

Tracy, Mary

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To: Tracy, Mary
Subject: FW: Comment for the rules committee

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From: lukoff.legal@gmail.com [mailto:lukoff.legal@gmail.com] **On Behalf Of** Lawyer
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Cc: Ryan English <Ryan@lukofflegal.com>; David Kennedy <david@lukofflegal.com>
Subject: RE: Comment for the rules committee

GR 30 Electronic Filing and Service

- Permit electronic filing of certified records of proceedings, conforming to practice;
- Strike the corresponding reference prohibiting such in the comment;
- The current rule permits electronic service of documents only when 1) local rule mandates electronic filing, and 2) the parties agree to accept electronic service. The CMC recommends striking the phrase "only by agreement" to reflect current practice;

I strongly object the striking of the phrase "only by agreement".

Contrary to the commentary by the proponent, this does not reflect current practice. The change is not trivial as the comment implies. While I am certain there are more examples, I am providing one that clearly shows that removing consent can result in an unfair advantage to one party at a minimum and more importantly can impede access to justice for the client.

As background, I represent clients who receive traffic infractions. According to the Infraction Rules for Limited Jurisdiction, discovery may be served by the prosecutor. Discovery. Upon written demand of the defendant at least 14 days before a contested hearing, filed with the court and served on the office of the prosecuting authority assigned to the court in which the infraction is filed, the prosecuting attorney shall at least 7 days before the hearing provide the defendant or the defendant's lawyer with (1) a copy of the citing officer's sworn statement (2) a copy of video or photographic evidence the prosecutor proposes to introduce at trial, unless in reply to the discovery request the prosecutor provides the address to a website where such evidence is accessible to the defendant; and (3) the names of any witnesses not identified in the citing officer's sworn statement. No other discovery shall be required. If the prosecuting authority provides any portion of the discovery less than 7 days before the hearing, such untimely discovery shall be suppressed only upon a showing of prejudice in the presentation of the defendant's case. If the prosecuting authority, without reasonable excuse or justification, fails to provide any portion of the discovery prior to the day of the hearing, the portion of discovery not provided shall be suppressed. Neither party is precluded from investigating the case, and neither party shall impede another party's investigation. A request for discovery pursuant to this section shall be filed on a separate pleading.

My peers and I have had situations where we can have more than 35 infraction cases scheduled on a single day. If the rule change is implemented, discovery for 35+ cases can be emailed or faxed to defense counsel without consent on the day (even in the afternoon or evening) before the hearing. If "only by agreement is eliminated," the prosecution can argue that they complied with both GR 30 and the discovery rule under IRLJ 3.1(b). If defense counsel did not have adequate time to prepare, he would have to show prejudice for 35+ clients or request a continuance which the judge may not grant. This would be blatantly unfair for the defense. The State can get out of this rule change by getting the court to draft up a local rule, the defense does not have that privilege. Even if defense is allowed to continue in this scenario, this would be contrary to IRLJ 1.1(b) Purpose. These rules (referring to the infraction rules) shall be construed to secure the just, speedy, and inexpensive determination of every infraction case.

Under this scenario, defense counsel may unwillingly be put in a situation where they do not have enough time to provide competent representation for their client. This ultimately could lead to the attorney being reprimanded or even disbarred if things go wrong as a result of the proposed rule change. Equally or even more importantly, this could deny the defendant's access to justice where the attorney is put in a situation where they do not have adequate time to prepare the best defense for their client.

I am all for the rules reflecting technological advances, but these changes should not be made in a vacuum without considering the ultimate consequences. Electronic service should be permitted, but only in situations where the parties agree. I have heard that once the rules are made available for comment, they always are enacted. I certainly hope that is not the case and that my comment as well as others get appropriate consideration.

Thank you for your consideration

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