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February 15, 2005

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

306 Townsend Street
Michael Franck Building
Lansing, MI
48933-2083

Re: Proposed Amendments to FRCP 5(e)

Dear Secretary:

At its February 7, 2005 meeting, the Executive Committee of the State Bar of Michigan voted to submit comments regarding the proposed amendment to Rule 5(e) consistent with the comments of the State Bar's Standing Committee on Justice Initiatives. The State Bar of Michigan opposes the proposed rule, to the extent that it permits local courts to require e-filing of persons other than attorneys. The SBM would support the proposed rule if it were limited only to attorneys and if the rule assured that local Courts would have to include some process for attorneys to show good cause for failing to file electronically.

We also recommend that the rule, its comments, or any technical standards adopted by the Judicial Conference of the United States include the following guidance to local courts that wish to adopt mandatory e-filing rules:

1. Any e-filing process should be ADA ("Bobby") compliant
2. A mandatory e-filing process should permit payment of fees in person
3. A mandatory e-filing rule should permit provisional e-filing of initial pleadings by persons who have filed a motion to proceed in forma pauperis
4. A mandatory e-filing rule should ensure that any costs associated with e-filing are waived for persons who are permitted to proceed in forma pauperis.
5. A mandatory e-filing rule should have options and procedures in place to protect sensitive information, e.g. related to identity, location of victims at risk, and private medical information.

The comments in support of our position are included below.

Introduction

The State Bar of Michigan appreciates the opportunity to comment on the proposed change to Rule 5(e) of the Federal Rules of Civil Procedure. We recognize the enormous potential of electronic filing processes to create significant benefits for the courts, lawyers and litigants. It is also clear that, for certain classes of filers/potential users, an electronic filing

system might magnify currently existing barriers to meaningful participation in the judicial process. Such barriers include costs, unfamiliarity with process, lack of appropriate software, and the intimidating nature of the process. An electronic filing system also potentially creates new barriers, such as lack of computer access and lack of technical support.

The "digital divide"¹ is a real and well-documented² problem. As more and more aspects of meaningful participation in our society become digitized, we are disenfranchising those without the means to make effective use of technology. We do not believe that the answer is to try to halt the digital revolution, but rather to build digital systems that ensure all sectors of society can participate and thus effectively bridge the divide one system at a time.

The justice system is such an important part of citizenship that it is imperative to digitize it in a way that promotes equal access to justice for all. For the purposes of these standards we think this means more than just ensuring that a mandatory e-filing system is accessible, but also means ensuring that any e-filing system provides meaningful access to all.

1. Only Attorneys Should Be Required to Use E-filing

For the most part, an e-filing rule would be an acceptable process for attorneys, most of who now use computers and the Internet. Although we believe most local courts would choose to make an e-filing process optional for unrepresented parties, the rule should make this clear on its face. The Western District of Michigan, for example, is following a local rule that requires electronic registration and filing only of attorneys. See <http://www.miwd.uscourts.gov/CMECF/localrule5.7.pdf>

The rule could for example read:

A court may by local rule permit or require papers SUBMITTED BY AN ATTORNEY to be filed, signed, or verified by electronic means...etc.

Limiting a mandatory e-filing process to an attorney addresses barriers faced by certain groups of unrepresented litigants, including those of limited English proficiency, and incarcerated persons who may have no access to the Internet and no credit cards readily available. Often, in times of political turmoil such as the civil rights movement or anti war protests, or if the petitioner is complaining about treatment by the custody personnel at the institution they are in, basic written petitions filed at the court must be an option.

¹ The "gap between those people and communities who can make effective use of information technology and those who cannot". Digital Divide Network's *Digital Divide Basics* - <http://www.digitaldividenetwork.org/content/sections/index.cfm?key=2>

² See *Falling Through the Net*, a Dept. of Commerce study on the extent of the digital divide in this country (<http://www.ntia.doc.gov/ntiahome/ftn00/contents00.html>).

2. Attorneys Should Be Given an Opportunity to Show Good Cause for Failure to Use E-filing

Some attorneys may have good cause for failing to use e-filing. There may be technical, software or cost considerations that are – at least for a period of time – a barrier. Some practitioners do not have access to the adobe acrobat software that would be required to convert documents to portable document format. Individual courts and attorneys should have a means to address these barriers and make appropriate exceptions or accommodations. The comments to the rule or other guidance should provide a non-exclusive list of good cause reasons.

