

Tammy Ludeman

From: Matthew Thelen
Sent: Monday, November 7, 2022 9:39 AM
To: Roberto Lange
Cc: Ronald Berry; Tammy Ludeman
Subject: FW: Federal Practice Committee - Proposed Local Rule Amendments
Attachments: MCH to Chief Judge Lange 11.7.22 (FPC Comments to Proposed Local Rule Amendments).docx

Judge Lange,

Attached is a memorandum summarizing the comments from the Federal Practice Committee regarding the proposed local rule changes.

Matt

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From: Melissa Hinton <mhinton@ehalawyers.com>
Sent: Monday, November 7, 2022 10:27 AM
To: Matthew Thelen <Matt_Thelen@sdd.uscourts.gov>
Subject: Federal Practice Committee - Proposed Local Rule Amendments

CAUTION - EXTERNAL:

Matt:

Attached is a memorandum I prepared summarizing the comments I received when I circulated the proposed local rule changes. Please let me know if there is anything further the Committee can do to assist the Court. Thanks, MCH.

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MEMORANDUM

TO: Chief Judge Lange
CC: Matt Thelen
DATE: November 7, 2022
RE: FPC Comments to Proposed Local Rule Amendments

Below is a summary of the comments I received from the FPC after circulating the proposed changes to the local rules. Some of the committee members did not limit their comments to the proposed changes. However, I have summarized all of the comments I received for the Court's awareness.

Local Criminal Rules

1. D.S.D. Crim. LR 10.1 – John Murphy expressed a concern with this rule, but his concern does not relate to the proposed changes. I have set forth the entirety of John's comment:

My concern is not with the rule as red-lined, but the rule itself. I don't believe the rule should encourage defendants to file written waivers in lieu of appearing personally for arraignment on a superseding indictment or information. The rule should let defendants know this is an option, but that is different from encouraging this practice.

Arraignment, even on a superseding charging document, serves a valuable purpose. It provides the defendant with notice of his or her rights, the substance of the charges, and, perhaps most importantly, the maximum and minimum punishments. A superseding charge may, and often does, lead to an increase in the mandatory minimum sentence a defendant faces.

By waiving personal appearance, the defendant foregoes the due process protection of having the judge advise him/her as to these matters. It then becomes an effective assistance of counsel issue as to whether the defendant's counsel adequately advised him or her of their rights, the substance of the new charge, and the punishments faced. I don't feel the Court should be encouraging defendants to forego personal advisement and notice by the Court.

I think the rule should be changed to merely state that "Defendants may file a written . . ."

I asked Jason Tupman to weigh in on John's comment. According to Jason, he shares some of the same sentiment. "I *generally* waive, because the additional hearing can be duplicative in lots of cases, but not always. I think instead of direct encouragement, perhaps a "should consider" waiving instead of a direct encouragement to waive strikes a better balance."

The USAO provided some comments to the proposed local civil rules, but none to the proposed local criminal rules. However, I did not specifically request that the USAO address John Murphy's comment. If the Court determines that this comment is worthy of consideration during a future FPC meeting, please let me know so that I may add it to the list of potential agenda items I am preparing for the next FPC Chairperson.

2. D.S.D. Crim. LR 12.4 – The final sentence of the proposed change says "within fourteen (14) days..." However, Fed. R. Crim. P. 12.4 allows 28 days for the filing. Is the intent to make this a shorter deadline?
3. D.S.D. Crim. LR 12.4 – The final sentence of the proposed change says "... of the party's first pleading or entry of appearance." This appears to be "carryover" language from the civil rules regarding "pleadings." Should this say "... of the defendant's initial appearance..." to match the language of Fed. R. Crim. P. 12.4 (b)(1)?
4. D.S.D. Crim. LR 12.4 – Should the first sentence be changed from "... organizational party in a criminal case" to "organizational defendant in a criminal case?" The criminal local rules refer to "a defendant" or "the defendant," when the reference does not also include the government.
5. D.S.D. Crim. LR 32.1 – Judge Lange's memorandum refers to issues with discovery being photographed and uploaded to social media. However, the proposed local rule change does not include discovery. It only affects confidential sentencing documents. Is clarification needed elsewhere to address discovery?
6. D.S.D. Crim. LR 49.1.1 – In the caption, there is a typographical error. "Make" should be "made."
7. D.S.D. Crim. LR 57.10 (C)(3) – At the legal writing CLE of the bar convention this year, we were encouraged use "they" and "their" as gender neutral pronouns. To my eye the "his/her" and "s/he" are harder to read than "their" and "they." In addition, D.S.D. Crim. LR 57.10(C)(2)'s use of "his/her" could be replaced with "their."

Local Civil Rules

1. D.S.D. Civ. LR 47.2.B – One of the committee members noted that in the Northern Division, once someone has served as a juror, they do not have to serve again during their term. If a juror cannot serve again, the committee member questions why the local rule requires permission from the judge before a juror can be contacted after a trial. The committee member noted that he has always found it helpful to interview jurors after a

trial and is not clear why there is a restriction on contacting jurors who will not be serving again.

When I received this comment, I let the committee member know that my sense is that the Court is primarily interested in comments regarding proposed changes, and this is not one of the rules to which the Court has proposed changes. I advised the committee member that I would pass along the comment to the Court as well as to the next FPC Chairperson as a potential topic for discussion during a future FPC meeting.

2. D.S.D. Civ. LR 83.9(D) - The other local briefing rule (LR 7.1) specifically sets forth when briefs are due. Therefore, instead of just stating “The briefing deadlines in the Supplemental Rules apply to all actions brought under 42 U.S.C. § 405(g),” we think it would be best to restate the times as set forth in the actual rule. We therefore suggest changing LR 83.9(D) to state as follows:
 - The plaintiff’s brief is due 30 days after the answer or certified record is filed or 30 days after entry of an order disposing of the last remaining motion to dismiss. The Commissioner’s Brief is due 30 days after service of the plaintiff’s brief. The Plaintiff may file a reply brief within 14 days after service of the Commissioner’s brief.
 - Also, there is an extra period in the redlined version (42 U.S.C.) that needs to be removed.