



Report on Public Policy Position

Name of Committee:

Committee on Justice Initiatives

Contact Person:

Terri Stangl; Hon. Cynthia D. Stephens

E-mail:

tstangl@ccj-mi.org; Cynthia.Stephens@3rdcc.org

Administrative Order Number:

ADM File No. 2002-37 – Electronic Filing

Date position was adopted:

July 18, 2007

Process used to take the ideological position:

Position adopted after an electronic vote.

Number of members in the decision-making body:

13

Number who voted in favor and opposed to the position:

16 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:

Please see attachment for position and recommended amendments

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/2002-37.pdf>

RECOMMEND STATE BAR ACTION ON THIS ISSUE:

Support subject to recommended amendments.

List any arguments against the position:

None.

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

Re: ADM File No. 2002-37 – Electronic Filing

Dear Clerk of the Court:

The State Bar of Michigan welcomes the opportunity for electronic filing 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 Bar'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 Local E-filing Plans

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:

(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.

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

In the spirit of the ABA Standard 1.65, we recommend that MCR 2.003E 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 indigency
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 an accommodation due to disabilities without that individual's express consent.

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 must ensure that indigent persons have an opportunity to seek waiver of any costs and fees associated with e-filing, as well as court fees. Currently, proposed rule 2E.104(A) recognizes that court filing fees may be waived, but it does not address the waiver of electronic filing fees. The rule should also make it clear that if court fees are waived due to indigency, 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 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 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 those 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.

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.

D. Privacy

Section 3.7 of the proposed standards describes several options for shielding various data fields. We agree that courts need flexibility. However, in the age of identity theft, we believe that special emphasis should be placed on the need to protect privacy, especially with regard to social security numbers and other account numbers. In addition, information about addresses and medical conditions should not be readily available to all through the Internet. In domestic violence situations, for example, it can be critical to keep an assailant from seeing a victim’s address. E-filing systems should include methods to redact this information from electronic files. New standards may be instituted to provide for the restriction of electronic access to causes of action that involve particularly

sensitive facts. For example, the Federal District Court for the Western District restricts access to Social Security Appeals Cases to counsel of record.

E. Access to Court Documents

If public access to court documents are to be available to the public electronically, it is important that the public has access that is at least comparable to the public's current access to paper documents. This is also consistent with the note accompanying ABA Standard 1.65(a)(xii).

F. Access to Training

We recognize that attorneys and other users may need to undergo some type of training in order to use a local e-filing system. In order to minimize delays or undue burdens, especially for attorneys who may not easily be able to attend in-person trainings in multiple counties, we recommend strongly, however, that such training be available on-demand, and on line rather than through periodic in-person trainings. In-person training should be a supplement to the on-line training for those who desire it.

G. Uniformity in Local Rules

Although we realize that local courts may require some local rules and procedures, we recommend that the Court encourage relative standardization of rules and procedures among those utilizing and/or mandating e-filing in certain types of cases. For firms and non-profit legal services providers that cover many counties, significant local variations in court rules can be confusing and unnecessary.

We would welcome an opportunity to work with the Court and any other key stakeholders in developing language that incorporates these principles. Please let the Public Policy Staff of the State Bar know if we can provide additional assistance, provide proposed language, or otherwise be of assistance.

Suggested Amendments (added language in bold)

Rule 2E.003 Scope

(A) A court whose electronic filing plan has been approved by the state court administrator may do any of the following, consistent with the rules of this chapter:

(2) Issue electronic filing guidelines consistent with this chapter. ***In developing and implementing electronic filing, the court 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 guidelines must be posted prominently on the court's electronic filing portal;

(3) Mandate electronic filing and electronic service of documents in specified cases ***if the court provides a free electronic filing process or a mechanism for waiving electronic filing fees for the indigent, and the court allows for the exceptions needed to ensure access to justice for litigants who are indigent or self-represented or who have disabilities or limited English proficiency, the court provides adequate advanced notice of the mandatory participation requirement, and the court (or its representative) provides ongoing and timely training opportunities for filers in the use of the process.***

(5) ***Specify any confidential information, including but not limited to social security numbers, about persons that must be redacted or abbreviated from documents that are publicly available,, to protect the privacy of such persons.***

Rule 2E.005 Service Fees

Service fees approved by the court may be assessed by an electronic filing service provider ***unless the court has waived court fees pursuant to court rule.***