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OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
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August 20, 2012

To: Mark Kravitz, Chair, Judicial Conference Committee on Rules of Practice and Procedure

From: Julie A. Robinson, Chair, Judicial Conference Committee on Court Administration and Case Management 

RE: REFERRAL OF CM/ECF POLICY ISSUES TO THE RULES COMMITTEE

Dear Judge Kravitz:

I am writing to ask the Rules Committee to consider two recommendations for Rules changes that arose in our policy discussions regarding the Next Generation of the Case Management/Electronic Case Files (CM/ECF) system. As you know, our Committee has been handling policy issues relating to the development of the new CM/ECF system, including, when appropriate, referring issues to other Conference committees for their input. At our meeting in June, our Committee agreed to ask your Committee to consider the two issues presented below.

**Notice of Electronic Filing as Certificate of Service**

Currently, the CM/ECF system automatically sends a Notice of Electronic Filing (NEF) to a filer such as an attorney, each time a document is entered in CM/ECF. The NEF contains the case name and number, docket text, the names and email addresses of recipients as well as those not receiving electronic transmissions, and includes a unique identification code called an electronic document stamp. Since 2006, when the Judicial Conference first endorsed Model Local Rules for Electronic Case Filing, courts have rules that permit, but do not require, the acceptance of the NEF as a certificate of service. Some courts apply the model rule, which

permits the NEF to constitute a certificate of service, while others require a certificate of service as an attachment to a pleading or require litigants to file a certificate of service as a separate document.

Many outside users of the CM/ECF system, including federal agencies and attorneys practicing in multiple jurisdictions, have asked for more consistency in CM/ECF procedures. Specifically, the users have noted the impact of the lack of uniformity regarding certificate of service requirements, and that the NEF could be used to provide sufficient information to establish proof of service.

Our Committee endorsed the concept and asked your Committee to consider whether the federal rules of procedure should be amended to allow an NEF to constitute a certificate of service when the recipient is registered for electronic filing and has consented to receive notice electronically. Our subcommittee emphasized, however, that it does not expect that the NEF will serve as a certificate of service for litigants that are not registered for electronic filing or have not consented to electronic service.

### **Retention of Records Requiring “Wet” Signatures of Third Parties**

Our Committee also requests your Committee explore creating a federal rule regarding electronic signatures and the retention of paper documents containing original signatures. Currently, courts’ local rules vary in their requirements to retain original paper documents bearing “wet” signatures. Some rules require retention until the end of the appeal period, others require retention until the applicable statute of limitations for perjury expires, and still others require retention in perpetuity (The Judicial Conference’s Model Local Rules, mentioned above, include a requirement that filers retain a paper document after electronic filing if the document contains an original signature). These varying practices have posed problems for attorneys that file in multiple districts, change law firms, and for law firms that merge. In addition, the Executive Branch has adopted procedures relying on an electronic signature as the original signature.

Our Committee suggests three alternative approaches. First (and our preferred approach) is a national rule specifying that an electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature. Under this proposal, the burden would be placed on persons opposing the validity of the signature to prove with appropriate evidence that an electronic signature was not valid. The second approach would be to require the courts to retain copies of all originally-signed, paper documents that are electronically filed. This method addresses problems with law firms retaining such records, but would require a substantial amount of work for the courts.<sup>1</sup> A third alternative would be a policy option – our Committee could ask the

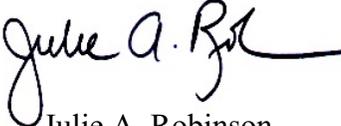
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<sup>1</sup> For example, over 1.7 million bankruptcy petitions are filed each year, each of which contains an original signature page that the courts would need to scan and retain.

Judicial Conference to specify the retention period for documents with wet signatures. Such a policy, however, would not address the problems for external users because of lack of uniformity in local rules, and would not encourage the reliance on electronic signatures.

I enclose the relevant papers presented to the subcommittee by Administrative Office staff on these issues, and a copy of our subcommittee's minutes which contain our recommendations on the requests. Thank you for your consideration of these issues. Our two Committees have worked on rules and policy issues related to the implementation of CM/ECF for the past decade, and I look forward to continuing this important work. If you have any questions, please do not hesitate to contact me.

Best regards,



Julie A. Robinson

Enclosures

cc: Noel Augustyn  
Peter McCabe  
Jonathan Rose  
Benjamin Robinson