A legal note from Marshal Willick about e-filing in Clark County vs. the rest of Nevada – the contracts, the math, and what the court system should do, now and in the future.

Two prior legal notes (Nos. 21 & 27; posted at http://www.willicklawgroup.com/newsletters) discussed e-filing and protested that filing documents is slower, more difficult, and much more expensive than it had been previously. The notes observed that such developments were not "progress" in any rational sense of the word, criticized the lack of information distributed as to why this had happened, and the apparent lack of concern on the part of the judiciary and court administration about improving the situation for lawyers and litigants.

There have been developments, and disclosures, revealing how much money is going where, and why. But the court bureaucracy – having addressed its internal problems – sees no urgency to improve matters for the public and Bar. Unless the judiciary changes course to refocus on ***those*** needs, things that should be done to improve operations and reduce costs will not happen, and we will be stuck with the current – and unacceptable – state of affairs indefinitely.

I. THE CONTRACTS – AND WHO GETS THE MONEY

County Clerk Steve D. Grierson graciously agreed to meet to discuss the litany of complaints, problems, delays, and costs regarding e-filing, especially in family court.

It took a number of months, but I eventually obtained the mysterious "Wiznet" (now Tyler) contracts that indicate who agreed to what, and who is receiving what.

Apparently the first contract with Wiznet is dated April 27, 2009, set for a term of three years, and was signed by the prior "Court Executive Officer." It calls for both an electronic filing program ("EDP") and a document access program ("DAP") and on its first page calls for electronic submissions to be received "on a voluntary basis."

The "meat" of the contract is on Exhibit A, which details that the Court was to incur no cost for either EDP or DAP. ***Users***, however, were to incur a $6 fee to file anything ($10 if electronic service was also made), of which the Court was to get a cut of $1.50 "for all civil, probate, family and criminal case types." The rest of the fees collected went to Wiznet, with the caveat that "revenue share percentages can be increased by mutual agreement . . . not to exceed 50%."

"The court" never actually got any money under the contract. Rather, all sums received went to the County general fund.

"Amendment No. 1" is dated May 1, 2010, with Tyler Technologies (which acquired Wiznet); it extended the prior contract for three years from its date – and automatically thereafter, if not terminated. The new Exhibits A-1 & A-2 continued the $900 annual subscriber fee, and $6 per filing e-filing charge, through August 31, 2010, at which time they were reduced to $700 and $3.50, respectively.

Upon the change date, the fee-split dropped to zero. Since September 1, 2010, ***all*** money collected went to Tyler. But the "big deal" of all this was the Court's decision to make e-filing ***mandatory*** as of February 1, 2010 – by way of an edict labeled "Administrative Order 09-12." So the anticipated million filings per year would ***all*** be electronic, and generate cash for Tyler.

II. *HOW* MUCH MONEY ARE WE TALKING ABOUT HERE?

From the rough figures provided, over $2 Million went to Tyler before July, 2010, and we are shoveling another $3.5 Million per year at them right now, and indefinitely, in per-document fees, plus ***another*** million or more per year in annual lawyer subscriber fees.

III. A WEE BIT O' LOGIC – LAWYERS ARE PAYING FOR COURT ADMINISTRATION

It's a little indirect, but the cost of running court functions has been dumped on the lawyers of Clark County. By making e-filing mandatory, and then slashing personnel who used to file all documents at no charge, the Court has effectively required the lawyers to involuntarily pay for a regular court function.

And that brings us to the "Nevada Electronic Filing Rules," with which all Nevada courts are required to comply:

> 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***.
> . . .

For further background, see legal note No. 27, which goes over the math.

The Court's apparent decision that "reasonable level" means "whatever the heck we want it to be" is indefensible. The question is the ***actual cost*** of e-filing, as ***opposed*** to over-the-counter filing. So the baseline is the prior cost, in manpower and equipment, of receiving paper files, stamping them, scanning them, indexing them, and posting the information to Blackstone, ***versus*** the cost of having the already-electronic copies posted to Odyssey.

That cost, per filing, is a lot ***lower*** now – that was the whole point of the prior Chief Judge's public announcement a year ago.

And if the County's costs are less now than they were before e-filing, the cost of e-filing should be ***zero*** under the Supreme Court's rules, or e-filing is just being used as a shell game to raid the Bar (and public) to fund regular court operations – which the rule prohibits.

At absolute ***maximum***, only the actual costs of e-filing itself on an ongoing basis could be charged – as is being done right now in Washoe County, where for $100 per year per lawyer to fund the cost of program operation, e-filing is otherwise free. This is ***still*** somewhat a shell-game-redirection of funding (since so much else got so much cheaper) but at least there is some theoretical conception for an opposing argument, by choosing to look at e-filing and other court administration costs separately.

But what is going on in Clark County has the unique attribute of being both utterly shameless, and shameful, at the same time. It cannot and does not cost millions of dollars per year to fund the "marginal costs of supporting electronic filing." It cannot and does not actually cost 40 to 50 times as much to pay for the "marginal cost" of e-filing in Las Vegas as it does in Reno.

In short, the Bar and public of Clark County are being robbed to pay for Court's decision to find a quick fix for its filing, budgeting, and personnel expenses. And there is no good excuse for it.

IV. CREDIT – AND BLAME – WHERE IT IS DUE

The court bureaucracy needed mandatory e-filing to address its own economics and personnel costs. However, now that the ***court's*** problem has been solved, court administration and the judges seem quite satisfied with the status quo.

The concepts of improving the timeliness of service ***to the lawyers*** to at least what it was before e-filing was imposed, or reducing the cost ***to the public*** to file documents to what it was before mandatory e-filing was imposed by edict (i.e., back to zero) apparently are not even on the radar of either the judges or the administrators.

