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August 21, 2013

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

RE: ADM File No. 2013-18 – Proposed New Rules 2E.001 *et seq.* of the Michigan Court Rules
ADM File No. 2013-18 – Proposed Administrative Order No. 2013-__
ADM File No. 2013-18 – Draft Standards for E-filing

Dear Clerk Royster:

At its July 26, 2013 meeting, the Board of Commissioners of the State Bar of Michigan considered the above administrative file numbers published for comment. In its review, the Board considered recommendations from the Civil Procedure & Courts Committee, the Criminal Jurisprudence & Practice Committee, the Committee on Justice Initiatives, the Domestic Violence Committee, and the General Practice Section.

Overall, the Board voted to support the adoption of standards and court rules that address the issue of electronic access to Michigan's courts, agreeing that the proposed rules and standards are a significant step toward fulfilling the recommendations of the 2011 *Judicial Crossroads Task Force Report.* In adopting the position of support, the Board voted to provide all of the comments from committees and sections of the Bar for the Court's consideration. Those comments are attached. Highlights include:

- The filing deadline in MCR 2E.001 should be 11:59 p.m., in line with the deadline for federal courts, rather than 5:00.
- All fees and costs associated with e-filing systems should be subject to waiver under the provisions of MCR 2.002, and requests for a waiver should not cause a delay. An e-filing system should incorporate a method to allow for electronic processing and approval of fee waiver applications.
- Because not all users will have access to a computer or technological know-how, mandatory e-filing should not be imposed on the entire range of court users from initial implementation. Opt-out should remain available until the e-filing system is fully accessible.
- The rules should provide for automatic acceptance of documents, similar to the federal PACER system. If there are problems with a filing, the clerk can issue a notice the following day, and provide a timeframe for the error to be corrected.
- Payment methods for fees should include reasonable alternatives for individuals that do not have a credit/debit card.
- Litigants should have a right to remotely access their own cases for free.

- Rules governing electronic access to records in cases where protection orders have been issued should comply with federal funding eligibility requirements, and with statutes protecting the identity of protected parties.

We thank the Court for the opportunity to comment on the proposed administrative files numbers.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Bruce A. Courtade, President

Report on Public Policy Position

Name of Committee:
Civil Procedure & Courts Committee

Contact person:
Daniel D. Quick

E-Mail:
DQuick@dickinson-wright.com

Proposed Court Rule or Administrative Order Number:
2013-18 - Proposed New Rules 2E.001 *et seq.* of the Michigan Court Rules
This series of proposed new "2E" rules contains court rules regarding e-filing in Michigan courts. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including a proposed administrative order regarding e-filing rules and the proposed e-filing standards.

2013-18 - Proposed Administrative Order No. 2013-__
This proposed administrative order would require the State Court Administrator to promulgate e-filing standards, and would require courts that offer e-filing to comply with those standards. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including proposed e-filing rules and proposed e-filing standards.

2013-18 - Draft Standards for E-filing
These proposed standards provide additional guidance for courts planning for implementation of e-filing in their jurisdiction. The proposed standards are published to provide a context for the proposed e-filing rules and proposed administrative order that have also been published for comment in this file.

Date position was adopted:
May 18, 2013

Process used to take the ideological position:
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:
18

Number who voted in favor and opposed to the position:
13 Voted for position
0 Voted against position
0 Abstained from vote
5 Did not vote

Position:
See comments

Explanation of the position, including any recommended amendments:
The Committee was honored to be joined by a representative of SCAO who drafted the proposed rule. SCAO noted that the provision is still subject to ongoing discussion, likely is going to be changed (and expanded as applied to service of process), and still subject to large-scale decisions (such as whether there will be a unified e-filing system state wide [which the Committee unanimously favors]). As such, our comments are more 'advisory' given the incomplete nature of the process.

- Generally there is opposition to a system which permits a review of filings before they are accepted. The Federal PACER system permits all filings; if there are problems, the clerk issues a notice the next day and gives a time for it to be corrected. This avoids the problem created by the proposed rule, where something is filed but then rejected for some inadequacy. The filing could then be late or time-barred absent a nunc pro tunc order of the court, an extra step which simply represents unnecessary motion practice. Moreover, an automatic acceptance system permits simultaneous filing and e-service, whereas the proposed system introduces the potential of delays between filing and service through no fault of the filing party.

