WILLICK LAW GROUP

A DOMESTIC RELATIONS & FAMILY LAW FIRM
3591 EAST BONANZA ROAD, SUITE 200
LAS VEGAS, NV 89110-2101
PHONE (702) 438-4100 • FAX (702) 438-5311
WWW.WILLICKLAWGROUP.COM

ATTORNEYS

MARSHAL S. WILLICK * † ‡ ❖ ®
KARI T. MOLNAR **
TREVOR M. CREEL

* ALSO ADMITTED IN CALIFORNIA (INACTIVE)
** ALSO ADMITTED IN FLORIDA
† FELLOW, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
‡ FELLOW, INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS
❖ NEVADA BOARD CERTIFIED FAMILY LAW SPECIALIST
® BOARD CERTIFIED FAMILY LAW TRIAL ADVOCATE
BY THE NATIONAL BOARD OF TRIAL ADVOCACY

LEGAL ASSISTANTS

LEONARD H. FOWLER III
FAITH FISH
TISHA A. WELLS
DEISY MARTINEZ-VIERA
MARY STEELE
RICHARD L. CRANE
BRENDA GRAGEOLA

FIRM ADMINISTRATOR

SETH WILLICK

E-MAIL ADDRESSES:
[FIRST NAME OF INTENDED RECIPIENT]@WILLICKLAWGROUP.COM

August 16, 2011

Ms. Tracie Lindeman, Clerk of the Court
SUPREME COURT OF NEVADA
201 S. Carson Street
Carson City, NV 89701

Re: ADKT 410; Electronic Filing Rules
Problems with NEFR 11(e)

Dear Ms. Lindeman:

Another member of the Clark County committee addressing e-filing suggested that I recap, briefly, what happened and why it is a problem, for the purpose of requesting reconsideration or amendment of new NEFR 11(e), which contradicts and turns back the clock on much that we have been trying to accomplish with the proposed amendments to the Clark County Electronic Filing Rules – which the Nevada Supreme Court has never seen.

Specifically, a year ago – in August, 2010 – the ongoing efforts to address e-filing and document-retention policy problems in Clark County Family Court were merged into the similar efforts that had been started in the Civil/Criminal Division. The combined committee went over all initiatives, and discussed all relevant experiences in different sorts of cases, practical matters, and ethical rules, and I was directed to draft proposed revisions to EDCR 8, the local rule governing e-filing in Clark County.

I did so, and after more meetings and some amendments, the proposed new EDCR 8 has been circulating from judicial committee to judicial committee, from October, 2010, to now. Apparently, it was never submitted to the Nevada Supreme Court, which on August 1, 2011, issued ADKT 410, adopting among other rules the directly-contradictory NEFR 11(e), never having even been informed

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of the proposed policy change in Clark County, or of the research behind or reasons for the changes proposed here.[1]

I. WHAT THE SUPREME COURT HAS DONE

ADKT 410 contains NEFR 11(e), which requires an "electronic filer" to "retain the original version of a document, attachment or exhibit that was filed electronically . . . for seven years after termination of representation" so that the "the court may require the electronic filer to produce the original of the [e-filed document]."

This is a really "big deal" because just sixty days earlier, the Court adopted ADKT 418, which contains rule changes essentially making e-filing in all civil matters ***mandatory***,[2] making the document-retention rule apply to essentially every piece of paper filed.

I'm informed that a member of the Clark County committee called Carson City, and spoke to a person involved in some way with drafting the new rules from that end, and was apparently told that NEFR 11(e) grew out of a reference to Rule of Professional Conduct (RPC) 1.15 ("Safekeeping Property").

II. WHAT WE PROPOSED FOR RULE 8, AND WHY (THAT THE SUPREME COURT NEVER HEARD ABOUT)

The Clark County committee discussed in great detail the way in which documents are actually created, circulated, signed, and filed, including the reality that many documents (for example, stipulations) are signed at different times in different places, so that no e-filer ***could***, as a practical matter, truthfully attest to the validity of the signatures.

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[1] There are multiple inconsistencies between the two rule sets, and in some places it is believed that the Clark County effort may have considered matters not entirely addressed by the rules as set out in ADKT 418 (June 29, 2011), which was apparently ***likewise*** completed and issued without any coordination with, or even input from or knowledge of, the Clark County judges and lawyers working on parallel, but varying efforts. I am informed that the Clark County proposed rules is expected to finally be sent to the Supreme Court in October – well over a year after it was drafted, and now contradictory, in several respects, to pieces of the rules set out in ADKT 410 & 418.

[2] Amended EDCR 2.02. ADKT 418 did not alter EDCR 8.06 or 8.07, which require scanning any page with a signature on it to be submitted in PDF or similar format. The importance of those provisions is discussed below.

