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March 29, 2012

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

RE: ADM File No. 2006-47 – Proposed Amendment of Rules 1.109, 2.107, 2.113, 2.114, 2.518, 3.001, 3.101, 3.218, 3.800, 3.901, 3.903, 3.930, 4.001, 5.101, 5.113, 5.731, 6.007, 8.108, and 8.119 of the Michigan Court Rules

Dear Clerk Davis:

At its March 27 meeting, the Executive Committee of the State Bar of Michigan considered these amendments. The Committee reviewed recommendations from the Business Law Section, Civil Procedure & Courts Committee, and Justice Policy Initiative (enclosed). The Committee voted to support the goal of the amendment to update the rules to reflect the use of electronic technology in court processes but to oppose the proposal as published.

The State Bar requests further time to recommend corrections to and clarifications of the proposed amendments. The Bar also recommends that the substantive changes concerning garnishment be removed from the package of amendments, for separate consideration.

We thank the Court for the opportunity to comment on the proposed amendments.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Julie I. Fershtman, President

Report on Public Policy Position

Name of section:
Business Law Section

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Proposed Court Rule or Administrative Order Number:
2006-47 Proposed Amendment of Rules 1.109, 2.107, 2.113, 2.114, 2.518, 3.001, 3.101, 3.218, 3.800, 3.901, 3.903, 3.930, 4.001, 5.101, 5.113, 5.731, 6.007, 8.108, and 8.119 of the Michigan Court Rules
The proposed amendments of these rules would update the rules making them less "paper" focused and reflecting the use of electronic technology in the way courts process court records.

Date position was adopted:
March 8, 2012

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:
15

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

Position:
Support

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
http://courts.michigan.gov/supremecourt/Resources/Administrative/2006-47_2011-12-21_order.pdf

Report on Public Policy Position

Name of committee:
Civil Procedure and Courts Committee

Contact person:
Daniel D. Quick

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Proposed Court Rule or Administrative Order Number:
ADM 2006-47 Proposed Amendment of Rules 1.109, 2.107, 2.113, 2.114, 2.518, 3.001, 3.101, 3.218, 3.800, 3.901, 3.903, 3.930, 4.001, 5.101, 5.113, 5.731, 6.007, 8.108, and 8.119 of the Michigan Court Rules
The proposed amendments of these rules would update the rules making them less "paper" focused and reflecting the use of electronic technology in the way courts process court records.

Date position was adopted:
March 15, 2012

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

Number of members in the decision-making body:
20

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

Position:
Oppose with amendments.

Recommendation:
See the recommendation of the Committee below the link.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
http://courts.michigan.gov/supremecourt/Resources/Administrative/2006-47_2011-12-21_order.pdf

The Civil Procedure and Courts Committee has reviewed the rules proposed in ADM File 2006-47. We have a number of specific comments that are set forth below. But the Committee would make two general points.

First, the order publishing the rules for comment includes little explanation of their purpose, and no explanation of individual provisions. Lengthy and complicated amendments are proposed with no indication of what problems are meant to be addressed or explanation of how the new rules will deal with them. This makes it difficult to evaluate the proposals. There are some fairly complicated provisions that are taken from statutes. Proposed MCR 1.109(D)(2) is from the uniform electronic transactions act, MCL 450.832(b), and 1.109(D)(3) is based on the federal electronic signatures in global and international commerce act. 15 USC 7001(g). It would have been helpful to those studying the rules to know that a provision has a statutory source.

Second, a substantial part of the proposal deals with the garnishment rule. MCR 3.101. But the proposed changes to that rule have little, if anything, to do with the main subject of the proposals – as the staff comment puts it: "making [the rules] less 'paper' focused". It would be better to separate the garnishment proposals from the papers/records/filing/etc. rules to allow more specific consideration of the substantive issues involved in the garnishment proposals, which have some problematic provisions. For example, the proposed change in MCR 3.101(H) would eliminate the requirement that the garnishee defendant file a copy of its disclosure with the court. This can cause difficulties when the plaintiff seeks costs. The plaintiff will need to include the disclosure as part of its request for costs. But that creates the appearance of the plaintiff acting on behalf of the garnishee defendant, which is not its client. And the rule says that if the disclosure is subsequently filed it is nonpublic. That can be administratively difficult since the request for costs itself presumably must be part of the public file. Is the clerk supposed to disassemble the plaintiff's request for costs, putting part in the public file and other parts in a nonpublic one?

