

COMMITTEE ON JUSTICE INITIATIVES
Respectfully submits the following position on:

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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

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The Committee on Justice Initiatives is comprised of members appointed by the President of the State Bar of Michigan.

The position expressed is that of the Committee on Justice Initiatives only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan.

The State Bar of Michigan's position on this matter is to support and send the Court the comments from committees and sections.

The total membership of the Committee on Justice Initiatives is 11.

The position was adopted after several meetings and an electronic discussion and vote. The number of members in the decision-making body is 11. The number who voted in favor to this position was 11. The number who voted opposed to this position was 0.

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. 2012-18
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 system¹.

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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The Workgroup consisted of Lorry 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 an 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 great². 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.