



The Circuit Court
for the Sixth Judicial Circuit of Michigan
OFFICE OF THE COURT ADMINISTRATOR
1200 N TELEGRAPH RD DEPT 404
PONTIAC MI 48341-0404

August 30, 2013

Mr. Larry S. Royster
Clerk, Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

Re: Proposed New Rules 2E.001 *et seq.*
ADM File No. 2013-18

Dear Mr. Royster,

Thank you for the opportunity to comment on the proposed e-filing rules and draft standards.

The Sixth Circuit Court is one of the State's e-filing pioneers. The Court reviewed the proposed rules and draft standards in the light of six years of e-filing experience with two different e-filing systems. Recognizing the different needs of the various courts throughout the State, the Sixth Circuit understands the need for dynamic rules and standards that empower courts to move forward with e-filing and avoids thrusting all jurisdictions into a cookie-cutter model that does not fit the individual needs of Michigan's many courts or the attorneys and self-represented litigants who appear in these courts. Based upon the Court's experience, please accept the following comments.

Rules:

1. Proposed rule 2E.004(A)(2) – The second sentence of this subrule does not define the Court's intent regarding the requirement that a court's electronic filing guidelines be "posted prominently." Traditionally, paper notices are posted in one or more locations throughout the courthouse, while this may be appropriate in many

- circumstances, the Sixth Circuit also recommends the use of electronic postings, perhaps on the court's e-filing website, as courts move forward with e-filing.
2. Proposed rule 2E.004(B) – The provisions regarding confidential information in this subrule are not easily synthesized with draft standard 3.1.11. Perhaps the Court could address both issues within a single rule or standard to reduce the confusion associated with them.
 3. Proposed rule 2E.006
 - a. Subrule (A) seems to be redundant of MCR 1.109(D)
 - b. Subrule (B) creates an obligation not identified in MCR 1.109(D). Ideally, distinctions between electronic filing and traditional filing in Michigan courts will be minimal. Perhaps the requirements of this subrule could be incorporated into MCR 1.109(D).
 4. Proposed rule 2E.101
 - a. In keeping with practices already used by Michigan courts, it is recommended that the time stamp reflecting when the submission was filed reflect when the transmission to the electronic filing service provider is complete, not when the document is accepted by the court, regardless of acceptance through an automated or electronic process. This is the practice the Sixth Circuit has successfully utilized throughout its pilot program.
 - b. In keeping with the maintenance of a single practice standard regardless of the format used to submit documents, the Sixth Circuit requests that the Court maintain a filing deadline of no later than 5:00 p.m. This standard permits courts to timely process documents and, as electronic service is treated as personal service, ensures that parties have adequate time to review and respond to matters filed and served electronically.
 5. Proposed rule 2E.102
 - a. The title does not define the scope of the rule. The Sixth Circuit recommends re-titling the rule as “Record of Transmittal.”
 - b. The first sentence of this rule is unclear. Neither MCR 1.109(A)(1)(a)(ii) nor the proposed rule define what type of record the EFSP data is or how the records of third parties shall be treated under General Schedule 16.
 6. Proposed rule 2E.201
 - a. In subrule (A), the Court uses the phrases “service of process” and “delivery of documents.” Some clarification as to the use of these phrases and the difference between them would be beneficial to courts and users.
 - b. Does the Court wish to clarify in the rule that parties serve initiating documents traditionally? Electronically filed initiating documents have no opposing “authorized user” to serve electronically. Likewise, MCR 2.105 does not permit e-service of initiating documents. In the second sentence of

this subrule, it is unclear what the Court means by “other parties who are not authorized users.”

- c. As discussed above regarding proposed rule 2E.101, a question exists as to when service is made. Perhaps this sentence could be clarified to read “a document electronically submitted to the court for filing shall be electronically served upon acceptance of the document as defined in the local plan and in accordance with these rules and standards.”

7. Proposed rule 2E.203

- a. The title to this rule is unclear. The Sixth Circuit recommends re-titling the rule as “E-Service Record.”
- b. The second sentence to the proposed rule is confusing, as it does not seem to alleviate a party of its obligation to submit a proof of service in accordance with MCR 2.107(D). Is it the Court’s intent to specify that the transmission by the electronic filing service provider is “evidence of service?”

Draft Standards

1.0 Definitions

E-Filing – Does the phrase “accompanying data elements” refer to a data field or fields required by a state case manager or may local jurisdictions require additional information as needed by the local court’s case management system or electronic filing service provider?

Electronic Court Records – The standard proposes the conversion of paper documents into searchable electronic documents. The standard does not specify whether this same requirement applies to electronically submitted documents. If electronically submitted documents must be searchable, at what point does this requirement apply and does this requirement apply retroactively? Will technical standards be developed to clarify issues like those identified?

2.0 Michigan Courts E-Filing Manager

This standard proposes the development of a single entry portal. What the standard does not address is the coordination of the portal with existing e-filing systems and whether the Supreme Court or pilot courts will bear the burden and cost of developing and maintaining interfaces between the Manager and existing systems.

