

**In re creation of Wis. Stat. 801.18,
relating to mandatory electronic filing in circuit court
and conversion to electronic circuit court records**

**SUPPORTING
MEMORANDUM
PETITION 14-03**

The Committee of Chief Judges, a committee of the Director of State Courts Office, hereby petitions the Supreme Court to create new Wis. Stat. § 801.18. This rule requires a county-by-county transition to all-electronic case files in the circuit courts, and mandates use of the court electronic filing system by attorneys and high-volume small-claims filers. This petition is made pursuant to the court's rulemaking authority under Wis. Stat. § 751.12 and its administrative authority over all courts conferred by Article VII, §3 of the Wisconsin Constitution.

The subject matter of this rule falls within the power of this court to regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits. Wis. Stat. §751.12; *In the Matter of E.B.*, 111 Wis. 2d 175, 183, 300 N.W.2d 584 (1983). Although the procedural changes made by this rule are wide-ranging, the rule does not abridge, enlarge, or modify the substantive rights of any litigant. The rule falls within the power of this court to manage the administrative business of the courts, maintain court records, and regulate the practice of law.

The rule is proposed as new Wis. Stat. §801.18. Chapter 801 may be amended by either court rule or by legislation. Cross-references are added to apply mandatory electronic filing and electronic record-keeping in criminal and juvenile cases. Other statutes and court rules have been amended as needed for complete implementation.

Overview

The Wisconsin circuit courts have had voluntary electronic filing (eFiling) since 2008 for civil, family, and small claims cases. However, the volume of filings remains very low and litigants and courts have not yet seen any increased efficiency as a result of eFiling. At the request of the Director of State Courts, the Committee of Chief Judges appointed a subcommittee to consider how use of eFiling might be increased.¹

¹ The subcommittee consisted of Chief Judge Robert Wirtz, chair, Chief Judges William Foust and Randy Koschnick, District Court Administrators Jon Bellows, Patrick Brummond, and Beth Perrigo, and Chief Information Officer Jean Bousquet. The subcommittee was staffed by Circuit Court Legal Advisor Marcia Vandercook.

The Chief Judges have concluded that in order to see the benefits of an eFiling system, all court files must be electronic and most litigants must file electronically. The national experience is that the best results come from making eFiling mandatory for all attorneys. Accordingly, the committee has proposed that the current voluntary rule, Wis. Stat. §801.17, become a mandatory one.

The new rule incorporates an implementation plan based on the experience of other state trial courts. Training and technology will be rolled out county-by-county over a three-year period. At the end of that period, all circuit court files will be electronic and all attorneys and high-volume filing agents will be required to file electronically. Self-represented litigants may participate on a voluntary basis. If self-represented litigants choose to file and receive filings on paper, the clerk of court will image their filings and place them in the electronic record.

As of October 2014, almost every state court in the country is actively moving toward eFiling, and eFiling procedures have been created by court rule or order in many states. In 17 states, a statewide eFiling system has been implemented in the trial courts for one or more case types.² In 25 states, eFiling is a pilot phase or in the process of implementation. In 4 states eFiling is available only in the appellate courts, in 3 states there are one or more county eFiling systems, and in Maine the supreme court is looking for funding.

Why a mandatory rule?

Subcommittee members visited the federal district court in Madison, studied eFiling in other state courts, and used the services of a technology consultant provided by the National Center for State Courts (NCSC). They learned that eFiling is a significant improvement over paper, leading to considerable efficiency and cost savings. Among other benefits, electronic records decrease data entry, improve the speed with which information can be retrieved and shared, reduce staff time and storage costs, and improve storage security. These benefits apply to both courts and law firms.

To achieve these efficiencies, eFiling must be the norm and not the exception. Of the 17 states where a statewide system is available, 14 make it mandatory for attorneys. Most federal courts require attorneys to file electronically. NCSC technology consultant Larry Murphy, former CIO of the Iowa court system, summarized his findings:

² See, for example, Alabama Efiling Admin. Order 6-12; Colorado R. Civ. Proc. 121; Delaware Admin. Dir. 2012-3; Florida Admin. Order AOSC 13-49; Hawai'i Electronic Filing and Service Rules; Iowa Court Rules ch. 16; Kansas Supreme Court Admin. Order 268; Minnesota Admin. Order 10-8011 and S. Ct. Rule 11; Missouri R. ch. 103; Nebraska Ct. Rules ch. 6, art. 4; New Mexico R. Admin. 1-005.2; North Dakota R. Ct. 3.5; South Dakota R. 13-12; Utah Code of Jud. Admin, Rule 4-503, 4-603.