- The Committee was advised of the significant debates regarding the assessment of fees by the courts and pending legislation. The Committee thus notes only that the transaction fees should be defined as taxable costs.

- Rule 2E.006(B): delete "them" and insert "copies and make originals available for inspection"

- If Rule 2E.008 is to stay, it should permit discretion of the court with consideration of the listed factors. As written, it suggests satisfaction of each factor is mandatory.

- A major advantage of electronic filing is 24/7 access. As such, the Committee does not favor a 5:00 p.m. deadline in 2E.101(A). Assuming service is accomplished automatically and simultaneously with filing, as in PACER, this should not present a problem for courts or practitioners. Whether such a system suggests that the current 7 day default rule for the filing of motions should be revisited is another topic.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2013-18_2013-05-01_formatted%20e-filing%20order_FINAL.pdf

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2013-18_2013-05-01_formatted%20e-filing%20AO_FINAL.pdf

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2013-18_2013-05-01_E-filing%20Standards_FINAL.pdf

Report on Public Policy Position

Name of Committee:
Criminal Jurisprudence and Practice

Contact persons:
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Proposed Court Rule or Administrative Order Number:
2013-18 - Proposed New Rules 2E.001 *et seq.* of the Michigan Court Rules
This series of proposed new "2E" rules contains court rules regarding e-filing in Michigan courts. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including a proposed administrative order regarding e-filing rules and the proposed e-filing standards.

2013-18 - Proposed Administrative Order No. 2013-__
This proposed administrative order would require the State Court Administrator to promulgate e-filing standards, and would require courts that offer e-filing to comply with those standards. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including proposed e-filing rules and proposed e-filing standards.

2013-18 - Draft Standards for E-filing
These proposed standards provide additional guidance for courts planning for implementation of e-filing in their jurisdiction. The proposed standards are published to provide a context for the proposed e-filing rules and proposed administrative order that have also been published for comment in this file.

Date position was adopted:
May 16, 2013

Process used to take the ideological position:
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:
14

Number who voted in favor and opposed to the position:
9 Voted for position
0 Voted against position
0 Abstained from vote
5 Did not vote

Position:
Support with Recommended Amendment

Explanation of the position, including any recommended amendments:
The committee voted to support the administrative orders regarding e-filing with the recommended amendment that the filing deadline listed in MCR 2E.001 be changed from 5 PM to 11:59 PM, in line with the deadline of the Federal Courts.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2013-18_2013-05-01_formatted%20e-filing%20order_FINAL.pdf

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2013-18_2013-05-01_formatted%20e-filing%20AO_FINAL.pdf

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2013-18_2013-05-01_E-filing%20Standards_FINAL.pdf

MEMORANDUM

TO: State Bar of Michigan Board of Commissioners

FROM: Committee on Justice Initiatives

Staff support: Candace Crowley, Peter Cunningham

RE: Recommendations re Michigan Supreme Court ADM File No. 2013-18
E-filing Standards and Proposed Court Rules

DATE: July 15, 2013

I. Background

In June of this year, the Committee on Justice Initiatives (CJI) created an e-filing Workgroup (Workgroup) to study and make recommendations on proposed MCR 2E.000 et seq (Electronic Filing Rules for all Michigan Courts) and Proposed Establishment of E-filing Standards to be Used by Michigan Appellate and Trial Courts. The Workgroup consisted of knowledgeable practitioners from CJI's initiatives, and an expert in electronic and web-based resources to assist self-represented persons in Michigan. The workgroup members have each worked extensively with low-income, disabled, institutionalized, and non-English speaking clients; have studied the issue of access and technology over time; and some have experience with the federal court e-filing system[1].

The Workgroup studied the proposed court rules, met several times to discuss the rules and review draft comments, and unanimously adopted recommendations that were then provided to the CJI. After making a few additions to the text, all eleven members of CJI voted to approve the recommendations of the Workgroup.

II. Introduction

The Committee on Justice Initiatives strongly supports the adoption of standards and court rules that address the issue of electronic access to Michigan's courts. CJI members represent decades of experience advocating for poor people who experience difficulties in accessing the justice system – from the lack of access to legal aid or pro bono lawyers to the lack of ability to afford fees required to use the courts. They also are familiar with the challenge that poor people experience in attempting to understand and engage technology for many aspects of their lives.

