



pamela christmas
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12/15/2004 11:15 AM

To Peter_McCabe@ao.uscourts.gov
cc

Subject Appellate Rules 25



04-AP-001
Request to Testify
1/25 DC

Dear Mr. McCabe:

I would like to testify at the Appellate Rules
Committee hearing on January 25, 2005, in Washington,
D.C. I would like to testify on Appellate Rule 25.

Sincerely,
Leroy White
Attorney-at-Law
265 South Englewood Dr
Baton Rouge, La 70810
Telephone 225-766-3142

pdc

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Send to: Office of Peter D. McCabe

04-AP-001

Testimony

From: Attorney Leroy White

Fax No: 202-502-1766

Attention: Secretary of Peter D McCabe
including cover: 5 pages total

Please Confirmed Received Fax at (225) 766-3142

Fax Reply (225) 769-6174

Leroy White
Attorney at Law
265 S. Englewood Drive
Baton Rouge, LA 70810
January 3, 2005

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference
Of the United States

Re: Statement on Proposed Amendment
To Appellate Rule 25 (a) (2) D on
Electronic filing of Appeals to United States
Circuit Courts of Appeal

The United States Court of Appeals for the Eleventh Circuit requires Electronic filing of appeals to the Eleventh Circuit Court of Appeals. Current copy of the Local Rule requiring Electronic filing has been received by undersigned from the Office of the Clerk, United States Court of Appeals for the Eleventh Circuit. The remaining United States Courts of Appeals do not require Electronic filing of Appeals to their Circuits Courts of Appeals.

A NOTE entitled Electronic filing and Informational Privacy by Kyllakitajima has published in the Hastings Law Quarterly at 27 Hastings Law Quarterly at page 563 (1999-2000).

A very current Article Copyright 2004 Association of Trial Lawyers of America entitled, The State of Electronic filing, by Susan Larson, a member of The South Dakota Bar.

Finally, an Article entitled, A Review of Electronic Court filing in the United States, has been published in the Journal of Appellate Practice and Process Volume 2. Number 2 (Summer 2000).

The big question as I see it, is whether action by the Judicial Conference in the area of Electronic filing is premature at this time. First of all, the general bar has shown no enthusiasm for active participation. The articles cited herein seem to point to wide future participation in all areas including commerce and state and federal courts. Only one United States Court of Appeals has moved from paper filings of Appeals to Electronic filing of Appeals. When I called the Clerks of Court of the circuit Courts the clerks informed me that they were working on Electronic filings. However, there has been no strong movement in that direction.

With so much hardware available to lawyers, the Courts, and the general public, I believe this is a matter where Congress should take the lead. I did not raise the question of costs, but because the people who have made the studies are optimistic and predict that electronic filings are coming, I believe Congress should be active and strongly encourage general participation by Appeals Courts of the United States, that do not require electronic filings of Appeals.

Finally on May 22, 2003 in comments on Rule 32.1 of Appellate Rules of Procedure considering unpublished opinions the committee noted that "unpublished" opinions are already widely available to the public, and soon every Court of Appeals will be required by law to post all of its decisions, including unpublished decisions on its website. See E-Government Act of 2002, Publ. 107-347, Section 205 (a) (5), 116 stat. 2899, 2913. Congress has already taken the first step by enactment of this legislation.

I will be in Washington, D.C. on another important matter on January 24, 2005. During my visit I will seek assistance from the Louisiana Congressman for the Sixth Congressional District of the State of Louisiana. I will share any direction I receive with the committee.

Respectfully Submitted:

A handwritten signature in cursive script that reads "Leroy White". The signature is written in black ink and is positioned above a horizontal line.

Leroy White
Attorney at Law
LA Bar Roll No. 13427

Enclosure:
Document
Received from
United States Court of Appeals,
11th Circuit

The Federal Rules of Appellate Procedure (FRAP), the Eleventh Circuit Rules, and the Internal Operating Procedures (IOPs) are available on the Internet at

www.ca11.uscourts.gov

The court's web site also contains answers to Frequently Asked Questions, and checklists and tables showing FORMAT, COLOR, QUANTITY, TIME, and other requirements for briefs, record excerpts, and other papers.

Please see the **Notice of Privacy Policy** posted on the court's website, on the **Briefing and Filing Instructions** page.