The best recommendable practice from a nationwide standpoint is to make eFiling mandatory after the pilot phase of the project, to obtain a better return on the investment in developing the eFiling system. Once the eFiling system has passed a user acceptance test, most court rules provide for eFiling to be mandatory. It should be noted that the court rules in mandatory usage states have been vetted by the public, judges and attorneys. Wisconsin should move in the direction of becoming a mandatory usage state sooner rather than later.

In 2008 the Wisconsin Supreme Court approved the voluntary eFiling rule, Wis. Stat. § 801.17, following a three-year pilot project. The technology was developed in-house by the Consolidated Court Automation Programs (CCAP) and is currently available for small claims, family, and civil cases. However, the voluntary rule has left it up to the clerk of circuit court and the judges of each county whether to make the technology available. As of October 2014, only 27 of 72 counties have done so. The number of cases filed from 2009-2013 was less than 1% of the cases filed statewide for those three case types. Voluntary participation simply has not resulted in the volume that would make eFiling worthwhile.

Implementation plan

The new rule is proposed as Wis. Stat. § 801.18, to be submitted as a petition to the Wisconsin Supreme Court in fall 2014. The rule applies to both new cases and new filings in open cases. It requires eFiling by all attorneys in all types of cases. For small claims actions filed under Wis. Stat. § 799.06, the rule requires eFiling by agents who act on behalf of an entity filing 10 or more small claims actions in a county per year (typically hospitals, debt collection firms, and property management companies). Self-represented litigants may participate on a voluntary basis.

The rule requires that each clerk of court and register in probate have all open files imaged by the time eFiling becomes mandatory in that county. The official court record, including transcripts, will be kept electronically.

The implementation plan is modeled on the rollout currently underway in the Iowa state courts. If this rule is adopted by the Wisconsin Supreme Court, the program will be rolled out county by county across the state over a three-year period. As tentatively proposed, the earliest counties will become mandatory January 2016 and the last will be implemented by December 2018. The order will be determined by the Director of State Courts and the CCAP Steering Committee based on county readiness. The date each county will become mandatory will be identified months in advance with publicity and outreach in coordination with bar. CCAP staff will provide training for judges and court staff, attorneys and law office staff, local agencies including child support, law enforcement and corporation counsel, and other frequent users of the court system. Online instructions and phone support will be available.

Building on existing technologies

The Wisconsin courts have long been leaders in court technology. The CCAP electronic case management system became available to the Wisconsin circuit courts in 1992, and the Wisconsin Circuit Court Access website (WCCA) has been online since 1999. The fact that CCAP has developed its technology in-house rather than through a vendor has enabled it to be exceptionally flexible and responsive to the needs of its users, and that flexibility will continue to be an advantage as eFiling is further developed.

eFiling is only a part of the movement toward electronic files. Internally, clerks of circuit court and registers in probate have been imaging paper files at a rapid rate. An increasing number of judges and court commissioners are reviewing case files electronically, using electronic signatures on orders, and managing their cases with judicial dashboard tools.

Externally, CCAP has worked in partnership with other agencies to allow filing of electronic citations by the state patrol, DNR wardens, and local law enforcement. Electronic interfaces for exchange of case information have been established with district attorneys and with the departments of transportation, justice, revenue, workforce development, and corrections.

Incorporating the electronic capabilities of law offices is the next logical development in this progression. In addition to filing by the private bar, pilot projects are proceeding for eFiling of criminal cases and cases filed by county child support agencies.

Advantages for users

eFiling is already familiar to attorneys who practice in federal court and other states. Many law offices are highly automated, and electronic documents and communication methods are routine. The State Bar of Wisconsin offers advice and training to members seeking to improve the efficiency of their practices through technology. Large filing agents such as debt collection firms, utilities and hospitals already use automated case management systems and electronic files.

eFiling users will be able to view the complete court file for each of their cases, from any computer, at any hour, and will be able to view documents as soon as they are filed. Attorneys may delegate access to staff in order to view the court file, pay filing fees, and prepare and file pleadings on behalf of the attorneys. Attorneys may also allow clients access to view the court file if they so choose. The routine costs of copying, mailing, and delivery services will be substantially reduced for many law offices. Other courts have found that after the transition period, attorneys and staff members are satisfied with the new technology.

Self-represented litigants and agents who appear on behalf of an entity filing fewer than 10 actions a year (typically smaller landlords and small business owners) will not be required to participate in the eFiling system. However, CCAP will work with interested groups to make the system as user-friendly as possible, to maximize the number of self-represented litigants who participate voluntarily. The proposed rule provides that a small claims complaint may be verified through a sworn statement, rather than in front of a notary, to make it easier to file electronically.

