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By e-mail to MSC_clerk@courts.mi.gov.

Corbin R. Davis, Clerk
Supreme Court of Michigan
P.O. Box 30052,
Lansing, MI 48909

RE: ADM File No. 2013-18

Dear Sir:

I have the following comments regarding Proposed New Rules 2E.001 *et. seq.*

Cost, Efficiency, and Uniformity

The proposed rules and accompanying comments do not address how the costs of acquisition, maintenance, and improvement of a statewide electronic court records and filing system will be met. A few hours searching the internet leaves the impression that there is a significant amount of information available about electronic court records and e-filing, much of it not available on-line, that needs to be reviewed and presented to Michigan lawyers and to other citizens. Public records of all kinds, not just court records, are now being kept and managed by Lexis/Nexis and other private operators. Access to the public record is available for a fee, which is true whether records are sought from the private company or the public custodial agency. There has been little discussion of this development in the media. All of the changes are taking place without a public dialogue and with significant consequences for access, transparency of governmental operations, accountability, and long term care of the records.

Implicit in the rule proposal as a whole and in Rule 2E.003, Electronic Filing Plans, is the notion that courts (counties?) are free to adopt an electronic records system, furnished by a private provider, that will be locally financed and operated. There are fifty seven circuit courts in the state. Even assuming that some counties may cooperate to provide electronic record keeping and filing, it seems inefficient and wasteful if all of this effort is not in the service of creating a statewide, uniform operation.

Texas and California, and I am certain, other states, appear to employ uniform records systems, which systems may be managed by others, and Electronic Filing Service Providers, private companies that are selected by the court managers from responses to RFPs. The sole job of the EFSPs is to receive documents from lawyers, convert them, and file them, for a fee. Filers can select from five or six EFSPs chosen by the court managers based on what I presume are price-competitive proposals. The providers, upon engagement, compete for electronic filing business from lawyers. These systems appear to be statewide, uniform in operation for all courts, and governed by uniform rules.

Tyler Technologies, operating in Wayne and Oakland counties, appears to be an EFSP of a different stripe, that furnishes, operates, and maintains the electronic court records system and also provides electronic filing and service. Tyler serves Oakland and Wayne County Circuit Courts for civil cases and Midland County Circuit Court for asbestos cases. Tyler also serves the Michigan Court of Appeals. On its website, Tyler discloses that it serves one county in Nevada, all courts in Minnesota, all courts in North Dakota, three courts in New Mexico and one court in Illinois. Tyler does not disclose if it is the sole provider to the courts it serves, or if it competes with other EFSPs. Tyler does not compete in Michigan and it is not clear if Tyler was selected in response to a widely distributed RFP.

The Texas and California filing systems are different from Michigan's pilot program, Michigan being more like the federal CM/ECF system.

With only two or three trial courts in the Michigan pilot program, there is time to consider alternatives and adopt a plan for electronic court records management that will be uniform and consistent statewide. It is rumored that the Odyssey system operating in the Wayne County Circuit Court, awkward and counter-intuitive, will replace the system currently in operation in the Oakland Circuit Court, which is superior in every respect. That would be unacceptable.

Rejection of Papers Submitted for Filing

Proposed Rule 2E.101(B), Time and Effect, refers to MCR 8.119 (C), which permits the clerk to reject a paper submitted for filing that fails to meet the requirements of identified rules. The only practical reason for permitting a clerk to reject a paper to be filed electronically is that the paper as presented cannot be entered and maintained in the proper electronic file, or, if entered in the system, the paper cannot be identified as properly filed or cannot be retrieved.

Document filing is usually time sensitive, with significant consequences for the filer for not having met a deadline. MCR 8.119(C) is not mandatory. It is permissive, giving a deputy clerk discretion in connection with a ministerial duty, filing papers. It is difficult to understand why a clerk should be

permitted to reject a pleading today for having been submitted in Verdana 11 point type, and allow her to accept a pleading tomorrow printed in Times New Roman 12 point type, when the Times New Roman 12 is smaller than the Verdana 11.

It is equally difficult to understand why a clerk should be given the discretion to reject any paper, ever. If a paper, when entered in the system, can be found in the place it should be and recovered, why should it not be filed? The court has control over careless or indolent lawyers through the power of the sanction, and opposing counsel are ever alert to point out the slips of their colleagues. So why should the client suffer for not having had a paper filed as required, when time is of the essence, rejection of the document will come as a surprise to the unsuspecting miscreant, and notice of his failing may well be received beyond the time for repair?

Given the consequences that may follow from a rejection, how is the rejection decision not discretionary, and therefore beyond the power of the clerk?

MCR 8.119 (C) is simply an invitation to mischief, practiced regularly by the Wayne Circuit e-filing clerks. It is not unusual to receive a rejection, with a reason for the rejection and an instruction for re-filing stated in the e-mailed notice, and then, having re-filed pursuant to the instruction, which instruction may bear no relation to any published court rule, have the second filing rejected for a completely different reason.

Clerks are not the only culprits. See e.g., *In re Haque Estate*, 237 Mich. App. 295, 602 N.W.2d 622 (1999), where the probate court had determined, in advance of any petition having been presented, that petitions for estate administration for deceased non-residents claiming property located in Oakland County would be rejected for filing unless administration had been first opened in the resident state. On appeal, the order of the probate court dismissing the petition was reversed.

The lack of an attorney's or party's signature on a pleading should not permit or require rejection. In a time when facsimile signatures and photocopy signatures are required for electronic filing, the absence of a real or facsimile signature should not precipitate a decision to reject, especially in light of the MCR 2.114(C)(2), which provides as follows:

"(2) Failure to Sign. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party."

For an accounting *in terrorem* of consequences visited on counsel and their clients for missed deadlines under electronic filing rules, some of it remarkably Draconian, see Stewart and Mills, *What Every Litigator Should Know, For The Defense*, pp. 28, June 2011. This article is available online.

Electronic record filing and management should ease the burdens of practice, not increase them, as this article suggests.

Clerks should not have the power to reject any documents lawyers present for filing.

My views on rejection of documents submitted to the clerk for filing are in accord with the applicable federal rule, FRCP 5(d)(4), as follows:

“Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

Fees

Rule 2E.005 permits the imposition of both transaction fees and convenience fees for credit card use. The MasterCard/Visa anti-trust settlement, apparently not yet concluded, may have a consequence for the assessment of convenience fees.

“Transaction fees” are not defined, but from what few reported cases there are it would appear, depending on the nature of the case and the discrete interest involved, that a fee formula designed to recover the costs of acquisition, installation, maintenance, and improvement of the electronic court records and filing system would be supportable under the rational basis test against a claim of denial of the constitutional right of access. But if the fees are imposed simply to generate a revenue stream for use generally by the courts, that scheme would be objectionable.

I am not aware that an accounting of operations at either the Oakland County or Wayne County pilot programs has been published. An accounting should include a statement of all costs of procurement, all ongoing costs of whatever nature, disclosure of the written agreements with Wiznet and Tyler, disclosure of all transactions, financial and otherwise, including rebates, with Wiznet and Tyler, cost comparisons between the system acquired and other systems, the projected costs of upgrades and improvements, termination requirements and projected termination costs, savings experienced as a result of adoption of the electronic system, and any other financial information available.

Thank you for the opportunity to comment.

Yours truly,

/s/ Carl Schier

Carl F. Schier