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1 The Workgroup consisted of Lorray Brown (Justice Policy Initiative), Professor C. Michael Bryce (Pro Bono Initiative), Administrative Law Judge Nicholas Ohanesian (Equal Access Initiative), Kenneth Penokie (Justice Policy Initiative), Marcy Rosen (Pro Bono Initiatives) and Angela Tripp (Project Manager of Michigan Legal Help). As Project Manager, Angela oversees the Michigan Legal Help website, which is a statewide program that includes local self-help centers and an online interactive website for people representing themselves in simple civil legal matters in Michigan.

The CJI community believes that technology holds the potential to dramatically improve access to justice for poor people, despite a technology gap that currently exists. Access can be afforded for a much greater portion of society if an electronic filing system is designed with the needs and challenges of all users in mind. This means creating accommodations for those who are challenged to find and use computers, to pay filing and other access fees, and to make required payments in a practical and not more expensive way. The challenges of those who are institutionalized – especially those who are incarcerated - and those with physical, mental and language access issues must also be taken into consideration when creating an electronic filing system. Comprehensive standards, and court rules that provide direction on these access challenges, are needed to assure that the hope to expand access for all is realized. In fact, CJI believes that the true potential for a transformative effect on how the public and attorneys access courts, and access justice for all, would be better realized in a statewide, integrated system. It would prefer a stronger and more comprehensive set of e-filing standards and implementing court rules.

In writing these comments the CJI used among other authority and resources the 2013 Principles and Best Practices for Access-Friendly Court Electronic Filing developed with input from the State Court Administrators, legal aid advocates, and the National Center for State Courts, among others ("Best Practices"). It also used the Judicial Crossroads Task Force Report and Recommendations, the federal court Public Access to Court Records (PACER) guidelines and the experience of thousands of Michigan self-represented persons who have used the Michigan Legal Help and the Legal Services of Northern Michigan Internet Representation Project website resources. These comments focus primarily on access for the populations described above and assume that other issues like privacy, identity protection and verification, and discrete task representation will be addressed by others and in a final set of standards and rules.

Section III of this Memo offers revised language for proposed court rules included in the Court's original Proposed New Rules 2E.001 et seq. It also offers two additional court rules to reflect the standards proposed in Section IV of this Memo.

III. Proposed New Rules 2E.001 et seq of the Michigan Court Rules (Electronic Filing Rules for all Michigan Courts)

2E.005 Fees

We recommend that the rule be amended to read as follows:

All costs associated with e-filing systems are fees pursuant to MCR 2.002 and shall be waived under the terms thereof. Payment methods shall include reasonable alternatives for individuals or entities that do not have a credit/debit card. Reasonable alternatives shall include but not be limited to: PayPal and other online payment systems, electronic funds transfer from checking account, pay by check or cash at the counter, pay by mail and non-fee pre-paid cards.

This rule relates to CJI proposed Standards 3 and 4.

2E.009 Public Access to Electronic Court Record

We recommend that the following rule be added:

Litigants have a right to remotely access their own case for free.

This rule relates to CJI Standard 5.

2E.102 E-Filing Transaction

We recommend that the rule be amended to read as follows:

An electronic receipt will be generated and transmitted upon receipt of every e-filing transaction.

Comment: The language "The filer has the responsibility of ensuring that filings have been received by the e-file system" is unclear as to how the filer can meet this responsibility unless the system generates some proof of the filing.

This rule relates to CJI proposed Standard 6.

2E.103 Payment of Filing Fees

We recommend that the rule be amended to read as follows:

E-filing for individuals requesting fee waivers shall not be delayed because of the request for the waiver. Electronic filing system shall incorporate a methodology to allow electronic processing and approval of fee waiver applications. Filing systems shall include automated screening and approval of fee waiver applications. To the extent that waivers may not be instantaneous, they should be granted "nunc pro tunc" making the time of filing of the pleading that of the waiver request.

Comment: Electronically screening for waiver eligibility should not be difficult and would free up a large amount of judicial time otherwise spent on these mundane applications. Fee waivers can always be reviewed and revised when a case is heard. At minimum a check box and input for DHS case information could be used for people on public assistance as fee waiver are mandatory in those cases.

This rule relates to CJI proposed Standard 2.