The problematic attitude was reflected in the interview by RJ reporter Doug McMurdo with the Chief Judge on January 26, 2011. The judge claimed "awareness" of complaints by attorneys, but simultaneously claimed no knowledge of what they might be.

Several offices have detailed specific problems, with case numbers and dates, directly to the court clerks. I have myself detailed a dozen such, including wrongful rejections, month-long "lost in space" submissions of attempted hearing settings, weeks-long delays in getting file-stamped documents returned, etc. Any lack of knowledge of specifics is attributable to a lack of desire to investigate.

And when the reporter, who had some familiarity with various problems, listed them, the response was to blame budget cuts and the lack of personnel, repeating the useless suggestion that "attorneys can file for free at the clerk's office," ignoring the fact that the time required to try to do that is even more expensive for the clients (see legal note No. 21), especially in light of what the Court's own announcement too-charitably termed "a limited number of workstations for filing . . . by pro se litigants."

Completely lacking in anything said by court administration, or the Chief Judge, is any initiative, or

program, or even ***intent*** to improve the operation of electronic filing so that litigation in the real world is not made slower and more difficult because of it, and to use all the money saved in salaries that have been eliminated to pay for the costs of the process. The Supreme Court Rule (Electronic Filing Rule 5(i)) ***requiring*** the court to limit fees "to recouping marginal costs of the e-filing process" is simply ignored.

It is the bureaucratic arrogance of not even ***attempting*** to satisfy the duty to the public (and the Bar), while remaining obsessed with internal budgets and making things easier for those running the system, that is so maddening. The bottom line message? "Too bad." But that is a choice, not a necessity.

V. WHAT THE COURT SYSTEM ***SHOULD*** BE DOING ABOUT IT, AND ISN'T

At a bare ***minimum***, those in charge should be demanding that Tyler expend whatever programming or other resources are necessary to provide the level of functionality the Bar was promised before e-filing was implemented, and immediate correction of the ***numerous*** problems the Bar has been pointing out month after month for the past year.

On the first list would be things such as permitting counsel of record to review counsel's own sealed cases. On the second list would be fixing things such as the inability to provide multiple receipts, the recurrent failure to provide rejection notices, and the programming bug that only allows the first page of a document to be viewed if the user is running Quicktime and tries to print a document out of Odyssey. Demanding those things seems pretty little in return for the millions of dollars already handed to Tyler.

For the multiple ***millions*** of dollars they are getting each year going forward, they should have technical staff on call required to solve administrative and programming problems immediately on request by the lawyers using the system.

In the bigger picture, judicial administration should fulfill its duty to the Bar and public by planning and implementing a ***drastic*** reduction in cost, or transition entirely away from Tyler to a system at least as efficient and inexpensive as that already in place in Washoe County – to be accomplished by the time the current Tyler contract expires. At that point, three years from now, ***we*** (the Bar and public) will have paid some 17 million dollars for the failure to plan ahead and efficiently and economically execute a transition to e-filing. And that is way, ***way*** more than "enough."

Has anyone in this County even ***asked*** the folks in Washoe County how they can manage an e-filing system that seems to work at least as well as the one in operation here for $100 per lawyer per year, rather than the $700 per lawyer, ***plus*** 3.5 million dollars in "per document" fees being extracted from Clark County lawyers and litigants each year? For an awful lot less than we are handing to Tyler Technologies every year, could we not duplicate what Reno has done?

If the answer to that last question is "yes," why in the world are we not doing so? And if the answer is "no," why not?

VI. CONCLUSIONS

There is a certain Darwinian logic as to why nothing visible is being done to correct the poor functionality and insane costs of e-filing in Clark County. No judges are impacted by multiple thousands of dollars of increased costs per case, or by the delays suffered daily by lawyers in getting case numbers, or hearing settings, or file-stamped documents, or certified copies. The judges can see the sealed cases just fine. And it is the ***judges*** who hire and fire the court administrators.

Since no one with any ability to actually ***do*** something about a shoddy system purchased at exorbitant cost has a job on the line, why ***should*** court administration care about a bunch of whiny lawyers complaining about litigation being slower and more difficult, and their clients getting fleeced? The ***Court's*** budget is doing just fine, thank you very much.

No one in the Court system has said a ***word*** about the obvious equal protection issue presented by the North/South cost differential for court access, ***or*** about the obvious rule violation of extracting millions of dollars more per year than the "marginal costs of e-filing," or why it is not a Constitutional violation for the court to fund its operations by emptying the pockets of those seeking access to the legal system instead of from general tax revenues.

The conclusion of legal note No. 21 included the observation that:

> ***ALL*** changes in court procedures, systems, staffing, and processes should be designed and implemented to make the litigation process faster, cheaper, and easier for attorneys and litigants – or they should not be implemented at all. There is no legitimate excuse for "improvements" that result in higher costs, slower processes, and increased problems.

As of this date, the process of filing papers in court is slower, more aggravating, and vastly more expensive than it was a year ago. That is ***NOT*** "progress."

The Bar, and public, have a right to demand a lot more than has been seen to date from the judiciary and the administrators who work for them. The silence on all these points to date has been deafening, and is completely unacceptable. Is ***anyone*** in the judicial administration of this State paying any attention to any of this? If not, why not? Is it going to take a federal lawsuit, like the one in Texas, to get anyone in a position of authority to take this matter seriously?

V. QUOTES OF THE ISSUE

"Out of clutter, find simplicity."
– Albert Einstein

"Duty is the sublimest word in our language. Do your duty in all things. You cannot do more. You should never wish to do less."
– Robert E. Lee

"Do what's right and try to get along with people, in that order."
– Ezra Taft Benson

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