UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
OFFICE OF THE CLERK

MEMORANDUM

Date: November 30, 2010
To: Clerk's Office Staff
Cc: Gregory Langham, Clerk
Chris Vagner, Chief Deputy Clerk of Operations
From: Ed Butler, Legal Officer
Subject: Summary of Federal and Local Rules Changes, effective Dec. 1, 2010

The following is a summary of both the federal and local rules of procedure changes. Regarding the federal rule changes, they were adopted by the Judicial Conference's Committee on Rules of Practice and Procedure, and approved by the U.S. Supreme Court earlier this year. As of today, November 30, 2010, Congress has taken no action on the amendments, and under the Rules Enabling Act, 28 U.S.C. § 2072, the amendments to the federal rules will take effect on December 1, 2010. Regarding the district court's local rule amendments, those were adopted by the court on Nov. 17, and will also take effect December 1, 2010.

I. Revised Federal Rules

The Supreme Court of the United States has approved the following rule amendments:

- Civil Rules 8, 26, and 56;
- Criminal Rules 12.3, 21, and 32.1;
- Appellate Rules 1, 4, and 29, and Form 4;
- Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, 9001 and new rule 5012;
- Evidence Rule 804.

Civil Rules 8, 26, and 56:

A Rule 8(c) – No Need for Discharge as an Affirmative Defense

A proposal to delete "discharge in bankruptcy" from the list of affirmative defenses in an answer (such as fraud, duress, statute of limitations) in Rule 8(c)(1) was adopted. The proposal was suggested by bankruptcy judges and approved by other experts, who argued that statutory changes in the bankruptcy code – 11 U.S.C. § 524(a) – eliminates the need for discharge to be an affirmative defense.

B. Rule 26(a) – Re: Required Disclosures of Expert Trial Witnesses

The Rule 26 changes are in two parts. Both stem from the aftermath of extensive changes adopted in 1993 to address disclosure and discovery with respect to trial-witness experts. One change creates a new requirement to disclose a summary of the facts and opinions to be addressed by an expert witness who is not required to provide a disclosure report

under Rule 26(a)(2)(B). The other change extends confidential attorney work-product protection to drafts of the new expert opinion summary disclosure and also to drafts of 26(a)(2)(B) [Expert employed to provide testimony] reports. It also extends the confidential work-product protection to communications between attorney and trial-witness expert, but withholds that protection from specific categories of communications – regarding the expert's compensation; and the facts, data or assumptions that the party's attorney provided to the expert for use in forming the opinions to be expressed..

C. Rule 56 – Summary Judgment

This important summary judgment rule has been revised to improve the procedures for presenting and deciding summary judgment motions and to make the procedures more consistent with those already used in many courts.

1. The Federal Rules Advisory Committee restored the more mandatory term of "shall," replacing the former "should" as the direction to grant summary judgment when there is no genuine dispute as to any material fact.

2. The Advisory Committee rejected a proposal for a "point-counterpoint" procedure, i.e., a detailed provision establishing a 3-part procedure [the motion/response/reply using a statement of material facts] for a summary-judgment motion – (this is the method that *is* followed by the judges in our court and contained in our Local Rule 56.1A). The Advisory Committee decided to continue to leave it to district courts and their discretion to provide for such procedures through their local rules or individual judges' procedures.

3. The rule now recognizes that a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746 as a substitute for an affidavit to support or oppose a summary-judgment motion.

4. Courts now have options when an assertion of fact has not been properly supported by the party or responded to by the opposing party, including considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or affording the party an opportunity to amend the motion.

5. The rule now explicitly recognize that "partial summary judgments" may be entered.

Criminal Rules 12.3, 21, and 32.1

A. Rule 12.3 (Notice of Public Authority Defense)

The amendment provides that a victim's address and telephone number should not automatically be provided to the defense when a public authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure.

B. Rule 21. Transfer for Trial

The amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial.

C. Rule 32.1. Revoking or Modifying Probation or Supervised Release
The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger, but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence, which has been established by case law.

Appellate Rules 1, 4, and 29, and Form 4:

A. Federal Rule of Appellate Procedure 1(b)
This rule was changed to condense and refine the definition of "state" in all sections of the rules.

B. Federal Rule of Appellate Procedure 4(a)(7)
This is in the nature of a clerical change. Amendments to the Federal Rules of Civil Procedure [regarding the re-formatting of Rule 58] required an update to the Fed. R. Civ. P. citations in this rule.

C. Federal Rule of Appellate Procedure 29(c)

A section was added here which requires amicus curiae parties ("friend of the court") to reveal whether 1) a party's counsel authored the amicus brief, 2) whether a party or party's counsel contributed money that was intended to fund preparation of the brief, or 3) whether a person other than the actual amicus contributed money intended to fund preparation of the brief, and requiring identification of that person or entity. The disclosure requirement, modeled on a Supreme Court rule, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs, and may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

D. National (in forma pauperis affidavit) Form 4
This is a clerical change to remove some unnecessary brackets in the text of the form.

Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, 9001 and new Rule 5012:

- None of the amendments put in place this year should have an impact on our court.

Evidence Rule 804: – Rule 804(b)(3)

The hearsay exception for an unavailable declarant's statement against interest.