Amendments to the Eleventh Circuit Rules took effect on April 1, 2003, and on January 1, 2003. The revised rules are available on the Internet at www.ca11.uscourts.gov. Among the revised circuit rules are provisions that:

- require that the Certificate of Interested Persons (CIP) in the second and all subsequent briefs filed must include only persons and entities omitted from the CIP contained in the first brief filed (and in any other brief that has been filed). See 11th Cir. R. 26.1-1.
- permit service by electronic means, if the party being served consents in writing. See FRAP 25(c).
- require counsel to provide the court with electronic briefs by uploading the electronic briefs to the court's web site. See 11th Cir. R. 31-5.

ELECTRONIC BRIEF UPLOADING

In addition to providing the required number of paper copies of briefs, all parties (except pro se parties) are required to upload the brief in electronic format to the court's Web site as described in 11th Cir. R. 31-5 and these instructions. The electronic brief must be completely contained in a single Adobe Acrobat® PDF file (see instructions for generating the PDF file below), i.e., the cover page through and including the certificate of service shall be contained in one file. Appendices need not be included in the electronic brief. Hypertext links to cases, statutes and other reference materials available on the Internet are authorized. The certificate of service shall continue to indicate service of the brief in paper format.

To upload your brief:

- Go to this court's Web site at www.ca11.uscourts.gov

(e) Extension of Time Must Be Requested Prior to Due Date. A request for an extension of time to file a brief or record excerpts pursuant to this rule must be made or filed prior to the expiration of the due date for filing the brief or record excerpts. The clerk is without authority to file a party's motion for an extension of time to file a brief or record excerpts received by the clerk after the expiration of the due date for filing the brief or record excerpts. A request for an extension of time to correct a deficiency in a brief or record excerpts pursuant to this rule must be made or filed within 14 days of the clerk's notice as provided in 11th Cir. R. 42-3. The clerk is without authority to file a party's motion to correct a deficiency in a brief or record excerpts received by the clerk after the expiration of the 14-day period provided by that rule. [See 11th Cir. R. 42-2 and 42-3 concerning dismissal for failure to prosecute in a civil appeal.]

(f) Motion for Leave to File Out of Time. The clerk is without authority to file a party's motion for leave to file a brief or record excerpts out of time received by the clerk after the expiration of the due date for filing a brief or record excerpts or for correcting a deficiency in a brief or record excerpts. [See 11th Cir. R. 42-2 and 42-3 concerning dismissal for failure to prosecute in a civil appeal.]

11th Cir. R. 31-3 Briefs - Number of Copies. One originally signed brief and six copies (total of seven) shall be filed in all appeals, except that pro se parties proceeding in forma pauperis may file one originally signed brief and three copies (total of four). One copy must be served on counsel for each party separately represented.

11th Cir. R. 31-4 Expedited Briefing in Criminal Appeals. The clerk is authorized to expedite briefing when it appears that an incarcerated defendant's projected release is expected to occur prior to the conclusion of appellate proceedings.

11th Cir. R. 31-5 Electronic Briefs.

In addition to and contemporaneous with the filing of any paper brief, counsel for any party or amicus curiae shall provide the court with the same brief in electronic format. All electronic briefs shall be in Adobe Acrobat® PDF file format. The time for serving and filing a brief is determined by service and filing of the paper brief, which is the official record copy of the brief, and is not affected in any way by providing electronic briefs. If corrections are required to be made to the paper brief, a corrected copy of the electronic brief shall be provided.

An electronic brief shall be uploaded to the court's Web site in accordance with this rule and directions to be provided by the clerk. In the alternative, at the direction of the clerk or with the clerk's permission, an electronic brief may be provided in another format, including (but not limited to) floppy disk or CD-ROM as described in this rule. An electronic brief in its entirety, including all contents required by 11th Cir. R. 28-1, 28-2, or 29-2, must be combined and contained in a single electronic document or file.

(a) Internet Upload. An electronic brief shall be provided by uploading the brief to the court's Web site at www.ca11.uscourts.gov. Prior to uploading the first brief, the uploading party will be provided instructions by the clerk. Appendices may be included in the electronic brief, but are not required to be included. Hypertext links or bookmarks to cases, statutes and other reference materials available on the Internet are authorized. The certificate of service shall indicate the date of service of the brief in paper format.

