

CIRCUIT COURT
BRANCH V
Judge Robert J. Wirtz

FOND DU LAC COUNTY
TELEPHONE 920-929-7053
CITY-COUNTY GOVERNMENT CENTER
160 S. MACY STREET
FOND DU LAC, WISCONSIN 54935

February 10, 2016

Wisconsin Supreme Court
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: Petition 14-03, Mandatory Electronic Filing in the Circuit Courts

Honorable Justices of the Supreme Court:

As chair of the Chief Judges Subcommittee on eFiling Implementation, I am writing to clarify several issues raised by recent written comments on the proposed rule for mandatory eFiling. We are happy to elaborate further at the hearing on February 23.

1. Waiver of the eFiling fee

Professor Marsha Mansfield, on behalf of the University of Wisconsin Law School civil legal clinics, and Judge James Gramling, on behalf of the Wisconsin Access to Justice Commission, are requesting clarification on when the eFiling fee will be waived. They ask to establish that any fee waiver will apply to the counsel of an indigent party, whether appointed or pro bono, including civil legal services organizations, the UW clinics, and the State Public Defender and its assigned counsel. Judge Gramling also cites to a report on *Principles and Best Practices for Access-Friendly Court Electronic Filing* (Legal Services Corporation 2013) for the principle that an eFiling system should not create any additional barriers or delays for waiver of filing fees. The report recommends the use of automatic waivers for recipients of means-tested benefits and clients of non-profit legal aid programs.

We believe these concerns are satisfied by the current proposal. Authorization to charge an eFiling fee is found in Wis. Stat. § 758.19 (4m), which provides simply that the director of state courts “may establish and charge fees for electronic filing of court documents.” Attached is the director’s proposed policy on imposition and waiver of the eFiling fee. It states that the director will waive the eFiling fee for any indigent party who qualifies for waiver of the court filing fee. The waiver applies to counsel as well as client.

In designing the eFiling system, CCAP has worked to avoid creating any new barriers for indigent parties and their counsel. As with paper cases, eFiling parties use court form CV-410 to request fee waivers. This form is designed to streamline the waiver process for recipients of

means-tested programs and clients of civil legal services and pro bono means-tested programs. If an eFiling party checks a box to indicate that the CV-410 form is being filed with the party's first pleading, the system will allow the filing without payment of either the filing fee or the eFiling fee. Both fee waiver requests are subject to court review using the same criteria.

The eFiling fee will be also waived for governmental units such as the district attorneys, public defender and SPD-appointed counsel, court-appointed counsel, child support agencies, Department of Justice, and county and municipal attorneys. These agencies will receive a waiver of the eFiling fee when they check the appropriate box.

Self-represented parties are not required to eFile. Those who choose to do so will pay the eFiling fee unless they qualify for a fee waiver.

We believe that the interests of self-represented and indigent parties and government agencies have been considered in the initial design of the system. As we discuss further below, there will also be ongoing opportunities to refine and improve them over time.

2. Funding the eFiling project

Justice Abrahamson is requesting additional information about how the costs for eFiling will be addressed and how services to court users may be affected. Under the voluntary eFiling system, the director's office has charged an eFiling fee of \$5 per party per case. While this committee was originally hopeful that we could maintain a similarly low fee for mandatory eFiling, the legislature did not provide the requested funding to build the system. This committee then explored the use of commercial eFiling providers, but the services offered were less than anticipated and harder to customize for Wisconsin. In states where the cost of court eFiling has not been borne at least in part by the legislature, the costs charged by vendors to the private bar are higher than the \$20 fee proposed for Wisconsin and largely outside the control of either the court or the bar.

This reduced our choices to two: give up on eFiling or forge ahead. The director of state courts has concluded that the only reasonable course for the circuit courts is to implement eFiling as soon as possible using existing resources to complete the start-up development costs, and we agree with that conclusion. In our view, eFiling is no longer optional and delay only works to the disadvantage of both the courts and the bar.

