

Via E-Mail
msc_clerk@courts.mi.gov

September 3, 2013

Larry Royster, Clerk
Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 203-18

Dear Mr. Royster:

The proposed new rules 2E.001, *et. seq.* are an admirable step forward in facilitating electronic filing in Michigan. However, there are a number of issues and changes which should be highlighted for the Court's consideration.

Proposed Rule 2E.006(B)

The proposed rule, as drafted, requires that handwritten signatures be maintained, with no outside timeframe identified for that requirement. The rule should be revised to require that handwritten signatures be maintained for a set period following the final resolution of the last appeal in a matter. We would propose that such documents be maintained by the filing party for one year following the final resolution of the last appeal.

Proposed Rule 2E.008

The proposed rule, as drafted, uses the standard of proving "to the court's satisfaction" the reasons for a failed transmission. A more definitive standard should be used to provide guidance to parties. We would suggest either striking the phrase "to the court's satisfaction" or changing proposed Rule 2E.008 to require that a party show "good cause, to include, but not be limited to" the three factors set out in the current proposed rule.

Additionally, we note that in the current e-filing system in use by various circuit courts within the state, different filing systems have different limitations on document sizes. Accordingly, a document that is accepted in one court may be rejected in another because of technical issues. We would suggest that a consistent limit on file sizes be set to avoid transmission failures.

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Proposed Rule 2E.101

We endorse each court setting a time, no later than 5:00 p.m., to be the “close of business” for purposes of e-filing. While e-filing systems should be available 24 hours a day for the convenience of the parties, a document should be deemed filed on a particular day only if filed before the “close of business.” That is especially important to maintain continuity between in-person filing and e-filing. We would urge the Court not to modify the determination of the “close of business.”

The final rule also should define when a transmission to the electronic filing service provider is “complete.” In some e-filing systems, including the Court of Appeals and the Federal PACER system, a document is time-stamped when submitted and is instantly viewable with that time-stamp. If there are deficiencies, the deficiencies may be addressed later, but the document is stamped with the time that the “click” to submit it is complete. This eliminates questions as to when a document was transmitted. In light of proposed Rule 2E.101(B), it appears that the proposed rules contemplate a filing to be deemed complete only when fully accepted by a court. This puts parties at risk of being prejudiced by issues regarding the acceptance of an electronic submission, as opposed to the substance of a filing. For example, some counties currently using e-filing will reject filings if the hearing date is not to the Court’s liking, instead of accepting it and requesting that the parties renote the hearing for another date. Other courts will reject filings if the correct documents are submitted, but in an order other than that which is preferred by the clerk (for example, if a motion, brief, and notice of hearing are submitted, but the notice of hearing is not the first document filed). There is also a significant variance in how the same counties treat different filings, where it appears that it depends on which clerk reviews the proposed e-filings as to whether it will be accepted. Making a document submission complete upon the “click,” and subject to later cure of any deficiencies, would remedy this issue.

Proposed Rule 2E.103

We would suggest the inclusion of a “memo” field or place to include billing information so that counsel may track the expenses for client billing purposes.

Proposed Rule 2E.201

We would suggest that the service list be automatically populated as new filers appear in the case. In some current filing systems, the service list must be manually re-entered each time a document is served, leading to the unnecessary potential for the inadvertent omission of parties, typographical errors, etc. which could be avoided by modifying this rule.

Proposed Rule 2E.202

The proposed rule is contrary to the current service rules for paper filing. Currently, transmission by mail is complete on a party mailing the document, whereas the proposed rule

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calls for transmission to be complete on the *system's* mailing of notice. This is outside of a party's control, and leads to the potential situation of which a document is filed late in the afternoon by a party, making it timely, but it is not emailed out by the system until after 5:00 p.m., making it served a day later on the opposing party. Service through the system should be considered complete upon submission. Further, the rule, as drafted, calls for the transmission to be "complete" before service is effective. Current Rule 2.107(C)(4)(h) calls for email service to be complete upon transmission, not upon the completion of transmission.

Proposed Rule 2E.203

The proposed rule requires a party to keep a record of the transmission. In the Federal PACER system, there is an acknowledgement page which appears, summarizing the transaction, upon the completion of the transmission. The current system should contain such a summary page, which will indicate what documents were submitted, at what time, by whom, and on whom they were served. This will alleviate many potential conflicts as to transmission, filing, and service of documents.

Additional issues for consideration by the Court include the requirement that courts provide a basis for rejection of the filing. Currently, filings may be rejected without any indication as to the nature of the defects. As some courts will reject filings, as indicated above, for things including an inconvenient hearing date, it can be difficult or impossible for a party to address the deficiencies without contacting the clerk and attempting to identify, after the fact, the deficiency. Some e-filing systems, including the Western District of Michigan Bankruptcy e-filing system, generate a deficiency notice, in the same fashion that the Court of Appeals generates deficiency notices for paper filings, which identifies the deficiency in the submission. So long as a party remedies the deficiency within the time period set out in the notice, the filing is deemed effective and need not be re-submitted. Not only does this help remove a burden on the parties of re-filing submissions, but it significantly reduces the burden on clerks to provide, after the fact, the reason that a filing was rejected.

A standard should also be provided for a time period in which filings must be accepted or rejected. In some current e-filing systems, most submissions are addressed within minutes, while in others it may take three to five business days to obtain an acceptance or rejection. In one recent case, it took 17 days to receive an acceptance notice. See the attached notice. With one week motion practice under MCR 2.119, this delay can be unworkable, and thus appropriate standards should be set. This is no different than what has historically been done, where clerks either accept or reject a filing on the spot when submitted. The transition to electronic filing from paper filing should not change that system.

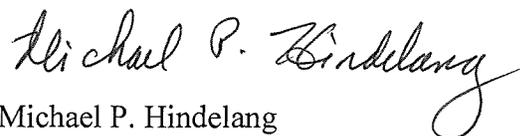
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Thank you for considering these comments and, should you have any questions or desire to discuss them, please feel free to contact me.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP


Michael P. Hindelang