For the court system, the advantages are numerous. Clerks will see reductions in the time spent on data entry, imaging, moving and storing files, and mailing. The complete court file will be available simultaneously to multiple users: at the public access terminal in the clerk's office, in the judge's chambers, to the judicial assistant, and in the law offices of the attorneys on the case. Cost savings may take the form of fewer staff or better use of staff time on quality control. The subcommittee studied the eFiling system used by the federal district court and was impressed by the enthusiasm of the judges and staff there. As the magistrate judge succinctly put it: "I can't imagine going back to paper."

Substantive changes to the current rule

Both the 2008 eFiling rule and the new rule try to minimize substantive changes to Wisconsin law unless needed for use of the technology. The main substantive changes in the new rule are:

1. Sub. (3)(a) requires eFiling by all attorneys and by agents filing 10 or more small claims actions per year.
2. Sub. (4)(e) provides that documents filed by 11:59 p.m. on the day they are due are timely filed. The fax rule for the circuit court is similarly amended.
3. Sub. (9)(c) and (d) require the clerk of court to keep the court record in electronic format.
4. Sub. (9)(h) requires parties to submit copies of documents, not originals.
5. Sub. (9)(L) requires an administrative record to be submitted electronically.
6. Sub. (11)(e) allows verification of a small claims complaint without notarization.
7. Sub. (12)(d) allows an attorney to delegate the use of his or her electronic signature to a staff member, superseding case law, while holding the attorney responsible for all documents filed through the eFiling system. This provision will apply statewide on [January 1, 2016] so a uniform technology can be used.
8. Sub. (15) sets out procedures for eFiling of transcripts.

Related amendments to other statutes and rules

The rule petition requests amendments to other rules and statutes for full implementation of electronic filing.

1. § 801.15(5)(b): For notices served by the electronic filing system between 5 p.m. and midnight, 1 day shall be added to the prescribed period for reply, consistent with application of the fax rule.
2. § 801.16(2)(f): The fax rule is amended to allow filing by 11:59 p.m. This extension of time is intended to give paper parties the advantage of the same extra few hours that eFiling parties now have.
3. § 808.075(1): For technical failures on the part of the eFiling system, the circuit court may grant relief. For technical failures on the part of a user's systems, the circuit court may grant relief from non-jurisdictional deadlines.
4. §§ 967.12 and 968.02: District attorneys may participate in eFiling through a direct interface between the district attorney information technology Protect system and the eFiling system. Electronic signatures may be provided by the Protect system.
5. § 968.12: Electronic transmission and electronic signatures are authorized for search warrants.
6. §§ 48.022 and 938.022: These sections are created to make it clear that electronic filing is required in juvenile cases.
7. SCR 70.42: The definition of electronic signature is made consistent with the definition used in § 801.18(2).
8. SCR 72.03: If a documentary exhibit is a copy and not the original, the clerk may scan it and incorporate it into the case file rather than store it separately as an exhibit.

Paying for eFiling

Many state courts have purchased case management and eFiling systems from private vendors. Compared with the cost of vendor-supported systems in other states, user costs for the in-house eFiling system developed by CCAP are expected to compare very favorably.

In 2007, the legislature created Wis. Stat. § 758.19(4m), allowing the Director of State Courts to establish and charge fees for eFiling. The current fee is \$5.00 per case for each attorney or self-represented litigant, paid when the attorney or party enters the case. Filing fees may be paid by credit card (with a 2.75% bank fee) or by e-check (\$2.50 bank fee per transaction). No charge is made for subsequent filings.

Unlike the one-time cost in Wisconsin, filing and service costs in other states multiply as the litigation progresses. Some vendors charge multiple times over the course of litigation for various pleadings or groups of pleadings: Michigan charges \$5.00 for filing, Arizona and New Mexico \$6.00, Colorado \$6.00-\$6.85. In addition, some vendors charge to serve pleadings on the other eFiling parties: Michigan charges \$3.00 for service, New Mexico \$4.00, Arizona \$6.00, Colorado \$6.00-\$7.50. A party filing and serving five filings docketed separately will spend \$40.00 on a single case in Michigan in addition to the regular filing fee.

Because the volume of eFiling cases in Wisconsin has been so low, the eFiling fee has not been enough to pay for expansion of the system. The Wisconsin Supreme Court is seeking legislative start-up funding for FY 2015-2017 to hire the necessary programmers and analysts, buy equipment, and train users during the county-by-county rollout. The system will be enhanced to accept all case types, interact with law office case management systems, and add user-friendly features. Once all counties are up and running, the eFiling fee will be used to respond to changes in law and practice, add enhancements, and provide ongoing user support.