2E.104 Public Access Terminals and public access to electronic court records

We recommend that the rule be amended to read as follows:

If the court makes e-filing mandatory, the court must provide sufficient public access

terminals that are available during the hours the court is open to enable reasonable access to electronic filing in conformity with this chapter. The court should have sufficient personnel on hand to assist those who have disabilities or other barriers to the use of the terminals or in the alternative the court may allow those with barriers to the use of e-filing to opt out and file conventionally. Public terminal access to electronic records for viewing and downloading documents shall be free of cost to the public.

This rule relates to CJI Standards 1, 5 and 8.

2E.105 Compliance

We recommend that the following court rule be added.

Existing local e-filing systems shall conform to these rules within six months.

IV. Proposed Establishment of E-filing Standards to be used by Michigan Appellate and Trial Courts

The proposed standards include 3.1.13 on Accessibility. CJI commends the drafters for acknowledging that access issues must be taken into account in the design of an e-filing system. To expand on the access issues, and to make it clear that access is more than the ability to "accept payments of fees, fines, surcharges, and other financial obligations electronically, including the processing of applications to waive fees" CJI offers a more detailed set of eight access standards. These are based largely on the Best Practices and are all suggested to enhance and expand access in its most promising form.

1. Access to internet and support

If litigants cannot get to the Internet the system is functionally inaccessible. E-filing systems need to develop ways that litigants can easily get online and obtain the help and services they need. E-filing systems should be deployed in conjunction with access to Internet systems that minimize any barriers from access to appropriate technology or from litigants' ability to use that technology. In addition, full access requires both physical access and human and tech support systems that are appropriate to the kinds of access needed for e-filing.

Practices that should be utilized include

- Online access points that are supported with broad access services actually used by target populations, including mobile technologies
- Physical access locations within courts at which access can be provided, and sufficient support is available to ensure that access is real and meaningful. This includes actual human support, printing services, etc.
- Community collaborations with libraries, community and senior centers, legal aid programs and other public service agency offices

- Support for persons with limited English proficiency with a focus on the identification of places that are appropriate for those with limited English proficiency
- Tech-based support systems such as LiveChat, co-browsing, phone hotlines, and how-to videos.

2. **Fee waiver processing**

The structure of the waiver process in the e-filing context can cause additional confusion and implementation delay, and is regarded as a significant barrier to access. The system should impose no additional submission barrier for that population of litigants that requests a waiver of fees, either for electronic filing or for the original filing. The waiver process should include and be the same for all filing related costs. The waiver process should be as instantaneous as possible, imposing no barrier or burden of delay. To the extent that waivers may be not instantaneous, they should be granted "nunc pro tunc" making the time of filing of the pleading that of the waiver request.

Practices that should be used to facilitate fee waivers include

- Automatic waiver for recipients of means test benefits
- Automatic waiver for screened clients for certain programs
- Provisional acceptance of filing, subject to waiver
- Online submission of financial data and algorithm
- Electronic referral to discretionary decision-maker
- Ongoing review of waiver process and standards

3. **Payment options**

If a waiver request is denied, the problem of payment comes up and an appropriate payment process is needed. E-filing systems usually rely on credit or debit cards. However, many low-income and self-represented people do not have and cannot obtain credit cards without having to pay an additional fee and an appropriate process must be established for this population. The system should make it as easy as possible for people to make any required payments regardless of their participation in the online economy.

Practices that should be used to facilitate payment include

- Multiple payments systems including credit and debit cards, PayPal and other online payment systems, electronic funds transfer from checking account, and pay at the counter options
- Use and availability of no fee pre-paid cards for the exact value of the filing fee and available for purchase at courts, libraries, other government locations and appropriate retail operations
- Availability of personal payment by mail by check or money order.

4. Supplemental fee/waiver for e-filing and associated services

Michigan's legislature is proposing a system where fees additional to the basic filing fee are charged, HB 4064, 4532. It is not clear that additional fees are necessary to support an e-filing system, and in fact the experience of other jurisdictions is that the savings from an e-filing system are great[2]. Moreover, the costs of administering supplemental payment and waiver systems are often ignored when decisions regarding such fees are under consideration. Full inclusion of these costs in the business plan may make them far less appealing, especially because such fees would impose an additional barrier to access for many poor and self-represented people.

