

Richard Zorza, Esq.
3097 Ordway St., NW
Washington DC 20008
202-549-1128
richard@zorza.net

February 12, 2005

Peter G McGabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the US Courts
One Columbus Circle, NE
Washington DC 20544

Re: Proposed Rules Changes Authorizing Mandating of Electronic Filing

Dear Mr. McGabe:

This letter is submitted in response to the proposal of the Rules Committee of the Federal Judicial Conference which proposes amendments to the Federal Appellate, Bankruptcy and District Court Rules, that would permit the mandating of electronic filing. While I am an attorney who works extensively with many groups dealing with issues facing the self represented, the comment is submitted on my own behalf alone.

I would like to draw the attention of the Committee to the risks this proposal has for access to the court systems for those without lawyers. The core risk, which I believe is not fully addressed by the Committee note, is that particular rules adopted under this provision would have the impact of adding an additional barrier to access to self represented litigants. This could occur either because a particular court adopted a mandate of electronic filing without exceptions, even for the self represented, or if it adopted exceptions not sufficient to protect fully the right to access to justice. Of course most if not all federal courts have so far taken a practical approach to electronic filing, and while it should be hoped that this commonsense attitude will prevail in all cases, it would seem inadvisable as a general matter in any regulatory drafting process to rely on good faith, knowledge, and understanding alone.

It is encouraging that the Committee Note to Rule 5 (e), for example, appears to place value upon the fact that “[c]ourts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means[.]” However the absence of mandate in this language, and the absence of any reference to any right of access, means that a court that choose to adopt a mandate of electronic filing would not

be in violation of the rule, and those excluded from filing as a result of the mandate, would apparently have no remedy under the rule.¹

Perhaps the greater risk is that the lack of guidance in the proposed rule will result in individual courts mandating electronic filing, and including exception language, but that the language of exception will be inadequate to protect the rights of those who have difficulty using electronic filing. Among these potential risks for self represented litigants might be that:

- The provision will list certain exceptions, but that those exceptions will be too limited.
- The provision will be vague, and in any event act as a discouragement to those who do not have capacity to file electronically.
- The provision will attempt to provide alternative paths to filing, but that those paths will be impracticable, expensive, or otherwise unavailable.
- The provision will not deal with the cost problems for the indigent or low income in dealing with a fee based system.
- The provision will not deal with the particular problems of those with physical or other disabilities.
- The provision will not deal with those who have a religious objection to the use of certain technologies.
- The provision will not address those who are “technologically challenged”
- The provision will not deal with the special situation of the incarcerated, many of whom are under regimes that prevent them from having online access.
- The provision will contain, as suggested in the Committee Note, a “more general ‘good cause’ exception,” but that those affected will not be reassured, and will therefore be deterred from even attempting to file.

Of course, few if any of these risks would occur if it were made clear that the authorization of mandate only applied to those with counsel.

Given these risks and complexities, I would urge that Federal courts should not be authorized to mandate electronic filing for the self represented at this stage in the

¹ Rule 5(e), for example, of the Civil Rules, currently states that “the clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.” It is not clear if use of paper rather than electronic submission would be considered as not the “proper form,” or whether that language refers to lesser transgressions.

development of the technology, either with or without exceptions. This doubt does not extend to represented parties

In my judgment, it would be ideal would be language making clear that electronic filing should be available, but not be mandated, for those without lawyers.

In any event, courts should be encouraged to combine the use of electronic filing with self-represented-friendly services, such as assistance with service, free access to electronic files, and document assembly programs. (This letter does not address in detail whether it is appropriate to bar the self-represented from electronic filing. In the long term this might, unless adequate safeguards were in place, effectively penalize the self represented in that their submissions might be handled differently, and their cases therefore prejudiced.

I hope that you will therefore clarify in the Rule or, if sufficient to have the force of law, make explicit in the note, that the mandate of electronic filing must be limited to those with counsel at the time of the filing of the document. This solution would be simple and easy to apply.

Thank you for your consideration of this comment.

Sincerely,

Richard Zorza, Esq.