Without legislative funding, a fee increase for eFiling is unavoidable. To provide sufficient funding for ongoing expansion and improvement of the system, the fee will need to be increased to \$20 per case per party. This fee is based on the number of cases filed each year, the number of law firms involved, and the anticipated expenses. We will provide additional detail prior to the hearing. We appreciate the unanimous support of the state bar board of governors for going forward with mandatory eFiling even with the fee increase.

In terms of the effect on court services, some CCAP staff and contractors have been redirected to work on the eFiling system rather than other court-related software projects. Each year CCAP develops an annual plan with a range of items: replacement hardware, stronger networks and

security, software changes suggested by clerks and judges, changes required by legislation and case law, and electronic interfaces with state agencies. To the extent that these upgrades can be delayed, they will wait until eFiling has been implemented. All the work necessary to maintain efficient day-to-day operations will of course continue.

Justice Abrahamson also asks whether the eFiling fee represents an increased cost to court users that implicates the court's ongoing concern about access to justice. In our view, it does not. As noted above, indigent parties will have the eFiling fee waived, and self-represented parties are not required to eFile at all. For law firms, the \$20 fee replaces costs they already incur, like postage, couriers, and service of subsequent documents. It dovetails with their own office automation by eliminating paper handling and storage costs. It also provides new services that save them time and money: online access to their cases, a personal portal to manage their filings, simplified document signing, and ability to receive and view transcripts. While most other court filing fees and surcharge increases are siphoned off by other entities, this fee supports services that are returned directly to the lawyers, judges and clerks who use them.

We believe the bar is realistic about what they will be getting for the fee and recognizes that it is necessary for the courts to move ahead. Going forward, the director's office is agreeable to conducting annual periodic review of the fee in consultation with the state bar.

3. Payment of the fee and other technical issues

The Wisconsin Creditors' Rights Association generally supports the advent of eFiling but would like to see a system where the eFiling fee, filing fee, and credit card fee are rolled into one in order to simplify client billing. They report that a member ran into technical difficulties with the use of electronic checks. These kinds of issues are common with any new system, so the important question for this court is whether CCAP has an ongoing plan for addressing technical problems and inconveniences.

With respect to credit card billing and credit card fees, the director's office is constrained by the options offered to state entities by the Department of Administration, but CCAP continues to investigate other payment methods with lower costs. To the extent that the separate fees create billing issues, CCAP is certainly willing to work with the clerks of circuit court and users on an efficient billing format.

The mandatory eFiling plan includes access to support resources for eFiling users when they run into technical difficulties. There will also be a user advisory group to discuss requests for upgrades and new features. One reason the state bar finds a higher eFiling fee acceptable is because CCAP can provide better customization and responsiveness than bar members could expect from a national vendor.

CCAP has a 25-year history of expanding and improving the case management software in response to user requests. It has recently completed a major upgrade to the circuit court judicial dashboard to improve the usability of electronic case files. CCAP is now working to upgrade the eFiling system for attorneys, volume users and pro se parties. In addition, the director's office has the discretion to slow down the rollout until important concerns are addressed. We have

confidence in CCAP's ability to meet the challenges, and we believe that the time to begin is now.

4. Labeling pleadings and other training issues

As an experienced user of electronic court records, Dodge County Judge Joseph Sciascia reiterates his concern that electronic court filings need to be clearly labeled in order to be useful to judges and parties. He notes that although the district attorney is handling this well, the clerk of court is shouldering the burden of re-labeling documents filed by other parties. Judge Sciascia proposes a new section to the eFiling rule laying out a naming convention and placing that burden on the parties.

Clerks are already performing the labeling function when they log paper documents into the court record, so this is not entirely a new workload, but we agree that the naming issue becomes more apparent when working with electronic files. CCAP is approaching this in three ways: (1) by covering it at trainings for attorneys and law office staff and in training materials; (2) by improving the drop-down menus available to the filers and using the software to push filers in the direction of better labeling; (3) by emphasizing labeling to court staff as they convert paper records to electronic. The Dodge County experience with the clerk and district attorney indicates that much progress can be made through training. We appreciate the judge's concern but believe that these issues can be addressed more responsively and quickly outside the rule.

