

COURTHOUSE NEWS SERVICE

30 N. Raymond, Third Floor, Pasadena CA 91103, (626) 577-6700, home@courthousenews.com

Wisconsin Supreme Court
Attn: Deputy Clerk – Rules
P.O. Box 1688
Madison, WI 53701-1688

RE: Comments from Courthouse News Service on Rule Petition 14-03

Dear Honorable Justices of the Supreme Court:

On behalf of Courthouse News Service, I submit these comments in response to Rule Petition 14-03 to urge the Court to include in the proposed rule language that recognizes and preserves the right of access that the press and public have long enjoyed to Wisconsin court filings.

Specifically, the Court should consider amending provision (a) of 801.18(9) OFFICIAL RECORD to accurately reflect that:

(a) Upon submission electronically filed records have the same force and effect and are subject to the same right of public access as documents filed by traditional methods. The electronic version constitutes the official record. No paper copy of an electronically filed document shall be sent to the court.

And amending provision (c) and adding a new provision (f) to 801.18(4) TIME AND EFFECT OF ELECTRONIC FILING to recognize and expressly require that:

(c) ~~If the clerk of court accepts~~ A document submitted to the electronic filing system for filing, it shall be considered filed with the court at the date and time of the original submission, as recorded by the electronic filing system. Upon acceptance, the electronic filing system shall issue a confirmation to serve as proof of filing. When personal service is not required, the confirmation shall also serve as proof of service on the other users in the case.

(f) The electronic filing system and clerk of court shall make provision for public access to electronically filed records upon submission, independent of and undelayed by any time required for subsequent processing for acceptance or rejection.

Without clarifying changes such as these, Courthouse News is convinced that the transition to e-filing that the rule seeks to expedite will inevitably delay press and public access to Wisconsin court records and frustrate effective coverage of its proceedings—defeating rather than accomplishing the Chief Justice’s goal “to ensure that technology meets the needs of the public” and undermining rather than enhancing transparency and public confidence.

Courthouse News Service has long experience and first hand familiarity with this issue. It is a nationwide news service that focuses on court records, from the initial pleading through to the final ruling. Our subscribers include most major law firms in Wisconsin and throughout the US, as well as other media outlets and law schools. The Courthouse News website, www.courthousenews.com, is updated daily with staff-written articles and averages more than 1 million unique readers per month. Our coverage includes the courts of Wisconsin where we have been reporting for more than a decade.

In the transition to e-filing, a small group of state courts around the country have implemented policy refusing press access to e-filings until the filings are “accepted” by a court clerk and backdated to the submission date. As a result, those jurisdictions follow two different de facto standards for the file date, one standard for the lawyers where documents are considered filed upon submission, and a second and separate standard for the press where documents are considered officially filed – and thus public -- only upon acceptance. Minnesota is an example of such a state, and the result has been a sharp reduction in press and public access to its court records.

By contrast, the federal courts in Wisconsin and throughout the United States and other state courts like Georgia and Nevada that have addressed the issue have recognized that e-filings, like traditional paper filings, should be public upon submission, and provide the press with immediate access through different means, press queues, temporary case numbers or automatic assignment of case numbers.

They do not wait for processing, or “acceptance,” by a court official, thereby preserving traditional, same-day press access.

The press and public in Wisconsin have always been accustomed to such access. In Milwaukee County, for example, the press, by long tradition, has been able to go behind the counter to review new civil filings at the end of the day they are submitted. For paper filings, reporters review the stack of new paper-filed complaints before they are docketed. For e-filings, clerks place a one-page cover sheet from each new e-filed complaint into the stack of paper complaints, and if the reporter needs to review a full e-filed complaint, it is available upon request. As a result of those press access procedures, which do not rely on a clerk’s processing, docketing or acceptance, news reporters are able to review nearly 100% of all new filings on the same day they are filed.

Unless clarified as suggested, Rule Petition 14-3 would likely be interpreted by clerks to mean that the press should not have access until acceptance. Such an interpretation would in essence move the goal posts and put the press behind the processing of new filings, which contrary to popular assumption takes time and requires work by court employees. In those jurisdictions that condition press access upon official acceptance, substantial access delays have resulted.

Delay is the antithesis of news. The damage that results from delay is manifold. It damages the First Amendment right of the press and the public for which it acts as a surrogate. It damages the news itself, which in basic aspects is like bread, best consumed fresh, stale the next day, and fit for soup crumbs thereafter. It also damages the interest of the public in all its myriad subsets in knowing promptly that a legal battle has been engaged in a court with great jurisdictional reach. The delay also has noxious side effects on the flow of information and the open nature of our governmental institutions. Plaintiffs will often manipulate news coverage when there is a hole in public access, feeding friendly publications with exclusive information that in turns brings splashy publicity, while newly filed matters languish in limbo, waiting for a clerk’s acceptance.

Delay also damages and indeed discourages press coverage of the institution of the courts by causing reporters to abandon active coverage of the court’s new and ongoing matters, in favor of leaks from friendly lawyers. With nationwide coverage

of the courts, CNS has witnessed first-hand the abandonment of press coverage of new matters when same-day access is denied and also seen its resurgence when same-day access is returned. Prompt access is fundamental to the health of the courts and the press.

We urge the courts of Wisconsin to avoid those many deleterious effects on press coverage, as the nation's federal courts and other state courts have done. We respectfully urge Wisconsin's high court to include a section in Rule Petition 14-03 that makes it clear that an e-filing is public when it is submitted and not at some later time.

Without making it clear that a filing becomes public upon submission, the technological step forward represented by e-filing would be a giant step backwards for press access, and it would thereby damage the operation and sweep of the First Amendment in the courts of Wisconsin.

Bill Girdner
Editor
Courthouse News Service