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1/19/05

Send to: Office of Peter G. McCabe

From: Attorney Keroy White

04-AP-001

Additional Testimony

Fax No: 202-502-1766

Attention: Secretary of Peter G. McCabe

Including Cover: 15 pages total

Please Confirmed Received Fax At (225) 766-3142

Fax Reply (225) 769-6174

Leroy White
Attorney at Law
365 Englewood Dr
Baton Rouge, La 70810
225-766-3142

January 19, 2005

Mr. Peter G. McCabe, Secretary
(202)502-1820
Fax (202) 502-1766

Re: Rule 25 (a) (2) (d)
Electronic Filing: Federal Rules
Of Appellate Procedure

A court of appeals may be local rule permit or require paper to be filed, signed, or verified by electronic means.....

Substance of Testimony to be given on January 25, 2005.

I consider the "opt out" provided to be extremely significant. Only one United States Circuit Court of Appeals requires Electronic Filings to that court which is The United States Court of Appeals for the Eleventh Circuit.

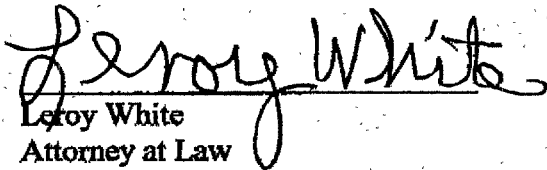
I have a copy of the action taken by the Judicial Conference of the United States in 2001 entitled Report on Privacy and Access Issues in electronic filings. The last action taken was on November 10, 2004.

Mr. John K. Rabiej, Chief, Rules Committee support office gave me an oral statement by telephone, yesterday, January 18, 2005 but I have received no written verification of his statement and I am willing to accept any written statement supporting it.

Because of the "opt out" clause provided the program appears to remain in the experimental stage and unless it is removed by action taken, it will remain in the experimental stage. The legal profession has changed drastically. Lawyers expend large sums advertising and promoting their law practice. Lawyers openly solicit class actions tort actions and medical malpractice clients.

Electronic filing may not be worth much to many lawyers who brag about large sums they recover in the millions of dollars with little work as enducement to potential clients. It is noted that two Law Review Publications were made in 2000 prior to the action of the Judicial Conference of the United States in 2001 and the E-Government Act of 2002. I am enclosing a copy of the law review article published in 2004.

Respectfully:

A handwritten signature in cursive script that reads "Leroy White". The signature is written in black ink and is positioned above the typed name and title.

Leroy White

Attorney at Law

LA BAR ROLL NO. 13427

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Article 1 of 14

 *Trial*, Jan 2004 v40 i1 p30(4)

Mark

The state of electronic court filing: courts are moving ahead to implement electronic filing systems - with or without input from the local bar. Knowing about what exists now can help lawyers shape systems yet to come. Susan Larson.

Full Text: COPYRIGHT 2004 Association of Trial Lawyers of America

Electronic filing is still in its infancy, but attorneys are witnessing its rapid spread throughout the nation's courts. There are no comprehensive state statistics yet, but on the federal side, over 40,000 users have filed their cases electronically with the 25 district and 60 bankruptcy courts that have implemented the Case Management/ Electronic Case Files system. As of September 1, the system held more than 10 million cases. (1)

In many ways the technology is still emerging, so in most jurisdictions attorney input can affect future implementations. While lawyers may need to adapt to the early systems that are in place, these will be upgraded and replaced with more advanced systems in the years to come. There is plenty of time for bar associations to get involved--if they are not already--and participate in shaping future electronic filing systems.

Electronic filing models

Unfortunately, many projects get under way without input from the local bar. Lawyers are often invited to the table late in the game--sometimes only when they are trained in how to use the new electronic filing system. Because courts have traditionally made their own decisions about technology and selected their case management systems independently, they may need a nudge to get lawyers on board from the inception of the project.

There are at least three different architectural models for developing an electronic court-filing system, and each affects lawyers differently.

Court-control model. Under this model, an outside vendor may create and install the system, but the vendor is "invisible" to the attorneys and does not interact with them. (2) The court itself implements and administers the system and deals directly with the lawyers as they file documents by logging on to a court Web server. This model is typically chosen by courts that wish to retain control over their systems and do not want vendors standing between them and the lawyers who file electronically.

