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MEMORANDUM

To: Clerks, United States Courts of Appeals
Clerks, United States District Courts
Clerks, United States Bankruptcy Courts
Clerk, United States Court of Federal Claims
Clerk, Judicial Panel on Multidistrict Litigation

From: Robert Lowney 

RE: IMPLEMENTATION GUIDANCE FOR NEW MISCELLANEOUS FEE EFFECTIVE
SEPTEMBER 1, 2018 (**INFORMATION**)

At its March 2018 session, the Judicial Conference approved a [new fee](#) for providing copies of records in electronic form when those records are not stored in the Case Management/Electronic Case Files (CM/ECF) system or available on the Public Access to Court Electronic Records (PACER) system. This new fee was added to the miscellaneous fee schedules for appellate, district, and bankruptcy courts, as well as the U.S. Court of Federal Claims and the Judicial Panel on Multidistrict Litigation. This new fee will become effective September 1, 2018.

To assist the courts in the implementation and application of this new fee, the Court Services Office has developed the attached implementation guidance. This document includes a collection of frequently asked questions and a checklist of implementation steps that courts may need to consider prior to the effective date of the new fee.

If you have questions concerning this new fee and its application, please contact staff in the Court Services Office – either [David Levine](#) (202-502-1582), who staffs the Court Administration and Case Management Committee, or [Mary Fritsche](#) (202-502-3055) or [Candice Murphy-Farmer](#) (202-502-2728) in the Operations Branch.

Attachment

NEW FEE FOR PROVIDING COPIES OF RECORDS IN ELECTRONIC FORM

Implementation Guidance and FAQs

At its March 2018 session, the Judicial Conference approved [a new fee](#) for providing copies of records in electronic form when those records are not stored in the Case Management/Electronic Case Files (CM/ECF) system or available on the Public Access to Court Electronic Records (PACER) system. This new fee was added to the miscellaneous fee schedules for appellate, district, and bankruptcy courts, as well as the U.S. Court of Federal Claims and the Judicial Panel on Multidistrict Litigation. This new fee will become effective September 1, 2018.

Provided below is a list of frequently asked questions to assist the courts in application of this new fee. In addition, the following is a checklist of implementation actions that courts may need to consider prior to the effective date of the fee.

- ✓ Make any necessary revisions to copy request policies/procedures/forms/systems.
- ✓ Make applicable changes to Pay.gov (for courts that use this system to collect fees).
- ✓ Update any local fee schedule.
- ✓ Develop a local policy regarding when requests for electronic copies will be honored if the copy requested can be provided in paper. (Additional clarification on this issue is included in the FAQs below.)
- ✓ Assess local policy regarding which court records are not stored in CM/ECF and evaluate possible efficiencies gained by inclusion in CM/ECF.

If you have questions concerning this new fee and its application, please contact staff in the Court Services Office – either [David Levine](#) (202-502-1582), who staffs the Court Administration and Case Management Committee, or [Mary Fritsche](#) (202-502-3055) or [Candice Murphy-Farmer](#) (202-502-2728) in the Operations Branch.

Frequently Asked Questions

1. What is the purpose of this fee?

Because CM/ECF allows case documents to be filed and maintained in electronic form, the judiciary is able to provide public online access to the vast majority of court records through the PACER system. There are, however, some records that may not be stored in CM/ECF and, thus, not available through PACER. Some of these records might include documents (either in paper or electronic form) that are not docketed in CM/ECF due to their large size¹ or records

¹ The CM/ECF application software does not set a maximum allowable file size. These file size limits are set locally based on, for example, available internet service speeds. Courts may want to periodically review their file size limits to determine if an adjustment would maximize the number of documents that can be stored in CM/ECF, and, thus, be made available to the public on PACER.

that exist only in an electronic format that are not uploaded to CM/ECF (*e.g.*, video files). This new fee is intended to provide a uniform way for courts to charge for providing electronic copies of these records to the public.