The current rule requires a **criminal**-case defendant – but not the government – to show corroborating circumstances as a condition to admission of an unavailable declarant's statement against penal interest. The revision extends the corroborating-circumstances requirement to the government, as some courts have done anyway. The proposed amendment makes no change for civil cases or for statements against pecuniary interest.

II. Individual Revised Local Rules

Affected Rule Number	Description of Revision
D.C.COLO.LCivR 7.2B.	**7.2B – Motions to Seal; Motions to Close Court Proceedings; Judicial Enforcement of Stipulations to Seal.** A problem was identified with regard to motions to seal documents that are the subject of stipulated protective orders. Sometimes the party that has no interest in the confidentiality of a particular document attaches it to a motion or brief. The party files a motion to seal because the confidentiality agreement or protective order requires it to do so, but it is difficult for such party to state sufficient grounds for sealing of the document. This local rule was revised to provide for the presumptive sealing of a document that is the subject of a confidentiality agreement or protective order for a period of fourteen days. If no motion to seal is filed within the fourteen day period, the document will then be automatically unsealed.
D.C.COLO.LCivR 7.2H.	**7.2H – Public Notice; Objections.** A request from the public sought clarification regarding calculation of the time period for public posting of motions to seal. To avoid confusion, the Court has adopted a modification to require that the motion be posted on the "next business day" after its filing.
D.C.COLO.LCivR 10.1I.	**10.1I – Format of Papers Presented for Filing; First Page; Case Number.** The Court has decided to eliminate the use of the word "type" as in "civil case type" in D.C.COLO.LCivR 10.1I., except in the introductory paragraph. The use of the word throughout the rule is repetitive. Some grammatical corrections were made to the rule, as well.

D.C.COLO.LCivR 11.1B.

11.1B – Appearances; Signature Not to Be Delegated.
A public comment requested simplification and clarification of the phrasing in 11.1B. to emphasize that any signature will be treated as that of the attorney. The Court, in response, has determined that more explanation in the rule just increased confusion; that simplicity and clarity were best achieved by deleting everything other than the first sentence of the rule, that pointedly states that signatures will not be delegated.

D.C.COLO.LCivR 56.1A.

56.1A – Summary Judgment Motions and Briefs – Motions.
In deference to the amendments to Federal Rule 56, and its recognition of motions for partial summary judgment, a corresponding reference was made in the local rule.

D.C.COLO.LCivR 56.1C.

56.1C – Summary Judgment Motions and Briefs; Exhibits to Motion or Briefs. The Court has eliminated the mandatory Exhibit Numbering System in the dispositive motion rule; differing practices among the judges of the court suggests that it is best to remove this requirement and instead leave it to the individual discretion of the judges.

D.C.COLO.LCivR 81.1

81.1 – Copies of State Court Proceedings in Removed Actions.
The clerk's office requested consideration of how and by whom state court papers (motions, orders etc) should be filed in the docket for removed actions. Currently, the clerk's office staff receives an email with attached state court papers. The clerk's staff attaches the state court papers as exhibits (without denomination) to the Notice of Removal.

The Court reviewed the statutes and rules that applied to removed actions, and considered the current inconvenience associated with filing of state court papers without appropriate designation in the federal case record.

Accordingly, the Court determined that the removing party is in the best position to determine what state court papers should be filed. State court motions and orders should be designated as such in the docket of the removed case both for ease of reference and to ensure timely disposition. Therefore, the removing party is now required to file – pursuant to the removal statute, 28 U.S.C. § 1446 – a notice of removal (and other case initiating documents such as the complaint, answer, service documents, and orders) and separately file other state court motions, including a docket sheet (termed in state court as the "register of actions") within 14 days.

D.C.COLO.LCivR Appendix F.1. 26.1 (Per Fed. R. Civ. P. 26.1)

Appx. F.1. – Proposed Scheduling Order – Compliance with Fed. R. Civ. P. 26 Requirements. Several amendments to Federal Rule 26 are scheduled to take effect this year. The proposed change affects only Appendix F.1, the template Scheduling Order. Since the Federal Rule has added a new category of expert witness disclosures, additional text has been inserted to operate as a reminder to counsel and parties.

D.C.COLO.LCivR 16.3 – Appendix G

Appendix G. – Final Pretrial Orders Appendix G, section 7(b) regarding disclosure deadlines, is now updated to reflect the recent 2009 time computation changes

Civil and Criminal Rules with Identical / Similar Revisions

D.C.COLO.LCivR 83.5F.1. and D.C.COLO.LCrR 57.7F.1

Attorney Discipline; Resolution of the Complaint by the Committee on Conduct; Dismissal of the Complaint.

The Court's Committee on Conduct requested that it be allowed to dismiss a complaint on grounds other than the merits. Presently a complaint must be dismissed strictly on those grounds.

The language "merits of the complaint" suggests that the Committee must reach the merits before dismissing a complaint. In some circumstances, dismissal may be appropriate without a determination on the merits. For example, in the past the Committee on Conduct has had to recommend dismissal of claims for ineffective assistance of counsel and a fee dispute, as being better addressed in other fora. The Committee on Conduct requested a change to grant it flexibility to dismiss a complaint on its own accord without a merits determination.

The Rule has been modified to require that the reason for the dismissal be stated by the Committee on Conduct.

Criminal Rules

No criminal rules are affected other than D.C.COLO.LCrR 57.7, discussed above.