Split-control model. In this arrangement, the court and one or more vendors share control over the electronic filing process. (3) The vendor's part is the front end--the attorney-side software, log on, authentication, and receipt of documents. The vendor and/or the system it uses are commonly called the electronic-filing service provider (EFSP). Attorneys establish accounts with one or more EFSPs and log in to the system directly to file court documents. This model allows vendors to compete for the court's front-end processing business, and if the court contracts with multiple vendors, lawyers can choose among them.

The EFSP controls the log-on process and authenticates filers. When it receives and accepts the filed documents, it relays the information and documents to the court's internal electronic-filing system, and all the filed documents are stored in the court's document management system. The EFSP also collects filing fees, as arranged with the court.

A variation on the split-control model uses one external EFSP, which maintains the official document repository. The documents themselves are not transferred to the court but are stored by the EFSE. When it receives a filing, it sends only case management information to the court. To view or obtain copies of the documents in the repository, parties and the public must log on to the EFSE not go to the court or its site.

Multi-source-control model. This model combines the other two and adds features. (4) It may involve one "invisible" vendor or multiple EFSPs, and it allows prosecutors and/or large law firms to install the EFSP component in their own offices, customizing it to integrate with both its internal case-management systems and the court's filing system automatically. That lets the law firm avoid assigning a staff person to log on to the EFSP Web server and select the documents to be filed.

'Tagging' data with XML

XML, an acronym for Extensible Markup Language, is a programming language that facilitates the electronic exchange of data. One of the heralded features of XML is its ability, to "tag" data

elements in an electronically filed court document so the court can recognize and process these elements without human intervention. Although it is not yet incorporated into many electronic filing systems, it will be in the future.

Today, when lawyers prepare paper court filings, they follow formatting standards that help readers identify and recognize important information, such as the state and county of filing, the file or docket number, the parties, and the document name. For a computer to identify these data elements without human intervention, the data must be tagged in some way.

That's where XML comes in. The language could be incorporated into law office software that would, for example, enable a firm to use a fill-in-the-blank form that would automatically tag the caption section of a document and other important information, such as the attorney's name, address, and license number; the narrative text would then be appended. The resulting document could be filed easily with the court. In the future, courts will probably identify specifically the information that must be tagged in electronically filed documents so they can recognize and merge the data into their case management and other systems without human intervention. This is the "ideal" to shoot for in electronic filing systems.

National standards

Over the past several years, without national standards for electronic filing, courts throughout the country have proceeded to implement different types of systems, each with its own filing requirements. Law firms that file in several courts may already feel the impact of these varying systems and approaches.

The future looks much brighter, however, because of efforts under way to develop national standards.

Two organizations that have taken the lead are the Conference of State Court Administrators (COSCA) and the National Association of Court Administrators (NACM). In December 2002, the Joint Technology Committee of COSCA adopted as a recommended standard the E-Filing Functional Requirements developed by the National Consortium for State Court Automation Standards. The committee then submitted the standards to the COSCA and NACM boards of directors, both of which approved them in March 2003. The E-Filing Functional Requirements contain policy standards, functional standards, and a conceptual model of the e-filing process.

(5)

The policy standards address:

- * the official court record
- * technical software requirements (Web browsers and XML)
- * identification of the sender
- * integrity, of transmitted and filed documents and data
- * court control over documents
- * service of filings on the opposing parties
- * when a document is considered filed
- * available hours for e-filing
- * remedies when e-filing fails
- * maintenance of scanning capability for paper-filed documents
- * elimination of unnecessary paper processes
- * electronic document archives.

The functional standards address:

- * document integrity
- * system security
- * signatures and authentication
- * case/document confidentiality
- * acceptance and rejection of filings
- * user and service registration
- * court payments
- * submission of all filings to the court
- * case-opening filings and subsequent case filings
- * service and notice
- * judicial consideration of drafts

- * clerk review
- * court-initiated filings
- * requests for case information and responses to such requests
- * integration with document- and case- management systems.

Another group that is active in standardization, and working with the Joint Technology Committee, is the OASIS LegalXML Electronic Court Filing Technology Committee. OASIS--a well-recognized national-standards organization that has been working to accelerate electronic business since 1993--has developed additional standards for electronic court filing. (6)

Public access

When court documents are filed electronically, should the public have the right to view them on the Internet? This question is so hotly debated that the Conference of Chief Justices and COSCA--with assistance from the State Justice Institute, the National Center for State Courts, and the Justice Management Institute--recently developed model guidelines on the issue. (7)

These guidelines are not a mandate, but they suggest a variety of policy positions on public access to state court records in both paper and electronic form. For example, they recommend that certain information and documents--such as Social Security numbers, financial account information, and medical records--be kept off the Internet for safety and privacy reasons.