Now to some specific points.

1. The approach of the proposed rules to avoiding the use of the word "papers" is problematic. In general, documents filed with the court are either "pleadings" [as defined in MCR 2.110(A)] or other "papers". See MCR 2.113(A). The proposed revisions change "papers" to another term in some of the rules, but not others. For instance, "papers" is changed to "materials" in MCR 2.107(G), to "documents" in MCR 1.109(C)(4), and to "documents and other materials" in MCR 8.119(C). It isn't clear why different substitutions are made, particularly since "materials" isn't defined anywhere. But there are many rules in which "papers" is not changed. E.g., MCR 2.107 [many places in subrules (A), (B) and (D)-(F)]; 2.113(A), 2.114(A); 2.117(A)(2), (B)(2)(b); 2.119(B)(2); 2.227(A)(4); 8.117. Given that there is no specific definition of "papers" in the rules, all of this just creates confusion. Perhaps a simpler approach would have been to add a definition of "papers" to MCR 2.110 that includes the broader concepts that these proposals are meant to address. This would meet the goals of achieving clarity while eliminating the necessity of revising multiple rules.

2. A great many of the rules are cast as definitions, but this has led to a number of odd provisions. The appropriate function of a definition is for the convenience of using a shorthand term for a more complicated concept to keep substantive provisions from becoming too cumbersome. For a good use of a definition, see MCR 7.202(5):

> "custody case" means a domestic relation case in which the custody of a minor child is an issue, an adoption case, or a case in which the family division of circuit court has entered an order terminating parental rights or an order of disposition removing a child from the child's home.

Such a definition serves a useful purpose: the subsequent rules can refer to the label "custody case" rather than having to repeat the lengthy catalog. But many of the provisions in these proposals that purport to be definitions don't serve that function. For example, Rules 8.108(C) and 8.119(H) each refer to records "as defined" in other subrules. But those subrules – 8.119(F) and (D), respectively – don't really "define" "records." They merely list types of materials.

Several of the "definitional" provisions say that a term "includes, but is not limited to" a number of types of items. E.g., Proposed MCR 1.109(A)(1(a), (A)(1)(b)(i), (iv). This makes the provision of little use as a definition, because it doesn't actually specify what the term means.

And at least one pair of definitional provisions appears circular. Rule 1.109(A)(1)(a) defines "records" as including "documents, . . ." But subrule (B) defines "document" as "a record . . ."

3. Many rules refer file management standards adopted by the Supreme Court, e.g., MCR 2.518(A), 8.119(D), or forms approved by the State Court Administrative Office. E.g., MCR 2.506(D); 3.101(C). These work well enough. The SCAO forms are readily available, and the file management standards apply to the courts, which are presumably in a position to keep up to date on what is required. But Rule 1.109(C)(2) is more problematic, because it is directed to the parties, who may have real difficulty in determining how they are to proceed. Subrule (1) says how "pleadings and other documents prepared for filing in the courts" are to be filed or transmitted. But then subrule (2) says "All other materials submitted for filing" [*does that mean things that were not "prepared for filing"?*] must be "prepared in accordance with this subrule" [*but there really isn't anything about document preparation except subrule (1), which can't really be read as applying to subrule (2) materials*] "and **standards established by the state court administrative office**." Are there such standards? Where are they? How many lawyers and parties will be able to find them?

4. Some of the provisions are awkwardly written. Rules that are broken into subrules still must read appropriately. For example, look at Rule 8.119C). It says that the clerk can only reject filings "that do not meet the following minimum filing requirements:" The first four provisions make sense as a continuation of that language, but then subrule (5) has the awkward statement: "the filing fee is not paid at the time of filing, unless . . . ." That just doesn't read properly as part of the main paragraph.

Or look at Rule 1.109(A)(1), which says: ". . . . Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules." So the rule says: records may be created and maintained as authorized by these court rules provided they comply with these court rules!

5. Other provisions are simply quite confusing. For example, take a look at Rule 1.109(D), which covers signatures. Many readers will be totally baffled by subrule (4):

> (4) Retention of a signature electronically affixed to a document that will be retained by the court in electronic format must not be dependent upon the mechanism that was used to affix that signature.

