse group of people.

The Preamble of the Access to Justice Technology Principles states: "The use of technologies in the Washington State justice system must protect and advance the fundamental right of equal access to justice. There is a particular need to avoid creating or increasing barriers to access and to reduce or remove existing barriers for those who are, or may be excluded or underserved, including those not represented by counsel."

The actual text of both the Supreme Court Order and the Access to Justice ("ATJ") Technology Principles as adopted can be electronically linked to at our website at: www.atjtechbillofrights.org

Other pertinent information and background can also be found at the above website. Of course, I am also pleased to respond either by direct e-mail or phone to questions or requests for clarification or further context.

It is from this perspective and from my over 40 years of varied experience in the justice system that I offer the following comments, again not only on my behalf but on behalf of this state's Access to Justice Board and, as such, the users and prospective users (both lawyers and non-lawyers) of court systems in this country, in this instance the federal courts.

I have read the proposed rules and the accompanying letters and memoranda. The amendments to the Rules here proposed are all the same, and they are very simple. They add the two words "or require" to an existing rule which to this time allows local courts to adopt local rules that permit electronic filing. With these two words, local courts may go beyond permitting electronic filing; they may require electronic filing. Those two simple words lead to many and complicated problems.

We all agree that our courts should be run as efficiently and as economically as possible. We all agree that the new technologies provide opportunities to help us do a better job of that. However, the essential mission of the courts is not that of a business. The essential mission and task of the courts is to be accessible to all persons who need the courts, and to those people provide a fair opportunity for a just result. Providing access to justice is the fundamental job of the courts, and a fundamental right of all persons in this country. Efficiency and economy cannot compromise that mission and the performance of that job. In order to maximize its goal of maximizing profits and long term success, a business can decide what portion of the population it will target and what portion of the population it will not attend to. Courts cannot do that; courts must be equally available to all. These comments do not reflect new thinking; they reflect the fundamental values and principles on which this country and its system of justice were founded, and which must apply to and guide the use of technology in the courts now and in the future.

The amendments currently proposed, without more, are a recipe for inconsistency, inequality, and inaccessibility. There is no requirement

for any exception to electronic filing in courts that make it mandatory for a vast group of unprepresented people and many attorneys who at this point in time either simply cannot use electronic filing or can use it only after having to overcome barriers or with burdens not required of or experienced by many others. Other persons will be disadvantaged even when using e-filing because of limited time and capacity availability of the necessary technology or persons who can use or assist them in using the technology.

The list is lengthy. The most obvious are pro se litigants. Within that group (and I am sure there are others I have inadvertently failed to list or have not yet discovered) the following face obvious exclusion, barriers, encumbrances, or disadvantages:

1. Those without the technology. Even if they know how to use the technology, public availability of the technology almost invariably carries a fee (and pro ses are often indigent or low or moderate income), and when free as in a library, there are time limitations, both in terms of hours of availability (which often conflict with work hours) and limitations on duration of use because of limited equipment and the demand for use by other members of the public. In certain places, particularly rural areas, availability of the technology is at a considerable distance or one must travel through difficult terrain, requiring time, money, appropriate transport, and occasionally even those are insufficient to enable access.
2. Those living in areas (whether rural or not) without publicly available technology, or, if available, without sufficient capacity (such as broadband) to support the interactivity, handle or support what may be massive amounts of content and material, and other features of the e-filing system in a way that makes its use workable at all or reasonably practical to use. Rural areas are most vulnerable to this, but many inner-city areas are as well.
3. Those who for a great variety of reasons don't know how to use the technology.
3. Persons with disabilities or infirmities who can't use or even get to the technology.
4. Those who, like many of the elderly, are intimidated by the technology.
5. Those who are incarcerated or whose freedom is otherwise restricted.

Whether they are pro se or not, many persons cannot afford additional fees for electronic filing if such are imposed either locally or nationally. There are no requirements in this rule for in forma pauperis standard and procedures as there are for traditional filing fees.

There are persons who have managed to comply with a mandatory requirement to file electronically by using a public facility, but do not have the ability or capacity to receive electronic notices or other transmissions from the court, either at all or in a timely manner.

