U.S. District Court, District of Colorado

Summary of Local and Federal Rule Changes
Effective December 1, 2016

The Advisory Committee on the Local Rules of Practice completed the following in this 2016 cycle of rule changes:

Amendments to the Local Rules of Practice were approved by the members of the Court on September 21, 2016, after consideration of the following: 1) the required post-pilot project review of local patent rules; 2) consideration of a proposal regarding the rules of professional conduct; and 3) 25 comments timely submitted during the 2016 cycle. After opportunity for public review and comment through electronic notices and posting on the court's website, the approved and finalized Local Rules of Practice were published on November 10, and became effective on December 1, 2016. Besides the conversion of the pilot program of local patent rules into new rules, this year's revisions include an assortment of new administrative provisions that will contribute to more efficient case administration, and several amendments to attorney practice rules.

As a result, the Local Rules revisions do the following:

- convert the magistrate judge direct assignment pilot programs into corresponding local rules;
- refine the criminal rules (regarding restricted documents, and created a protocol for disposition of exhibits);
- refine the civil rules (create a new rule re: miscellaneous cases; emphasize electronic exchange of written discovery; create exception for prisoner litigants re: amended pleadings protocol; provide greater discretion to judicial officers regarding deposition locations for supervision; mandate notices to be filed in all cases proposed for consolidation; and correct procedure for magistrate judge treatment of foreign discovery motions).
- refine the court's attorney rules (eliminating most exceptions to the Colo. Rules of Professional Conduct; enhance student practice rules; and correct party eligibility and attorney withdrawal procedures in civil pro bono representation);
- undertake certain minor restyling and reformatting changes (stylistic changes are not listed below).

For the complete versions of the Local Rules of Practice, in both final and redline form, visit the Local Rules page of the court's website: http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/LocalRules.aspx.

Also, the Advisory Committee urges court staff, members of the bar, and the general public to be aware that the Federal Rules of Civil Procedure have undergone several changes regarding the Federal Rules of Civil Procedure (particularly removal of ambiguous language regarding service, and elimination of the three-day rule for items served electronically); Criminal Procedure (service on foreign corporate defendants and venue to obtain warrants for remote electronic searches); Appellate Procedure (particularly inmate filing rules, late post-judgment motions and appeal time, and length limits for briefs and other documents); and certain Bankruptcy Procedure rules. Those changes are for the most part addressed in the summary provided below, but for a comprehensive account of the federal rule changes, please visit the Committee Reports / Records and Archives of the Rules Committees subpages of the Rules and Policies section of the U.S. Courts website: http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/committee-reports. For your convenience, an Executive Memorandum and Summary of Proposed [Now Final] Amendments to the Federal Rules, provided by the Judicial Conference Committee on Rules of Practice and Procedure to the U.S. Supreme Court for review, is attached at the end of this document.

The Advisory Committee on the Local Rules always welcomes comments from court users, members of the bar, and the public at large. Please send your comments or suggestions to: LocalRule_Comments@cod.uscourts.gov

Local Rule Number and Title, or Important Federal Rule Revision	Practice Under Previous Local Rule	New Practice Under Revised Local Rule	Related Federal Rule, Statute, or Other Consideration .
CIVIL RULES			
D.C.COLO.LCivR 2.1 Forms of Action	**New rule:** A proceeding not defined as a civil action under Fed. R. Civ. P. 2 shall be filed as a civil miscellaneous ("mc") or registered judgment ("rj") action only if it is included in the List of Miscellaneous Cases provided on the court's website, and on payment of the fee required in the court's Schedule of Fees. [See "Categories of Miscellaneous Cases" form on the USDC website here.]	This new rule has the purpose of prohibiting the filing of contested matters that are essentially civil actions that masquerade as miscellaneous cases. With growing frequency, parties submit materials to the court that essentially are successful attempts to use the court as a records depository. Documents filed as a miscellaneous case avoid the filing fee required of civil actions, but these are often contested matters that eventually require resolution by a judicial officer, unlike a registered judgment, apostille, receivership order, etc. -- the materials traditionally categorized as miscellaneous matters.	**Fed. R. Civ. P. 2. One Form of Action. There is one form of action—the civil action.** A civil action is the proceeding that constitutes the court's mission to hear cases and controversies under Art. III, Sec. 2 of the United States Constitution.
Fed. R. Civ. P. 4. Summons. **(No corresponding local rule.)**	**(4)(m) Time Limit for Service.** If a defendant is not served within 90 days after the complaint is filed, the Court on motion or on its own after notice to the plaintiff must dismiss the action without prejudice against that defendant or order that service be made within a specified	No corresponding Local Rule.	Federal Rules Committee Note: Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the time set by Rule 4(m).

	time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).		
D.C.COLO.LCivR 5.3 ~~Non-Filed~~ Discovery Materials	New Subdivision (c): **(c) Written Discovery Requests and Responses.** Except in prisoner cases or unless otherwise ordered, written discovery requests and responses shall be exchanged by private e-mail or other non-paper means.	The new provision emphasizes the efficiency, cost-savings, and convenience of electronic exchanges of written discovery. Note that under **D.C.COLO.LCivR 5.1 Formatting, Signatures, Filing, And Serving Pleadings And Documents, (d) Electronic Service**: "Registration in CM/ECF shall constitute consent to electronic service of all pleadings or documents."	**Fed. R. Civ. P. 5. Serving and Filing Pleadings and Other Papers;** **(b) Service: How Made. (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; or and **(d) Filing. (1) Required Filings; Certificate of Service.** Any paper after the complaint that is required to be served—together with a certificate of service—must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

Fed. R. Civ. P. 6. Computing and Extending Time; Time for Motion Papers	Local Rule applicable provision: **D.C.COLO.LCivR 5.1 Formatting, Signatures, Filing, And Serving Pleadings And Documents.** **(d) Electronic Service**: * * * * * When a pleading or document is filed in CM/ECF, it is served electronically under Fed. R. Civ. P. 5. The time to respond or reply shall be calculated from the date of electronic service, regardless of whether other means of service are used.	Revised Federal Civil Rule 6(d) now states: **(d) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after ~~service~~being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a). The revision eliminates the Three-Day Rule, i.e., providing an additional 3 days to any deadline, when service is effected electronically. The Three-Day provision continues to be applied to service effected by mail, delivery to the clerk, or other means consented to. Please note that "Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service 'by any other means' of delivery under subparagraph (F)."	Federal Rules Committee Note: Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served. Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.
D.C.COLO.LCivR 15.1 Amended Pleading	-- Amendment made as a matter of course [Subdivision (a)], or by motion [Subdivision (b)] must follow specific textual markings to allow court to understand proposed changes.	Amendment of pleadings technical requirements will now not apply to unrepresented prisoners, who often do not have the ability to electronically insert and mark text as required by this rule.	**Fed. R. Civ. P. 15. Amended and Supplemental Pleadings.**
D.C.COLO.LCivR 30.3 Sanctions For Abusive Deposition Conduct	Previously, specific sites within and without the courthouse were listed as possible locations for prompt supervision of abusive depositions by a judicial officer.	The rule now provides liberty to the court to specify any location for supervised deposition: **(d) Location of Deposition.** ~~If deposition abuse is anticipated,~~ A~~a~~ judicial officer may order that a deposition be taken at a specific location~~the courthouse or master's office so that, at the request~~	**Fed. R. Civ. P. 30. Depositions by Oral Examinations.** **(d) Duration; Sanction; Motion to Terminate or Limit.** **(3) Motion to Terminate or Limit.** (A) Grounds. At any time during a

