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MEMORANDUM TO: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

FROM: **Professor Daniel R. Coquillette**

RE: **Proposed Amendments to Appellate Rule 25(a), Bankruptcy Rule 5005(a), and Civil Rule 5(e) re Mandatory Electronic Filing**

DATE: **November 10, 2004**

The Committee on Court Administration and Case Management (CACM) has recommended that the Bankruptcy and Civil Rules be amended—on an expedited basis—to authorize local rules that require electronic filing. Mandatory electronic filing should achieve significant cost savings for the judiciary. Partly because it is simple, and partly because it seems better to address all the sets of rules at once, an informal consensus has emerged that the Appellate, Bankruptcy, Civil, and Criminal Rules should be included in the same course of action.

The Court Management/Electronic Case Filing system (CM/ECF) has been implemented in a majority of the district courts, including bankruptcy courts. The remaining courts are scheduled to be operating the system within a year. CM/ECF provides courts with the capability to accept electronic case filings. We understand that 31 district courts and at least 27 bankruptcy courts require electronic filing. Thus implementing CACM's request should not be difficult as a practical matter.

The Appellate, Bankruptcy, and Civil Rules governing electronic filing are virtually identical. (The Criminal Rules adopt by incorporation the filing provisions of the Civil Rules.) The proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, and Civil Rule 5 are identical and would add the words "or require." For instance, Civil Rule 5(e) provides that "[a] court may by local rule permit papers to be filed, signed, or verified by electronic means . . . ."

The proposed amendment adds "or require" after "permit." The same proposed amendments are made to the Appellate and Bankruptcy Rules. These proposals give courts the authority that CACM recommends.

The only concern that has been expressed is whether required electronic filing would be construed as consent to electronic service under Civil Rule 5(b)(2)(D). *See* Agenda, Advisory Committee on Civil Rules, October 28-29, 2004, Section 3. This could be resolved by a Committee Note indicating that no consent to service was implied. But as all courts that have required electronic filing have also provided an "opt out" for those not wishing electronic service, this is not a problem in practice. Given this fact, plus the practical value of the simple rule change and the expedited schedule, the Civil Rules Advisory Committee sees no need to address the consent issue now.

The advisory committees have found the proposed amendments noncontroversial. They propose that the amendments be published for comment on an accelerated and abbreviated schedule. If the proposals meet with no substantial opposition, the plan would be to have the Standing Committee recommend adoption at its June 2005 meeting. This would require publication of the proposed amendments in November 2004, with a shortened public comment period that expires on February 15, 2005. The Appellate, Bankruptcy, Civil, and Criminal Rules Committees have agreed to publish the proposed amendments on this expedited schedule.

The proposed amendments to Appellate Rule 25(a), Bankruptcy Rule 5005(a), and Civil Rule 5(e) are attached, along with draft Committee Notes.

Attachments