LocalRule Comments

From:
Sent: Monday, October 14, 2024 10:20 AM
To: LocalRule Comments
Subject: Comment on Proposed Revision to Local Rule 8.1(a)

CAUTION - EXTERNAL:

Hello,

I write to comment on the proposed revision to Local Rule 8.1(a), concerning review of pro se and IFP pleadings. I am strongly in favor of the revision. The proposed revision will greatly cut down on wasted judicial and public resources. Currently, the AG's office defends against numerous suits filed by pro se parties that should be subject to summary dismissal but are not reviewed by anyone prior to the defendants being served. This requires the assigned attorney to unnecessarily spend time briefing a motion to dismiss and requires the assigned magistrate judge to spend time reading and evaluating the briefing rather than conducting its own review, which is likely much more efficient that sorting through the parties' arguments. This is especially true for many pro se parties, who, because of their lack of legal training, often make confusing and hard to follow arguments. And attorneys who proceed pro se on their own claims often use their legal training to make the arguments particularly convoluted. If the parties have already not consented to the magistrate judge when the ruling granting the motion to dismiss is issued, that now requires the defense to spend unnecessary time briefing the pro se plaintiff's objections. Then the district court judge has to spend time evaluating that briefing. On top of all of this, the time spent between MTD briefing and the magistrate judge's recommendation and between the objection briefing and order adopting the recommendation keeps many cases sitting on the court's docket for months that could have easily been dismissed upon summary dismissal review.

I currently have one case that exemplifies this issue. The pro se (but not IFP) plaintiff brought suit against the judge who is presiding over his state court domestic relations (divorce) case. This is the fifth time he has sued either the presiding judge or the court in which the case is being heard. All four cases were previously dismissed. Plaintiff has been expressly warned that future claims stemming from his divorce case are subject to summary dismissal and potential sanctions. Yet, the most recent case was not reviewed prior to service because the plaintiff does not have IFP status. The motion to dismiss has been fully briefed for three months. And the court is now going to have to spend time reviewing the briefing rather than simply reviewing the complaint and summarily dismissing it. Since the motion has been fully briefed, the plaintiff has filed multiple motions (all improper because the court does not have subject matter jurisdiction over the case), that court will also now have to review and rule upon. All of this could be avoided if the complaint had been subject to review for summary dismissal prior to service of the complaint. Accordingly, I strongly support the proposed revision and ask that the court adopt it.

LocalRule Comments

From:
Sent: Tuesday, October 15, 2024 7:31 AM
To: LocalRule Comments
Subject: comment on proposed local rule change - D.C.COLO.LCivR 72.2

CAUTION - EXTERNAL:

Hello –

I only have a comment about the proposed change to D.C.COLO.LCivR 72.2.

I think the existing prohibition on judicial officers and other court staff attempting to influence the consent process should remain in place.

I think it would be unseemly for judicial officers (especially the magistrate judges themselves) to potentially press the parties to consent to magistrate judge jurisdiction. Judicial officers wield great influence over counsel's choices. I would feel uncomfortable answering a judicial officer's questions about why we are making a particular choice about consent in a particular case. And, if it is clear that one side does not wish to consent while the other side does, that could set up a situation where the judicial officer feels unfavorably about the party that did not choose to consent.

CAUTION - EXTERNAL EMAIL: This email originated outside the Judiciary. Exercise caution when opening attachments or clicking on links.

LocalRule Comments

From:
Sent: Tuesday, October 15, 2024 11:32 AM
To: LocalRule Comments
Subject: Comments on Proposed Rule Changes
Attachments: Bottger-Statement of Expectations.pdf; Comments on Proposed Local Rule Changes - 223412.pdf

CAUTION - EXTERNAL:

To the Court:

I am writing to comment on the proposed amendment to D.C.Colo.LAttyR 2(a) and 7(b)(1). I am opposing the proposed rules changes. While it is appropriate for a judge to have expectations of attorneys appearing in their courtroom, standards of professional conduct, which can affect an attorney's entire career, should be uniform and should be based on a consensus of the profession or governing authority, rather than the potentially idiosyncratic views of an individual judge.