		~~of any party, deponent, or counsel, a dispute may be heard and decided immediately by a judicial officer or master~~.	deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order. (B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending. (C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.
D.C.COLO.LCivR 40.1 Assignment Of Cases	-- Use of distinct forms regarding case assignment procedures for direct and traditional consent jurisdiction of magistrate judges.	-- Standardization of Consent form names to: • Election of Consent or Non-Consent Form to United States Magistrate Judge Jurisdiction • Instructions regarding Direct Assignment to United States Magistrate Judge Jurisdiction • Instructions regarding Traditional Consent to United States Magistrate Judge Jurisdiction [See Civil Case Forms on the USDC website here.]	**Fed. R. Civ. P. 73. Magistrate Judges: Trial by Consent; Appeal.** and: **28 U.S.C. § 636(c) - Jurisdiction, powers, and temporary assignment.** (1) *Upon the consent of the parties*, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order

			the entry of judgment in the case, *when specially designated to exercise such jurisdiction by the district court or courts he serves*. **[See D.C.COLO.LCivR 72.2 – Consent Jurisdiction of a Magistrate Judge, (a) Designation.]** See also: **28 U.S.C. § 137 - Division of business among district judges**. "The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court."
D.C.COLO.LCivR 42.1 Motion to Consolidate	Previously: "A motion to consolidate shall be decided by the district judge to whom the lowest numbered case included in the proposed consolidation is assigned. A motion to consolidate shall be given priority. Consolidated cases shall be reassigned to the judicial officer(s) to whom the lowest numbered consolidated case was assigned."	The revision to 42.1 requires that notice be given to the judicial officers presiding over the consolidated cases, not just the one with the lowest numbered case. This is to prevent unnecessary or duplication of efforts by judges and their staff: "A motion to consolidate shall be filed in the lowest numbered case included in the proposed consolidation and shall be decided by the district judge to whom the lowest numbered case ~~included in the proposed consolidation~~ is assigned. **A notice of filing of a motion to consolidate shall be filed by the movant as a party or, with the assistance of the clerk, as an interested party in all other cases proposed for consolidation**. A motion to consolidate shall be given priority. Consolidated cases shall be reassigned to the judicial officer(s) to whom the lowest numbered consolidated case was assigned."	**Rule 42. Consolidation; Separate Trials.** **(a) Consolidation.** If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.
D.C.COLO.LCivR 67.2 Court Registry	New provision in Subdivision (e):	Subdivision (e) is a technical amendment necessary to conform to IRS requirement that interpleader	The Internal Revenue Service (IRS) in February 2006 amended the

	(e) Interpleader funds deposited under 28 U.S.C. § 1335 are defined by the IRS as a Disputed Ownership Fund (DOF), a taxable entity that requires tax administration. Unless otherwise ordered, interpleader funds shall be deposited in the DOF established in the CRIS and administered by the Administrative Office of the United States Courts (AO), which shall be responsible for meeting all DOF tax administration requirements. The Director of the AO is designated as the custodian of funds deposited in the DOF.	funds be stored in a separate account from other funds kept in the court's electronic registry, the CRIS system.	regulations implementing the taxation requirements for designated settlement funds. See 26 U.S.C. § 468B, 26 C.F.R. § 1.468B-9. Under the amended regulations, interpleader funds deposited under 28 U.S.C. § 1335 meet the IRS definition of a "disputed ownership fund" (DOF), a taxable entity that requires tax administration (26 C.F.R. § 1.468B-9(b)(1), 9(h)(3)).
D.C.COLO.LCivR 72.1 General Authority And Duties Of A Magistrate Judge	A correction regarding discovery motions. Previous practice regarding magistrate judge rulings on out-of-district discovery incorrectly authorized those judicial officers to determine these matters directly, and has been eliminated: **(b) Duties.** A magistrate judge may: ***** ~~(7) make determinations and enter appropriate orders on discovery disputes in cases pending in other federal courts or courts of another country;~~	This amendment is necessary in order to provide Art. III judicial review for petitions filed under 28 U.S.C. § 1782 for the issuance of subpoenas to seek evidence for use in foreign proceedings. See Phillips v. Beierwaltes, 466 F.3d 1217, 1222 (10th Cir. 2006). Amended rule: **(c) Other Duties.** On reference or order by a district judge, a magistrate judge may: ***** (4) make determinations and enter orders or recommendations on discovery disputes in cases pending in other federal courts or courts of another country.	**28 U.S.C. § 636(b) - Jurisdiction, powers, and temporary assignment.** **28 U.S.C. § 1782. Assistance To Foreign And International Tribunals And To Litigants Before Such Tribunals.**
D.C.COLO.LCivR 79.1 Custody Of Pleadings, Documents, Conventionally Submitted Materials, And Exhibits.	The rule generally only discussed custody and removal of exhibits:	There is now a new protocol for disposition of exhibits: **(a) Custody and Removal.** Unless otherwise ordered, pleadings, documents, conventionally submitted materials, and	**Rule 79. Records Kept by the Clerk.**

		exhibits in a court file or submitted to a judicial officer shall not be removed from the office or custody of the clerk or judicial officer. **(b) Disposition.** (1) After 60 days of entry of final judgment in a civil action in which no appeal is taken, the clerk may notify counsel of record and any unrepresented party that the clerk intends to dispose of any conventionally submitted material or exhibit in the possession of the clerk. If no objection is filed within 14 days of the notice, the clerk may dispose of the conventionally submitted material or exhibit. (2) In a civil action on appeal, any conventionally submitted material or exhibit that was not transmitted as a part of the record on appeal may be transferred by the clerk to the offering attorney or unrepresented party who shall retain the conventionally submitted material or exhibit pending order of the appellate court.	
Fed. R. Civ. P. 82. Jurisdiction and Venue Unaffected. **(No corresponding local rule.)**	**Rule 82. Jurisdiction and Venue Unaffected.** These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C. "1391-1392~~.	No corresponding Local Rule.	Federal Rules Committee Note: Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392. [The amendment deletes the reference to § 1391 and to repealed § 1392 and adds a reference to new § 1390 in order to carry forward the purpose of integrating Rule 9(h) with the venue statutes through Rule 82.]

