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AUG 19 2016

**CLERK OF SUPREME COURT
OF WISCONSIN**

From: Shirley Abrahamson
To: Abrahamson, Shirley
BC Diane Fremgen
Date: 8/19/2016 3:45 PM
Subject: Supreme Court Rule Petition 14-03 (E-filing)
Attachments: 14-03A Final Order pdc.pdf

To: Interested Parties (I am writing to all parties notified of the original order (with updates) as shown on a communication from the court dated December 29, 2014).
From: Shirley S. Abrahamson
Re: August 17, 2016 Order re Rule Petition 14-03A (E-filing)
Date: August 19, 2016

I am writing about my concurrence to the order issued on August 17, 2016, posted on the court website and to be published. My concurrence states: "Several defects in the procedure by which this order has been adopted are evident and bewildering."

I write to comment on the last bullet in my concurrence describing the following defect in procedure:

* "The usual procedure is that when a separate writing is circulated, each Justice is to advise the other justices (and the commissioner if one is involved in the drafting of the document) whether the Justice is continuing with his or her prior vote approving the draft document, is seeking a revision of the draft document, or is joining the separate writing. A reader would then be correct in believing that each justice considered each writing and that each justice's vote was based on full information.

"This procedure was not followed here. The majority of justices who voted to approve the order prior to my circulation of my separate writing were not consulted after the separate writing was circulated. Thus several justice's votes were not fully informed, and most justices were in effect barred from full participation. (A copy of the August 17, 2016 order and concurrence are attached and are posted on the court's website)."

I added this bullet to the initial circulated concurrence after I was advised that the order would be released even though justices did not respond to my circulated concurrence. I was also advised, despite my objection, that a response from each justice was not a necessary step in the court's practice.

In light of this information, I added the above quoted bullet and circulated the revised concurrence to all justices.

This bullet was correct with regard to the initial circulation of my concurrence. The bullet was, however, later rendered inaccurate at least in part.

Here's what happened. After I circulated the revised concurrence to the justices with the last bullet point, the other participating justice were consulted on August 16 or 17 for his or her position on the order and concurrence. I was not advised of these consultations or the responses before the order and concurrence were issued.

I am pleased that the court has finally followed its long-standing good practice of obtaining the vote of each justice. I am disappointed, however, that I was the only participating justice not advised of the belated consultations and responses. My concurrence was thus unnecessarily rendered inaccurate in part by events to which I was not privy. Not good practice! Had I been advised of the consultations, I could have made a simple revision to my writing to reflect the belated process.

I am drafting an amendment to my concurrence to correct the bullet. The amendment will be circulated to all participating justices (giving each justice the opportunity to join the amendment, remain with the order, or respond to my amendment). It appears, however, that my attempt to issue any correction or explanation to my concurrence to be posted on the website and given the same publication as the August 17, 2016 order and concurrence may be blocked.

I write today to correct the record as promptly as possible.

shirley s. abrahamson

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 14-03A

In the matter of corrections to Supreme Court Order 14-03 creating Wis. Stat. § 801.18 (mandatory e-filing) and amending or creating other rules to reflect the adoption of mandatory electronic filing

FILED

AUG 17, 2016

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

The court, advised by the Committee of Chief Judges, has recognized the need for certain corrections to its order issued April 28, 2016, creating Wis. Stat. § 801.18 (mandatory e-filing) and amending or creating other rules to reflect the adoption of mandatory electronic filing. Accordingly,

IT IS ORDERED that effective the date of this order:

SECTION 1. 801.16(2)(f) of the statutes is amended as follows:

801.16(2)(f) Papers filed with the circuit court by facsimile transmission completed after regular business hours of the clerk of circuit court's office are considered filed on a particular day if the submission is made by 11:59 p.m. Central Time, as recorded by the court facsimile machine, so long as it is subsequently accepted by the clerk upon review. The expanded availability of time to file shall not affect the calculation of time under other statutes, rules and court orders. Documents submitted by facsimile transmission

completed after 11:59 p.m. are considered filed the next day the clerk's office is open.

SECTION 2. 801.18(4)(e) of the statutes is amended as follows:

801.18(4)(e) A document is considered filed on a particular day if the submission is completed by 11:59 p.m. Central Time, as recorded by the electronic filing system, so long as it is subsequently accepted by the clerk of court upon review. Documents filed after 11:59 p.m. are considered filed the next day the clerk's office is open. The expanded availability of time to file shall not affect the calculation of time under other statutes, rules, and court orders.

SECTION 3. The Comment to 801.18(4)(e) of the statutes is amended as follows:

Sub. (4)(e) is a change to law and practice. Currently, paper filings must arrive at the office of the clerk of court before the end of the regular business day in order to be considered filed on that day. Northern Air Services v. Link, 2011 WI 75, 336 Wis. 2d 1, 804 N.W.2d 458. However, the most common if not universal practice among courts that mandate electronic filing is to use the entire calendar day as the filing period; this is also the practice recommended to the Wisconsin courts by the National Center for State Courts. This provision gives a user an extra few hours to file on the last day a document is due but does not otherwise affect the calculation of time. If a user ~~files~~ submits a document or the court signs an order on a day when the clerk's office is closed, it is considered filed on the next day the clerk's office is open, except as provided by other statutes and rules, or by court order.