If supplemental fees are indeed imposed, it is important to assure that the system allows for fee waiver for those unable to pay. Any fee structure should place no additional net or perceived financial burden on low income and self represented persons. There should be no extra fee for any services associated with electronic filing, such as for the electronic filing, the use of a credit card, or the use of a document assembly tool. If the system cannot be set up to eliminate supplement fees, those fees should be waivable upon request in as rapid and minimally burdensome way as possible. The financial structure should also minimize disincentives for pro bono attorneys who agree to volunteer legal services but might not accept a pro bono case if it also means paying financial costs out of their own pocket.

Practices that should be used to facilitate these principles include

- Use of court rules to eliminate or ensure that supplemental fees can be waived
- Minimization of complexities that can bar availability to all
- Avoidance of delay or burden for those requesting waiver
- Options to minimize financial impacts of waivers, including the bundling of e-filing related fees into the overall filing fee; calculating e-filing fees to subsidize those who need a fee waiver; subsidizing e-filing costs by other charges relating to the usage of the data, such as access fees which are structured to minimize the burden on litigants of limited means
- Exempt some priority case types from supplemental fees
- Waive fees for pro bono attorneys
- Built in electronic screening and fee waiver for most indigent users
- Include waiver policies and requirements in vendor contracts

5. Relationship to public access to the electronic court record

As courts go paperless, the system is moving to one in which there is broad access by the public, litigants and counsel, to the electronic court file. Because of this, access to the whole system should be easier for the poor and the self-represented. Litigants have a basic right to access their own cases for free.
Practices to address this concern include

[2] A time and motion study conducted by Orange County, California, for example, determined that every document filed electronically produces a "net savings" of $2. Best Practices, p. 9.

- Potential for need for design changes in both systems
- Fee waiver and payment systems for access systems
- User accessibility in public access systems

6. Ongoing service and communications

Once service of process is obtained, there are ongoing challenges in an e-filing system with respect to communications after service of process, reliability, sufficiency of notice, and accessing technology for certain groups. Post-service filings should be handled in a way that is congruent with the original filing procedure.

An e-filing system should provide for on-going, instructive communication with the poor, the disabled, those who have limited English proficiency, and self-represented litigants to assist through case completion. This includes the filing of additional documents and updating on the status of the case. The process should be automated as much as possible and be timely, reliable, accessible and compliant with privacy standards.

Practices to address these concerns include

- Automatic creation of linking to online accounts upon case initialization
- Electronic verification of accounts
- Notification of activity through wide variety of communication tools
- Litigant choice of preferred communication methods
- Links to information, help and tools
- Notices to include reminders
- Help to include navigation and navigator help
- Rejection communication and correction

7. Assessment of accessibility/frequent review as experience is gained

Ongoing assessment of the accessibility of e-filing is critical to its ultimate success. Attention to accessibility should be built in to the project from the start, and ongoing assessment of accessibility should be a key management task so long as the service is in place.

Practices to assure accessibility include

- Include assessment of barriers in initial steps
- Include assessment in all steps
- Establish criteria and goals early in process
- Establish systems for continuing assessment of access

8. Opt-out and exemption

A mandatory e-filing system should not be imposed on the entire range of court users from initial implementation of the system. Neither is a blanket restriction of the poor, the disabled, non-English speakers, or the self-represented from e-filing encouraged. The benefits of e-filing are so great that systems must not avoid engaging the real difficulties of

deploying systems that are access-friendly by simply allowing for opt-out. Opt-out options are helpful and should remain available until it is guaranteed that the e-filing system is fully accessible. It may be necessary to maintain an opportunity for opt-out exceptions for certain populations like those who are institutionalized – especially those who are incarcerated – or who for other reasons simply cannot obtain access to the internet.

Practices that can assist in this area include

- Plan for the poor, the disabled, non-English speakers, those who are institutionalized, and the self-represented as a core constituency
- Plan an early self-representation pilot
- Hold mandatory e-filing until access is guaranteed
- Include opportunities for opt-out exemptions for appropriate cases.