Local Rule Number and Title or Important Federal Rule Revision	Practice Under Previous Local Rule	New Practice Under Revised Local Rule	Related Federal Rule, Statute, or Other Consideration
CRIMINAL RULES			
Fed. R. Crim. P. 4. <u>Arrest Warrant or Summons on a Complaint</u>.	**[No corresponding local rule.]**	<u>Revised Rule</u>: **Rule 4. Arrest Warrant or Summons on a Complaint** **(a) Issuance.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If <u>an individual</u> defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant. <u>If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by United States law.</u> * * * * * **(c) Execution or Service, and Return.** **(1) *By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons. **(2) *Location.*** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. <u>A summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.</u> **(3) *Manner*.**	The Federal Rules Committee explains: **A. Service on Foreign Corporate Defendants** The amendment to Criminal Rule 4 addresses service of a summons on organizational defendants that have no agent or principal place of business within the United States. The current rule provides for service of an arrest warrant or summons within a judicial district of the United States but poses an obstacle to the prosecution of foreign corporations that have committed offenses punishable in the United States. Such corporations often cannot be served because they have no last known address or principal place of business in the United States. Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that the Criminal Rules should provide a mechanism for foreign service on an organization. **The amendment makes several**

		(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible. (B) A summons is served on an individual defendant: (i) by delivering a copy to the defendant personally; or (ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address. (C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. ~~A copy~~If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization~~organization's last known address within the district or to its principal place of business elsewhere in the United States~~. D) A summons is served on an organization not within a judicial district of the United States: (i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a managing or general agent, or to an agent appointed or legally authorized to receive service of process; or (ii) by any other means that gives notice, including one that is: (a) stipulated by the parties; (b) undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or (c) permitted by an applicable international agreement. * * * * *	**changes to Rule 4.** **First**, it fills a gap in the current rule by specifying that the court may take any action authorized by existing laws (e.g., statutes, treaties) if an organizational defendant fails to appear in response to a summons. **Second**, the amendment changes the mailing requirement for service of a summons on an organization within the United States by eliminating the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but requires mailing when delivery has been made to an agent authorized by statute, if the statute itself requires mailing to the organization. **Third**, the amendment authorizes service on an organizational defendant outside of the United States by prescribing a non-exclusive list of methods for service, including service in a manner authorized by the applicable foreign jurisdiction's law, stipulated by the parties, undertaken by foreign authority in response to a letter rogatory or similar request, or pursuant to an international agreement. In addition to these enumerated means of service, the proposal contains an open-ended provision that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the other means enumerated in the rule.

Fed. R. Crim. P. 41. Search and Seizure.	**[No corresponding local rule.]**	Revised Rule: **Rule 41. Search and Seizure** * * * * * **(b) ~~Authority to Issue a Warrant~~Venue for a Warrant Application.** At the request of a federal law enforcement officer or an attorney for the government: * * * * * **(6)** a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if: (A) the district where the media or information is located has been concealed through technological means; or (B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts. * * * * * **(f) Executing and Returning the Warrant.** **(1) *Warrant to Search for and Seize a Person or Property.*** * * * * * (C) *Receipt.* The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to use remote access to search electronic storage media and seize or copy electronically	The Federal Rules Committee explains: **B. Venue to Obtain Warrants for Remote Electronic Searches** This amendment addresses venue for obtaining warrants for certain types of remote electronic searches. At present, Rule 41 generally limits searches to locations within a district, with a few specified exceptions. The Department of Justice asked the Advisory Committee to amend Rule 41 to account for two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown; and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts. The amendment addresses these gaps by amending Rule 41(b) to include two additional exceptions to the list of out-of-district searches permitted under the subsection. Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside or outside of the district: (1) when a suspect has used technology to conceal the location of the media to be searched; or (2) in an investigation into a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), when the media to be searched include protected computers that have been damaged and are located in five or more districts. The revision

		stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person. * * * * *	also amends Rule 41(f)(1)(C) to specify the process for providing notice of a remote access search.
Fed. R. Crim. P. 45. Computing and Extending Time.	Local Rule applicable provision: **D.C.COLO.LCrR 49.1 Formatting, Signatures, Filing, And Serving Pleadings And Documents.** * * * * * **(d) Electronic Service**: "When a pleading or document is filed in CM/ECF, it is served electronically under Fed. R. Crim. P. 45. The time to respond or reply shall be calculated from the date of electronic service, regardless of whether other means of service are used."	Revised Federal Criminal Rule 45(c) now states: **(c) Additional Time After Certain Kinds of Service.** When a party may or must act within a specified ~~period~~time after ~~service~~being served and service is made ~~in the manner provided~~ under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under subdivision (a).. The revision eliminates the Three-Day Rule, i.e., providing an additional 3 days to any deadline, when service is effected electronically. The Three-Day provision continues to be applied to service effected by mail, delivery to the clerk, or other means consented to. Please note that "Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service 'by any other means' of delivery under subparagraph (F)."	Federal Rules Committee Note: **Subdivision (c).** Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.
D.C.COLO.LCrR 47.1 Public Access To Cases, Documents, And Proceedings	-- Documents that shall be filed with Level 2 restrictions did not include information provided by cash bail submitters.	Additional Level 2 restriction for cash bail documents creates greater administrative efficiencies for the court. Revised Local Rule 47.1(d) now states:	Fed. R. Crim. P. 12. Pleadings and Pretrial Motions

		(f) Documents Subject to Presumptive Restriction. The following documents shall be filed subject to the specified presumptive restriction levels without the order of a judicial officer: **(1) Documents that shall be filed with Level 2 restriction (access limited to the filing party, the affected defendant(s), the government, and the court):** * * * * * (D) information provided by an owner of cash bail.	Fed. R. Crim. P. 49.1. Privacy Protection for Filings Made with the Court

Local Rule Number and Title or Important Federal Rule Revision	Practice Under Previous Local Rule	New Practice Under Revised Local Rule	Related Federal Rule, Statute, or Other Consideration
LOCAL PATENT RULES (SECTION III – NEW SECTION)			
D.C.COLO.LPtR 1 SCOPE OF THE LOCAL RULES	**None. Please note that these rules existed in modified form as the Pilot Project on Local Patent Rules.** **See Memorandum re: Pilot Program Implementing Proposed Local Patent Rules, adopted June 4, 2014; available on the Court website here.**	[The New Rules are provided in their entirety in this column.] **(a) Title and Citation.** These rules shall be known as the Local Rules of Practice of the United States District Court for the District of Colorado - Patent Rules. These rules shall be cited as D.C.COLO.LPtR Rule, Section, and Subsection (e.g., D.C.COLO.LPtR 3(a)). **(b) Effective Date.** Unless otherwise stated, these rules are effective as of December 1 of each year. **(c) Scope and Applicability.** These rules apply to patent infringement, invalidity and unenforceability actions. A judicial officer may modify the obligations or deadlines set forth in these rules based on the circumstances of any particular case, including, without limitation, the nature of relief sought and/or the simplicity or complexity of the case as shown by the patents, claims, technology, products, or parties involved. **(d) Applicability of Local Civil Rules.** Except where inconsistent with these rules, the Local Rules of Practice of the United States District Court for the District of Colorado – Civil apply. **(e) Forms.** Forms are subject to modification without notice.	**None.**
D.C.COLO.LPtR 2 INITIAL SCHEDULING CONFERENCE		Lead counsel for the parties shall participate in the conference under Fed. R. Civ. P. 26(f). The parties shall prepare and submit a proposed Patent Scheduling Order in the form (HERE). Nothing in these rules precludes or prohibits a	