5. Access to public records and the role of the clerk of court

The Courthouse News Service seeks an amendment to provide that electronically filed documents be publicly available immediately upon filing, before they are reviewed and entered into the court record by the clerk of court. Courthouse News asks that eFiled records be "subject to the same right of public access" as paper records and also asks that they be available "upon submission". This request is inconsistent with our understanding of how paper documents are generally handled.

In the paper world, the clerk receives new filings in the mail or in a basket placed on the counter. It is not common nor is it encouraged for members of the public or the press to go through those filings before the clerk reviews them. Indeed, there are strong reasons not to allow it, including the clerk's responsibility for safeguarding all papers filed and for shielding confidential filings from public access. New filings are not noted on the CCAP court record and are not placed in the paper court file until the clerk has a chance to review them. Although there may be exceptions in some courthouses, this is the best practice.

In the electronic world, new filings can be viewed by the court and by the other parties as soon as they are sent by the filer. However, they cannot be viewed at the public access terminals in the clerk's office until the clerk reviews and accepts them. This process is consistent with the process for paper filings in most courthouses. If a reporter knows of a new filing and calls the clerk to request a copy, the clerk can agree to make a copy just as clerks do now.

This committee does not anticipate the type of delay cited by Courthouse News. The clerks who

have converted to electronic records find that new filings take less time, not more. There is a bright yellow band across the top of the clerk's screen indicating arrival of a new filing, and staff training emphasizes the need to pay attention to the queue of eFiled documents. We expect most filings to be processed the same day.

The goal of the eFiling system is to streamline the transmission and storage of information. It is not intended to replace the judgment and experience of court staff in managing the court record. Even with the training and software improvements described above, filers will still upload things to the wrong case, label them incorrectly, and fail to note confidential material. Timely public access is important, but it must be preceded by the clerk's review.

It bears repeating that the eFiling proposal does not include development of a PACER-type system as used by the federal courts and a few other state courts. Circuit court documents will continue to be available to the public only at the courthouse. We believe that careful study must precede online public access to court documents, and it is not the issue before the court today.

We appreciate the strong support of the Wisconsin Clerks of Circuit Court Association and the State Bar of Wisconsin for this essential improvement to court technology. We look forward to speaking with you about the proposed rule and rollout plan.

Sincerely,

Robert J. Wirtz

Honorable Robert J. Wirtz
On behalf of the Committee of Chief Judges
Director of State Courts Office

**Wisconsin Director of State Courts
Electronic Filing Fee
Draft, February 10, 2016**

Wis. Stat. § 758.19 (4m) provides that the director of state courts may establish and charge fees for electronic filing of court documents.

For mandatory eFiling under proposed §801.18, the director's office intends to impose the eFiling fee as follows:

- The basic fee will be \$20 per case per party, charged per lawyer or law firm.
- Fees will be applied in civil, small claims, family, probate, criminal and forfeiture cases.
- The fee will be waived for indigent parties when the filing fee is waived under § 814.29.
- The fee will be waived for public agencies (state, county and municipal).

The director will waive the eFiling fee for any indigent party who qualifies for waiver of the court filing fee. The waiver also applies to counsel representing indigent parties, such as pro bono legal services and pro bono counsel. Parties who wish to request a fee waiver should file form CV-410 and submit it with their first filing. Fee waivers are subject to court review under § 814.29.

The eFiling fee is also waived for governmental units such as the district attorneys, public defender and SPD-appointed counsel, court-appointed counsel, child support agencies, the state Department of Justice, and county and municipal attorneys. The eFiling fee will be waived even when these agencies pay a case filing fee. The eFiling fee is waived automatically when government filers identify themselves to the eFiling system.

Self-represented parties are not required to eFile under §801.18(3). Self-represented parties who choose to eFile must pay the eFiling fee unless they qualify for a fee waiver.

This policy will be posted on the eFiling website and with the circuit court fee schedule. It will be reviewed periodically in consultation with the State Bar of Wisconsin.