3. Any E-filing System Should Comply with the Americans with Disabilities Act (Be “Bobby” Compliant)

Some attorneys and unrepresented litigants have disabilities that could make use of an e-filing problematic. Guidance should include the following type of language to the Courts. We have previously recommended that this language be adopted by our state court system:

The intent of this standard is for courts to take reasonable steps to ensure that electronic filing systems prevent, rather than create, barriers to public access to the courts.

Courts shall ensure that electronic filing processes comply with any requirements imposed by the Americans with Disabilities Act or the Rehabilitation Act. They shall ensure that websites used for electronic filing are “Bobby compliant” (i.e., that they comply with the Bobby Worldwide guidelines developed by the Center for Applied Special Technology, a non-profit organization devoted to ensuring access to technology for persons with disabilities. See <http://www.cast.org/Bobby> “Bobby compliance” ensures that a website’s content is accessible by a person using special readers for persons with sight and hearing disabilities.

4. Any Mandatory E-filing System Should Permit Payment of Filing Fees in Person

Some legal organizations or litigants may not be able to pay filing fees by credit card. Such persons should be permitted to pay filing fees in person by check or money order.

5. A Mandatory E-filing Rule Should Permit Provisional E-filing of Initial Pleadings by Persons Who Have Filed a Motion to Proceed In Forma Pauperis

Even if an indigent litigant is represented by counsel, a mandatory e-filing system must have a method to ensure that a litigant’s inability to pay a filing fee is not a barrier to timely filing. An in forma pauperis petition, should – for example - be good cause for failing to file initial pleadings electronically. Alternatively, the system should permit provisional filing of initial pleadings electronically pending approval of a motion to file in forma pauperis.

6. A Mandatory E-filing Rule Should Ensure That Any Costs Associated With E-filing Are Waived for Persons Who Are Permitted to Proceed In Forma Pauperis.

A number of e-filing systems have certain costs associated with the registration in and use of that system above and beyond the court filing fees. It is important that these costs be waived for indigent litigants, whether or not they are represented by counsel. We recommend that standards for local courts include the following:

Courts shall waive any fees associated with electronic filing or with electronic access to electronic records for persons who are not able to pay them. They shall require that private sector service providers operating electronic filing systems for the court make those services available at no cost to indigent persons.

7. A Mandatory E-filing Rule Should Have Options and Procedures in Place to Protect Sensitive Information, e.g. Related to Identity, Location of Victims at Risk, and Private Medical Information.

It is important that any guidance or standards for local courts include procedures for shielding various data fields. Because identity theft is such a serious problem, we believe that the rule or guidance should stress the need to protect privacy, especially with regard to social security numbers and other account numbers. In addition, information about addresses and medical conditions should not be readily available to all through the Internet. In domestic violence situations, for example, it can be critical to keep an assailant from seeing a victim's address. E-filing systems should include methods to redact this information from electronic files. New standards may be instituted to provide for the restriction of electronic access to causes of action that involve particularly sensitive facts. For example, the Federal District Court for the Western District does not require e-filing of case records (which include sensitive medical information).

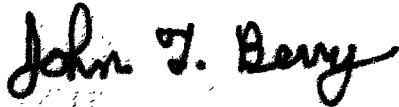
Implementation of E-filing

Although this is beyond the scope of the rule, we recommend that any guidance or standards should require local courts to set up advisory bodies or other meaningful methods of involving representatives from organizations representing populations who are likely to have special needs related to e-filing/, including indigent persons, prisoners, persons of limited English proficiency and persons with disabilities in the courts' implementation planning processes. In addition, it is recommended that input be sought from representatives of these special populations prior to implementing court rules creating an e-filing system.

Conclusion

Although e-filing presents real opportunities to save time and money, it should not be required by local courts without the limitations and protections outlined above.

Sincerely,

A handwritten signature in black ink that reads "John T. Berry". The signature is written in a cursive style with a large initial "J" and "B".

John T. Berry
Executive Director

Cc: Nancy J. Diehl, President
Janet Welch, General Counsel