The guidelines include extensive commentary, explaining much of the discussion and reasoning that produced them. The process included a public comment period and a public hearing. (8) The comments represented a range of views--from allowing full Internet access to prohibiting public access entirely.

As far back as 1994, state and federal courts have been debating the release of court information on the Internet, assembling committees and preparing reports--and sometimes backtracking on decisions soon after making them.

In August 2001, for example, a 14-judge Committee on Court Administration and Case Management of the Judicial Conference of the United States recommended a new policy on electronic access to federal court files. It stated that "public remote electronic access to documents in criminal cases should not be available at this time, with the understanding that this policy will be re-examined within two years of adoption by the Judicial Conference."

Then, in March 2002, the Judicial Conference approved an 11-court pilot program allowing remote public access to criminal case files. The reason given for the change was the need to reduce the burden on court staff fielding requests for copies of documents in high-profile cases, such as *United States v. Moussaoui*, then pending in a federal court in Virginia.

The majority of people involved in the pilot program praised the experience, and the Judicial Conference announced recently that it would begin drafting implementation guidance for the courts. (9) This brings the federal court policy full circle, as some of the 11 pilot courts had made criminal case files available to the public online before the August 2001 moratorium. (10)

Round-the-clock filings

Electronic filing is not without humor; in fact, the U.S. District Court for the Western District of Wisconsin recently weighed in on electronic filings that arrived at the court just after its midnight deadline.

In *Hyperphrase v. Microsoft*, the court allowed Microsoft to file a summary judgment motion at 12:04:27 a.m., with supporting documents trickling in as late as 1:11:15 a.m. The judge remarked in his one-page order,

I don't know this personally because I was home sleeping, but that's what the court's computer docketing program says, so I'll accept it as true.... Wounded though this court may be by Microsoft's 4-minute-and-27-second dereliction of duty, it will transcend the affront and forgive the tardiness. Indeed, to demonstrate the even-handedness of its magnanimity, the court will allow Hyperphrase on some future occasion in this case to e-file a motion 4 minutes and 30 seconds late, with supporting documents to follow up to 72 minutes later. (11)

Whether lawyers find electronic filing humorous or not, they can agree that it will have a significant impact on the practice of law and court procedure. As technology evolves, so will electronic filing systems. Lawyers can either accept whatever comes or get involved and contribute to the process.

Notes

(1.) News Release, Administrative Office of the U.S. Courts, Judicial Conference Seeks Restoration of Judges' Sentencing Authority (Sept. 23, 2003), available at www.uscourts.gov/Press_Releases/index.html (last visited Nov. 10, 2003).

(2.) Dallas Powell, Architectural Models, Business Decisions, and Interoperability issues (pts. 1& 2), 3 E-FILING REP. 15 (2003).

(3.) Id. at 16.

(4.) ID. at 4.

(5.) Electronic Filing Processes (Technical and Business Approaches), available at www.ncsconline.org/D_Tech/Standards, select "Electronic Filing Processes" (last visited Nov. 10, 2003).

(6.) See www.oasis-open.org (select "LegalXML Court Filing" from the left menu, then select "Documents" from the right menu) (last visited Dec. 1, 2003).

(7.) Martha Wade Steketee and Alan Carlson, Nat'l Ctr. for State Courts & Justice Mgmt. Inst., Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts (2002), available at www.courtaccess.org/modelpolicy (select "10/18/2002 CCJ/COSCA Guidelines Final Report" from the left menu) (last visited Dec. 5, 2003).

(8.) Id.

(9.) News Release, supra note 1.

(10.) For detailed information on public access issues go to www.courtaccess.org.

(11.) Hyperphase Tech. v. Microsoft Corp., 56 Fed R. Serv. 3d 467 (W.D Wis. 2003)

SUSAN LARSON is a partner at Boos, Grajczyk & Larson in Milbank, South Dakota. She focuses on information technology law and intellectual property.

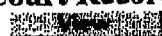
Subjects Court records - Access control
Electronic filing - Usage


Jurisdiction United States

Article A112906987

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Trial, Jan 1, 2004

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