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04-CV-184

February 14, 2005

The Honorable David F. Levi  
Committee on Rules of Practice and Procedure  
Rules Committee Support Office  
Administrative Office of the U.S. Courts  
4-140 Thurgood Marshall Federal Judiciary Building  
1 Columbus Circle, NE  
Washington, D. C. 20002

Re: Proposed Amendment to Rule 5(e), Civil Rules,  
Authorizing Court to Mandate Electronic Filing

Dear Judge Levi,

On behalf of the California Commission on Access to Justice, we wish to comment on the proposed amendment of Rule 5(e) of the Civil Rules.

The California Commission on Access to Justice was established in 1997 to find long-term solutions to the chronic lack of legal representation available for poor and moderate income Californians. Commissioners are appointed by the Governor, the Attorney General, the President Pro Tem of the Senate, the Speaker of the Assembly, the Judicial Council, the State Bar, and other civic, religious, and business groups.

The Federal Courts Committee of the Commission on Access to Justice was responsible for preparing this comment. The committee includes judges named by the Chief Judge of each federal district in California and representatives from the Ninth Circuit, the State Bar, and liaisons to the State's Judicial Council and its Administrative Office of the Courts.

**Possible Impact of the Proposed Amendment on Unrepresented Parties:**

The proposed amendment of Rule 5(e) of the Civil Rules provides that district courts are allowed to require litigants to use electronic filing.

We are aware that electronic filing has improved the efficiency of filings in federal courts, particularly in civil cases; has made case information more easily accessible; and has been helpful in other ways to attorneys and the courts. Electronic filing is an important way for the federal courts to use resources wisely, which is of paramount concern in these days of stringent budgets.

However, there is reason to use caution to avoid mandatory electronic filing becoming a new impediment to unrepresented parties' access to justice. While a substantial percentage of the population is now technologically proficient, and electronic filing for many individuals may make it easier for them to file documents, for lower income individuals with limited resources and lack of training in the use of computers, a requirement that they file federal court documents electronically may make it impossible, as a practical matter, for them to use the federal courts to assert and protect their rights or to defend against a suit brought against them. This is particularly true for persons with limited English proficiency, which could include a large percentage of the population in some areas of the country. For unrepresented litigants with limited English proficiency, successfully navigating an electronic filing system may be more challenging than the already difficult task of preparing and filing appropriate pleadings because of limited computer literacy, or the need to decipher the English explanation for the electronic filing requirements.

In recognizing recently that through some of its enactments and proposed actions it could unknowingly and unintentionally harm access for low and moderate income persons, the California Judicial Council adopted the following policy:

The ability of many of California's low- and moderate-income residents to effectively participate in the justice system is limited by economic barriers, including lack of access to legal assistance, inability to pay court fees, and lack of access to technology. Rules, forms, programs, and legislative proposals adopted by the council have the potential to impede access for low- and moderate-income persons....

When establishing or revising court rules, standards, or forms, or when considering positions on proposed legislation, the Judicial Council's advisory committees should expressly consider the impact of the proposed action on low- and moderate-income litigants and address that impact in the report to the council.

**The Honorable David F. Levi  
Proposed Amendment to Rule 5(e), Civil Rules,  
Authorizing Court to Mandate Electronic Filing**

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(The full policy statement is attached.)

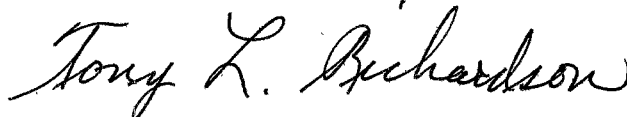
The Ninth Circuit Judicial Conference adopted a pro bono resolution in August 2000 intended to ensure that each district had a plan for increasing pro bono assistance for unrepresented litigants with meritorious claims. This resolution inherently acknowledges the challenges facing unrepresented parties, and encourages plans for reducing unintentional barriers that might limit their access to the judicial system. (The resolution is attached.)