A little about me before I more fully explain my objections to the rule proposals. I have been a practicing attorney in Colorado for over 20 years and a member of the bar of this court since December 2002. I am also a member of the 10th Circuit bar and the United States Supreme Court bar. I am a former president of the Mesa County Bar Association and was on the board of governors of the Colorado Bar Association. I am currently on the Colorado Supreme Court Civil Rules Committee and the Twenty-First Judicial District Judicial Performance Commission. I have been active in the profession and have been a consistent proponent of professionalism.

I am opposed to the rule changes in part because it is already difficult enough to keep track of the disparate rules within the court: from the Federal Rules of Civil Procedure, to the local rules, to the individual judge's practice standards. There may also be magistrate judge standards in addition to the district judge's standards. While it may be appropriate for these rules to govern the individual cases before the court and to have consequences in those cases, violation of the rules or standards of professional conduct have consequences far beyond the individual case. The rules and their violation can affect the attorney's ability to practice before the court as a whole; and with reciprocal discipline they can affect the attorney's entire career. Such consequences should not rest in a rule unique to one judge or one courtroom.

The problem is exacerbated because it is not uncommon for a case to be transferred, meaning there can be different expectations even within the same case. The rule does not address what happens if a case is transferred and new rules apply; what happens if prior conduct now violates a rule imposed by the new judge? Would application of the rule by prospective from the judge's assignment only? The issue of compliance will be even more acute for young attorneys or attorneys new to federal practice. No one is teaching law students about local rules and judicial practice standards. As a junior attorney, I only learned about local rules because I worked with a more senior attorney, and only learned about judges' practice standards because I was before a judge who expressly called out her practice standards. Because of the potential impact of professional misconduct, the rules should be well known, well publicized, and universal so that attorneys can be sure of their obligations.

Another reason I am opposed to the proposed rule changes is, as I've noted, standards of professional conduct and their violation can affect an attorney's entire practice, not just an individual case. As their very names implies, standards of professional conduct should govern the entire profession, not just a courtroom. Rules that potentially affect an entire career should be based on a consensus view of the profession and, in particular, the governing authority, be it a supreme court, a bar committee, or a panel of judges. It should not be based on the views of an individual judge or how they chose to word their version of the rule. The proposal could lead to inconsistent rules, inconsistent interpretations, and inconsistent discipline. The same conduct in different courtrooms might lead to discipline in one and no complaint at all in another. That is not appropriate for standards governing professional conduct.

I am not opposed to, and in fact support, judges having expectations for professional conduct in the courtroom. Several years ago, a Mesa County judge would issue a statement of expectations in contentious cases. **See Attachment**. Such expectations might be enforced through contempt of court, rulings on motions, attorney fee sanctions, and similar consequences. A failure to confer properly might result in having to re-file a motion at attorney expense. Misconduct during a deposition might result in an attorney having to pay for their opponent to retake it. Misconduct during discovery might result in an attorney fees award in addition to relief on a motion. Sanctions such as these are a far more appropriate way to address an individual judge's expectations of professionalism, rather than sanctions like suspension from the practice of law, or even a public admonishment that will follow an attorney throughout their career. I would welcome a rule change that allows a judge to impose reasonable sanctions in an individual case, while I oppose a rule that allows an attorney's entire career to be impacted by the idiosyncratic rule of a single judge found in their practice standards.

I encourage the court to refrain from adopting the proposed changes to D.C.Colo.LAttyR 2(a) and 7(b)(1). I would encourage the court to instead adopt a rule allowing judges to set forth their expectations regarding conduct and professionalism and allow them to impose reasonable sanctions in individual cases. This would maintain the distinction between a judge's practice standards and standards of professional conduct that should govern the entire profession and have a profound impact on attorney's careers. It would also reduce problems of inconsistency and disproportionate impact on junior attorneys or those new to federal practice.

