**Rule 5 of the Federal Rules of Civil Procedure Should Be Revised To Allow For Electronic Service of Papers Without Prior Consent**

## I. Introduction

We propose that the provision of Rule 5 of the Federal Rules of Civil Procedure dealing with service of papers by electronic means be changed to reflect the practice of the vast majority of federal practitioners today — service of discovery papers by electronic mail. We propose that the rule be modified in three principal ways: (1) removing the requirement that a serving party obtain written consent to serve by electronic means; (2) specifying that the manner in which the service is to be effectuated is to be in a manner reasonably calculated to lead to effective service, it being understood that conformance with a district court's format guidelines for ECF filing or electronic service is presumptively reasonable; and (3) requiring that notice of service be filed with the district court, thereby providing litigants with an additional layer of notice of service in the event that an electronically served document is not received.

## II. Rule 5(b)(2)(E)

Rule 5 provides the methods by which a party may serve papers. Rule 5(b)(2) provides: "A paper is served under this rule by: . . . (E) sending it by electronic means if the person consented in writing — in which event service is complete upon transmission, but is not effective if the serving party learns that is did not reach the person to be served . . .."

## III. Consent

The present wording of Rule 5 makes prior written consent a prerequisite for electronically serving papers. The requirement of prior written consent prevents electronic service from occupying the same default footing as personal service or service via mail or

common carrier. This limitation contrasts with the use of electronic service in motion practice, and it fails to recognize a trend among federal litigators to "serve" discovery documents and other non-pleading papers by e-mail without formally obtaining written consent. By modifying Rule 5, including the requirement of prior consent, we attempt to bring the wording of the Rule in line with the evolving practice and norms of electronic service.

In making electronic service available to litigants by default, we believe it is appropriate to place the burden on a litigant who cannot reasonably accept electronically served documents to "opt out" of this method of service. This is the inverse of the present practice, which requires litigants to "opt in" before electronic service is permitted.

A similar practice is employed by the district courts in the context of electronic filing. All district courts make ECF filing the default mode of filing pleadings and trial documents. Most (if not all) courts require registration with the ECF system upon admission to that court's bar. An attorney who wishes to opt out of ECF filing must, in many cases, ask permission to do so by application to the court. For example, the Western District of New York, Administrative Procedures Guide 1.C.viii. provides:

> Once registered, an attorney may withdraw from participation in the Electronic Filing System only by permission of the Chief Judge of the District for good cause shown. The registered attorney seeking to withdraw must submit a written request to the Chief Judge explaining the reason(s) or justification(s) for withdrawal. . . . It is the Filing User's responsibility to notify opposing counsel in all pending cases that the Filing User has been granted permission to withdraw from the Electronic Filing System and that all future service of documents must therefore be made by conventional means.

Similarly, a litigant who wishes to opt out of electronic service for *bona fide*, technological reasons should be allowed to do so, if the district court is satisfied that the basis or bases for opting out are reasonable. That said, opting out would strictly be a matter of technological limitation; just as a litigant cannot opt out of personal service or service by mail

because of personal preference, litigants should not be able to opt out of electronic service because they dislike e-mail or wish to frustrate their opponent.

## IV. Format of Electronic Paper

Another consideration in making electronic delivery a standard method of service is the question of transmission format. File formats (*e.g.*, pdf, pdf/A), the size of individual electronic documents to be transmitted, and the overall size of e-mail transmission are all factors that may affect a litigant's ability to send or receive electronically-served papers. It should go without saying that federal court litigants, and the information technology apparatus they use, do not possess the same level of technological sophistication. Similarly, accepted tactics for limiting spam and malicious electronic transmissions often involve placing size restrictions or other limitations on a user's ability to send and receive e-mail.

Given the speed at which standards are changed and updated, it would not be feasible nor advisable to attempt to formalize such a dynamic set of criteria within the Federal Rules. Rather, it is sensible to utilize each district court's ECF guidelines and requirements as the guidelines for electronic service of discovery papers.

In crafting local rules and guidelines, district courts take into account particular technological or practice characteristics of that district (most especially that of the particular court). For example, if there were a district where high-speed broadband was not widely available, a district court might choose to limit the maximum size of papers filed with the court to account for the slower rate of transmission some attorneys may have to endure. Software prevalence and preference, security concerns, and other factors may also influence local format customs or standards.

Local ECF standards may change fairly often and are district-specific. But, there is no reason why those same format rules cannot be applied to the e-service of other papers. To the contrary, a court's requirement that e-service conform with e-filing format rules will minimize the chance that particular parties or litigants will be unable to receive or view e-served papers. The format of electronic papers should be deemed presumptively reasonable if that format conforms to the local ECF format standard (or other locally-promulgated format criteria).

## V. Notice of Service

Although adherence to local standards and norms, as set out by the district courts in local rules or guidelines, should maximize the effectiveness of electronic service, there is always a risk that a particular transmission will not be received. (Indeed, this can happen by service via mail as well.) To further guarantee the effectiveness of electronic service, litigants serving in this fashion should be required to lodge a notice of service with the district court. A minority believes it is unnecessary.