Finally there is MCR 1.109, which has many of the pivotal definitions and filing requirements. It is very complicated, perhaps to the point of impenetrability. Maybe everything in that rule is necessary and creates a coherent scheme for document requirements. But many litigants, judges, and clerks [who can reject filings based on noncompliance with rule 1.109, see MCR 8.119(C)(1)], may have great difficulty navigating the provisions.

* * *

This is a 2006 file, suggesting that the proposals have been under consideration for a number of years. In light of that, the Committee is hesitant to suggest that the proposals need to be revisited in their entirety, but fears that the problems with the rules are such that only substantial rewriting can make them workable. Hopefully, the substantive questions have been carefully thought through by whoever worked on these proposals, so that most of the additional work will be in clarifying the language rather than rethinking basic concepts.

We also note that there would seem to be considerable overlap between these proposals and the earlier ones regarding electronic filing. See ADM 2002-37. In 2007, the Committee submitted recommendations on that topic that were endorsed by the State Bar, among other things stressing the desirability of uniformity in standards statewide. The Supreme Court has approved a number of electronic filing pilot projects in individual courts, which works against developing uniform procedures, but does not appear to be proceeding on the statewide rule proposals. The Committee continues to believe that a uniform approach is much preferable and that it might be desirable to coordinate these filing rules with the earlier proposals.

Report on Public Policy Position

Name of committee:
Justice Policy Initiative

Contact person:
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Proposed Court Rule or Administrative Order Number:
2006-47 Proposed Amendment of Rules 1.109, 2.107, 2.113, 2.114, 2.518, 3.001, 3.101, 3.218, 3.800, 3.901, 3.903, 3.930, 4.001, 5.101, 5.113, 5.731, 6.007, 8.108, and 8.119 of the Michigan Court Rules
The proposed amendments of these rules would update the rules making them less "paper" focused and reflecting the use of electronic technology in the way courts process court records.

Date position was adopted:
March 7, 2012

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

Number of members in the decision-making body:
15

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

Position:
Support with Recommended Amendments

Explanation of the position, including any recommended amendments:

D-R-A-F-T

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

Re: ADM File No. 2006-47 – Definition of Court Records, Documents, Filing Standards, Signatures, Access

Dear Clerk of the Court:

The Justice Policy Initiative welcomes the opportunity to embrace electronic records, documents, filing, signature and record access for many of our members and their clients. This will help save time and paper for both courts and litigants. Our comments relate primarily to the Initiative's concerns that any court procedures be accessible to all users of the court, including those who may be unrepresented by counsel, indigent and/or persons with disabilities.

Introduction: Guidelines for Definition of Court Records, Documents, Filing Standards, Signatures, Records Access

We understand that local courts may have to implement procedures that may differ somewhat from one another. However, we urge you to adopt the recommendations contained in this rule as the basis for a common standard to ensure consistent accessibility to the courts for all litigants.

Our recommended guidelines are consistent with the ABA Standard 1.65 related to Court Filing Processes, which was adopted by the ABA in February 2004 (emphasis added):

> **(a) (xii) Addressing the Special Needs of Users.** In developing and implementing electronic filing, courts should consider the needs of indigent, self-represented, non-English speaking, or illiterate persons and the challenges facing persons lacking access to or skills in the use of computers.
>
> The ABA included the following explanatory note along with the above standard:
>
> > Courts must ensure that their electronic records processes are *as easy to access as possible* and that non-electronic filing and access remains available for those who do not own, have access to, or know how to use computers.
>
> **(c)(ii) Mandatory Electronic Filing Processes.** Court rules may mandate use of an electronic filing process *if the court provides a free electronic filing process or a mechanism for waiving electronic filing fees in appropriate circumstances, the court allows for the exceptions needed to ensure access to justice for indigent, disabled or self-represented litigants*, the court provides adequate advanced notice of the mandatory participation requirement, and the court (or its representative) provides training for filers in the use of the process.

The ABA further included additional explanation relating to the implementation of electronic filing and records access:

> The standards contain guidance for court policies and rules, a conceptual model of a common technological approach, and functional standards for courts and vendors to follow in designing and building automated applications to support electronic filing. They are intended to provide a common model for state and federal trial and appellate court electronic filing processes in order to achieve six purposes including…
>
> • to endorse a "full service" model of electronic filing including *not only the transmission of electronic documents into the courts, but also the routine use of electronic documents and the electronic record for case processing, for service on other parties, and for access and use by everyone involved in, or interested in, the case*…
>
> • to provide a "road map" for vendors to use when developing their *electronic filing, case management, and document management products*…
>
> • Improved legal processes, as judges and lawyers *learn to take advantage of the universal availability and ease of sharing of electronic documents*…
>
> • Enhanced public safety arising from electronic service of and *instantaneous access to court orders* (e.g., domestic violence orders of protection) and warrants…

Moreover, the ABA included comments with respect to standard technology.

