

**DATE:** May 6, 2008

**TO:** Hon. Elizabeth L. Perris  
Chief Bankruptcy Judge, District of Oregon  
Advisory Committee on Bankruptcy Rules

**FROM:** Hon. Vincent Zurzolo  
Chief Bankruptcy Judge, Central District of California

**RE:** FRBP 9014(b), Serving Motions

The purpose of this memo is to point out the apparent requirement in FRBP 9014(b) that motions be served using traditional methods, despite the shift to allowing delivery via CM/ECF of a NEF and hyperlink to constitute service of a document on attorneys who have already electronically filed a document in a bankruptcy case. My colleague Alan Ahart pointed out to me the apparently restrictive language of FRBP 9014(b) which, if strictly followed, fails to recognize service of motions via NEF on most attorneys. This is problematic, especially as it relates to motions filed in bankruptcy cases as opposed to motions filed in adversary proceedings.

**A. FRBP 9014(b), 7004(g), FRCP 5(b)(3)**

The current version of FRBP 9014(b) only allows service of motions via NEF on attorneys for debtors, and not on attorneys for any other persons or entities:

**RULE 9014 CONTESTED MATTERS**

*“(b) Service.* The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided for by Rule 5(b) F. R.Civ.P.”

The pertinent provisions of FRBP 7004 are:

**RULE 7004 PROCESS; SERVICE OF SUMMONS, COMPLAINT**

*(b) Service by First Class Mail.*

This subsection identifies individuals and other types of defendants, and does not appear to contain any treatment of parties represented by counsel.

*“(g) Service on Debtor’s Attorney.* If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor’s attorney by any means authorized under Rule 5(b) F.R.Civ. P.”

FRBP 7005 makes clear that transmission of a NEF and hyperlink to a document constitutes service of: (1) motions filed and served in adversary proceedings; and (2) motions filed in bankruptcy cases and served on debtor's attorneys.

**RULE 7005 SERVICE AND FILING OF PLEADINGS  
AND OTHER PAPERS**

(a) SERVICE: WHEN REQUIRED

“(1) *In General*. Unless these rules provide otherwise, each of the following papers must be served on every other party:”

“(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;”

“(D) a written motion, except one that may be heard *ex parte*; and”

(b) SERVICE: HOW MADE

“(1) *Serving an Attorney*. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.”

“(2) *Service in General*. 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 it did not reach the person to be served;”

“(3) *Using Court Facilities*. If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).”

Based upon the above, it appears that a motion filed within a bankruptcy case is treated differently than a motion filed within an adversary proceeding. For example, if a trustee files a motion to assume an executory contract, under FRBP 9014(b) that motion would be served under 7004(b), and therefore must be served by traditional means except on debtor's counsel. Yet, if a plaintiff in an adversary proceeding files a motion for summary judgment, that motion qualifies under FRCP 5(a)(1)(D) to be served via NEF under FRCP 5(b)(2)(E) and (b)(3).

**B. Policy Promoting Use of NEF as Service Method**

The Central District of California, and districts nationwide, have made significant strides toward registering attorneys as CM/ECF Users for the purpose of electronic filing and electronic receipt of notice and service. Our Court is presently revising its Local Bankruptcy Rules to affirmatively specify that delivery to an attorney via NEF of any filed document, be it a notice, motion, response, order, etc, constitutes service of that document regardless of whether it is the duty of the court or another person or entity to complete such service.

It will create confusion and increased workload to impose a separate duty of non-electronic service just for motions filed in bankruptcy cases, when the same duty is not required when serving motions in adversary proceedings.

It is also not logical because NEFs are only transmitted to attorneys who have already electronically filed a document in a particular bankruptcy case. As a result, that attorney will be added by CM/ECF to the list of attorneys or trustees who will receive NEFs of all documents filed in the future in that case. Attorneys who register for CM/ECF know that they are consenting to receipt of filed documents via NEF. What purpose is served by transmitting to an attorney a NEF with a hyperlink to a subsequently filed motion, and also requiring the movant to separately deliver the motion to the attorney by traditional means?

**C. Amendment of FRBP 9014(b)**

My suggestion is to amend FRBP 9014(b) as follows:

“(b) *Service*. The motion and any paper served after the motion shall be served in the manner provided for by Rule 5(b) F. R.Civ.P.”