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Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: *Rules Suggestion of Modifying Rule 5(d) to Allow Permissive Filing of Rule 26 Disclosures and Discovery Requests and Responses*

To Whom It May Concern:

I suggest that Rule 5(d) be changed to provide that parties may file Rule 26 disclosures, discovery requests and discovery responses.

The Rules have always required service of these documents. However, since these documents may not be filed under the current Rule, service cannot be accomplished through CM/ECF. Therefore, parties must serve the documents by mail or in-person.

Since Rule 5(d) was last amended in this regard twenty-five years ago, service by traditional United States Postal Service mail has unfortunately become slower and less reliable. During the same period, the cost, speed and reliability of electronic service (and storage of the electronic document) has improved dramatically. See Advisory Committee Note to Year 2000 Amendment to Rule 5(d) (discussing then-varying “present capacities to store filed materials that are not used in an action” only four years after Rule was amended to permit, but not require, electronic filing and before service by electronic means was even permitted).

In essence, the initial purpose of the Rule (and similar Local Rules that preceded it) of avoiding “junking up” paper court files has largely been made obsolete by technological progress. While a similar concern may arise with respect to each action’s CM/ECF docket, any “junking up” of those dockets would be minimal and mitigated by the creation of an appropriate CM/ECF event that designates the event (of filing of disclosures or discovery requests prior to the time they are

¹ Licensed in Tennessee and Kentucky.

used in the proceeding) as not requiring Court action. The actual digital memory requirements associated with Court filing would be minimal.²

The change would permit a new form of service that is needed and would be beneficial. The comment for the 2018 amendment specifically recognized CM/ECF service or “service through the court’s facilities as a uniform national practice,” also writing that “[t]he time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney.” However, because of the prohibition on filing in Rule 5(d), without the change this letter proposes, CM/ECF service remains impossible for Rule 26 disclosures and discovery requests and responses.

While service by email is possible by consent under current Rule 5(b)(2)(E), there are unfortunately attorneys who refuse to consent to email service (despite regularly receiving the equivalent email notice through CM/ECF), and disputes arise in other cases regarding whether or not a party did or did not consent to service by email. The proposed Rule change would allow a party to serve registered CM/ECF users by filing the documents, which would accomplish electronic service in a manner consistent with registered CM/ECF users’ general receipt of court papers and also eliminate disputes about whether and when a document was served.

In addition to improving the efficient progress of civil actions, the Rule change would provide cost and environmental benefits, as parties will not be required to physically print and send through physical space. There are of course financial (postage or process server) costs of sending paper versions of documents. In addition, the current Rule commonly imposes a cost on the recipient of scanning the received paper document into the electronic format in which most law firms now operate. Further, while not large in the global sense, there would be some environmental benefits associated with electronic rather than paper service of documents: less paper used, a smaller carbon footprint due to less transportation of the documents, etc.

I would note that, while the vast majority of affected papers would be in cases solely involving parties represented by counsel who are registered users of CM/ECF, this change would also not adversely affect *pro se* and other parties who are not registered in CM/ECF. The change would allow filing. However, while filing through CM/ECF effects service through CM/ECF on CM/ECF registered users under Rule 5(b)(2)(E), the proposed change would not affect or remove the general requirement of serving persons who are not registered users through other means.

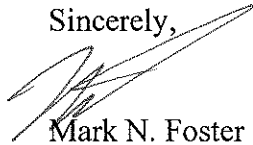
A variation of the change I am proposing would be to require parties to file these documents, rather than to merely remove the prohibition on filing. This would prevent parties from attempting to gain advantage from delays in receipt associated with traditional mailing. While I would also be in favor of this change, the change to simply allow filing I initially suggest above may be the best option as the first step. That change’s merits will be demonstrated in its

² Rule 26 disclosures, discovery requests, and discovery responses will be susceptible to filing in normal PDF format and generally not involve large numbers of pages. It may be beneficial to clarify in making the change that documents produced as responsive to requests for production (as opposed to the response to the request, itself), as well as depositions, both of which could involve more substantial storage requirements (in the cases of depositions, those that involve video components), should continue to not be filed until they are to be used in the proceeding.

operation, and experience under permissive filing will enable better evaluation of whether mandatory filing should be required.

Please let me know if the Committee will consider this change. Should you have any questions, I am happy to discuss further. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark N. Foster', written over the printed name.

Mark N. Foster