> (a)(iii) Fully interoperable electronic filing systems – in which the same basic process is usable in every court and in every law office – require the use of standard technologies. Use of the Internet, eXtensible Markup Language, and web services are the accepted technologies as of the adoption of these standards.

A. Exceptions to Accommodate Special Needs of Users of the Court

In the spirit of the ABA Standard 1.65, we recommend that the proposed amendments of court rules set forth in ADM File No. 2006-47 set forth consistent statewide rules that ensure that any local court rules will:

1. Allow but not require e-filing by litigants who are unrepresented by counsel. This would include unrepresented persons who are incarcerated and that do not have access to the internet.

2. Allow but not require e-filing by persons who are eligible for a waiver of fees due to indigence.

3. Allow but not require e-filing by any person who may require an accommodation due to disability.

4. Ensure that any person who is deemed indigent is not required to pay electronic filing fees and/or costs.

5. Not require electronic service of documents to or from a person who is unrepresented and/or indigent and/or who requests accommodation due to disabilities without that individual's express consent.

6. Ensure that local courts do not adopt any system that makes records access or filing difficult for pro se litigants or others who would normally be entitled to a fee waiver.

7. Ensure that any electronic filing or records access system adopted requires the use of standard technologies. Use of the Internet, eXtensible Markup Language, and web services are the accepted technologies as of the adoption of these standards.

8. Ensure that any electronic filing or records access system adopted must also continue to allow paper filing without delay, cost or prejudice.

We note that the federal courts and bankruptcy courts, which have implemented e-filing already, exempt unrepresented persons and indigent persons from mandatory e-filing.

B. Indigent Litigants Who Elect to E-file

Although indigent litigants should, as a group, be exempt from a mandatory e-filing rule, some indigent litigants and/or their attorneys may be able to successfully use e-filing. Especially in rural areas, e-filing may save time and money. Legal Services Programs in Michigan, several of which serve 14 or more counties, can benefit from e-filing because it can save the cost of postage and travel.

Any e-filing system or electronic records access system must ensure that indigent persons have an opportunity to seek waiver of any costs and fees associated with e-filing and records access, as well as court fees. The rule should also make it clear that if court fees are waived due to indigence, then electronic filing fees must also be waived.

If the process of becoming a "registered user" requires a personal or corporate credit card as a condition of registration, this is not always available to either indigent litigants or legal services programs. Any local process should separate the function of establishing a user account from the function of establishing an electronic payment arrangement. This ensures that those who do not have credit cards can use the system, and that those who have had fees waived can access the system.

We recommend, therefore, that any local e-filing system or records access system either 1) allow provisional registration to a user pending waiver of fees, and/or 2) that requires the clerk of the court to note when fees are waived that any costs for electronic filing or records access by an indigent litigant would be paid by the county.

We recommend that any registration procedure include a procedure and instructions for obtaining waiver of fees and e-filing charges. This could be done automatically for persons who verify that they are on public assistance, or through court order for persons not on public assistance but considered indigent. Waiver of fees should also constitute an automatic waiver of any surcharges.

C. Access to Document Conversion Software

Many unrepresented or indigent litigants will not have ready access to software that will convert documents into an appropriate format for e-filing. Low-income users will probably not be able to purchase special software for creating court documents. We recommend that local courts be required to make available conversion software to any users. This software should be readily available on the court's regular and e-filing sites. It is further recommended that Courts be required to adopt document formats (such as PDF), which are supported by open source software.

Unrepresented litigants, especially those of modest means, will not necessarily have access to scanning equipment, which may be necessary. Many litigants and some attorneys may not have access to imaging software such as adobe acrobat. If courts require conversion of such documents to electronic form, computers and user support should be made available in courthouses and, where feasible, other public facilities. We recommend that provision should also be made for free access to scanners and computers with imaging software for use by the indigent and other special population members who would otherwise not have access to such devices and software.

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

http://courts.michigan.gov/supremecourt/Resources/Administrative/2006-47_2011-12-21_order.pdf