2. When does this fee apply?

This fee applies when: (1) a court provides a copy of a record in electronic format; (2) that record is not stored in the court’s CM/ECF system; and (3) no separate fee for a copy of a recording of a court proceeding applies. (Additional information on the fee for recordings of court proceedings is provided in FAQ 9 below.)

3. What constitutes an “electronic record” for purposes of this fee?

The fee does not define the term “electronic record,” but does include a non-exhaustive list of examples, including, but not limited to, document files (*e.g.*, PDF), audio recordings, and video recordings. Generally, a single electronic file would constitute one “electronic record” for purposes of this fee. However, courts have the discretion to interpret the fee language when applying the fee under various circumstances that might be presented.

4. What are examples of the types of electronic records that might be stored outside of CM/ECF?

Although not a complete list, examples might include: a video recording of a deposition submitted in support of a dispositive motion; a video recording of a law enforcement traffic stop submitted in support of a motion to suppress; voluminous state court records in habeas proceedings under 28 U.S.C. § 2254; or lengthy administrative records pertaining to administrative appeals.

5. Can this fee be charged if the record provided in electronic form is stored in CM/ECF?

No. This fee only applies when providing an electronic copy of a record stored *outside* of the CM/ECF system.

6. Can this fee be charged if the record provided in electronic form is available on PACER?

No. This fee should only be charged if the electronic record is stored *outside* of CM/ECF and, thus, not available on PACER. See [JCUS-MAR 18, p. 13](#) (noting that this fee is to be charged “for providing an electronic copy of a record that is stored outside a court’s CM/ECF system and is therefore not available through [PACER]” (emphasis added)). PACER is a system that provides access, with certain limitations, to the CM/ECF system.

7. Can the court charge an amount in addition to the new fee to cover the cost of the media (*e.g.*, CD, DVD, thumb drive) used by the court to provide the electronic copy?

No. A court may only charge a fee that is prescribed by statute or authorized by the Judicial Conference as specified in the miscellaneous fee schedules.

8. Could a court require a requesting party to provide the media, such as CDs, DVDs, or thumb drives (also commonly referred to as “flash” or “USB” drives), which the court would use to transfer the electronic file to the requesting party?

This practice is strongly discouraged due to substantial IT security risks. While there is no current policy that expressly prohibits the use of third-party media on judiciary networks, the *Guide to Judiciary Policy* does require that judiciary IT assets be protected. See [Guide, Vol. 15, Ch. 3, § 310.10.20: Importance of Security](#) (“The confidentiality, integrity, and availability of IT assets in the judiciary must be appropriately protected.”). Such protection would clearly include avoiding possible threats posed by the use of third-party media infected with malware on judiciary systems, one of the judiciary’s most critical IT assets. Accordingly, the AO IT Security Office (ITSO) strongly discourages the use of untrusted third-party media on judiciary systems. See, e.g., [IT Security Tip: Don’t Be Part of the Equation](#) (recommending that unknown thumb drives, CDs, or DVDs not be used because of the risk of exposure to malware); [Beware of Malware](#) (April 2018).

9. What is the difference between the new fee and the existing fee that some court types charge for reproduction of a recording of a court proceeding?

The new fee should not be applied when the court provides a recording of a court proceeding if that court type’s fee schedule includes a specific fee for such recordings. For example, the fee schedules for district, bankruptcy, and federal claims courts include a fee for providing a reproduction of an audio recording of a court proceeding.² Also, the Court of Appeals fee schedule provides a fee for reproducing a recording of proceedings “regardless of the medium,” which would cover both audio and video recordings of court proceedings.³ However, the [Judicial Panel on Multidistrict Litigation](#) does not contain a separate fee for recordings of court proceedings. As such, it would be appropriate to apply the new fee when providing recordings of court proceedings in this court type.

10. Because the amount of both the new fee and the fee for providing recordings of court proceedings is \$31, does it matter if the court fails to distinguish between the fees collected?