For consistency, the circuit court fax statute, s. 801.16 (2)(f), is also amended. For a document that can be filed by facsimile, paper parties are given the advantage of the extended filing hours by providing that pleadings received before midnight will be considered filed that day.

SECTION 4. 801.18(7)(c) of the statutes is amended as follows:

801.18(7)(c) Users shall be charged a fee for use of the electronic filing system, as provided under s. 758.19(4m) and established by the director of state courts. The fee is a recoverable cost under s. 814.04(2) and s. 799.25(13). The electronic filing fee shall not be charged to Wisconsin state and local government units.

SECTION 5. 801.18(11)(e) of the statutes is amended as follows:

801.18(11)(e) Notwithstanding s. 706.07(8)(c), an electronically filed complaint under ~~s. ch. 799.22~~ may be verified by applying the electronic signature of the plaintiff or the plaintiff's attorney to a written oath attesting that the facts of the complaint are true, without swearing to the oath in front of a notarial officer.

SECTION 6. 809.80(3)(a) of the statutes is amended as follows:

809.80(3)(a) Except as provided in pars. (b) to (e), filing is not timely unless the clerk receives the paper documents within the time fixed for filing. Filing may be accomplished by hand delivery, mail, or by courier. Filing by facsimile is permitted only as set forth in s. 801.16(2)(a) to (e). Documents completing transmission after regular business hours of the clerk are considered filed the next business day the clerk's office is open.

IT IS ORDERED that notice of these corrections to Rule order 14-03 be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

DANIEL KELLY, J., did not participate.

Dated at Madison, Wisconsin, this 17th day of August, 2016.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. (*concurring*). The proposed draft of the order was circulated to the members of the court by e-mail on August 3, 2016, directing a response by August 15, 2016. Again, the justices are confronted by a unilateral directive issued without regard to various issues involved or the need for haste.

¶2 I write separately for two reasons: (1) I object to the procedure used in drafting and adopting the order amending existing rules and statutes; and (2) I renew my comments critical of the e-filing order adopted on April 28, 2016.

(1)

¶3 Following approved procedural steps is important because good procedures increase the probability that the substance of the order will be correct.

¶4 Several defects in the procedure by which this order has been adopted are evident and bewildering.

- No open public consideration of this order was undertaken as set forth in Wis. Stat. § 751.12 and Supreme Court Internal Operating Procedures III.
- The long list of persons interested in mandatory e-filing was not advised at all of the proposed changes. Indeed as best I can determine no one but each justice was advised of the proposed changes until August 12, 2016.
- The proposed changes were not even placed on the court's web page dedicated to rules as a means of keeping the stakeholders, litigants and their lawyers,

and the public apprised of the court's proposed rule making.

- The court has not discussed the subject of this order in public or even in closed session except through e-mail.
- The proposed order states the changes were made at the request of the committee of chief circuit court judges. The reference apparently is to the 10 chief circuit court judges who meet periodically. No paper or electronic record of who made the request for the changes seems to exist. No paper or electronic record of the requested wording of the changes seems to exist. The chief circuit court judges considered the proposed draft order as a group at an August 12, 2016 meeting.
- Although the changes might not seem momentous, they might provoke the many interested persons to propose further tweaking of the mandatory e-filing or to seek additional changes now that they have had an opportunity to work with the April order mandating e-filing.
- The usual procedure is that when a separate writing is circulated, each Justice is to advise the other justices (and the commissioner if one is involved in the drafting of the document) whether the Justice is continuing with his or her prior vote approving the draft document, is seeking a revision of the draft

document, or is joining the separate writing. A reader would then be correct in believing that each justice considered each writing and that each justice's vote was based on full information.

This procedure was not followed here. The majority of justices who voted to approve the order prior to my circulation of my separate writing were not consulted after the separate writing was circulated. Thus several justice's votes were not fully informed, and most justices were in effect barred from full participation.

¶5 In sum, the procedure the court used not only excluded full participation by the justices but also excluded input from those intimately involved in e-filing, including court system stakeholders, litigants paying e-filing fees (and their lawyers), the State Bar, and the public. Not good!

(2)

¶6 With regard to the substance of the order adopting these changes, I favor mandatory e-filing but I renew my comments critical of the mandatory e-filing order adopted on April 28, 2016. I incorporate herein my concurrence to the original order regarding Rule Petition 14-03 and also the concurrence of Justice Ann Walsh Bradley.¹

¹ These concurrences appear on the court's website dedicated to rule making, specifically in the Rule Petition 14-03 file.

¶7 The concerns expressed in these concurrences are even more pertinent now than ever.

¶8 In adopting these changes without undertaking further review, the court continues to shirk its fiscal and administrative responsibilities. The court is into its second year of the biennium and is about to submit a new budget proposal. Yet the court still has not received adequate information about the court system's present and predicted financial situation. The limited information it has received indicates that the court has options for financing mandatory e-filing from its appropriation. The court has not considered any such options.

¶9 Furthermore, the court has not received any information about the e-filing fees collectable or collected to date or the expenses CCAP has incurred for e-filing.² Thus, the court blindly continues to condone the increased filing fees for mandatory e-filing, fees imposed by J. Denis Moran, Interim Director of State Courts. The fees are arguably being imposed on those civil litigants who are least likely able to afford them.

¶10 For the reasons set forth, I write separately to point out procedural shortcomings and substantive concerns.

² The chief circuit court judges asked for this information at their August 12, 2016 meeting. No figures were submitted.

