

Rule Revision Proposals Published for Comment

The Advisory Committee on Rules of Court of the Judicial Council of Virginia has approved the draft rule revisions below for publication and receipt of comments from the public, the bench and the Bar. They relate to the developing option for "electronic filing" of cases in the Virginia courts.

Statutory changes were made by the General Assembly in the last two years authorizing the adoption and phase-in of procedures for electronic filing of cases in our courts. A large task force with members from many constituencies in Virginia has been at work for more than two years on the mechanisms for electronic filing to make them simple, reliable and clear.

As part of the developing efforts to implement "e-filing," the Advisory Committee was asked to review Rules 1:17 and 3:3, which have been part of the Rules of Court in Virginia for many years, to consider amendments needed in order to ready the Rules for the expected advent of e-filing as Virginia court technology moves forward.

The proposals below have been reviewed by the Advisory Committee, which is soliciting comments before final approval and recommendation to the Judicial Council and the Supreme Court for adoption. These amendments are not currently in effect, and have not been formally recommended to, or reviewed by, the Supreme Court of Virginia.

Comments on these proposed draft rules should be sent by March 30, 2012 to:

Advisory Committee on Rules of Court
c/o Steven Dalle Mura
Office of the Executive Secretary
Supreme Court of Virginia
100 North Ninth St.
Richmond, VA 23219

OR via email with the subject line: "comment on E-Filing Rules" to:

proposedrules@courts.state.va.us

The proposed amendments below include the following changes to portions of the existing Rules:

- Rule 1:17(c)(5) will provide that *remote* access (from your office, for example) to court records in an electronically filed case will be available to members of the Virginia State Bar and their authorized agents. Any person will be able to access the records from terminals at the courthouses, but until the security procedures are refined for electronic filing, the suggestion has been made that only Bar members and their direct agents (secretaries, paralegals) be authorized as remote access users. It is expected that remote access will be made available more broadly as the system safety and security measures develop.
- E-filing will be available 24 hours a day, 7 days a week. A document can be filed up to 11:59 p.m. on any day. Of course, filing on weekends will not be effective until the next day the courts are open: the next day that is not a Saturday, Sunday, or court holiday.

Thus a document filed on a Saturday, will be accepted when tendered, and deemed filed effective on the following Monday. Rule 1:17(d)(5)(i) makes this clear.

- Particularly during the early period of operation of an e-filing system, it is important to make provision for mistakes or errors that occur in filing papers. Subcommittees have been working for more than a year to assure that the "user interface" screens will be clear and easily navigated. The Rule 1:17(d)(7) changes proposed below divide perceived errors or mistakes in a filing into two categories. Filing fee problems can be dealt with by the Clerk of Court, as at present, but – if the correct fees cannot be obtained – the Clerk will *not* immediately strike a filing, but will instead provide notice to the parties that the fee defect exists and that the paper will be stricken if the fee problem is not corrected within five business days. Other defects, such as execution problems, will be brought to the parties' attention with a notice that the defect will be reviewed by the judge at a specified date and time at least 10 business days later, for appropriate action. If any electronically filed paper is eventually "stricken," a copy of the electronic filing will be retained in the court records to facilitate any further review or motion practice.

- Rule 1:17(e) deals with electronic service of papers *after* a case is filed and has been designated to proceed as an "electronically filed case." For those proceedings, the Rule amendments provide that service of motions and other papers (not the initial service of process) shall be made electronically, as provided today under Rule 1:12. A similar amendment is made in the relevant portion of Rule 3:3.

Draft Amendments to the Rules of Court re Electronic Filing of Papers Published for Comment – October 2011

Rule 1:17. Electronic Filing and Service.

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(c) *System Operational Standards.* In addition to the obligations and procedures set forth in subdivision (d) of this Rule, electronic filing systems under this Rule shall meet these requirements:

- (1) Electronic documents must be stored without loss of content or material alteration of appearance.
- (2) Files capable of carrying viruses into court computers must be scanned for viruses prior to being written to disk in the clerk's office.
- (3) The electronic filing system must be capable of securing the document upon receipt so that it is protected from alteration.
- (4) The electronic filing system must be capable of establishing the identity of a sender of a document by means of a registered user identity and password, or by digitally encrypted electronic signatures, or by any other means reasonably calculated to ensure identification to a high degree of certainty.
- (5) Remote electronic access to documents submitted in an electronically filed case and stored electronically shall be limited to judges, court personnel, any persons assisting such persons in the administration of the electronic filing system, and to active members of the Virginia State Bar and their authorized agents ~~counsel of record, including parties appearing pro se~~, who have complied with the registration requirements to use the electronic filing system....

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(d) *Electronic Service and Filing Practice and Procedures.*

(1) In an Electronically Filed Case, all pleadings, motions, notices and other material filed with the court shall be in the form of Electronic Documents except where otherwise expressly provided by statute or the Rules of Court, or where the court orders otherwise in an individual case for good cause shown.

(2) Each attorney admitted to practice in the Commonwealth shall be entitled to a registered User ID and password issued by the clerk, or access using any comparable identification system approved by the Supreme Court, for the electronic filing and retrieval of documents.

(3) The clerk shall provide a means, in the courthouse or other designated location, for the parties, counsel and the public to review and copy electronic records from the electronic file during normal business hours.

(4) The format for electronically filed material shall be the Portable Document Format (PDF). Notice will be provided if any other format is approved.