V. Conclusion

We believe that an electronic filing system has the potential to open the doors to the justice system much wider for the poor, the self-represented, those with physical and mental disabilities, those who are institutionalized, and those who have limited English proficiency. We are concerned, however, that an e-filing system might actually restrict access for these populations unless appropriate considerations are made during the design and ongoing assessment of the system. We also understand that these systems have the potential to provide substantial cost savings for the courts. We urge the Court to direct a proper amount of those savings to assure access for greater numbers of people.

Report on Public Policy Position

Name of committee:
Domestic Violence Committee

Contact person:
Rebecca Shiemke

E-Mail:
rshiemke@lsscm.org

Proposed Court Rule or Administrative Order Number:
2013-18 - Proposed New Rules 2E.001 *et seq.* of the Michigan Court Rules
This series of proposed new "2E" rules contains court rules regarding e-filing in Michigan courts. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including a proposed administrative order regarding e-filing rules and the proposed e-filing standards.

2013-18 - Proposed Administrative Order No. 2013-
This proposed administrative order would require the State Court Administrator to promulgate e-filing standards, and would require courts that offer e-filing to comply with those standards. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including proposed e-filing rules and proposed e-filing standards.

2013-18 - Draft Standards for E-filing
These proposed standards provide additional guidance for courts planning for implementation of e-filing in their jurisdiction. The proposed standards are published to provide a context for the proposed e-filing rules and proposed administrative order that have also been published for comment in this file.

Date position was adopted:
July 11, 2013

Process used to take the ideological position:
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:
19

Number who voted in favor and opposed to the position:
10 Voted for position
0 Voted against position
0 Abstained from vote
9 Did not vote

Position:
The committee neither supported nor opposed the proposed court rules, but instead drafted a report detailing concerns that the proposed rules may have on cases involving domestic violence, including PPO cases, and suggesting possible responses.

Explanation of the position, including any recommended amendments:
The proposed new rules include:

- ADM File No 2013-18 – proposed new rules 2E.001 et seq. regarding e-filing statewide.
- ADM File No 2013-18 – includes Proposed Administrative Order regarding proposed establishment of e-filing standards and Draft E-filing Standards.

The following summarizes concerns expressed by the public policy subcommittee and the full committee at its May 2013 meeting:

A. Protection orders and E-Filing: Rules governing electronic access to records in cases where protection orders have been issued should comply with federal funding eligibility requirements, and with statutes protecting the identity of protected parties. Under 18 USC 2266(5), the term "protection order" includes civil protection orders (such as Michigan PPOs), probation and pretrial conditional release orders in criminal cases, and other types of protection orders meeting the statute's definition, namely:

> **"(A)** any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and
>
> **"(B)** any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking."

1. Michigan currently receives approximately $3.5 million under the federal STOP and Grants to Encourage Arrest Programs. These programs support criminal justice initiatives responding to domestic violence, sexual assault, and stalking in every Michigan County. Any rules governing electronic court records should comply with federal eligibility conditions for these programs. These federal conditions include a prohibition on charging victims of domestic violence, sexual assault and stalking for the costs associated with the filing, issuance, registration, modification, enforcement, dismissal, withdrawal or service of a protection order, or a petition for a protection order (as defined in 18 USC 2266(5)). Such charges would include any fees that might be imposed for electronic access to records in cases involving protection orders. The federal grant conditions are found in the following statutes:

a) *42 SC 3796gg-5(a) (Excerpt) - Governing eligibility for federal STOP grant funding*

> "A State, Indian tribal government, or unit of local government, shall not be entitled to funds under this subchapter unless the State, Indian tribal government, or unit of local government--
> "(1) certifies that its laws, policies, and practices do not require, in connection with the prosecution of any misdemeanor or felony domestic violence, DATING VIOLENCE, SEXUAL ASSAULT, OR STALKING offense, or in connection with the filing, issuance, registration, MODIFICATION, ENFORCEMENT, DISMISSAL, WITHDRAWAL or service of a protection order, or a petition for a protection order, to protect a victim of domestic violence, DATING VIOLENCE, sexual assault, or stalking, that the victim bear the costs associated with the filing of criminal charges against the offender, or the costs associated with the filing, issuance, registration, MODIFICATION, ENFORCEMENT, DISMISSAL, WITHDRAWAL or service of a warrant, protection order, petition for a protection order, or witness subpoena, whether issued inside or outside the State, tribal, or local jurisdiction." *[2013 amendments indicated in ALL CAPS]*

b) *A similar provision exists in 42 USC 3796hh(c), which provides conditions of eligibility for federal Grants to Encourage Arrest.*

2. Any rules governing electronic court records should comply with 18 UCS 2265(d)governing full faith and credit for protection orders (as defined in 18 USC 2266(5)). This statute prohibits a state from making information that would identify or reveal the location of a party protected by a protection order publicly available on the Internet, as follows:

> "(3) Limits on Internet publication of registration information.--A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes."