		request or order to expedite proceedings, including a request or order for an expedited claim construction hearing or ruling.	
D.C.COLO.LPtR 3 DISCOVERY OBJECTION; PRESERVING CONFIDENTIALITY; ENTRY OF PROTECTIVE ORDER		**(a)** **Premature Discovery Objection.** A party may object to a request for discovery seeking information or documents in advance of the deadline in the Patent Scheduling Order for disclosure of such information or documents. **(b)** **Confidentiality.** The parties shall not delay making disclosures under Fed. R. Civ. P. 26(a) on the grounds of confidentiality. The parties shall not delay responding to discovery on the grounds of confidentiality. The producing party may designate a discovery response as “confidential” or use another confidential designation such as "outside attorneys' eyes only". Disclosure of a confidential document or information by the receiving party shall be limited by the designation of confidentiality. **(c)** **Protective Order.** No later than ten (10) days prior to the Rule 16 Scheduling Conference: (1) the parties shall submit an agreed proposed protective order; or (2) if they cannot agree, each party shall submit a separate proposed protective order which specifically identifies the provisions on which the parties agree and disagree. Each party simultaneously may submit a brief of no more than two (2) pages in support of its proposed protective order.	
D.C.COLO.LPtR 4 DISCLOSURE OF ASSERTED CLAIMS AND INFRINGEMENT CONTENTIONS		**(a)** **Infringement Contentions.** By the date specified in the Patent Scheduling Order, a party claiming patent infringement shall serve Infringement Contentions identifying with specificity each accused product or process (the "Accused Instrumentality"). **(b)** **Claim Chart.** A party who serves Infringement Contentions also shall serve a claim chart for each Accused Instrumentality. If two or more Accused Instrumentalities have the same relevant characteristics, they may be grouped together in one claim chart. The claim chart(s) shall be specific and	

		shall contain the following information: (1) Identification of each claim of each patent in suit that is allegedly infringed by the Accused Instrumentality; (2) Identification of the specific location of each limitation of the claim within each Accused Instrumentality, including for each limitation that the party contends is governed by 35 U.S.C. §112(f), the identity of the structures, acts, or materials in the Accused Instrumentality that perform the claimed function; (3) A statement of whether each limitation of each asserted claim is literally present in the Accused Instrumentality or present under the doctrine of equivalents; and, (4) If an allegation of direct infringement is based on acts of multiple parties, a description of the role of each such party in the direct infringement.	
D.C.COLO.LPtR 5 DOCUMENT PRODUCTION ACCOMPANYING INFRINGEMENT CONTENTIONS		Contemporaneously with service of the Infringement Contentions, the party claiming patent infringement shall produce to each party (or make available for inspection and copying) the following documents and identify by production number which documents correspond to each category: (a) All documents demonstrating each disclosure, sale (or offer to sell), or any public use, of the claimed invention before the application date or the priority date (whichever is earlier) for each patent in suit; (b) All documents created on or before the application date or the priority date (whichever is earlier) for each patent in suit that demonstrate each claimed invention's conception and earliest reduction to practice; (c) A copy of the patent(s) in suit and all communications with the United States Patent and Trademark Office	

		regarding the patent(s) in suit and any related application(s); and (d) All documents demonstrating ownership of the patent rights by the party claiming patent infringement.	
D.C.COLO.LPtR 6 RESPONSE TO INFRINGEMENT CONTENTIONS		By the date specified in the Patent Scheduling Order, a party opposing a claim of patent infringement shall serve its Response to Infringement Contentions, which shall be specific and include the following: (a) A clear identification of each limitation of each asserted claim alleged not to be present in the Accused Instrumentality; (b) A detailed description of the factual and legal grounds for each limitation identified in subdivision (a); and (c) To the extent that the Response to Infringement Contentions is based on claim interpretation, identification of any relevant claim term.	
D.C.COLO.LPtR 7 DOCUMENT PRODUCTION ACCOMPANYING RESPONSE TO INFRINGEMENT CONTENTIONS		Contemporaneously with service of the Response to Infringement Contentions, a party opposing a claim of patent infringement shall produce to each party (or make available for inspection or copying) the following: (a) All documents sufficient to show the operation of any aspect or elements of an Accused Instrumentality identified by the party claiming patent infringement in its Infringement Contentions under D.C.COLO.LPtR 4; and (b) If relevant, source code, specifications, schematics, flow charts, artwork, formulas, and any other description of the operation of the Accused Instrumentality.	
D.C.COLO.LPtR 8 INVALIDITY CONTENTIONS		**(a) Invalidity Contentions.** By the date specified in the Patent Scheduling Order, a party opposing a claim of patent infringement shall serve its Invalidity	

		Contentions, if any. **(b)** **Claim Chart.** The Invalidity Contentions shall include a chart (or charts) identifying each allegedly invalid claim, and each item of prior art that anticipates or renders each claim obvious, including the specific location in the items of prior art of each limitation of each asserted claim. Claim charts shall be specific and contain the following information: (1) An explanation, including the relevant statutory language, of how the item qualifies as prior art; (2) If anticipation is alleged, identification of each item of prior art and an explanation of how it anticipates the asserted claim; (3) If obviousness is alleged, identification of each item of prior art or combination of items of prior art, and, separately for each item of prior art or combination of items of prior art, an explanation of how the item or combination of items renders the asserted claims obvious; and (4) A statement explaining any other grounds of invalidity of any asserted claims.	
D.C.COLO.LPtR 9 PRODUCTION OF PRIOR ART WITH INVALIDITY CONTENTIONS		Contemporaneously with service of the Invalidity Contentions, a party opposing a claim of patent infringement shall produce to each party (or make available for inspection and copying) a copy of each item of prior art identified under D.C.COLO.LPtR 8 which does not appear in the file history of any patent at issue. If an item of prior art is not in English, an English translation shall be provided.	
D.C.COLO.LPtR 10 RESPONSE TO INVALIDITY CONTENTIONS		**(a)** **Response to Invalidity Contentions.** By the date specified in the Patent Scheduling Order, a party claiming patent infringement shall serve a Response to Invalidity Contentions.	

		(b) **Claim Chart.** The Response to Invalidity Contentions shall include a chart or charts which respond to the corresponding Invalidity Contentions. A claim chart shall be specific and contain the following information: (1) For each item of asserted prior art, identification of each limitation of a claim that the party believes is absent from the prior art. (2) If the Response is based on claim interpretation, identification of the relevant claim term; and (3) If obviousness is alleged, an explanation of why the prior art does not render the asserted claim obvious. **(c)** **Information for Design Patents.** For design patents, a party shall explain why the prior art does not anticipate the claim.	
D.C.COLO.LPtR 11 DOCUMENTS ACCOMPANYING RESPONSE TO INVALIDITY CONTENTIONS		Contemporaneously with service of the Response to Invalidity Contentions, a party claiming patent infringement shall produce to each party (or make available for inspection and copying) any document, electronically stored information, or thing supporting the Response.	
D.C.COLO.LPtR 12 DISCLOSURE REQUIREMENT IN PATENT CASES SEEKING DECLARATORY JUDGMENT		If a party files a pleading seeking a declaratory judgment that a patent is not infringed, is invalid, or is unenforceable and the responsive pleading does not include a claim for patent infringement, then D.C.COLO.LPtR 4 shall not apply. If a party does not assert a claim for patent infringement in its answer to the pleading requesting declaratory judgment, then the party seeking a declaratory judgment shall proceed under D.C.COLO.LPtR 8 by the date specified in the Patent Scheduling Order.	
D.C.COLO.LPtR 13 OPINION OF COUNSEL		**(a)** **Production of Opinion.** By the date specified in the Patent Scheduling Order, a party relying on an opinion of counsel to defend a claim of willful infringement,	

