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SUPREME COURT OF ARKANSAS

Opinion Delivered September 24, 2009

IN RE: PROPOSED
ADMINISTRATIVE ORDER
NUMBER 21 –
ELECTRONIC FILING

PER CURIAM

The Arkansas Supreme Court Committee on Automation and the Committee's Task Force on E-Filing has submitted to the court a report and proposed administrative order governing electronic filing in the state's courts. The court is greatly appreciative of Task Force's work and thanks its chair, David M. Fuqua, Esq., and each of its members: Rhonda Long-Whorton, Circuit Clerk, Faulkner County; Steve Sipes, Court Administrator, Pulaski County Circuit Clerk's Office; Hon. David McCormick, Circuit Judge, Fifteenth Judicial Circuit; Linda Shields, IT Manager, United States District Court Clerk's Office, Eastern District of Arkansas; Fever McElyea, District Clerk, Carlisle District Court; Hon. Paul Danielson, Arkansas Supreme Court; David G. Nixon, Esq.; Sue Jones, Hot Spring County Circuit Clerk; Hon. Ben Story, Circuit Judge, First Judicial Circuit; Hon. William McKimm, District Judge, Montgomery County District Court; Hon. Alice Lightle, District Judge, Little Rock District Court; and Hon. D. P. Marshall, Arkansas Court of Appeals.

The Task Force reviewed electronic filing procedures of other courts, including the

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United States District Courts in Arkansas, in formulating its recommendation. We are now at the point for the current work product to be published for general review and comment. Appended hereto are the Report and Recommendation of the E-Filing Task Force and Draft Administrative Order Number 21 – Electronic Filing. Together these documents explain the provisions and highlight some of the significant issues.

We publish proposed Administrative Order Number 21– Electronic Filing for comment, and the comment period shall expire November 1, 2009. Comments should be in writing and addressed as follows: Clerk, Arkansas Supreme Court, Attention ADMINISTRATIVE ORDER NUMBER 21 - ELECTRONIC FILING, Justice Building, 625 Marshall Street, Little Rock, AR 72201.

REPORT AND RECOMMENDATION OF THE E-FILING TASK FORCE

The following persons constituted the E-Filing Task Force, and the Task Force members jointly submit this report and make their recommendation for further action to be taken on their proposed Administrative Order Number 21: Rhonda Long-Whorton, Circuit Clerk, Faulkner County; Steve Sipes, Court Administrator, Pulaski County Circuit Clerk's Office; Hon. David McCormick, Circuit Judge, Fifteenth Judicial Circuit; Linda Shields, IT Manager, United States District Court Clerk's Office, Eastern District of Arkansas; Fever McElyea, District Clerk, Carlisle District Court; Hon. Paul Danielson, Arkansas Supreme Court; David G. Nixon; Sue Jones, Hot Spring County; Hon. Ben Story, Circuit Judge, First Judicial Circuit; Hon. William McKimm, District Judge, Montgomery County District Court; Hon. Alice Lightle, District Judge, Little Rock District Court; Hon. D. P. Marshall, Arkansas Court of Appeals; David M. Fuqua, Chairman.

1. Attached hereto as Exhibit "A" is proposed Administrative Order Number 21. The Task Force believes that the implementation of E-Filing should be accomplished by an Administrative Order rather than by rule.

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2. The Task Force was divided on the question of whether cases should be initiated through the E-Filing system or by conventional filing (Section 3). The E-Filing System, as it is presently conceived, will be able to accommodate electronic case initiation. The Order as presently written requires that case initiating documents be filed conventionally. It was the consensus of the Task Force that this issue be considered further following public comment on the proposed Order so that ideas, concerns, and issues from interested parties can be ascertained and considered. The Order as presently written, Section 3(c), is essentially identical to the rule followed by the United States District Court, Eastern District of Arkansas.

3. Preservation and retention of original documents (Section 5) was another issue that the Task Force debated at length. The concerns centered on a clerk's obligation to retain conventionally filed documents after they are converted to electronic form and placed into the electronic system and the impact that the E-Filing system might have on a clerk's statutory duty to preserve certain types of original documents, such as wills. The sense of the Task Force is that most documents tendered for conventional filing will be and should be destroyed after the clerk has converted the document to electronic form and placed it into the system. In the end, the Task Force chose to leave the issue of document retention within the discretion of

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the clerk.