3. One approach to compliance with the above statutes is to exempt PPO cases from electronic record-keeping systems to avoid any possible violations. The Domestic Violence Committee notes that PPOs are currently not included in the electronic records systems currently used in some courts, and recognizes that this approach avoids inconsistencies with the above federal statutes, at least with regard to this type of protection order. Courts using this approach need to further recognize that the federal definition of "protection order" is broad enough to encompass other types of orders with conditions to protect victims of domestic violence, sexual assault, and stalking, including probation and pretrial release orders in criminal cases.

The Committee further recognizes that electronic access to court records that complies with the above statutes may benefit some survivors who cannot get to the courthouse or other e-filing locations during business hours because of distance, lack of transportation, disabilities or interference from an abuser. If PPOs and other types of protection orders are not exempted from electronic records systems, the committee urges that the governing rules exempt these cases from any additional e-filing fees, including transaction and convenience fees. Furthermore, public access to court records in these cases should be restricted as provided by 18 USC 2266(5).

B. Practical concerns for domestic violence survivors using e filing systems in all types of cases

1. Access or safe access to a computer; technological know-how:

- Although the proposed rule requires courts to provide on-site electronic access, many survivors will still have access issues. Survivors may have difficulty getting to the court's location for the reasons noted in A.3 above. They also may not have access to their own computer, may lack knowledge about computer technology, or have limited English proficiency, all of which create potential barriers to court process.
- After e-filing is initiated, parties receive notice of subsequent e-filings in their case by email. Similar to above concerns, some survivors do not have access to their own computer. Others may not have access to a safe email account due to interference from an abuser. Survivors with these types of access barriers are at risk of missing notices regarding their cases.

In light of the foregoing access barriers, the proposed rules governing electronic records systems should include provisions allowing litigants to opt out of e-filing for the above, and other applicable reasons. (Other applicable reasons might include the inability to pay for access fees electronically, see discussion in B.2, below).

2. General concerns for low income or self-represented litigants (including domestic violence survivors)

- E-filing potentially adds additional costs to court cases (e.g., a transaction fee and a convenience fee)
- E-filing fees presume that fees will be paid by credit card or other electronic transfer, without much consideration for those who do not have credit cards and can only pay by cash
- The rules are not clear about how fee waivers will be processed; and
- Requests for a fee waiver must not result in a delay in filing a case.

The proposed rule should allow persons who cannot pay electronically to pay in cash, or to opt out of e-filing. Further, the rules should more clearly define that no fees related to e-filing will be charged to any litigant with a waiver of fees, and describe in detail the process a court must follow when processing fee waiver requests, including a statement that the processing will not add any delay to the litigant's case.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2013-18_2013-05-01_formatted%20e-filing%20order_FINAL.pdf

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2013-18_2013-05-01_formatted%20e-filing%20AO_FINAL.pdf

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2013-18_2013-05-01_E-filing%20Standards_FINAL.pdf

Report on Public Policy Position

Name of Section:
General Practice Section

Contact person:
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Proposed Court Rule or Administrative Order Number:
2013-18 - Proposed New Rules 2E.001 *et seq.* of the Michigan Court Rules
This series of proposed new "2E" rules contains court rules regarding e-filing in Michigan courts. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including a proposed administrative order regarding e-filing rules and the proposed e-filing standards.

2013-18 - Proposed Administrative Order No. 2013-__
This proposed administrative order would require the State Court Administrator to promulgate e-filing standards, and would require courts that offer e-filing to comply with those standards. Please note that this proposed order is part of a group of documents in this file that has been published for comment, including proposed e-filing rules and proposed e-filing standards.

2013-18 - Draft Standards for E-filing
These proposed standards provide additional guidance for courts planning for implementation of e-filing in their jurisdiction. The proposed standards are published to provide a context for the proposed e-filing rules and proposed administrative order that have also been published for comment in this file.