**Recommendation:**

The Committee Note states that "Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general "good cause" exceptions." It is a valid approach for the Committee to depend, as the Note states, on "[e]xperience with these local practices [to] facilitate gradual convergence on uniform exceptions" over time. Nevertheless, based on the policy considerations noted above, and understanding the realities facing unrepresented litigants, we urge the Committee to make it clear, preferably in the language of amended Rule 5(e) or in a revision to the Committee Note, that an exception to electronic filing should be made for unrepresented parties. The rule should make clear that local courts have the option of setting up a system that allows unrepresented parties to use the electronic filing system if they prefer to do so.

Thank you for allowing us this opportunity to comment on the proposed amendment. We hope that it is helpful to your Committee. We would be pleased to provide any additional information that might be useful, or to respond to any other request from your Committee.

Respectfully submitted,



Tony L. Richardson, Chair  
California Commission on Access to Justice

**Attachments**

- Formal Resolution on Pro Bono for Federal Courts (adopted by the 9<sup>th</sup> Circuit Judicial Conference, August 2000, Sun Valley, Idaho)
- Access Policy for Low- and Moderate-Income Persons (Judicial Council of California, Administrative Office of the Courts, November 12, 2001)

# Exhibit A.

## Formal Resolution on Pro Bono for Federal Courts

### **Resolution**

(Adopted by the 9th Circuit Judicial Conference, August 2000, Sun Valley, Idaho)

WHEREAS an increasing number of civil cases are filed each year by parties appearing in propria persona in each district court in this Circuit; and

WHEREAS, in many of these cases the matters presented for adjudication by the court are complex, either legally or factually; and

WHEREAS, many of these cases involve meritorious claims; and

WHEREAS, proceeding without assistance of counsel may result either in an inability to establish a case, or inefficient and ineffective use of the court's time, as well as that of the litigants, in prosecuting the matter; and

WHEREAS, lawyers practicing within the districts recognize their ethical responsibility to ensure access to justice for litigants,

Therefore let it be

RESOLVED, that each district shall prepare and implement an action plan to provide for the representation of litigants in meritorious claims filed in propria persona, including establishing panels of pro bono lawyers; and let it be

FURTHER RESOLVED, that this Circuit requests the Federal Judicial Center to study the number of unrepresented litigants presently in federal court, and the nature of their claims; to provide guidance for the effective and efficient use of private volunteer counsel in meritorious matters.

# Exhibit B.

## Access Policy for Low- and Moderate-Income Persons

JUDICIAL COUNCIL OF CALIFORNIA  
ADMINISTRATIVE OFFICE OF THE COURTS

455 Golden Gate Avenue  
San Francisco, California 94102-3660

### Report

TO: Members of the Judicial Council

FROM: Center for Families, Children & the Courts  
Diane Nunn, Director, (415) 865-7689  
Bonnie Rose Hough, Senior Attorney, (415) 865-7668

DATE: November 12, 2001

SUBJECT: Approval of an Access Policy for Low- and Moderate-Income Persons  
(Action Required)

### Issue Statement

The ability of many of California's low- and moderate-income residents to effectively participate in the justice system is limited by economic barriers, including lack of access to legal assistance, inability to pay court fees, and lack of access to technology. Rules, forms, programs, and legislative proposals adopted by the council have the potential to impede access for low- and moderate-income persons.

The California Commission on Access to Justice is a broad-based blue-ribbon commission dedicated to improving access to justice for poor and moderate-income Californians both represented and unrepresented by counsel. The commission, which includes members appointed by the Chief Justice, has requested that the Judicial Council adopt the following policy. The Access and Fairness Advisory Committee also supports the policy. The policy seeks to identify and address existing barriers and to seek to prevent actions, rules, standards, and forms adopted by the Judicial Council from creating addi-

tional barriers to participation by low- and moderate-income litigants.