Yes. It is important for the courts to accurately distinguish between these two fees for accounting purposes. The amounts collected for these two fees are deposited into different funds. Specifically, 100% of the amount collected for the new fee will be deposited into Fund 510000 because the fee was created pursuant to the Federal Courts Improvement Act of 2000, Pub. L. No. 106-518 § 102 (permitting the judiciary to retain all revenue derived from the

² See Item 5 of the [District Court](#) fee schedule, Item 3 of the [Bankruptcy Court](#) fee schedule, and Item 9 of the Court of [Federal Claims](#) fee schedule. The language of the new fee in each of these schedules clarifies that “[a]udio recordings of court proceedings continue to be governed by a separate fee [in the fee schedule].”

³ See Item 5 of the [Court of Appeals](#) fee schedule. While the language of the new fee in this schedule does not specifically reference Item 5, Item 5 continues to govern recordings of court proceedings.

creation of new miscellaneous fees). For further guidance on the proper deposit funds for fees collected see the [Fee Charts](#) on the JNet. These charts are in the process of being updated to reflect the new fee.

11. Does this new fee require courts to provide the requested record in electronic form?

No. The establishment of the fee does not create a right of a party or an obligation of the court to provide a copy of a record in electronic form where a copy of the record can be provided in paper form.

12. When would the new fee be charged for providing an electronic copy of a record retrieved from NARA?

If the requested record is in paper format at the Federal Records Center (FRC), and the requestor wants to receive the copy electronically, knows what document(s) he/she wants, and the paper material does not exceed 100 pages, then the court should redirect the requestor to the [SmartScan service](#). This FRC service includes locating and pulling the paper record, scanning it, performing quality control procedures, saving the scanned copy in PDF format, and transmitting the file to the court via email.

However, if a court receives a paper copy of a requested record from the FRC and then scans it and provides it to the requester in electronic form, the court would charge the new \$31 fee in addition to any other fees applicable to the request. Note, however, that the fee being charged in this circumstance is for providing the electronic copy and not for the scanning of the paper copy. There is no fee that a court may charge for scanning a paper document.

13. How can courts encourage parties to use PACER to obtain electronic copies of court records?

In responding to requests for records that are available on PACER, courts should consider informing the requestor (*e.g.*, on the court’s copy request form) that PACER can be used to obtain both paper and/or electronic copies of court records subject to applicable PACER fees. To encourage requesting parties to obtain copies of records via PACER or at the court’s public terminal, courts should consider explaining the difference in cost for the various options. The table below provides a comparison of the various costs of obtaining records.

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Record Type	Stored in CM/ECF?	Method of Obtaining Copy	Fee⁴
Audio recording ⁵	Yes	PACER	\$2.40

⁴ PACER fees listed would be applicable after accruing more than \$15.00 in a quarterly billing cycle.

⁵ CM/ECF has the functionality to docket audio recordings.

Record Type	Stored in CM/ECF?	Method of Obtaining Copy	Fee⁴
(not of a proceeding in appellate, district, bankruptcy, or federal claims court)	Yes	Provided by clerk's office. [<i>Note:</i> This could apply when the requester does not have access to a PACER account or to CM/ECF.]	None
	No	Provided by clerk's office	\$31.00
Video recording (e.g., video included as an exhibit to a dispositive motion)	No	Provided by clerk's office	\$31.00
35-page document	Yes	PACER	\$3.00
	Yes	Electronic copy provided by clerk's office (e.g., email or CD) [<i>Note:</i> This could apply when the requester does not have access to a PACER account or to CM/ECF. It is in the clerk's discretion to provide the requested document electronically. <i>See</i> FAQ #11.]	None
	Yes	Paper copy printed from public terminal	\$3.50
	Yes	Paper copy provided by clerk's office	\$17.50
	No	Electronic copy provided by clerk's office (e.g., email or CD)	\$31.00