Some district courts require that litigants file notices of service for all discovery demands and responses that are served by any means. This gives all registered litigants (and the district court) separate notice of the transmission of papers that are not otherwise filed with the court via the ECF system. For example, Local Rule 5.4(b) of the United States District Court for the District of Delaware provides:

> Service Without Filing. Consistent with Fed. R. Civ. P. 5(a), in cases where all parties are represented by counsel, all requests for discovery under Fed. R. Civ. P. 26, 30, 31, 33 through 36 and 45, and answers and responses thereto, and all required disclosures under Fed. R. Civ. P. 26(a), shall be served upon other counsel or parties but shall not be filed with the Court. In lieu thereof, the party requesting discovery and the party serving responses thereto shall file with the Court a "Notice of Service" containing a certification that a particular form of discovery or response was served on other counsel or opposing parties, and the date and manner of service.

The requirement that a notice of service be filed should virtually eliminate the risk that a party will be prejudiced by ineffective electronic service. While attorneys and others are responsible for providing an e-mail address that works, transmissions may fail, among other reasons, due to mis-spelled e-mail addresses or from the use of spam filters. Therefore, there should be a cross-check provided by a simple notice of filing. In the event that a litigant does not receive electronically-served papers, but receives notice of service lodged with the district court, this will flag the issue of failed or incomplete electronic service at an early stage. Lodging such notices in the local ECF system will impose a *de minimis* additional burden on a district court and its ECF system, owing to the brevity of such notice. This requirement would also not be an imposition on the serving litigant.

## VI. Proposed Modification of Rule 5(b)(2)(E)

With these considerations in mind, we propose that the following changes be made to Rule 5(b) with an appropriate Advisory Committee note:

(2) Service in General. A paper is served under this rule by:

. . .

(E) sending it by electronic means in a manner reasonably calculated to achieve effective service and if the serving party contemporaneously files a certification with the court that identifies the particular paper served and the date and manner of such service ~~if the person consented in writing~~ – in which event service is complete upon transmission~~, but is not effective if the serving party learns that it did not reach the person to be served~~;]

*Comment*

The modifications made to Rule 5(b)(2)(E) are intended to formalize what has become the general practice of most federal practitioners, namely service of discovery papers via

electronic mail or another established file transfer system or protocol without the need of prior consent.

Service of papers via electronic means in a format that conforms to a district court's ECF standards will be presumed to have been served in a manner reasonably calculated to achieve effective service. A manner that is "reasonably calculated to achieve effective service" is, by design, a fluid standard that is intended to cover both present practices and future practices that may not be reasonably foreseeable at present.[1] It is assumed that formatting papers to comply with the district court's particular ECF guidelines, which have been crafted in light of the information technology characteristics and norms of that district, will maximize the technical likelihood that service will be completed successfully. The district court will retain the ability under the proposed changes to Rule 5 to promulgate local rules or guidelines regarding format that would further enhance the effectiveness of service given the particulars of that district.

This standard also places the responsibility on the serving party to choose and execute a method of delivery that fairly and adequately delivers papers to the adversary. For example, service via traditional mail is successful when someone places a properly addressed, properly stamped copy of papers in a designated U.S. Mail repository. Of course, a party cannot assure that such papers will be properly retrieved and delivered by the post office, but service by mail makes it substantially likely that the opposing party will receive those papers. By making the presumptive standard for electronic service conform to district court standards for electronic filing, one is guided by the same philosophy that underlies other rules of service, that a party

[1] At present, the standard method of electronic service is via e-mail. The proposed changes to Rule 5 are designed to be applicable to both this method of service or future methods that may become standardized but are presently not envisioned.

who takes care in selecting a fair and effective format and method of service will be deemed to have discharged its service obligations.[2]

As with all methods of service, it is expected that the parties will honor the spirit of Rule 1 and work cooperatively in the event that electronic service attempted reasonably and in good faith is nonetheless unsuccessful. For example, in the event that a serving party learns, despite having complied with the requirements of subparagraph (e), that such service was actually ineffective, it is expected that the serving party will not take the indefensible position that the receiving party is obligated to act on the paper within the same time period as if service had been effective. Similarly, if the serving party complies with the requirements of subparagraph (e), but electronic service is actually ineffective, it is expected that the receiving party will not unreasonably object to the re-serving of the paper in question and will consent to reasonable scheduling modifications as needed to allow the serving party to comply with any applicable deadlines or notice periods.

The requirement that a serving party also file a certification with the district court identifying the paper served and the manner of service provides assurance that, in the event that actual service is not successful, a receiving party will have timely notice of the failure and may address that failure with the serving party. It is expected that the certification will be a simple short document and would not be a burden on either the serving party (who must create the document) or the district court (whose ECF system would house it).

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[2] It is understood that technology advances far more quickly than courts' rules and regulations can. Thus, it is likely to be the case that more convenient forms of electronic transmission have and will be developed than those approved for ECF. Nothing in this proposed rule change should be interpreted to suggest that those methods should not be utilized by parties. To the contrary, just as parties presently serve documents by mail and send courtesy copies by e-mail, we hope parties in the future will serve discovery documents by approved electronic methods and send courtesy copies by other electronic methods available to them if such would improve convenience and ease of use between the parties.

## VII. Conclusion

The Section has concluded that it is appropriate to modify Rule 5 to place electronic service on an even footing with more traditional methods of service. We further conclude that requiring that electronic service methods that comply with district-specific guidelines (ECF standards or those implemented by local rule or administrative provision) will enhance the likelihood that electronically served papers will reach their intended destination. An additional notice-of-filing requirement will assure that recipients of electronically-served papers will be made aware of such service and, if something is amiss, be able to timely address the situation where electronically-served papers were not received.

December 12, 2012

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