The rules (EDCR 8.07(e)) were therefore amended to assert that the e-filer verifies "that the signatures are authentic to the best of the filer's knowledge and belief." This was seen as the optimum balance between efficiency and verifying legitimacy, replacing the cumbersome requirement of creating two different versions of every signed document as set out in the existing rules.

Noting that the NEFR deems the electronic form of every document in the court's electronic files to ***be*** the "original," the committee deemed it illogical to require retention of the paper documents from which that original was created. We did away entirely with the prior requirement of EDCR 8.07(i)-(j) & 8.08(a) for two years' retention and production upon demand of the paper from which the electronic original was produced, which requirement had caused so much consternation, confusion, ethical complexity, and unnecessary cost on the part of the Bar.[3]

This was a topic on which considerable time was spent. The committee examined all the different kinds of criminal, civil (including probate and construction defect), family, and other filings that were made, and noted the extremely small number of cases in which the legitimacy of signatures was contested. We examined the variations in procedure and burdens of proof for any such legitimacy contests with and without the document-retention requirement, weighed against the inconvenience and cost of requiring every lawyer to keep massive amounts of almost-never-referenced paper.

Judges and practitioners in each field participated in the discussion, and ultimately, the question was considered not even close: the document-retention policy was unnecessarily burdensome and expensive, and eliminated.

III. THE MEANING OF "ORIGINAL"

NEFR 6(a) provides that the electronic form of an e-filed documents ***is*** the "official court record." The EDCRs have a similar provision, which was clarified in our proposed re-write of EDCR 8.08(a) to state that:

> For documents that have been electronically filed, the electronic version of the document constitutes the official court record, and electronically filed documents have the same force and effect as documents filed by traditional means. For

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[3] The district attorney's office, especially the child support enforcement unit, has been especially critical of what their personnel describe as a large number of hours, significant physical storage requirements, and diversion of funds and manpower needed for substantive work to satisfy this paper-retention requirement – without a single instance in which the paper original of an e-filed document had ever been requested, by anyone.

> documents that have been scanned and electronically filed, the electronic form of the documents are the official court record.

IV. ETHICS

Section (a) of RPC 1.15 ("Safekeeping Property") first requires a lawyer to hold "funds or other property of clients or third persons "separate from the lawyer's own property." The second sentence speaks to how a lawyer should hold funds, and the third compels a lawyer to "appropriately safeguard" any "other property." The last sentence, which was apparently the basis for NEFR 11(e), states:

> Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

Nothing in the extensive annotations to Model Rule 1.15 suggests any kind of duty to keep the entire original file of a client for seven years. The intent of the quoted language is only to keep ***accounting records*** for seven years sufficient to allow authorities to figure out what happened to client funds.

For many years, former Nevada Bar Counsel (now district court judge) Rob Bare was asked about the meaning of the Nevada enactment of this rule, and said exactly what is set out above. Several years ago, my office asked for an opinion by the Bar as to record and copy-keeping requirements, as part of our intended transition to a "paperless" office without ***any*** paper storage after the close of a case.

Our proposed retainer agreement language was:

> After payment of all sums due and upon Client's request, Attorney will deliver Client's file (other than Attorney's personal notes, briefs, and work product that Attorney elects to retain) to Client, along with any Client funds or property in Attorney's possession. If Attorney is not instructed otherwise, Client's file will be kept in Attorney's office for a limited time after completion of the case. **Files are digitized, stored as PDF files and then destroyed upon completion of a case. If you want your file, or anything out of your file, you should obtain it promptly upon conclusion of your case.**

The Bar had no problem whatever with this intended procedure; upon specific inquiry, the Bar instructed that it was irrelevant in what ***form*** the required retention of accounting records was made, specifically approving retention of electronic billing records as complete compliance with RPC 1.15.

Both I and Mr. Bare were on the Ethics 2000 Committee that reviewed RPC 1.15 (along with every other ethics rule) before submitting it to the Nevada Supreme Court for approval in 2004. Neither he, nor I, nor any other member of the Ethics 2000 Committee saw any need for any alteration in the rule, or the prior interpretation of the rule, based on any development in ethics law during the past 20 years.

In other words, nothing in RPC 1.15 actually requires or even hints at the provisions now embodied in NEFR 11(e) for physical retention of every piece of paper filed in every case for seven years after completion of representation.

As part of the Clark County review of the electronic filing rules, Mr. Bare made a presentation to the Clark County bench/Bar Committee before stepping down as Bar counsel. As he pointed out, even the existing two-year original-signature-retention rule in current EDCR 8.08(a) creates an ethical dilemma.

Specifically, counsel has a duty to return the ***entire*** client file to a client, relinquishing any retaining lien, once the client pays the outstanding bill. A rule simultaneously requiring counsel to pick out and retain all signature pages directly conflicts with this duty, making the lawyer's duty unclear; this was part of the Committee's reasoning in eliminating the retention rule.