Wis. Stat. § 758.19(4m) gives the Director of State Courts the discretion to set the eFiling fee. It currently applies to each attorney and each self-represented litigant who becomes a registered user on a case. Other states have different fee structures that may exempt government agencies or indigent parties. The Director's office is investigating ways to structure the eFiling fee in a way that reaches a fair, affordable balance of costs between private attorneys and public agencies, while still providing adequate support for maintenance of the system.

The chief judges subcommittee discussed a number of options for funding the electronic filing system besides the user fee. Options included: (1) raising the filing fee in civil and family cases; (2) raising the costs assessed against defendants in criminal and civil forfeiture cases; (3) imposing a fee for filing on paper instead of electronically; (4) requesting an ongoing appropriation from the legislature; and (5) assessing an annual fee on attorneys. Each of these options has its drawbacks, and the subcommittee concluded that continuing to rely on the eFiling user fee is the option best suited to long-term support of the system.

Another suggestion is to use the efficiencies created by eFiling to offset the cost, but this idea is complicated by the way Wisconsin circuit courts are funded: all of the costs for eFiling programming, hardware and support are borne by CCAP at the state level, while the efficiencies will be spread across the justice system, including in the clerk of court offices funded by the counties.

Another possibility for offsetting the cost of the eFiling system is through the online sale of non-confidential court documents. The federal court PACER system makes all non-confidential documents available online for a per-page cost to view and print. Other state courts partially support their automation programs by making non-confidential documents available in various ways: by page view, by subscription, and by sale of packaged reports. The Chief Judges concluded that online document sales represent a significant policy issue needing further study and that implementation of eFiling should not wait on the results of this effort. The eFiling report and rule do not address this issue, and the rule makes no changes to case information as it displays on the court's WCCA website.

In addition to costs borne by the courts, state and county agencies that file court cases may choose to upgrade their software and hardware earlier than they would otherwise. The State Public Defender needs a significant updating of its software and may not be able to participate in eFiling immediately, so the rule includes a provision allowing the director to make exemptions until upgrades can be made. Wireless connectivity for courtrooms will make the system to work more efficiently by allowing parties to access electronic files during the proceedings.

Review process

These rule changes have been reviewed by the Committee of Chief Judges, CCAP Steering Committee, the Planning and Policy Advisory Committee (PPAC) Planning Subcommittee, and the full PPAC Committee. The Office of Lawyer Regulation reviewed the attorney signature provisions. CCAP set up vendor booths at state bar conferences in June and October. The proposed rule was circulated to bar committees over the late summer and early fall and comments sought from a number of interested groups. The State Bar published articles on eFiling in the September *Inside Track* and the October 2014 *Wisconsin Lawyer*. The report and rule are posted on the court system website with an invitation to submit comments. This petition is being filed with the Wisconsin Supreme Court in fall 2014, with a request that it be heard in spring 2015.

Relation to redaction rule petition

Many state courts have rules requiring parties to redact pleadings for reasons of privacy and identity theft, by removing financial account numbers and personal identifiers like social security numbers. Some of these courts link their redaction rule to their eFiling rule, with the goal of making electronic records free of this information. A subcommittee of the CCAP Steering Committee has drafted a redaction rule that has been circulating at the same time as the eFiling rule. If adopted, it will become effective on the same schedule, and training will be provided at the same time.

Conclusion

The Wisconsin courts have made many advances in electronic records management, but other states have gone further by requiring eFiling. CCAP is now ready to take that step. The chief judges believe that the Wisconsin bar, circuit court judges, and clerks of court are ready to take that step as well.

Respectfully submitted this ____ day of _____, 2014.

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

Links:

- Mandatory E-filing May Be Coming Soon to the Courts Near You
<http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=87&Issue=9&ArticleID=23600>
- E-Filing in Four Easy Steps
<http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=87&Issue=9&ArticleID=23599>
- Report of NCSC eFiling consultant Larry Murphy
<http://www.wicourts.gov/ecourts/efilecircuit.htm>
- Circuit court eFiling website
<http://www.wicourts.gov/ecourts/efilecircuit.htm>
- COSCA Policy Paper on Managing 21st Century Court Records
<http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/12012013-Standards-Maintaining-Managing-21st-Century-Court-Records.ashx>
- National Center for State Courts Electronic Filing Rules and Web Sites
<http://www.ncsc.org/Topics/Technology/Electronic-Filing/State-Links.aspx>

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