4. The question of E-Filing system failure (Section 12) was also debated at length by the Task Force. Everyone was in agreement that the Order must provide some protection to lawyers who are prevented from filing by a failure in the system itself. After several revisions to the Order, the Task Force adopted a provision that is essentially identical to the rule adopted by the United States District Court, Eastern District of Arkansas. Section 12 of the Order is closely aligned with Rule 6 of the Arkansas Rules of Civil Procedure which provides that computation of time for filing does not include a day when the clerk's office is closed. Technology problems experienced by a system user other than an E-Filing system failure are not considered excusable filing errors, and the user must resort to conventional filing if necessary to meet a filing deadline. Finally, if a system user is prevented from filing due to a true system failure, that user must certify to the court that the user did attempt to file electronically and was prevented from doing so by the system. If the E-Filing system is in fact not working, the system administrator will be able to verify this fact to the court, if necessary.

5. The Task Force requests that proposed Administrative Order Number 21 be referred as quickly as possible to the Committee on Civil Practice for review and

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comment and that it then be published by the Court for public comment before adoption.

6. The Task Force will remain available to undertake any further work at the pleasure of the Court.

7. The Task Force expresses its appreciation to the Administrative Office of the Courts for its technical advice and assistance on completing the work.

8. The Administrative Office of the Courts should be authorized to prepare and publish an Administrative Policies & Procedures Manual for Electronic Filing.

DRAFT [AUGUST 28, 2009]

ADMINISTRATIVE ORDER NUMBER 21 — Electronic Filing

A. General Provisions

Section 1. Purpose, Scope, and Application.

(a) *Purpose.* This order establishes statewide policies and procedures governing the electronic filing process in all the courts in Arkansas.

(b) *Scope.* Electronic filing is a voluntary means of fulfilling the filing requirements of the courts of this state, but any court or clerk that elects to adopt electronic filing pursuant to this order must use the electronic filing system provided by the Administrative Offices of the Court (“AOC”). Once an election is made to use the electronic filing system provided by the AOC, then electronic filing shall be the exclusive means of filing in all cases, except as may otherwise be provided in this order.

(c) *Application.* This order shall be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice by the court.

Section 2. Definitions.

(a) *Case management system.* A “case management system” is an electronic database maintained by the court or clerk to track information used to manage the court’s caseload, such as case numbers, party names, attorneys for parties, titles of all documents filed in a case, and all scheduled events in a case.

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(b) *Conventional document*. A “conventional document” is a paper document that may be filed or submitted to the clerk for filing in paper form or a paper document that must be converted by a registered user or clerk to an electronic document.

(c) *Document management system*. A “document management system” is an electronic database containing documents stored in electronic form and structured to allow access to those documents using index fields such as case number, filing date, or type of document.

(d) *Electronic case*. An “electronic case” is one in which the case documents are electronically maintained in a document management system.

(e) *Electronic document*. An “electronic document” is an electronic version of a conventional document and has the same legal effect.

(f) *Electronic filing*. “Electronic filing” is the electronic transmission to or from a clerk of an electronic document by uploading from the registered user’s (or his designated agent’s) computer to the electronic filing system. It does not include submission via e-mail, fax, floppy disks, or other electronic means.

(g) *Electronic filing system*. “Electronic filing system” refers to the system established pursuant to this order that receives and stores electronic documents.

(h) *Electronic service*. “Electronic service” is the electronic transmission of an electronic document, or of notice of its filing, to a party, attorney, or representative under these rules. Electronic service may not be used to accomplish service of process or a subpoena to gain jurisdiction over persons or property.

(i) *Public access terminal*. A “public access terminal” is a computer terminal provided by a clerk for viewing publicly accessible electronic documents. Public access terminals must be available during the clerk’s normal business hours.

(j) *Registered user*. A “registered user” is an individual who has been issued a user ID and password to access the electronic filing system.

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Section 3. Implementation of Electronic Filing.

(a) *Establishment of electronic filing system.* The AOC is authorized to develop or contract with a vendor for the development of electronic filing systems for the district, circuit and appellate courts.

1. In the district courts, the District Judge(s) shall decide whether to adopt the electronic filing system.

2. In the circuit courts, the Circuit Clerk, and, if applicable, the Ex Officio Circuit Clerk for the Probate Division, together with input from the Administrative Judge of the Court shall decide whether to adopt electronic filing system.

3. In the appellate courts, the Supreme Court shall decide whether to adopt the electronic filing system.

(b) *Mandatory electronic filing processes.* Once implemented, use of the electronic filing system in all cases or a particular type of case is mandatory only if: (1) the court provides a mechanism for waiving electronic fees in appropriate circumstances; (2) the court allows for the exceptions needed to ensure access to justice for indigent, disabled, self-represented litigants, and other litigants who have special needs; (3) the court provides adequate advanced notice of the mandatory participation requirement; and (4) the court provides training for filers in the use of the process.

(c) *Paper filing exceptions.* (1) All case initiating documents shall be filed conventionally, followed by electronic filing of such documents by the clerk not later than 48 hours after the conventional filing.

