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To Rules_Comments@ao.uscourts.gov
cc
bcc
Subject Rule 5(e)

Attached in Adobe Acrobat PDF version 6.0 document format, please find a letter setting forth my comments to the proposed rule change. I requested and was granted permission to file the comments late. Thank you for this consideration. Best regards.



JM comment on Rule 5(e).pdf



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February 21, 2005

Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Offices of the
United States Courts
Washington, DC 20544

Re: Comments Regarding the Proposed Amendments to Rule 5(e) of the Federal Rules of Civil Procedure Re Electronic Filing of Pleadings and Other Papers.

Dear Mr. McCabe:

My name is John Messing. I speak only for myself, although I am the Chairman of the Electronic Filing Committee of the Science and Technology Law Section of the ABA, and I represent the ABA in an international organization, OASIS and LegalXML-OASIS, that creates technical standards for such tasks as electronic filing in court cases. I concern myself particularly with security of electronic court filings, both with regard to the systems that exist for transmitting and receiving them, and also for each individual document's security, so that its authenticity and pristine state can be authoritatively determined years later.

I thank the Conference for the grant of my request for an opportunity to submit comments after the deadline.

I have read with great enthusiasm the comments of Mr. Robert J. Grey, Jr., President of the ABA, who has submitted an inspiring plea on behalf of the less computer literate which suggests that the commentary to Rule 5(e) is insufficient to protect the rights of the pro se litigant. It states:

"Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general

Re: Comments on Rule 5(e)

'good cause' exceptions. Experience with these local practices will facilitate gradual convergence on uniform exceptions, whether in local rules or an amended Rule 5(e)."

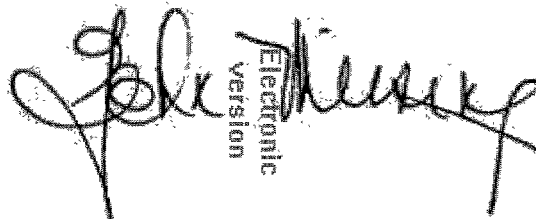
Citing the protections of ABA Standard 1.65, Mr. Grey requests the Conference to put specific language into the text of the Rule based upon ABA Standard 1.65.

I support Mr. Grey and offer to add my humble words to his fine letter. I also seek to go further and request the Conference to consider referencing other protections of ABA Standard 1.65 in Rule 5(e), particularly those provisions concerning security. When a court requires lawyers and perhaps others to file electronically, it implies that security is adequate for the stated purposes, even potentially on an ongoing basis, because security threats evolve and become more sophisticated at an ever-increasing rate. The commonsensical goal of good security risk management is often poorly articulated as a policy or local rule and then not always faithfully followed, with a result that electronic judicial orders are generated and disseminated without advanced security features that are readily available, even from open sources that do not charge for the technology. Electronic court orders issued are often subject to tampering in undetectable ways. Without available standard security protections, it is unfair to require the use of court electronic systems by all practitioners, who may not understand what must be done from their side properly to protect their computers and the integrity of the documents being exchanged. We see examples in electronic commerce daily of identity theft and electronic document alterations. Perhaps we have become so accustomed to fostering electronic practices that we have grown used to overlooking the dangers of using these technologies without requiring proper safeguards.

Just last week some mainland Chinese cryptographers broke the encryption that is used commonly to protect the integrity of electronic court documents in the courthouses of this country. That this development came from a country that has not always been a staunch ally of the United States is of little comfort when the security of our court orders may be at stake.

I therefore urge the Conference to require the security protections of ABA Standard 1.65 on an ongoing basis in addition to the protections for pro se litigants that Mr. Grey has so eloquently invoked.

Very truly yours,



John H. Messing