Finally for this section of the comments, there are not only the pro ses, but the lawyers in rural or other areas that currently do not have sufficient capacity (such as broadband) to support the interactivity, handle or support what may be massive amounts of content and material and other features of the e-filing system in a way that makes its use workable at all or reasonably practical to use.

Positions have been taken in a few of the communications about these proposed amendments that the local courts will take care of such problems. First of all, the rules and the amendments are not clear as to whether, once e-filing has been declared mandatory by a local court, any exceptions are allowable. There is nothing in the rule or the amendments that explicitly provides or recognizes that authority. But assuming that is included, either implicitly or explicitly, there are no standards or any basis set forth on which to base any such action by the local

court. Without standards, there is no rule of law. Judges are adrift, as are litigants. Most often they try to do their best, but sometimes they don't, or they don't succeed. There isn't or may not even be consistency within the local court. If local courts do adopt local rules, where is any guidance for the standards, and why should basic access to justice standards vary? The argument is somtimes made that local systems and conditions vary, and therfore there should be no overarching standards that apply to all courts. This argument is easily met by proper balancing, which is what courts, even in their rule-making capacity, are supposed to be expert at and in fact do all the time. National standards exist in many areas of the law. They cannot and should not be ignored or avoided when they deal with basic requirements such as access to the justice system. The standards can without difficulty be drafted carefully and broadly enough to accommodate local conditions and operational needs while assuring adherence to basic requirements and principles of law. In any event, it is better to guarantee access to the courts more strictly than necessary than not to guarantee it at all. Injustice will not happen in the interim until the correct balance is achieved, as it would if there are no required standards.

Further, the fact that many local courts have to now engaged in good practices without such standards does not solve the problem. What happens when circumstances or conditions change or technology changes? What happens when judges change? Why is there a need for any national rule at all if reliance is simply on local practice? There can be no argument against appropriate standards that are cognizant of the need for sufficient local operational flexibility.

That is what we in the state of Washington tried to do when in 2003 we developed and adopted a statewide court rule pertaining to electronic filing. We hope and believe it is a good rule for now, but we know it's not a perfect rule. We are too early in the evolution of this technology for any rule to be perfect, and as we learn more, we will improve the rule. Washington is a state with a great variety of local conditions, from a large urban center like Seattle to very sparsely populated mountainous regions, to flat prairies to tiny fishing villages and more. In many of these areas connectivity, capacity of access and other technical problems are very different from the areas around Microsoft. We have tried to formulate our standards so that they work for all the people who live in all those areas, and for the courts that serve them, whatever the local conditions. We have tried to accommodate people of different economic status and other differences. We have tried to treat pro se litigants equally. We have provided for local operational flexibility.

While that rule (GR 30) does not currently allow for exclusive mandatory electronic filing, it does make a serious effort to provide consistency and fairness for those, both lawyers and pro ses, where that service is available and is used by one or both parties. Thus, while local courts can determine whether or not they want to charge an additional fee for electronic filing, there is an in forma pauperis provision requiring waiver of such a fee under the same conditions and standards as for waiver of a non-electronic filing fee. (GR 30.6(b)).

Likewise, to treat small law firms or solo practitioners equally with law firms with 16 or 24 hour staffs, GR 30.4(a) provides that a document electronically received outside the Clerk's normal business hours will not be considered filed until the beginning of the next business day.

These are issues that especially require consideration when electronic filing is made mandatory. No doubt there are others.

To conclude, given the significant access to justice and equitable treatment issues, and in the context of the present state of technology availability and capacity, and the computer literacy and capability of the people we must serve, our considered opinion is that providing for mandatory electronic filing at this time is premature. There must be alternative means of filing allowed, and the treatment of all filers of whatever type must be equal. As an alternative, if mandatory filing is allowed, then there must be exceptions provided for in accordance with nationally applicable standards that assure equal and full access to the courts while providing flexibilty for local operational needs.

Electronic filing should not become a barrier to access to the federal courts, or to any court system. I am sure the intention and the substantial effort and resources expended on this effort was to make access easier and less burdensome to all. This requires further careful thought and directly addressing the issues which have been raised.

We stand ready to assist and to provide our full cooperation and resources should you so desire.

Respectfully,

Donald J Horowitz
Former Superior Court Judge
Chair, Access to Justice Technology Bill of Rights Committee
Washington State Access to Justice Board
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