2.1 E-Filing Manager Functionality

The functionality proposal and timetable raise more questions than they answer. First and foremost, is the electronic filing manager (EFM) actually an electronic filing service provider

(EFSP)? If yes, is the intent to move all courts not only to a single entry portal but to a single, unified service provider? If the latter is the case, what voice may pilot courts anticipate in the development and implementation process? If a court already has an EFSP and wishes to continue with it, where and how does this fit into the timeline?

The development schedule times out in January 2014. What reliance may a pilot court place on even the initial development schedule? Equally important, what is the plan and commitment to the plan to develop phases II and III?

Phase II speaks to developing a process “for nonattorneys and for self-represented users to access the system.” Why, for purposes of submitting documents to the court, are non-attorneys treated differently from attorneys? Parties exempted from e-filing, be they attorneys or non-attorneys, will submit documents differently than those participating in electronic filing; however, neither the proposed rules nor the draft standards enunciate a reason for categorically distinguishing between attorneys and non-attorneys for electronic filing purposes. The Sixth Circuit uses the same process for all filers and finds that the consistency of the system helps to ensure access. It also avoids creating external barriers as parties move between self-representation and representation. Internal practice is simplified as staff use the same practice for all electronic submissions.

3.0 Electronic Transmission/Filing of Documents

3.1.1 The term “unique identifier” is not defined throughout the standards? Does it reference a party or attorney’s authorized user registration [2E.002(A)], email address, or password? Perhaps this term could be clarified. Who develops the unique identifier? The clear preference would be for the user to develop his/her own identifier.

3.1.2 What is meant in the standards by “and must be isolated from other court networks or applications”? It appears that the draft standard simply calls upon all participating courts to implement security procedures to safeguard the EFM, the EFSP, and the court’s network from Internet-borne viruses, malware, spyware, and other related risks. If this is the intent, could the proposal be simplified to require courts and contracting EFSP vendors to meet specified security standards? Presumably the Court does not intend to require courts participating in electronic filing to maintain two separate systems, one for electronic filing and one for other court purposes with this draft standard.

3.1.3 If payment is accepted at the EFM, how, when, and by whom are stakeholder payments made? This includes the distribution of designated state funds under MCL 600.2529, vendor payments, and credit card fees. Who bears the responsibility for processing refunds?

3.1.5 Are participating courts reviewing documents prior to acceptance or, following the federal model, will all submissions be accepted to be sorted out after the fact? If the

Court prefers the latter option, is it the intent of the Court to modify MCR 8.119(C) relative to rejecting non-conforming documents? If retransmission is required, at whose expense is this done?

- 3.1.6 The document format standard fails to account for hand-written documents either prepared in court or submitted by self-represented litigants. By definition, such documents cannot be searchable; however, they may be the only effective means for the party to present the document to the court. In addition, the draft standard does not specify what constitutes an acceptable document format. This is important, because a common means of scanning documents converts the document into a single image, which makes conversion of the image into a searchable document difficult. Perhaps this issue can be addressed in either the standards or technical standards.
- 3.1.7
- 3.1.10 While the draft standard provides that paper documents shall be converted to searchable electronic documents, the draft standard does not address when paper submissions would be appropriate.
- 3.1.11 The breadth of the draft standard makes it confusing. The identification of specific sources of authority with which one must comply excludes other relevant authorities as there is no catch-all provision. This includes local court rules, local administrative orders, and local e-filing plans. In addition, neither the draft standard nor the proposed rules propose a remedy when a party fails to comply with the requirements of the standard. Thus, with the exception of a violation of the social security number limitations established in Administrative Order 2006-2, there is no proposed remedy for a violation of this requirement. Courts may rely upon the broad grant of authority provided for contempt proceedings, but a contempt finding is an imperfect remedy for the publication of non-public information. While it is impracticable to mandate that the clerk review every document for non-public information, the clerk should be empowered to reject documents that contain it in an effort to limit the potential damage caused by intentional and inadvertent disclosures of non-public information.
- 3.1.12 The inclusion of data created by EFSP when processing electronic record submissions as provided in MCR 1.109(A)(1)(a)(ii) and this draft standard seems overly broad in nature. It is akin to including the internal records of document delivery services and process serving agencies in court records. While such information may be pertinent to establishing the time of delivery, receipt, and processing of a document submitted electronically, inclusion of this data in the definition of court records unnecessarily expands the scope of court records in a manner that was not done prior to electronic filing. In short, if a party wishes to verify the transmittal, receipt, processing, or rejection of a document submitted through an EFSP, the rules of evidence provide tools to verify the authenticity of the EFSP records. It is unnecessary to clutter the record by including this information in it. Finally, neither MCR 1.109(A)(1)(a)(ii) nor this draft standard

define what type of record the EFSP data is or how the records of third parties shall be treated under General Schedule 16.

I remain,

Sincerely Yours,



Richard Lynch
Manager – Civil/Criminal Division