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Bar News - April 16, 2014

**Court News: Rules Committee Reviews e-Filing, Small Claims Rules**

By: Kristen Senz

Pioneering a new electronic system designed exclusively for pro se litigants and leading the nation in bringing every case type online, the New Hampshire e-Court Project is poised to change the way lawyers practice law and litigants engage with the court system.

Sparked by the recommendations of the Innovation Commission in 2011, the New Hampshire Judicial Branch has gone through a series of changes, from the creation of the Circuit Court to the rollout of the NH Trial Court Call Center. These projects have resulted in cost savings and increased efficiencies in the existing court system, but the NH e-Court Project is about to fundamentally change the system itself.

Accomplishing this goal and addressing all of the policy and procedural changes it entails involves a particular kind of balancing act, explained NH Circuit Court Chief Judge Edwin Kelly at a March 14 public information session of the NH Supreme Court Committee on Rules.

"We are essentially creating an entirely new judicial branch," Kelly said. "It's changing everything."

Because there are no models to follow for establishing court rules that can apply to two electronic systems – one for unrepresented parties and one for lawyers – as well as every case type the courts process, the temporary e-court rules remain a moving target. Kelly said court administrators expect to be tweaking them regularly throughout the Small Claims Pilot Project that is planned to launch in Concord and Plymouth in late July.

"We're expecting to be making changes almost from day one," Kelly said. "We need to be as light as we can be on our feet."

Kelly said the court intends to accept several of the suggested changes to the proposed pilot rules that were submitted to the court during the comment period. The committee that drafted the pilot rules, which is made up largely of judicial branch employees, is now considering the comments and will resubmit the amended temporary rules to the court. According to Carolyn Koegler, secretary to the rules committee, the court will consider the submission and then will likely adopt the rules on a temporary basis. The court would then refer them to the NH Supreme Court Advisory Committee on Rules for its recommendation as to whether the rules should be adopted on a permanent basis, or whether changes should be made, Koegler said.

NH Supreme Court Justice Robert Lynn, chair of the rules committee, said at the March 14 meeting that the committee was prepared to approve the rules and "let this play out for a period of time."

**Public Access**

Input and feedback from members of the bar and the public have been important parts of project development, Kelly said during a recent interview. But public access to online court records under the new system is something that still requires the attention of project administrators.

During the small claims pilot project, scheduled to run through December 2014 in Concord and Plymouth, there will be no public access to online court records.

NH Superior Court Justice Larry Smukler chaired the Supreme Court Public Access Task Force when it formed in 2006 and again when it reconvened in 2012 to begin discussions about the delicate balance between the right of the public to know about the court and its cases and the right of parties to keep certain information confidential.

Smukler, on behalf of the task force, submitted a letter expressing its concerns over inconsistencies between the temporary e-filing rules and the recommendations of the task force. He suggested two revisions to the rules. The first revision removed language from the preamble for the e-filing rules that "may indicate prejudice that inappropriately biases future discussions or debates" about public access and document confidentiality. Second, Smukler suggested amending Rule 11(b) to delete "references to documents that could never be part of a small claim, such as juror questionnaires."

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Presently, if someone accidentally files a court document containing sensitive information, it remains publicly available in the case file until a judge grants a motion to seal. That is not a major problem in the world of paper files, but "In the electronic world, if someone files that document, it's going to be immediately available to the world on the Internet and will remain available to the world until a judge seals it," Smukler told the rules committee.

A suggestion to institute a 10-day hold on documents so that they can be reviewed has created an obstacle for the software vendors working with the Judicial Branch on the e-Court Project.

Kelly said court administrators are still weighing whether they will work to address public access concerns following the implementation of e-filing in small claims cases or whether they will proceed with adding another case type to the e-filing system. The same core group of people is working on all aspects of the project and can only tackle one major hurdle at a time, he said.

### Small Claims

The proposed rules for small claims cases are "quite a bit different from what the rules are today," Senior Court Administrator Gina Apicelli said at the public information session.

One concern raised at the meeting that will likely resonate through many of the changes needed to achieve an all-electronic system was the balance between efficiency and due process. For example, what constitutes notice of service if done by email? The new rules say that in small-claims cases, parties can agree that notices of violations for failure to meet payment agreements can be delivered online, instead of by mail or in-person by the sheriff's department. To protect due process, especially in instances that could result in a future arrest warrant, the defendant would be required to confirm a waiver of in-hand service.

"You want to make sure that the person has actual notice of something, in case a court order comes out later that affects their liberty," Apicelli said in a recent interview.

On the other hand, accepting service online means a defendant does not have to pay a service fee.

Once the electronic court project begins taking on case types, Judge Kelly said the New Hampshire court system will begin to experience change "at lightning speed."

"The thing about change is that it becomes contagious," he said. "You have success changing one thing and you want to move on to something else. It's exciting."

Kelly said that after the small claims pilot project, either landlord-tenant or plea-by-mail motor vehicle cases are likely to be the next case type to move online in 2015.

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