

RULES RESEARCH REGARDING E-FILING

The research has been split into two separate issues; e-filing, and e-service. There is no applicable caselaw that is recent or relevant to the issues generated by the prisoner e-filing project, but I've included some research below, and consulted The Guide and the rule advisory committee notes. **In summary, it looks like prisoner e-filing shouldn't be a problem under the federal rules, but e-service on prisoner litigants is likely to be a little sticky.** If you need anything else, or want more detail, just let me know. Thanks!

1) E-Filing - FRCvP 5(d) is adequate. The rule states that a paper is filed by "delivering it to the clerk" and it allows for filing "by electronic means...if reasonable exceptions are allowed." The prisoner e-filing project involves the scanning and submission of prisoner filings through a designated email address by trained prison personnel, which is comparable to the use of the CM/ECF system by an attorney and his/her staff. While the Judicial Conference (The Guide) does not specifically state that email is an approved means of "delivering" an electronic filing, email is without a doubt the most widely accepted method by which to transmit data electronically. The "reasonable exceptions" requirement could be an issue, but the prisoner e-filing project doesn't prohibit prisoners from continuing to file documents on paper via US Mail, if they so choose. At any rate, a prisoner filing is still considered "filed" upon delivery to prison officials and the original is still sent to the clerk via US Mail, much like a fax filing. According to the advisory committee notes, **we should detail the prisoner e-filing procedures in a local rule (probably LR 5.6), but a federal rule amendment doesn't appear to be necessary.**

The notes of the advisory committee on the 1996 amendments to Rule 5(d) (at the time it was Rule 5(e)) read: "It has authorized filing by facsimile or other electronic means on two conditions. The filing must be authorized by local rule. Use of this means of filing must be consistent with standards established by the Judicial Conference. Local rules must address these issues until Judicial Conference standards are adopted."

The Guide to Judicial Conference Policy references CM/ECF as a case management tool, but does not mention anything about CM/ECF being the "technical standard" for electronic filing or service. The Guide later goes on to ambiguously state that "filings with the court may be accomplished by mail or electronically." It appears that the Judicial Conference has not officially established a "technical standard" for electronic filing.

2) E-Service - FRCvP 5(b) is adequate, only if the prisoner consents to electronic service. The rule allows for service "by electronic means" or service "by any other means" only "if the person consented in writing." The email service arrangement that ILCD initiated with defendants to eliminate problems generated by the USM service is acceptable. The defendants have "consented in writing" to participate in the project and receive electronic service. They also routinely execute waivers of service of the complaint and summons for prison employees who are named as defendants. As for the prisoners, I don't believe they've ever given their consent on this project. Although the prisons and prison staff members have consented to participate in the project and in all likelihood, the prisoners love it, the prisoners have never officially consented to receive electronic service via prison email. (In the CDIL copies are still mailed to prisoners) In my opinion, this is a potential problem and can only be resolved by obtaining each prisoner litigant's consent in writing. **A federal rule amendment probably won't be able to successfully address this issue, because it is not advisable to require parties to accept electronic service without their consent.**

The notes of the advisory committee on the 2001 amendments to Rule 5(b)(2)(D) read: "It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. The consent must be express, and cannot be implied from conduct. Consent is required because it is not yet possible to assume universal entry into the world of electronic communication."

Although The Guide has not yet contemplated filing and/or service in prisoner litigation in any manner

other than paper, I did find something encouraging, which is a section regarding the "Prisoner Civil Rights Pretrial Videoconferencing Project." This project was undertaken with the consent of the Judicial Conference in an effort to "enhance case management and save judiciary resources," which seems to bode well for a prisoner e-filing project. See below.

5.04 (b)(4)

Prisoner Civil Rights Pretrial Videoconferencing Project

The District Courts of the United States have experienced a growing volume of prisoner civil filings. In some districts, the caseload for such proceedings represents a substantial percentage of all civil filings. Managing this caseload requires considerable personnel resources and is complicated by the need to transport inmates to the courthouse, or alternatively, for judicial officers to travel to correctional facilities to conduct pretrial hearings.

Following a three year pilot study authorized by the Judicial Conference, a six year project to provide support for the use of videoconferencing in civil pretrial proceedings was initiated by the AO. The objective of this project is to make videoconferencing available to district courts for use in prisoner civil pretrial proceedings in order to enhance case management and save judiciary resources. This project provides funding to support the use of videoconferencing in prisoner pretrial proceeding to district courts based on their satisfaction of criteria for participation adopted by the Judicial Conference. Since the beginning of this project in 1994, the Committee has authorized funding for thirty district courts.

Participation in the project requires that district courts demonstrate a substantial case load of prisoner civil filings and enter into cost-sharing arrangements with state, local or federal prison authorities. The project also encourages the use of videoconferencing equipment for other court business in order to maximize the flexibility and uses of the technology. For further information on this project, contact the Court Administration Policy Staff at the AO.

62B Am. Jur. 2d Process § 137

Law Reviews and Other Periodicals

Arwood, [Personal Jurisdiction: Are the Federal Rules Keeping Up with \(Internet\) Traffic?](#), 39 Val. U. L. Rev. 967 (2005)

Murphy, [From Snail Mail to E-mail: The Steady Evolution of Service of Process](#), 19 St. John's J. Legal Comment. 73 (2004)

Schreck, [Preventing "You've Got Mail" TM from Meaning "You've Been Served": How Service of Process by E-Mail Does Not Meet Constitutional Procedural Due Process Requirements](#), 38 J. Marshall L. Rev. 1121 (2005)

Toole et al., [International Litigation](#), 41 Int'l Law. 329 (2007)

Vernace, [E-mailing Service of Process: It's a Shoe In!](#), 36 UWLA L. Rev. 274 (2005)

Where service by fax is not an authorized method of service it is insufficient for the purpose of obtaining personal jurisdiction over defendant. The federal rule governing the service of a summons and complaint does not specifically authorize service by fax, e-mail or other electronic means. The rule does, however, permit dispatching a notice, complaint, and request for waiver by first-class mail or "other reliable means" as part of the waiver service provisions.

Observation:

[Federal Rule of Civil Procedure 5\(b\)](#), which governs methods by which papers (not including the summons and original complaint) in a federal civil suit may be served, does not authorize service by facsimile, unless consented to in writing by the person served. Similarly, a plaintiff may not generally resort to service of process by e-mail on his or her own initiative, but must seek approval of the court of the use of such an alternative means of process.