		induced infringement, or contributory infringement, to assert that a case is exceptional shall disclose the identity of counsel and produce (or make available for inspection and copying) the written opinion and any document containing the facts and data considered by counsel in forming the opinion. **(b)** **Privilege Log.** A party relying on an opinion of counsel shall serve a privilege log complying with Fed. R. Civ. P. 26 (b)(5)(A).	
D.C.COLO.LPtR 14 JOINT CLAIM TERMS CHART		By the date specified in the Patent Scheduling Order, the parties shall file a Joint Disputed Claim Terms Chart identifying the disputed claim terms and phrases and each party's proposed construction with citations to supporting intrinsic and extrinsic evidence.	
D.C.COLO.LPtR 15 CLAIM CONSTRUCTION BRIEFING		Unless otherwise ordered, by the date specified in the Patent Scheduling Order: (a) A party opposing a claim of patent infringement and/or asserting invalidity (if there is no infringement issue in the case) shall file an opening claim construction brief which shall include all supporting evidence; (b) An opposing party shall file a response which shall include all supporting evidence; (c) A party filing an opening claim construction brief may file a reply; and (d) Contemporaneously with the completion of claim construction briefing, the parties shall file a "Joint Motion for Determination".	
D.C.COLO.LPtR 16 FINAL PATENT CONTENTION DISCLOSURES		**(a)** **Final Infringement Contentions.** **(1)** **Due Date.** No later than 28 days after the claim construction order is filed, a party asserting infringement shall serve its Final Infringement Contentions.	

		(2) **Contents.** Unless otherwise ordered, a party shall not assert at trial an infringement contention not contained in its Final Infringement Contentions. (3) **Amendments.** Final Infringement Contentions shall not identify additional accused products or processes not contained in the preliminary infringement contentions without good cause (e.g., discovery of previously undiscovered information or an unanticipated claim-construction ruling). The party asserting infringement shall include a separate statement of good cause for any amendment. (4) **Exclusion.** Accused infringers may seek to exclude an amendment to Final Infringement Contentions on grounds that good cause does not exist. (5) **Due Date for a Motion to Exclude.** A motion to exclude shall be filed no later than 14 days after service of the Final Infringement Contentions. (6) **Failure to Object.** Any unopposed amendment to the Final Infringement Contentions shall be included. **(b) Final Invalidity Contentions.** (1) **Due Date.** No later than 21 days after service of the Final Infringement Contentions, each accused infringer shall serve its Final Invalidity Contentions. (2) **Contents.** Final Invalidity Contentions shall include a party's final statement of all contentions. A party shall not assert at trial any invalidity contention not contained in its Final Invalidity Contentions. (3) **Amendments.** If the Final Invalidity	

		Contentions identify additional prior art, the amendment shall be supported by good cause (e.g., discovery of previously undiscovered information or an unanticipated claim-construction ruling) and an accused infringer shall include a separate statement of good cause for any amendment. **(4)** **Exclusion.** A party asserting infringement may seek to exclude an amendment to the Final Invalidity Contentions on grounds that good cause does not exist. **(5)** **Due Date for a Motion to Exclude.** A motion to exclude shall be filed no later than 14 days after service of the Final Invalidity Contentions. **(6)** **Failure to Object.** Any unopposed amendment to the Final Invalidity Contentions shall be included.	
D.C.COLO.LPtR 17 WORD LIMITS; CERTIFICATE OF COMPLIANCE		Unless otherwise ordered: (a) A claim construction brief or brief on a dispositive motion shall not exceed 10,000 words, double spaced, in Arial 12 point font. (b) If a party files a supporting brief and a reply brief, the two briefs together shall not exceed 10,000 words, double spaced, in Arial 12 point font. (c) Each brief shall include a Certificate of Compliance stating the number of words in the brief.	

Local Rule Number and Title or Important Federal Rule Revision	Practice Under Previous Local Rule	New Practice Under Revised Local Rule	Related Federal Rule, Statute, or Other Consideration
AP RULES (No Changes)			
		Other than the change of name of a form referenced in **D.C.COLO.LAPR 72.2 Consent Jurisdiction of a Magistrate Judge, (d) Unanimous Consent; Determination**, no substantive changes have been made to the "AP" rules (administrative agency, board, commission or officer, and bankruptcy appeals).	

Local Rule Number and Title or Important Federal Rule Revision	Practice Under Previous Local Rule	New Practice Under Revised Local Rule	Related Federal Rule, Statute, or Other Consideration
ATTORNEY RULES			
D.C.COLO.LAttyR 2 Standards of Professional Conduct	Local Attorney Rule 2(b) – Exceptions – previously has not recognized certain provisions of the Colorado Rules of Professional Conduct (Colo. RPC) regarding limited scope representation, as well as one RPC concerning inadvertent disclosure of documents from an opposing party. LAtty2(b), and before that D.C.COLO.LCivR 83.4 Standards of Professional Responsibility and Local Administrative Order 2007-6, historically have declined to permit counsel and pro se parties to enter into limited representation arrangements, as permitted by the Colo. RPC. The U.S. District Court now authorizes entry of parties and counsel into such arrangements – for both civil prisoner rights litigation and unrepresented, non-prisoner civil litigation; the parties, however, must follow the court's requirements regarding entry and withdrawal from such arrangements in civil cases by court approval. See also LAttyR 5(a) and (b). The Court's exception to Colo. RPC 4.4 (Respect for Rights of Third Persons) regarding inadvertent	**(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. **(b)** **Exceptions.** The following provisions of the Colorado Rules of Professional Conduct (Colo. RPC) are excluded from the standards of professional responsibility for the United States District Court and the United States Bankruptcy Court for the District of Colorado: (2) Colo. RPC 1.2(d), Comment [14] (counseling and assisting client regarding Colorado Constitution art. XVIII, §§ 14 and 16 and related statutes, regulations, or orders, and other state or local provisions implementing them), except that a lawyer may advise a client regarding the validity, scope, and meaning of Colorado Constitution art. XVIII, §§ 14 and 16 and the statutes, regulations, orders, and other state or local provisions implementing them, and, in these circumstances, the lawyer shall also advise the client regarding related federal law and policy related statutes, regulations, or	Compare to Colo. RPC 1.2, et seq., and CRPC 11. Colorado rules of procedure and conduct are available on the Colo. Judicial Branch website here.

	disclosure of documents has been determined to be unnecessary after a further examination as to the actual text and commentary to the rule. Please note that no change was made regarding Comment [14] of the Colo. Supreme Court about Colo. RPC 1.2(d), the professional conduct guidance regarding marijuana use and industry regulations.	orders, and other state or local provisions implementing them), except that a lawyer may advise a client regarding the validity, scope, and meaning of Colorado Constitution art. XVIII, §§ 14 and 16 and the statutes, regulations, orders, and other state or local provisions implementing them, and, in these circumstances, the lawyer shall also advise the client regarding related federal law and policy. ~~(3) Colo. RPC 4.2, Comment [9A] (communicating with person to whom counsel is providing limited representation);~~ ~~(4) Colo. RPC 4.3, Comment [2A] (dealing with person to whom counsel is providing limited representation);~~ ~~(5) Colo. RPC 4.4(b) (notifying sender of inadvertently disclosed document); and~~ ~~(6) Colo. RPC 6.5 (limiting scope of representation).~~	
D.C.COLO.LAttyR 5 Entry And Withdrawal Of Appearance and Maintenance Of Contact Information	[No previous provisions regarding limited representation entry and withdrawal requirements.]	Provides new guidance regarding entry and withdrawal re: limited representation arrangements in civil cases. **D.C.COLO.LAttyR 5 Entry And Withdrawal Of Appearance and Maintenance Of Contact Information** ***** **(a) Entry of Appearance.** (1) Unless otherwise ordered, an attorney shall not appear in a matter before the court unless the attorney has filed an Entry of Appearance or an Entry of Appearance to Provide Limited Representation or signed and filed a pleading or document.	