(2) Conventional paper filings may be permitted by the clerk for specific documents or classes of documents, such as documents not available in electronic form, documents that are too lengthy to electronically image, and documents filed under seal.

(d) *Quality control procedures.* The clerk must institute a combination of automated and human quality control procedures sufficient to ensure the accuracy and reliability of their electronic records system.

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(e) *Archiving electronic documents.* The clerk must maintain forward migration processes to guarantee future access to electronic documents.

(f) *Effect on Rules of Evidence.* This order does not affect any rule of evidence regarding the authentication of a document.

B. Filing and Service of Documents

Section 4. Official Court Record.

(a) *Legal effect of electronic documents.* An electronic document is the official court record and has the same force and effect as a document filed conventionally.

(b) *Form of record.* To the maximum extent feasible, the clerk must ensure that all documents filed in electronic cases are maintained in electronic form.

(c) Case-initiating documents and other paper documents may be scanned by the clerk and made part of the electronic record. Once the conventional document has been scanned, the electronic document is the official court record. Once scanned, with the exception of conventional documents identified in Section 5, the conventional document may be destroyed.

(d) *Court documents.* The court may electronically file or issue any notice, order, judgment, or other document prepared by the court.

Section 5. Preservation of Certain Conventional Documents.

(a) *Destruction of original documents.* After conversion to an electronic document, a clerk may return or destroy conventional documents.

(b) *Statutory requirements.* This order does not alter a clerk's statutory obligation to retain conventional documents.

Section 6. Time of Filing, Confirmation, Existing Practice, and File-Mark.

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(a) *Filed upon transmission.* An electronic document shall be considered filed with the clerk when the transmission to the electronic filing system is completed. Upon receipt of the electronic document, the electronic filing system shall automatically confirm to the registered user that the transmission of the electronic document was completed and the date and time of the document's receipt by the electronic filing system. Absent confirmation of receipt, there is no presumption that the electronic filing system received the electronic document. Absent confirmation, the electronic filer is responsible for verifying that the clerk received and filed the document transmitted.

(b) *Existing practice maintained.* Electronic filing of documents does not change the rules and practice for the acceptance or rejection of documents presented to a clerk for filing.

(c) *File Mark.* The electronic filing system shall affix an electronic file mark that shall have the same force and effect as a manually affixed stamp of the clerk.

(d) *Time of filing.* Any electronic document received by the electronic filing system before midnight shall be deemed filed on that date.

Section 7. Electronic Service.

(a) *Consent to electronic service.* Registered users of the electronic filing system consent to electronic service of electronic documents as the only means deemed to constitute service and such notice of filing is valid and effective service of the document on the registered users and shall have the same legal effect as service by conventional means.

(b) *Applicability.* Complaints, petitions, subpoenas, or other documents that must be served with a summons may not be served electronically.

(c) *Service on registered users.* (1) The electronic filing system shall provide notice to all registered users associated with the case that an electronic document has been filed and is available on the document management system. The notice shall be

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sent electronically to the addresses furnished by the registered users associated with the case.

(2) When the clerk accepts a conventional document for filing pursuant to Section 3(c) and converts it to an electronic document that is stored in the document management system, then the electronic filing system shall provide notice of this conventional filing to the registered users associated with the case.

(d) *Service on nonregistered recipients.* The registered user filing an electronic document shall serve nonregistered parties as otherwise provided by law or rule.

(e) *Time of service; time to respond.* Electronic service is complete at the time of transmission of the notice required by subsection 7(b). For the purpose of computing time to respond to documents served via electronic service, any document served on a day or at a time when the court is not open for business shall be deemed served at the time of the next opening of the clerk for business.

Section 8. Signatures

(a) *Deemed signed.* Every electronic document shall be deemed to be signed by the registered user who files it. Each electronic document must bear the indentifying information of the registered user as is required by rule or law. Where a statute or court rule requires a signature at a particular location on a form or pleading, the person's typewritten name shall be inserted. In the alternative, a facsimile, typographical, or digital signature may be used.

(b) *Documents under penalty of perjury or requiring signature of notary public.* Documents required by law to include a signature under penalty of perjury, or the signature of a notary public, may be submitted electronically, provided that the declarant or notary public has signed a conventional form of the document. The conventional document bearing the original signature(s) must be scanned and electronically submitted for filing in a format that accurately reproduces the original signatures and contents of the document.

(c) *Documents requiring signatures of opposing parties.*

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(1) When a document to be filed electronically requires the signatures of opposing parties, such as a stipulation, the party filing the document must first obtain the signatures of all parties on a conventional document.

(2) The printed document bearing the original signatures must be scanned and electronically submitted for filing in a format that accurately reproduces the original signatures and contents of the document.