I appreciate the opportunity to comment on the proposed rule changes and hope that the court will consider my comments.

U.S. DEPARTMENT OF JUSTICE

Matthew T. Kirsch
Acting United States Attorney
District of Colorado

1801 California Street, Suite 1600 *(303) 454-0100*
Denver, CO 80202

October 25, 2024

By email to LocalRule_comments@cod.uscourts.gov
United States District Court, District of Colorado
Alfred A. Arraj United States Courthouse
901 19th Street
Denver, CO 80294

Re: Comments on Proposed Revisions to the Local Rules of Practice for the United States District Court for the District of Colorado

To the Clerk of Court:

The United States Attorney's Office for the District of Colorado provides these comments on proposed amendments to the Local Rules of Practice for the United States District Court for the District of Colorado, which the Court opened for comment on October 12, 2024. As set forth below, our office suggests two changes. First, as to the proposed amendment to D.C.COLO.LCivR 8.1(a) regarding review by a judicial officer of the pleadings of all *pro se* parties, we suggest that the Court provide clarification to that rule to ensure that the review of pleadings by the judicial officer takes place *before* the defendants must respond to the complaint. Second, as to the proposed amendments to D.C.COLO.LAttyR 2(a) and 7.1(b)(1) expanding the grounds for attorney discipline to include violations of any practice standards and orders imposing standards of professional conduct, we suggest that the Court not adopt this rule.

I. D.C.COLO.LCivR 8.1: PRO SE PARTY, IN FORMA PAUPERIS PARTY, AND PRISONER PLEADINGS

The Court proposes to amend D.C.COLO.LCivR 8.1(a), which currently provides for the screening of pleadings where a party is proceeding without prepayment of a filing fee. *See* D.C.COLO.LCivR 8.1(a) (requiring, in relevant part, requires review by a judicial officer of pleadings filed by "a party who is allowed to proceed without prepayment of filing fees to determine whether the pleadings should be dismissed summarily"). The Court proposes to amend this rule to require review by a judicial officer of the pleadings of *all* pro se parties—not just those proceeding without prepayment of fees. The amended rule would add the underlined text:

> A judicial officer designated by the Chief Judge shall review the pleadings of a pro se party or a party who is allowed to proceed without prepayment of filing fees to determine whether the pleadings should be dismissed summarily….

The proposed amendment thus would expand the judicial officer's review to include pleadings by all *pro se* parties, even if the *pro se* party has paid the filing fee and served the defendant.

We believe this proposed amendment, without further clarification, could lead to confusion about whether and when a defendant should file a response to a *pro se* complaint. Currently, that confusion is generally avoided because the Court's review of *pro se* pleadings is governed not only by D.C.COLO.LCivR 8.1, but also by 28 U.S.C. § 1915. Section 1915 includes provisions that clarify how such judicial review proceeds when a complaint is filed by a *pro se* party who is proceeding *in forma pauperis*. In particular, it provides for "officers of the court" to "issue and serve all process…." *Id.* § 1915(d). In such cases, the Court typically does not direct officers of the court to issue and service all process until after the judicial officer has reviewed the pleading and determined whether some or all of it should be dismissed.

The proposed amendment of D.C.COLO.LCivR 8.1(a) leaves ambiguous whether a defendant should await the conclusion of the judicial officer's review before responding to a complaint that has been served on the defendant by a *pro se* party who is *not* proceeding *in forma pauperis*. Absent some clarification about when defendants should respond to such complaints, confusion and inefficiency may result, as a defendant is likely to be preparing a response to the complaint at the same time that a judicial officer may still be reviewing that complaint.

