A legal note from Marshal Willick about further developments regarding e-filing and video hearing records

On July 27, 2010, the Clark County Chief Judge announced a prospective reduction in e-filing fees, from $6 to $3.50. While that is "less bad," it is not good news, and basically constitutes notice that the courts of Clark County have elected to directly tax the attorneys working in this County for their operating budget – without the request or consent of those taxed, and apparently in violation of the applicable rules. In the meantime, however, some sign of impending improvement was made in the area of transmission of video records, which should be acknowledged, and there is prospective change regarding the much-criticized "original document retention" rule (EDCR 8.08).

I. RECAP OF THE PROBLEM

A prior legal note (No. 21; posted at http://www.willicklawgroup.com/newsletters) protested that, from the point of view of lawyers and litigants, both the filing of documents and obtaining a video record of a hearing had become slower, more difficult, and much more expensive than those tasks had been previously. It posited that such developments could not be considered "progress" in any rational sense of the word. The many responses received were in unanimous agreement. Since then, there have been developments on both fronts which merit further discussion.

II. E-FILING

A. COSTS – A BIT OF MATH

According to the July 27 news release, "The court's long standing agreement with its e-filing technology partner, Tyler Technologies E-file and Serve (formerly Wiznet), requires a service fee for each filing and a subscription fee for the filing application."

It also specified that there had been 309,985 submissions in the five months since the system went mandatory (netting nearly two million dollars), and that the court expected a million submissions in one year.

The news release touted electronic filing as a means to "manage increasing workloads with reduced staff, free up space for additional judges, and eliminate the growing concern for future storage." All of that is fine, and an appropriate matter for court administration to do on its own without consultation with the Bar.

But there is way more than that going on here. The County is not just reducing its costs, but has constructed a set of rules and procedures by which it is involuntarily extracting an extra $3.5 Million (new fees) to $6 Million (old fees) from the Bar per year. And that is ***NOT*** "fine," or "appropriate."

The difference between improving efficiencies to reduce costs, on one hand, and compelling

payment to the County of some extra millions of dollars from private counsel, on the other, should be pretty obvious. It puts lawyers in the position of either absorbing those costs, or passing them along to their clients.

I do not envy anyone trying to handle government services in a time of declining tax revenues. On the other hand, judges' salaries were recently increased – a ***lot*** – and have not been reduced a penny during the recession, while incomes across the private Bar have been decimated, leading to belt-tightening everywhere, and even the complete collapse of entire firms across Clark County. So I do not see placing the cost of running the courts on the backs of the lawyers as appropriate, and much less so given the unannounced way it was imposed on the Bar. This is pretty basic "taxation without representation" territory.

At least three issues are presented.

1. Reno, Vegas, and Basic Fairness

First, while the filing fee variance has been reduced, filing papers still costs orders of magnitude more in Clark County than in Reno. Why is it possible for Washoe County to manage its e-filing system at a cost of $100 per ***year*** for unlimited filing of documents, while it takes (now) "just" three and a half dollars ***per*** document – ***plus*** a subscription fee – to perform that function here? For a lawyer filing 100 documents a month, the cost has been reduced from $600 per month to "just" $350 – but that is still $4,200 per year, per lawyer.

It certainly appears that the cost of e-filing in Clark County is in violation of rules passed by the Nevada Supreme Court in 2006. The "Nevada Electronic Filing Rules," with which all Nevada court systems are required to comply, state in part:

> 5(i). Surcharges for electronic filing. Mandatory electronic filing processes should be publicly funded to eliminate the need to impose surcharges for filing of or access to electronic documents. A court may, however, impose such surcharges or use a private vendor that imposes surcharges when sufficient public funding is not available. ***Such surcharges must be limited to recouping the marginal costs of supporting electronic filing processes if collected by the court or to a reasonable level if imposed by a private vendor***. . . .

If in fact the Court is using the e-filing process as a cash-cow to fund other court operations, it would appear to be in violation of the Supreme Court's rules for such systems. And it is hard to conclude that such is not ***exactly*** what is happening. Or is someone going to pretend to be able to rationalize how "the marginal costs of supporting electronic filing" costs three and a half million dollars per year, in addition to the two million dollars we have already paid?

Objectively, how could it possibly cost 42 times more per year to have access to e-filing in Clark County than it does in Washoe? Did Clark County just sign a really, ***really*** lousy deal with Tyler? If so, can't that contract be broken, or renegotiated? And whose head should roll for entering into it in the first place?

Doesn't anyone in Clark County court administration see an equal protection/equal access to justice problem here? If they don't, they should.

2. The Bench Versus the Bar?

Second, just how much of the cost of running the courts is going to be imposed on the Bar, as opposed to general tax revenues? Filing fees have increased again, and again, and are pretty much at "obscene" at this point. And now every lawyer in every case is effectively forced to pay a toll each day to perform the basic job function of filing papers.

Is this going to continue, with the costs of court administration increasingly imposed on the Bar? Because, if so, then the lawyers should have a much, ***much*** bigger say as to how and on what our money is being spent in the courthouse. Put another way, if the court does not want the Bar starting to demand cost-cutting and salary oversight, it better stop looking at lawyers as its revenue source.