If anything, NEFR 11(e) makes that dilemma much worse, increasing both the quantity of paper counsel must keep and the time counsel is required to retain it, while counsel remains subject to the same existing rules requiring surrender of the file to the client. And if most files are routinely surrendered, any conceivable utility that the rule might have been thought to have would be inconsistent to the point of being illusory.

V. THE ATTEMPT TO CREATE PAPERLESS COURTS – AND OFFICES

Then there is the matter of practicalities.

In the present real world of litigation, a great deal of discovery – for example, bank records – is received on disk in electronic form, and never printed; if portions of it are deemed relevant to the litigation, those pages are electronically extracted, and electronically attached to filings. It is believed that this is even more common in certain other legal fields than it is in family law. Requiring each page of that information that is filed with the court to be printed and retained in paper form would be a leap backward in the evolution of legal practice.

In terms of in-office procedure, it would be even more counter to what has actually been going on in the real world to impose any such requirement as NEFR 11(e). Many firms – this one included

– spent considerable time and effort over the past decade digitizing and then destroying all paper files, eliminating the cost of off-site storage while actually greatly improving the ability to retrieve closed files. While no hard statistics are known, I personally am aware of similar initiatives in dozens of firms, large and small, across Nevada. Many have, as we have, entirely eliminated paper copies of closed files.

NEFR 11(e) would require exact reversal of all such efforts, at a staggering real-world cost. In a family law case, it is not that unusual for a file to remain open for more than a decade – perhaps for the entire minority of the children. Keeping the paper file for "seven years beyond the conclusion of representation" of such a client would require physical retention of every scrap of paper filed – no matter how trivial or useless – for a quarter century. The physical file-storage requirement alone would be enormous, in both total size and cost, pushing up the price of legal representation for every client for no practical purpose whatsoever.

VI. THE UNFAIRNESS OF BURDEN-SHIFTING

Part of the Clark County discussions concerned the double-standard by which the court's electronic form of a document was considered the "original" of the document, while maintaining that for ***lawyers***, the paper copies from which those electronic forms had been created would be considered the "originals." Included in this discussion was the reality that the court was in the process of destroying virtually all paper copies of virtually all documents already on file, as they had been deemed irrelevant to the official record.

The committee noted that in all practical terms, the reality of the situation was that the court was shucking off to the private Bar the duty of maintaining the court's paper file – at the expense of lawyers and litigants. Any such purpose – or, if unintentional, such result – was seen as indefensible and unjust.

VII. AN ASIDE ABOUT THE RULE-MAKING PROCESS

It seems likely that the specific problem addressed in this letter – and the time, effort, and expense of addressing it by all concerned – was caused by the fact that the Nevada Supreme Court was not even informed of the efforts (or existence) of the Clark County committee, and by the ***year-long*** delay in forwarding the committee's recommendations to the Court for adoption. If the Court had been informed of what the Clark County committee was doing, and why, NEFR 11(e) as issued presumably would never have been drafted.

Similarly, I am informed that no one in the Clark County rule-making hierarchy apparently had any clue that what became ADKT 410 and 418 were even in process until after they were published. How can this be so? Both ADKTs indicate that "public notice" was given and "open hearings" were conducted, but apparently no judge and no lawyer in Clark County involved in addressing the very same rules heard anything whatsoever about either the proposals, ***or*** the hearings.

It is respectfully submitted that the rule-making process, as is, in both directions, is so slow, inefficient, and non-communicative as to be dysfunctional. I believe it would be in the best interest of the Nevada Supreme Court, ***and*** the Clark County courts, and most certainly in the best interest of the Bar and the general public, for the ***process*** of rule-making to be examined, streamlined, and improved. At minimum, the process of informing each entity of the matters under review at the others should be improved. If I can be of any service in any such effort, I would be happy to do so.

VIII. CONCLUSION AND RECOMMENDATIONS

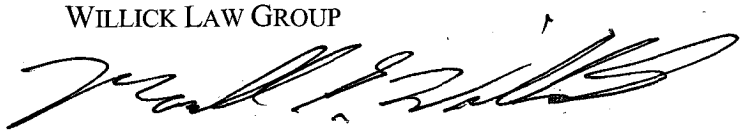
NEFR 11(e) should be eliminated.

The entire text of ADKT 410 should be suspended and reconsidered in light of the recommendations made by the Clark County committee seeking to revise the e-filing rules in Clark County, since some of the recommendations made in the proposed EDCR 8 improvements may well be seen, upon comparison, as superior to the alterations made in ADKT 410.

At minimum, a further public hearing, to discuss the differences between the proposals, and what would be better for bench, Bar, and public, and why, would appear to be warranted.

In the larger picture, the rule-making process, both at the Clark County and Supreme Court levels, should be examined, streamlined, and improved, with the objectives of increasing the speed and efficacy of the rule-making process.

Sincerely yours,
WILLICK LAW GROUP



Marshal S. Willick, Esq.

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