Accordingly, we suggest that the Court should add language to D.C.COLO.LCivR 8.1(a) to provide that a defendant should not respond to a *pro se* party's complaint until the judicial officer's review of that pleading is complete. The amended rule could be modified, for example, to include the underscored text below:

> A judicial officer designated by the Chief Judge shall review the pleadings of a *pro se* party or a party who is allowed to proceed without prepayment of filing fees to determine whether the pleadings should be dismissed summarily. <u>A defendant shall not respond to the pleading until the judicial officer has issued an order determining whether the pleading will be dismissed or may proceed. If the judicial officer issues an order permitting the pleading to proceed, it will issue an order, as appropriate, either directing the *pro se* party to serve the order and pleading on the defendant, or, for a party who has been allowed to proceed without prepayment of filing fees, directing officers of the court, pursuant to 28 U.S.C. § 1915(d)(1), to serve all process.</u>

II. D.C.COLO.LAttyR 2: STANDARDS OF PROFESSIONAL CONDUCT D.C.COLO.LAttyR 7: COMPLAINTS AND GROUNDS FOR DISCIPLINE

The Court proposes to amend its rules to expand the grounds that may subject a member of the Court's bar to disciplinary sanctions. Currently, D.C.COLO.LAttyR 2(a) adopts the Colorado Rules of Professional Conduct (with a few specified exceptions) as the "standards of professional responsibility for the United States District Court and the United States Bankruptcy Court for the District of Colorado." D.C.COLO.LAttyR 7, in turn, permits any person to file a

complaint against a member of the bar of this Court based on, among other things, "a violation or attempted violation of the Standards of Professional Responsibility." The Court proposes to amend those rules by adding the following underscored language:

> **D.C.COLO.LAttyR 2**
> *(a) Standards of Professional Conduct.* Except as provided by Subdivision (b) or order or rule of the United States Bankruptcy Court for the District of Colorado, the Colorado Rules of Professional Conduct (Colo. RPC) are adopted as standards of professional responsibility for the United States District Court and the United States Bankruptcy Court for the District of Colorado. A judicial officer may impose additional standards of professional conduct by practice standard or order, the violation of which constitutes grounds for discipline under D.C.COLO.LAttyR 7(b)(1).
>
> **D.C.COLO.LAttyR 7 COMPLAINTS AND GROUNDS FOR DISCIPLINE**
> ***
> *(b) Grounds for Discipline.* Grounds for discipline include:
> (1) a violation or attempted violation of the Standards of Professional Responsibility or of a practice standard or order imposing additional standards of professional conduct.

If those rules are amended as shown above, an attorney who violates any individual judicial officer's practice standard or order that is deemed to impose a "standard of professional conduct" may be subject to discipline. At the same time, the Court proposes to lower the burden of proof applied in disciplinary proceedings by the Committee of Conduct and the Disciplinary Panel, from "clear and convincing evidence" to "preponderance of the evidence." *See* D.C.COLO.LAttyR 7(e)(1), (f).

We do not believe that the Court should adopt these proposed amendments, for several reasons.

First, the proposed amendment would significantly expand the scope of attorney conduct that is subject to discipline, without the benefit of the extensive processes that ordinarily precede the adoption of standards governing the profession. Currently, attorneys in the District of Colorado face discipline under the well-defined set of standards in the Colorado Rules of Professional Conduct. Those Rules, in turn, generally accord with longstanding principles reflected in the American Bar Association's model standards. Practitioners also generally have the ability, with standards of professional conduct, to obtain guidance from public bodies about the scope of permissible conduct. Here, the Court's amendment would subject attorneys to a new set of unpredictable rules that would not have the protections that other well-established standards provide, such as carefully defined *mens rea* standards.