		(2) As permitted under D.C.COLO.LAttyR 2(b)(1), an attorney may provide limited representation to an unrepresented party or an unrepresented prisoner in a civil action by order granting a motion which defines the scope of limited representation with reasonable particularity and certifies the approval of the unrepresented party or unrepresented prisoner. Any change in the scope of limited representation must be approved by the court. (3) An Entry of Appearance, Entry of Appearance to Provide Limited Representation, initial pleading, or initial document shall include (A) the identity of the party for whom the appearance is made; (B) the firm name, office address, telephone number, and primary CM/ECF e-mail address of the attorney; and (C) the certification of the attorney that the attorney is a member in good standing of the bar of this court. (~~3~~4) A form of Entry of Appearance or Entry of Appearance to Provide Limited Representation is available on the court's website HERE or in the office of the clerk of court. (~~4~~5) Only an unrepresented party or a member of the bar of this court as defined in D.C.COLO.LAttyR 3 may appear in a matter before the court, sign and file a pleading or document, or participate in a deposition, hearing, or trial. The provision restricting the signing of a document shall not apply to a	

		witness, deponent, declarant, or affiant. (~~5~~6) The responsibility for signing a pleading or document shall not be delegated. (~~6~~7) This rule shall not be applied or construed in a manner inconsistent with any statute or rule governing an attorney appearing for the United States. **(b) Withdrawal of Appearance.** An attorney who has filed an Entry of Appearance or an Entry of Appearance to Provide Limited Representation or has appeared otherwise in a case may seek to withdraw on motion showing good cause. Withdrawal shall be effective only on court order entered after service of the motion to withdraw on all counsel of record, any unrepresented party, and the client of the withdrawing attorney. A motion to withdraw must state the reasons for withdrawal, unless the statement would violate the rules of professional conduct. Notice to the client of the attorney must include the warning that the client is personally responsible for complying with all court orders and time limitations established by applicable statutes and rules. Where the client of the withdrawing attorney is a corporation, partnership, or other legal entity, the notice shall state that such entity may not appear without counsel admitted to the bar of this court, and that absent prompt appearance of substitute counsel, pleadings and papers may be stricken, and default judgment or other sanctions may be imposed against the entity.	
D.C.COLO.LAttyR 14 Student Practice	-- Procedures for Client Approval, Supervision by practicing attorney, and entry of appearance.	**Supervised student appearances not limited to government agencies or law school clinics; non-felony criminal case appearances permitted.** **(a) General Provisions.** (1) With the approval of the presiding judicial officer~~district judge (or magistrate judge exercising consent~~	See Forms page on website for Student Practice form.

		~~jurisdiction under D.C.COLO.LCivR 72.2), to whom a matter has been assigned~~, an eligible law student may appear, under the supervision of an attorney who is a member of the bar ~~admitted to practice in~~of this court ~~and employed in a law school clinical program or by a government agency,~~ in a~~n~~ civil action or non-felony criminal case on behalf of a~~ny~~ party who has consented in writing. (2) Unless otherwise limited, once admitted under Subdivision (d), the student may appear in that civil action or criminal case ~~in court~~ and ~~or~~ other related proceedings when accompanied by the~~a~~ supervising attorney and may prepare and sign pleadings and documents which also must be~~are~~ signed by the supervising attorney. **(b)** ~~**Student**~~ **Eligibility.** To be eligible, the student shall: (1) be enrolled in a law school approved by the American Bar Association or, if graduated~~following graduation~~, be preparing to take a written bar examination or awaiting admission to the bar following that examination; (2) be enrolled in or have successfully completed a law school clinical program or an externship or internship with a government agency; (3) have completed two full semesters of law school, including a course in evidence; (4) be certified by the dean of the law school (or the designee of the dean) as qualified to provide the legal representation authorized by this rule. The certification may be withdrawn by the certifier at any time by mailing notice	

		to the court; (5) be introduced to the court by the supervising attorney; (6) not receive compensation of any kind from the client. This shall not affect the ability or right of an attorney or law school clinical program to seek attorney fees which may include compensation for student services; and (7) certify in writing that the student~~or she~~ is familiar with the Federal Rules of Criminal or Civil Procedure (depending on the nature of the action or case~~matter~~), Federal Rules of Evidence, and local rules of practice of this court and website HERE, including the judicial officers' procedures. **(c)** **Supervising Attorney.** The attorney supervising a student shall: (1) be a member in good standing of the bar of this court; ~~(2) supervise students in a clinical program of an eligible law school or supervise students enrolled in an externship or internship program with a government agency;~~ (~~3~~2) maintain appropriate professional liability insurance for the supervising attorney and eligible students; (~~4~~3) introduce the student to the court; (~~5~~4) assume professional responsibility for the work of the student; (~~6~~5) be present whenever the student appears;	

		(~~7~~6) sign all pleadings; and (~~8~~7) sign and file a written agreement to supervise a student in accordance with this rule. **(d) Admission Procedure.** (1) The student, dean (or designee), supervising attorney, and the client shall complete the Law Student Appearance form HERE, which shall be filed with the clerk. (2) The appearance of the student is not authorized until approved by the presiding judicial officer ~~district judge (or magistrate judge exercising consent jurisdiction under D.C.COLO.LCivR 72.2),~~ which approval may be ~~withheld or~~ withdrawn for any reason without notice or hearing.	
D.C.COLO.LAttyR 15 Civil Pro Bono Representation	2016 revisions are corrections to pro se eligibility, and withdrawal of counsel provisions.	**-Inclusion of "any filing fee" permits all categories of unrepresented parties, not just plaintiffs (i.e., defendant removing case from state court proceedings).** **(e) Pro Se Party Eligibility.** (1) The following unrepresented parties are eligible for appointment of pro bono counsel: (A) after initial review of the complaint by the Pro Se division of the court, a non-prisoner, unrepresented party who has been granted leave to proceed in forma pauperis (IFP) under 28 U.S.C. ' 1915; (B) after initial review of the complaint by the Pro Se division of the court, an unrepresented prisoner; and (C) after demonstrating limited financial means, a non-prisoner, unrepresented party who has paid ~~the~~any filing fee in full. **-Removes incorrect reference to prof. conduct rule.** **(j) Withdrawal from Representation.** An attorney may seek to withdraw from the representation of an unrepresented party by motion to withdraw under D.C.COLO.LAttyR ~~2 and~~ 5(b).	See Forms page on website for Civil Pro Bono Representation forms.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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WILLIAM K. SESSIONS III
EVIDENCE RULES

October 9, 2015

M E M O R A N D U M

TO: Scott S. Harris, Clerk of the Supreme Court of the United States

FROM: Jeffrey S. Sutton

SUBJECT: Summary of Proposed Amendments to the Federal Rules

This memorandum summarizes proposed amendments to the Federal Rules of Practice and Procedure approved by the Judicial Conference of the United States on September 17, 2015. These amendments will take effect on December 1, 2016, if the Supreme Court adopts the proposed amendments and transmits them to Congress no later than May 1, 2016, and Congress takes no contrary action before the effective date.