(d) *Signature of judicial officer or clerk.* Electronically filed court documents requiring a court official's signature may be signed electronically. A court using electronic signatures on court documents must adopt policies and procedures to safeguard such signatures and comply with any AOC guidelines for electronic signatures that may be adopted.

Section 9. Format of documents.

An electronic document shall be formatted in accordance with the applicable rules governing formatting of conventional documents, including page limits. Electronic documents shall be self-contained and shall not contain hyperlinks to external papers or websites. Hyperlinks to other electronic documents filed in the case are permitted.

Section 10. Registration requirements.

(a) *Registration mandatory.* All persons wanting access to the electronic filing system or document management system must become a registered user in order to access the system. The following persons shall be permitted to become registered users: (1) licensed Arkansas attorneys; (2) non-Arkansas attorneys permitted to practice pro hac vice in Arkansas; and (3) litigants appearing pro se in a particular case in which the court has mandated electronic filing. A clerk shall permit persons who are not registered users who are not authorized to access the document management system to access electronically filed documents via a public access terminal located in the courthouse, subject to the restriction on disclosure of confidential documents provided in Section 11 of this order.

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(b) *Registration requirements.* The AOC shall establish registration requirements for all authorized users and must limit the registration of users to individuals, not law firms, agencies, corporations, or other groups. The AOC must assign to the registered user a confidential, secure log-in sequence. The log-in sequence must be used only by the registered user to whom it is assigned and by agents and employees as the registered user may authorize. No registered user shall knowingly permit his or her log-in sequence to be used by anyone other than his or her authorized agents and employees.

(c) *Electronic mail address required.* Registered users shall furnish at least one electronic address that the electronic filing system will use for electronic service and other notices. It is the registered user's responsibility to ensure that the electronic filing system has the correct electronic mail address.

(d) *Misuse of electronic systems.* Any registered user who attempts to harm the electronic filing system or document management system in any manner, attempts to alter electronic documents or information stored on the systems, or attempts any unauthorized use of the systems, has committed misuse of the system. Misuse of the electronic filing system or document management system may result in loss of a user's registration and subject the registered user to any other penalty provided by law or rule.

Section 11. Access to Electronic Documents; Confidential Information.

(a) *Confidential information not to be filed.* All confidential information identified in Administrative Order Number 19 (Section VII – A) shall be redacted from an electronic document before it is filed using the electronic filing system.

(b) *Exceptions; filing under seal.* Where a registered user reasonably believes that confidential information is necessary and relevant to the case and must be included in an electronic document, then the registered user shall file the unredacted document under seal and shall also file a redacted version of the document pursuant to Administrative Order 19 and related implementing rules. An electronic document or conventional document containing confidential information shall not be a public document.

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(c) *System requirements.* The electronic filing system and the document management system shall segregate unredacted documents containing confidential information and filed pursuant to Section 11(b). Unredacted versions of documents shall be available only to registered users associated on the electronic filing system with the case in which such documents are filed. The electronic filing system shall give notice to registered users associated with a case that an unredacted document containing confidential information has been filed in the case.

Section 12. Electronic Filing System Errors.

The electronic filing system is deemed subject to a technical failure on a given day if the site is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 8:00 a.m. that day. Anticipated system outages must be communicated to registered users by electronic mail within a reasonable time prior to the outage and must be posted on the web site, if possible.

1. Problems on the user's end, such as phone line problems, problems with the user's Internet Service Provider (ISP), or hardware or software problems, shall not constitute a technical failure under these procedures nor excuse an untimely filing. A user who cannot file a document electronically because of a problem on the user's end must file the document conventionally.

2. In the event of a technical failure of the electronic filing system, documents may be submitted to the Clerk's office conventionally.

3. A filing party whose filing is made untimely as the result of a technical failure of the electronic filing system may seek appropriate relief from the court. Sample language is attached to this order as Form A.

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Form A

IN THE _____ COURT OF _____ COUNTY, ARKANSAS

_____Plaintiff(s)

vs. Case No. _____

_____Defendant(s)

**DECLARATION THAT PARTY WAS UNABLE
TO FILE IN A TIMELY MANNER**

Please take notice that [NAME OF REGISTERED USER AND PARTY REPRESENTED] was unable to file [NAME OF DOCUMENT] in a timely manner due to technical difficulties. The deadline for filing the [NAME OF DOCUMENT] was [DATE]. The reason(s) that I was unable to file the [NAME OF DOCUMENT] in a timely manner and the good faith efforts I made prior to the filing deadline to both file in a timely manner and to inform the court and the other parties that I could not do so are as follows:

[Statement of reasons and good faith efforts to file and to inform]

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

/s/ _____

Name of Registered User

Address

City, State, Zip Code

Phone:

Email:

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