### **Recommendation**

AOC staff recommend that the Judicial Council approve a policy on access to the court system for low- and moderate-income persons as recommended by the California Commission on Access to Justice, as follows:

1. When establishing or revising court rules, standards, or forms, or when considering positions on proposed legislation, the Judicial Council's advisory committees should expressly consider the impact of the proposed action on low- and moderate-income litigants and address that impact in the report to the council. Staff should ensure that comments on these proposals will be sought from groups and entities representing or advocating for litigants who face economic and other barriers to the effective use of the judicial system. A list of such entities will be maintained and updated on an annual basis by the Administrative Office of the Courts.
2. Council advisory committees will begin a process to solicit comments from the legal services community to identify issues and concerns regarding existing rules, standards, and forms, with comment from the groups and entities included on the AOC list maintained as directed in the preceding paragraph, to determine the extent to which any of these create economic barriers to access. The advisory committees will determine the extent to which new rules, standards, or forms would affirmatively increase access. Thereafter, each committee will, as part of its annual plan, review new projects and proposals using the same standards.
3. The Center for Judicial Education and Research will attempt to ensure that economic access issues are included in the curriculum development process and integrated into substantive courses as appropriate in education for judges, court administrators, and staff.
4. Attorneys with knowledge of low- and moderate-income issues will be encouraged to apply for membership on council advisory committees and task forces.
5. AOC staff will provide a copy of this policy, and may provide technical assistance to the extent that resources allow, to local courts to help them develop and maintain their own procedures for evaluating local practices consistent with the goals and mechanisms set forth in paragraph 1.
6. To assist the implementation of this policy, the AOC will develop and disseminate to the council, its committees, and trial court presiding judges information concerning successful practices, rules, standards, and forms developed by courts to improve economic access.
7. The liaison between the council's Access and Fairness Advisory Committee and the California Commission on Access to Justice will be continued to coordinate work and information on appropriate issues of fairness and access.

### **Rationale for Recommendation**

The Judicial Council has adopted "Access, Fairness, and Diversity" as Goal I of its strategic plan. The second policy direction related to Goal I of the strategic plan provides that the council shall "Broaden and facilitate access to and understanding of the court process for all persons served by the courts, including unrepresented, low- or middle-income, disabled, and non-English-speaking individuals." This protocol is an important step that will enhance and complement the other actions already taken by the Judicial Council to improve access, including the work of the Access and Fairness Advisory Committee and the newly established Task Force on Self-Represented Litigants.

The problems addressed by this protocol are not limited to the population in poverty or to the self-represented. The barriers for moderate-income persons, who have some ability to bear the costs of representation and access, are also real. Lack of economic access can also disproportionately impact people of color, women, persons with disabilities, and language minorities. The California Commission on Access to Justice believes, and AOC staff concur, that consideration of the impact of actions upon low- and moderate-income persons will improve access for a broad range of Californians.

### **Alternative Actions Considered**

The council could choose not to approve this policy. However, the policy advanced by this protocol directly supports the goals set forth in the Judicial Council's strategic plan, which include improvement of access to justice for all persons.

The council could choose, alternatively, to adopt a rule of court requiring that all local courts adopt such a protocol in their consideration of local rules, forms, and procedures. However, staff recommends that the council, instead, provide information to the courts about its activities in this area and suggest best practices, rather than mandate these activities.

### **Comment From Interested Parties**

This proposal was not circulated to outside groups, as it is an internal policy for the Judicial Council.

### **Implementation Requirements and Costs**

Implementation of this protocol would involve staff and committees undertaking the following steps:

1. Analyze issues relevant to each committee or task force that may impact low- or moderate-income litigants, in order to develop a framework for periodic analysis of rules, standards and forms;
2. Amend the Judicial Council report format to require a description of the impact of the proposed action, rule, or form on economic access to justice and a list of entities

or individuals to whom the proposal was circulated for comment prior to submission;

3. Convene appropriate trainings about access issues for low- and moderate-income persons for AOC staff who draft rules and forms.

The recommendations contained in this report will have no direct fiscal effect on the courts; nevertheless, the courts will indirectly benefit from assistance provided to self-represented litigants.