I. Elimination of the Three-Day Rule for Items Served Electronically

The Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure have long added three extra days to calculate time periods measured from certain types of service, most notably for service by U.S. mail. For some time, the three extra days have applied to filings served electronically. Each Advisory Committee affected by this convention agrees that the time for treating electronic service like mail service has come and gone. They therefore propose to eliminate the 3-day rule when a party receives service of an item electronically. The resulting package would amend Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(d), and Criminal Rule 45(c) to eliminate the 3-day rule in cases of electronic service. Each of the amendments works in the same way—with one exception. The proposed amendment to Appellate Rule 26(c) differs slightly because, under current Rule 26(c), application of the 3-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service. The proposed amendment to Rule 26(c) deems a paper served electronically as delivered on the date of service stated in the proof of service.

With the approval of the Standing Committee, all of these amendments were published together. The key concern identified during the public comment period was that this modification of the 3-day rule might create hardships in some settings. The Advisory Committees as a result agreed to add parallel language to each Committee Note recognizing that extensions of time may be warranted to prevent prejudice in certain circumstances. All four Advisory Committees and the Standing Committee unanimously approved the final package of amendments.

II. Federal Rules of Appellate Procedure

A. Inmate-Filing Rules

The Advisory Committee proposed several amendments to clarify and improve the process for inmate litigation. Proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration. The Advisory Committee proposes a minor change to Forms 1 and 5—existing notice-of-appeal forms—to include a reference alerting inmate filers to the existence of new Form 7. The amendments also clarify that, if sufficient evidence does not accompany the initial filing, the court of appeals may permit an inmate to submit a declaration or notarized statement to show timely deposit. The Advisory Committee and the Standing Committee unanimously approved the amendments.

B. Late Post-Judgment Motions and Appeal Time

The proposed amendment to Appellate Rule 4(a)(4) addresses a circuit split over whether a late motion filed under Civil Rules 50, 52, or 59 counts as timely filed under Appellate Rule 4(a)(4). Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Five circuits take the view that a motion is "timely" only if filed within the deadline set by the rules. One circuit holds that, if a district court mistakenly extends the time for filing a post-judgment motion, the motion is "timely" for purposes of Rule 4(a)(4).

The proposed amendment addresses the split by adopting the majority view: A motion restarts the time for taking an appeal only if the relevant party filed the motion within the time allowed by the Civil Rules. The change ensures a uniform deadline for post-judgment motions and sets a definite point in time when litigation will end. The notice-and-comment process revealed substantial support for the proposal. A concern raised by the sole opponent of the amendment was its potential effect on unsophisticated litigants, which prompted the Advisory Committee to include examples in the Committee Note of motions that, under the Rule, would not restart the appeal time. The Advisory Committee and the Standing Committee unanimously approved the amendment.

C. Length Limits for Briefs and Other Documents

The proposed amendments affect length limits set by the Appellate Rules for briefs and other documents. The Advisory Committee undertook this project to address a concern that the length limits for petitions and motions should not be measured in pages but should be measured in words, as is already the case for briefs. The Committee agreed that technology made page limits vulnerable to manipulation and that word limits should be used across the board in the Appellate Rules. In considering how to convert page limits to word limits, the Committee examined the present length limit for briefs. In 1998, the length limit for principal briefs was converted from 50 pages to 14,000 words. In the intervening years, judges have expressed concern that briefs are too long. Others have questioned whether the 14,000-word limit (which reflects a conversion ratio of 280 words per page) is an accurate translation of the traditional 50-page limit. In studying the issue, the Advisory Committee concluded that many judges were justified in believing that briefs filed under the current rule often are too long, and that a reduction in the length limit for principal briefs would sharpen the presentation of legal arguments without interfering with the effective administration of justice.

The proposed amendments to Rules 5, 21, 27, 35, and 40 convert the existing page limits to word limits for motions and petitions prepared with a computer. The amendment uses a conversion ratio of 260 words per page in order to approximate traditional volume and to avoid increasing the length of documents such as motions, petitions for rehearing, and petitions for permission to appeal. For documents prepared without a computer, the proposed amendments retain the current page limits.

The proposed amendment to Rule 32 changes the word limits for briefs so that they reflect the pre-1998 page limits multiplied by 260 words per page. As a result, the current word limit for a party's principal brief would change from 14,000 to 13,000 words, and the word limit for a reply brief would change from 7,000 to 6,500 words. The proposal correspondingly reduces the word limits set by Rule 28.1 for cross-appeals.

New Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. A new appendix collects in one chart all length limits stated in the Appellate Rules. And Form 6, which addresses certificates of compliance, accounts for the proposed amendments to length limits.

The Advisory Committee received many public comments in response to the proposed reduction in the length limit for principal briefs, mainly by private practitioners concerned about whether the word limit would restrict their ability to present legal arguments in complex cases. The committee also received testimony from four appellate lawyers during a public hearing. The Solicitor General offered written comments generally supporting the proposal.

In response to the public comments, the Advisory Committee modified the proposal in two ways. First, the original proposal would have employed a conversion ratio of 250 words per page and reduced the word limit for principal briefs from 14,000 to 12,500 words, while the amended proposal would set a limit of 13,000 words. Second, the amended proposal highlights (in rule text and Committee Note) the authority of a court of appeals to allow longer briefs in appropriate cases. Taken together, the two pieces of the compromise allow courts of appeals to require shorter briefs if they wish or to keep the status quo if they prefer. As a point of

comparison, the Civil Rules do not contain any uniform length limits and thus permit district courts to establish their own customized length limits for briefs and motions. The Advisory Committee unanimously approved the modified proposal. The Standing Committee approved the modified proposal without dissent and with one abstention.

D. Amicus Filings in Connection with Rehearing

Proposed new Appellate Rule 29(b) establishes default rules for the treatment of amicus filings in connection with petitions for rehearing. There is no national rule that establishes a filing deadline or a length limit for amicus briefs in connection with petitions for rehearing. Most circuits do not have local rules on point. Attorneys reported confusion caused by the lack of guidance. The resulting amendment does not require courts to accept amicus briefs but establishes guidelines for filing such briefs when permitted. Most of the features of current Rule 29 are incorporated for the rehearing stage, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. Under the proposal, a circuit may alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

Overall, commentators expressed support for amending Rule 29 to address amicus filings in connection with rehearing petitions and offered varying suggestions as to length and timing. Some commentators expressed concern about the length limits for the briefs, *see supra*, and time limits. In response to these comments, the Advisory Committee changed the length limit under Rule 29(b) from 2,000 to 2,600 words, and revised the deadline for amicus filings in support of a rehearing petition from three to seven days after the filing of the petition. The Advisory Committee and the Standing Committee unanimously approved the proposed amendment.