(5) (i) Subject to the provisions of subsections (d)(6) and (7) of this Rule, an electronic document shall be filed by following the procedures of the applicable E-Filing Portal, and shall be deemed filed on the date that it is received in the E-Filing Portal. If the electronic document is received in the E-Filing Portal on a Saturday, Sunday, legal holiday, or any day or part of a day on which the clerk's office is closed as authorized by an act of the General Assembly, then such document shall be deemed filed on the next day that is not a Saturday, Sunday, legal holiday, or day or part of a day on which the clerk's office is closed. Filings will be accepted ~~during normal business hours and~~ until 11:59:59 p.m. on any day ~~the clerk's office is open.~~

(ii) Upon electronic filing of a document, an electronic confirmation shall be transmitted to the filing party indicating that the document has been successfully filed through the E-Filing Portal. In addition, the court to which the document is directed shall promptly transmit an electronic acknowledgement of its receipt of the electronically filed document, specifying the identity of the receiving court, the date the document was received by the court, and a court-assigned document reference or docketing number.

(6) A person who files a document electronically shall have the same responsibility as a person filing a document in paper form to ensure that the document is properly filed, complete, and readable. However,

(i) if technical problems at the E-Filing Portal result in a failure to timely file the electronic document, counsel shall provide to the clerk of the court on the next business day all documentation which exists demonstrating the attempt to file the document through the E-Filing Portal, any delivery failure notice received in response to the attempt, and a copy of the document, and

(ii) in the event that the E-Filing Portal was not available due to technical problems during the last filing hours of a business day, the office of the clerk of the court to which the document is directed shall be deemed to have been closed on that day solely with respect to that attempted filing and the provisions of Virginia Code § 1-210(B) and (C) shall apply to that particular attempted filing for purposes of computing the last day for performing any act in a judicial proceeding or the filing of any legal action.

(7) Clerk's notice of defects in a filing; striking documents; court orders.

(i) **Incorrect or missing fee.** If the clerk of court determines that an electronically filed document is defective because of an incorrect or missing filing fee,

(A) if possible, the clerk shall immediately process payment of the correct fee through the credit or payment account authorized by the filing party;

(B) if processing by the clerk of the proper payment through a credit or payment account authorized by the filing party is not feasible, notice shall be sent by the clerk electronically to the filing party, and all other parties who have appeared in the case, that – at a specified date and time at least five business days after transmission of such notice – the document will be stricken from the court records by the clerk.

(ii) **Defects other than incorrect or missing fees.** If the clerk of court determines that an electronically filed document is defective because of a missing signature or required verification, or any other defect considered grounds for rejection or striking of a filed document, other than those relating to fees as provided in subsections (d)(7)(i)(A) and (B) above, the clerk shall prepare and transmit electronically to all parties who have appeared in the case a notice that the defect will be presented to a judge of the court – at a specified date and time at least 10 calendar days after the transmission of such notice – for consideration of an order striking the document from the court records or directing other action.

(iii) A copy of all notices transmitted by the clerk under this subpart (d)(7) shall be retained in the permanent electronic case file maintained by the court. The document made subject to a notice under subparts (d)(7)(i) or (ii) remains validly filed during the period afforded for curing such defects and until it is stricken from the court's docket records. A copy of any document stricken under the provisions of this subsection (d)(7) shall be retained by the clerk with a designation clearly reflecting that it was stricken and the date of such striking, as a record of its content and disposition.

(8) The clerk's office must accommodate the submission of non-electronic documents in an Electronically Filed Case if filing in electronic form cannot, as a practical matter, be achieved. Such documents shall be imaged to facilitate the creation of a single electronic case file to the extent reasonably possible. An oversized document that is capable of being imaged shall be retained in the form submitted.

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(e) **Application of, and Compliance with, Other Rules.** In an Electronically Filed Case:

(1) Unless otherwise agreed by all parties, or ordered by the court in an individual case for good cause shown, all documents required to be served – after the initial service of process – ~~may shall~~ be served by electronic transmission, ~~or by delivering, dispatching by commercial delivery service, transmitting by facsimile, or mailing, a copy to each counsel of record on or before the day of filing.~~ Such service shall be effective as provided in Rule 1:12....

Rule 3:3. Filing of Pleadings; Return of Certain Writs.

(a) *Filing Generally.* The clerk shall receive and file all pleadings when tendered, without order of the court. The clerk shall note and attest the date of filing thereon. In an Electronically Filed Case, the procedures of Rule 1:17 shall be applicable to the notation by the clerk of the date of filing. Any controversy over whether a party who has filed a pleading has a right to file it shall be decided by the court.

(b) *Electronic Filing.* In any circuit court which has established an electronic filing system pursuant to Rule 1:17:

(1) Any civil proceeding may be designated as an Electronically Filed Case upon consent of all parties in the case.

(2) Except where service and/or filing of an original paper document is expressly required by these rules, all pleadings, motions, notices and other filings in an Electronically Filed Case shall be formatted, served and filed electronically as specified in the requirements and procedures of Rule 1:17; provided, however, that when any document listed below is filed in the case, the filing party shall notify the clerk of court that the original document must be retained.

(i) Any pleading or affidavit required by statute or rule to be sworn, verified or certified as provided in Rule 1:17(d)(5).

(ii) Any last will and testament or other testamentary document, whether or not it is holographic.

(iii) Any contract or deed.

(iv) Any prenuptial agreement or written settlement agreement, including any property settlement agreement.

(v) Any check or other negotiable instrument.

(vi) Any handwritten statement, waiver, or consent by a defendant or witness in a criminal proceeding.

(vii) Any form signed by a defendant in a criminal proceeding, including any typed statements or a guilty plea form.

(viii) Any document that cannot be converted into an electronic document in such a way as to produce a clear and readable image.

(c) *Return of writs.* No writ shall be returnable more than 90 days after its date unless a longer period is provided by statute.