A proof-reader of these notes has suggested that the above might be perceived as "a threat." It isn't. It is simply a pretty straight-forward projection of consequences to be expected if the courts decide to fund themselves not from general tax revenues, but by emptying the pockets of those seeking access to the legal system.

3. The Meaning of "Progress"

Third, as noted previously, a system which has been made slower, more aggravating, and more expensive to utilize is ***not*** "improved" in any sense outside of Orwellian double-speak, regardless of the easing of burdens on those ***inside*** the court bureaucracy. Is the announced "reduction" in e-filing fees – to "only" $3.50 per document more than it used to cost – going to be the only response to the call to make the court's transformation of processes at ***least*** cost-neutral to the lawyers and litigants using the Courts?

If not, then it is not good enough. Not by a long shot. Frankly, this is no different than gas prices jumping from two dollars per gallon to four, and then the oil companies asking for thanks when the price finally came down to three. Slightly less massive of a cost increase is no cause for celebration, and making a court function cost ***something*** that used to cost ***nothing*** is ***not*** an improvement, from the point of view of the user.

The lawyers, and the general public, have a right to demand that improved efficiencies and technological advances in court processes make ***their*** lives cheaper, faster, and easier. Reduced staff? More space? Greater efficiency? Swell. Where is the benefit to the ***public***? If there is not going to be one, the people running our courts better start trying something different.

A lot of us out here in "court user" territory are not at all satisfied with "progress" to date that makes the court run better – at our increased expense of time, effort, and money. The cost of e-filing should be ***ZERO*** – or as close to zero as it can be made and still permit the function to be run. The Bar is

owed an explanation of how anything more than that does not violate the applicable rules, and why the current state of affairs should not be perceived as simple robbery.

B. DOCUMENT RETENTION POLICIES

When Clark County put together its e-filing rules in 2006, much was unknown as to how e-filing would work. The "Editor's Note" to Part VIII of the Eighth Judicial District Court Rules notes that the Nevada Supreme Court intended EDCR 8 to be "interim rules pending the court's further review." That review is, in part, now proceeding.

Few have apparently read them, but the electronic filing rules adopted by the Nevada Supreme Court were made applicable State-wide by way of ADKT 404, dated December 29, 2006, and effective March 1, 2007. The earlier Clark County rules vary from, and partially violate, the Nevada rules.

The most notable variance is the requirement in the Clark County (but not the Nevada) rules requiring lawyers to maintain all documents containing original signatures for a period of two years. As discussed at the last Family Court bench/Bar meeting, that requirement is problematic for a number of reasons, both practical (it thwarts the move by many offices to "go paperless" by requiring retention of a whole new regimen of paper files) and ethical (apparently contradicting the duty to release all original files to a client at the end of a case).

Multiple initiatives to review the Clark County rules were begun in the different divisions of the district court. They have been consolidated in a committee headed up by Judge Elizabeth Gonzalez, which is trying to craft amendments to conform to the State-wide standards, without imposing additional obligations on counsel. When results are reached, I'll make a further announcement.

III. VIDEO RECORD OF COURT PROCEEDINGS

On those occasions when there is good news, it should be celebrated. Court administration has announced a program by which counsel will be able – eventually – to obtain the video record of the hearings in which they participate, free, and over the internet.

This is to replace the current kludgy practice of waiting days, standing in line, and paying for "special" County memory sticks – which process itself replaced the prior practice of allowing counsel to copy the videotape record for free by bringing a tape to the hearing.

Details are still being worked out, but at least the court is ***trying*** to fulfill the promise of making technological progress no more expensive for court users than the systems being replaced. If we return to the future soon, to a world where counsel can get a copy of a hearing in real time and without cost, I will count this one as a promise kept.

IV. CONCLUSIONS

When various technological changes were first announced, the Bar was told that they would make the process of litigation easier and less expensive. Reality has not just fallen short, but been the ***opposite*** – virtually every step of actually getting things done has been made slower, more burdensome, and much more expensive.

In the area of video records, it looks like we may soon be no worse off than we were before the court starting changing video equipment. If and when the additional costs and delays imposed on the Bar during the past year are corrected, this change in equipment and processes will be acceptable.

E-filing is an entirely different matter. There is no excuse for the wholesale plundering of the Clark County Bar, which is obviously orders of magnitude in excess of any costs rationally related to setting up e-filing itself – the entirety of which ***should have*** been paid for by the millions of dollars in fees already paid. Somebody has already, pretty obviously, profited quite handsomely.

Going forward, only the ***actual*** costs of running the e-filing system should be passed on to litigants and lawyers – the court must look to general tax revenues for its other funding. If those in charge of the courts do not act to bring this service and its cost in line with the existing rules on the subject, further attention – and action – will be warranted. Soon.

V. QUOTE OF THE ISSUE

"And he that will not apply New Remedies,
Must expect New Evils;
for Time is the greatest Innovator."
– Sir Francis Bacon, *Of Innovations* (1625)

"A computer lets you make more mistakes faster than any invention in human history – with the possible exceptions of handguns and tequila." *U.S. v. Carelock*, 459 F.3d 437, 443 (3rd Cir. 2006) citing Mitch Ratcliffe (quoted in Herb Brody, *The Pleasure Machine: Computers*, Technology Review, Apr. 1992, at 31).

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This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.