E. Technical Amendment

In 2013, then-existing Appellate Rule 13, governing appeals as of right from the Tax Court, became Rule 13(a). A new Rule 13(b)—providing that Rule 5 governs permissive appeals from the Tax Court—was added. Rule 26(a)(4)(C)'s reference to "filing by mail under Rule 13(b)" should have been amended to refer to "filing by mail under Rule 13(a)(2)." The proposed amendment to Rule 26(a)(4)(C) updates the cross-reference. The Advisory Committee and the Standing Committee unanimously approved the technical change.

III. Federal Rules of Bankruptcy Procedure

A. Procedures for International Bankruptcy Cases.

The Advisory Committee proposes amendments to facilitate the handling of international bankruptcy cases. Shortly after chapter 15 (Ancillary and Other Cross-Border Cases) was added to the Bankruptcy Code in 2005, the Bankruptcy Rules were amended to add provisions governing cross-border cases. Among the new provisions were changes to Rules 1010 and 1011, which previously governed only involuntary bankruptcy cases, and Rule 2002, which governs notice. The proposed new rule and amendments would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 (Responsive Pleading in Cross-Border Cases) to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to

clarify the procedures for giving notice in cross-border proceedings. The Advisory Committee and the Standing Committee unanimously approved the amendments.

B. Chapter 13 Notices

Bankruptcy Rule 3002.1 applies to chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and the trustee notice of any changes in the periodic payment amount or the assessment of any fees or charges during the bankruptcy case. This rule was intended to ensure that debtors who attempt to maintain home mortgage payments while in chapter 13 have the information needed to do so.

The proposed amendments seek to clarify three matters over which courts have disagreed: (1) the rule applies whenever a debtor will make ongoing mortgage payments during the chapter 13 case, regardless of whether a prepetition default is being cured; (2) the rule applies regardless of whether it is the debtor or the trustee who makes the mortgage payments; and (3) the rule generally ceases to apply when an order granting relief from the stay becomes effective with respect to the debtor's residence. The notice-and-comment process did not generate any material criticism of the proposals. The Advisory Committee and the Standing Committee unanimously approved the amendments.

IV. Federal Rules of Civil Procedure

A. Service on a Foreign Corporation

The proposed amendment to Civil Rule 4(m), the rule addressing time limits for service, corrects an ambiguity regarding service abroad on a corporation. Many practitioners labor under the misimpression that the time for service set forth in Rule 4(m) applies to foreign corporations. This ambiguity arises because two exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1) are clearly referenced, while no such explicit reference is made to service on a corporation. Rule 4(h)(2) provides for service on a corporation at a place not within any judicial district of the United States in a "manner prescribed by Rule 4(f)." It is not clear whether this is service "under" Rule 4(f). The proposed amendment makes clear that the time limit set forth in Rule 4(m) does not include service under Rule 4(h)(2). The Advisory Committee and the Standing Committee unanimously approved the amendment.

B. Service

This proposed amendment to Civil Rule 6(d) substitutes the language "after being served" for "after service." The purpose of the amendment is to correct a potential ambiguity that was created when the "after service" language was included in the rule when it was amended in 2005. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. The proposed amendment was published in August 2013, and approved unanimously by the Advisory and Standing Committees in 2014. It was held in abeyance for one year so that it could be submitted simultaneously with the 3-day rule package.

C. Venue Technical Amendment

This amendment is technical and conforming. Civil Rule 82 addresses venue for admiralty and maritime claims. The proposed amendment arises from legislation that added a new § 1390 to the venue statutes in Title 28 and repealed former § 1392 (local actions). The proposed amendment deletes the reference to § 1391 and to repealed § 1392 and adds a reference to new § 1390 in order to carry forward the purpose of integrating Rule 9(h) with the venue statutes through Rule 82. The Advisory Committee and the Standing Committee unanimously approved the amendment.

V. Federal Rules of Criminal Procedure

A. Service on Foreign Corporate Defendants

The proposed amendment to Criminal Rule 4 addresses service of a summons on organizational defendants that have no agent or principal place of business within the United States. The current rule provides for service of an arrest warrant or summons within a judicial district of the United States but poses an obstacle to the prosecution of foreign corporations that have committed offenses punishable in the United States. Such corporations often cannot be served because they have no last known address or principal place of business in the United States. Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that the Criminal Rules should provide a mechanism for foreign service on an organization.

The proposed amendment makes several changes to Rule 4. First, it fills a gap in the current rule by specifying that the court may take any action authorized by existing laws (*e.g.*, statutes, treaties) if an organizational defendant fails to appear in response to a summons. Second, the amendment changes the mailing requirement for service of a summons on an organization within the United States by eliminating the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but requires mailing when delivery has been made to an agent authorized by statute, if the statute itself requires mailing to the organization. Third, the amendment authorizes service on an organizational defendant outside of the United States by prescribing a non-exclusive list of methods for service, including service in a manner authorized by the applicable foreign jurisdiction's law, stipulated by the parties, undertaken by foreign authority in response to a letter rogatory or similar request, or pursuant to an international agreement. In addition to these enumerated means of service, the proposal contains an open-ended provision that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the other means enumerated in the rule.

The Advisory Committee considered at length whether to require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means but ultimately concluded that the Criminal Rules should not adopt such a requirement. In its view, requiring prior judicial approval might raise difficult questions regarding the appropriate institutional roles of the courts and the executive branch as well as unripe questions of international law.

The Advisory Committee received six comments and one witness testified at a public hearing about the proposed amendment. In addition, the Department of Justice provided written responses to the issues raised by the comments. The commentators generally agreed with the proposal because it: (1) addresses a gap in the current rules that poses an obstacle to the prosecution of foreign corporations that have committed crimes in the United States; (2) provides methods of service that are reasonably calculated to provide notice and comply with applicable laws; and (3) gives courts appropriate discretion to fashion remedies. The Advisory Committee unanimously approved the proposed amendment, and so did the Standing Committee.

B. Venue to Obtain Warrants for Remote Electronic Searches

This proposed amendment addresses venue for obtaining warrants for certain types of remote electronic searches. At present, Rule 41 generally limits searches to locations within a district, with a few specified exceptions. The Department of Justice asked the Advisory Committee to amend Rule 41 to account for two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown; and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The proposal addresses these gaps by amending Rule 41(b) to include two additional exceptions to the list of out-of-district searches permitted under the subsection. Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside or outside of the district: (1) when a suspect has used technology to conceal the location of the media to be searched; or (2) in an investigation into a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), when the media to be searched include protected computers that have been damaged and are located in five or more districts. The proposal also amends Rule 41(f)(1)(C) to specify the process for providing notice of a remote access search.

This proposal generated considerable interest. The Advisory Committee received forty-four written comments, and eight witnesses testified at a public hearing. Much of the opposition reflected a misunderstanding of the scope of the proposal. The proposal addresses *venue*; it does not itself create authority for electronic searches or alter applicable statutory or constitutional requirements. In response to the public comments, the Advisory Committee approved revisions that clarified the procedural nature of the proposed amendment. It changed the published caption from "Authority to Issue a Warrant" to "Venue for a Warrant Application" and revised the Committee Note to state that the amendment does not alter the constitutional requirements for issuing a warrant. The Advisory Committee also approved revisions to the notice provision and accompanying Committee Note that respond to points raised by commentators. By an 11-1 vote, the Advisory Committee approved the amendment, and the Standing Committee unanimously approved it.