Second, the proposed amendments would not give the bar—or even the Committee on Conduct—clarity on what orders or practice standards, if not followed, would subject attorneys to discipline. The judges' existing individual practice standards do not generally identify which of those standards should be viewed as "professional conduct" standards. For example, the Uniform Civil Practice Standards adopted by several district judges and magistrate judges do not

specifically designate or identify any of those standards as rules of professional conduct. Nor do they make clear whether their prohibitions and prescriptions should be viewed as qualifying as "practice standard[s] … imposing standards of professional conduct." Some of those practice standards *might* be viewed as imposing standards of professional conduct. *See, e.g.,* Uniform Civil Practice Standard § 10.1(c)(4) (directing parties to "avoid characterizing the opposing party's actions ('counsel conveniently overlooked,' 'counsel attempts to mislead the court by stating,' etc."); Uniform Civil Practice Standards of the United States Magistrate Judges § V.9 (requiring a party filing a motion under Fed. R. Civ. P. 12(b) to "include a conspicuous statement describing the specific efforts undertaken to comply with this Practice Standard," and providing that an attorney's failure to comply "may subject them to an award of attorney's fees and costs assessed personally against them").

Third, even if the judges were to expressly designate certain of their practice standards or orders as setting standards of professional conduct, the proposed amendment would grant individual judges unusual amounts of authority to set those standards. After this amendment, all the judges could, without any process, adopt their own individual practice standards or orders setting professional practice standards. Attorneys who violate those standards could face disciplinary sanctions. Conduct might be subject to discipline before one judge under that judge's practice standards even if the same conduct in another courtroom would be permitted. This variation by judge in professional practice standards would deprive practitioners of the protection of the predictability provided by the current professional standards that the Court applies in its disciplinary proceedings.

Fourth, the proposed amendment could lead to a dramatic expansion of disciplinary complaints to the Committee on Conduct, while leaving the Committee with ambiguity on how to evaluate those complaints. The judges' individual practice standards are voluminous and complicated in many respects, and cover both major and minor matters. After the proposed amendment, any person could submit a complaint to the Committee on Conduct to report any attorney who has violated a judge's order or practice standard that could be viewed relating to professional conduct. The Committee on Conduct and the Disciplinary Panel would have little guidance about whether a violation of a practice standard should be subject to discipline as a violation of a "professional conduct" standard.

Finally, we note that any negative effects of this proposed amendment could be compounded by the effects of another, related change the Court has proposed—to lower the burden of proof required to impose disciplinary sanctions on lawyers, from a "clear and convincing evidence" standard to a "preponderance of the evidence" standard. The Court has not provided an explanation of the reasons it proposes to make these proposed amendments to D.C.COLO.LAttyR 7(e)(1) and (f), and we are not aware of any reasons to change this standard. This change would depart from the burden-of-proof standard typically used in attorney disciplinary proceedings. *See* American Bar Association Standards on Imposing Lawyer Sanctions, Standard § 1.3 (2019) ("When disciplinary proceedings are brought against lawyers alleged to have engaged in unethical conduct, disciplinary counsel in most jurisdictions have the burden of proving misconduct by 'clear and convincing evidence.'"). In attorney disciplinary hearings in Colorado, the Attorney Regulation Counsel must prove violations of the Colorado Rules of Professional Conduct by clear and convincing evidence. *See* Colorado Rules of

Attorney Discipline, Rule 242.30(b)(3) (Disciplinary Hearings) ("*Burden of Proof*. Proof as to rule violations, affirmative defenses, and eligibility for reinstatement or readmission must be by clear and convincing evidence….). Adopting the proposed amendments to D.C.COLO.LAttyR 7(e)(1) and (f) and thus lowering the evidentiary standards applicable to these complaints could backfire, by encouraging the submission of marginal complaints to the Committee on Conduct where the evidence is not substantial, while giving the Committee less authority to dismiss those complaints.

We recognize that the Court may have good reasons for seeking additional tools to ensure appropriate behavior by attorneys appearing before the Court, and we don't wish to interfere with that goal. We believe, however, that additional consideration of the best means to achieve this goal is warranted.

* * *

We greatly appreciate the opportunity to provide comments.