Date position was adopted:
July 15, 2013

Process used to take the ideological position:
Position adopted after an electronic discussion and vote.

Number of members in the decision-making body:
9

Number who voted in favor and opposed to the position:
8 Voted for position
0 Voted against position
0 Abstained from vote
1 Did not vote

Position:
See comments

Explanation of the position, including any recommended amendments:
The use of electronic media in court is to be encouraged. Every time we save a person from having to drive out to court we save fuel, time, congestion at the courthouse, and at the same time can accommodate disabilities. Electronic filing, such as the ECF system used in the Federal Courts, demonstrates this saving.

The Solo and Small Firm-General Practice Section is specifically interested in the future development of electronic filing systems. We have seen the establishment of several e-filing systems in Michigan Courts. Unlike the Federal ECF system, individual judicial circuits in Michigan have established their own systems. This is a particular burden on solo and small firm practitioners, who generally do not have IT departments. Any attorney who accepts a case in an "e-filing" county in which he or she has not previously practiced must learn a new system. Any attorney who does not have regular business in a county usually has to "bone up" on the county system if some time has passed since the last filing. It also means having filings rejected until the nuances of each new system are perfected.

Having distinct e-filing systems in the several judicial circuits runs counter to two overarching principles which guide our justice system in Michigan. Article 6 §1 of the Michigan Constitution establishes one court of justice, which is divided into a supreme court, court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction. MCR 1.105 indicates that the Michigan Court Rules are to be construed to secure the just, speedy and economical determination of every action.

The paper filing system which is being replaced by e-filing is uniform. An attorney can go into any judicial circuit and file papers using the same procedure as any other circuit. The system that is evolving envisions a different set of filing rules for each circuit. Every attorney must "join" the county system in each circuit that establishes e-filing (possible 57 circuits with different systems), have the equipment necessary to access the system, keep a pass code for each system, and keep up with the changes for each system. What if the 83 probate courts, the 98 district courts and the 4 municipal courts go to e- filing? Use of individualized systems places a tremendous burden on small practitioners, who cannot "spread out" the overhead cost of learning new filing systems over a large client base.

A state wide system would have the added benefit of spreading out the costs of the system itself. This would perhaps allow some jurisdictions, which would otherwise find the transition cost prohibitive, to enjoy the benefits of this technology.

A single system would also permit each circuit to access other systems with the obvious benefits. For example, attorney scheduling could be tracked between courts, to avoid scheduling conflicts.

Another problem with the current e-filing systems is the fees being charged. E-filing has reduced the need for court clerks and clerical help, but we now see charges for us in the system for each filing (e.g. $8.75 charge for an "envelope" for each filing in the 6 Circuit (Oakland County $1.00 per page to retrieve a "filed" copy of a document in the 16th Circuit (Macomb County)). These charges are a direct burden on the clients, many of whom are severely impacted financially by having to engage in litigation in the first place.

All other fees charged for filing papers with the court (case filing fee, motion fee, judgment fee *etc.* are set by statute. MCLA 600.2529 provides that the fees enumerated therein "are payment in full for all clerk, entry, and judgment fees in an action from the commencement of the action to and including the issuance and return of the execution or other final process, and are taxable as costs". It seems that charging fees for

electronic filing, which is less costly to the court should be covered by the rubric of "clerk" fees and subsumed in the filing fee paid by the litigant.

Adding direct costs to the litigation process also favors the wealthy litigant. Any extra cost taxed to the party with less financial means is an impediment to justice. Litigation has become so expensive that in many cases, the question debated by clients and attorneys is not whether the facts or the law support our position, but how much will it cost for us to get a decision. It is certainly disconcerting to see a client with a perfectly good case have to give up because the other side is litigating the matter to death and he or she cannot afford to pursue the matter. Must we widen this gulf?

The Solo and Small Firm-General Practice Section firmly believes that the Supreme Court must establish a state wide e-filing system in the circuit courts. In this way, practitioners will be able to master one set of rules, which will guide their filing in any circuit court in which they choose to practice. The key is uniformity, which will not be achieved with separate systems. Further, the cost savings should be passed on to the public who litigate in the courts, as opposed to viewing e-filing as an opportunity for a new revenue stream.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

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http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2013-18_2013-05-01_E-filing%20Standards_FINAL.pdf