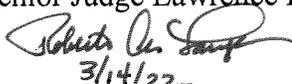


MEMORANDUM EXPLAINING DSD'S PROPOSED LOCAL RULE CHANGES

TO: Eighth Circuit Judicial Council Rules Committee

FROM: Chief Judge Roberto A. Lange with the approval of Judge Karen E. Schreier, Senior Judge Jeffrey L. Viken, Senior Judge Lawrence L. Piersol, and Senior Judge Charles B. Kornmann 
3/14/22

DATED: March 14, 2022

I. Overview and Introduction

The District of South Dakota has not updated its local rules of practice for many years. The rules review project began shortly before the pandemic. These changes seek to make the local rules consistent with changes to the federal rules, to delete redundant or unneeded rules, and to provide consistency between the district's civil and criminal local rules. We also incorporated terms of numerous standing orders into the Local Rules so that counsel will have fewer standing orders to remember, locate and navigate. If these revised Local Rules are approved, we will eliminate many of our existing standing orders.

After the district judges approved the proposed changes, they were reviewed by the District of South Dakota's Federal Practice Committee. The Committee made some suggestions, which the district judges adopted. The rules were then posted on the Court's website.¹

II. Civil Local Rules of Practice – Tab A (redlined) and Tab B (clean)

On page 2 of Tab A,² Civ. LR 5.1 has been substantially revised consistent with the 2018 amendments to Rule 5 of the Federal Rules of Civil Procedure. It also adds a new section (Section F) on how to file and serve highly sensitive documents outside of the Court's Electronic Filing System consistent with Standing Order 21-04.

On page 7 of Tab A, Civ. LR 7.1 (B) has been revised. It now requires a written brief for every opposed motion (and no longer for every motion) raising a question of law except oral motions made during a hearing or trial. Under the changes, the word count was stricken (which was hard to police), but the 25-page limit was increased to 30 pages. The reference to attachments is stricken, making it clear that the brief itself cannot exceed 30 pages, unless the presiding judge grants a motion to allow additional pages.

On page 12 of Tab A, Civ. LR 43.1 has been substantially revised consistent with Standing Order 20-01. The revised rule directs the clerk to: (1) electronically file all documentary exhibits offered or received in CM/ECF; (2) initially restrict electronically filed exhibits to court users and

¹ They were posted on December 6, 2021. They were re-posted on February 11, 2022, after the addition of a subsection of DSD Crim. LR 57.10 concerning handling of transcripts in a way to protect identities of cooperating witnesses, and of DSD Crim LR 57.12 and DSD Civ. LR 83.10 on court security officer duties.

² The page references are to the redlined copy at Tab A.

case participants; and (3) return documentary exhibits to the offering party after filing. It gives parties 21 days to review their returned documentary exhibits to determine whether redactions are required and establishes a procedure for filing redacted exhibits. Where no redactions are required, the new rule directs the clerk to remove the restriction and enter a Notice of Unrestricting Trial/Hearing Exhibits in CM/ECF. Finally, it allows the clerk to return physical exhibits to the offering party at the conclusion of a trial or other proceeding for retention and preservation.

Four rules have been stricken as redundant or unnecessary: Civ. LR 43.2 (Taking Testimony), Civ. LR 47.1 (Examination of Potential Jurors), Civ. LR 77.1 (Office of the Clerk), Civ. LR 83.3 (Assignment of Official Reporters).

On page 15 of Tab A, Civ. LR 47.2 has been revised to incorporate paragraph 6 of Standing Order 18-03.

On page 16 of Tab A, Civ. LR 54.1 has been revised to expressly provide that a party moving for an award of attorney's fees may submit a reply brief.

On page 18 of Tab A, Civ. LR 72.1 is new and delineates magistrate judge duties consistent with Standing Order 21-08.

On page 19 of Tab A, Civ. LR 83.1 has been revised consistent with paragraph 4 of Standing Order 18-03.

On page 20 of Tab A, Civ. LR 83.2, there are changes to three sections of the rule for attorneys: Section C (Procedure for Admission), Section E (Appearance of Attorney Pro Hac Vice) and Section F (Attorneys for the United States and Federal Public Defender). Section C.7 clarifies that the Court will contact approved applicants to schedule an admission ceremony and section C.8 adds a time requirement for an admission ceremony after approval for admission. Section E was revised to require attorneys seeking admission pro hac vice to disclose prior instances where the attorney's conduct resulted in sanctions in addition to disclosing disciplinary actions. Section F was revised to create two subsections for resident attorneys and non-resident attorneys for the United States and Federal Public Defender, and to distinguish between regular admission and provisional admission for resident attorneys.

On page 26 of Tab A, Civ. LR 83.3 is a new rule that mirrors Crim. LR 30.1 (Jury Deliberations) with minor changes.

On page 28 of Tab A, Civ. LR 83.7 has been revised to clarify that the rule requiring a court order for withdrawal of counsel does not apply to situations where withdrawal does not alter continued legal representation of the party.

On page 29 of Tab A, Civ. LR 83.9 is a new rule based on Standing Order 21-10. Under the rule, every case filed under 42 U.S.C. § 405(g), (that is, social security case appeals) is initially assigned to a magistrate judge. After case opening, each party has 60 days to submit a completed Social Security Case Assignment Form, through which the party either consents to disposition of the case by the magistrate judge or asks to have a district judge assigned to the case. If there is not unanimous consent, the case is randomly assigned to a district judge.

On page 30 of Tab A, Civ. LR 83.10 is a new rule that sets forth court security officer duties consistent with Standing Order 22-02.

III. Criminal Local Rules of Practice – Tab C (redlined) and Tab D (clean)

On page 4 of Tab C,³ Crim. LR 11.1 adds language in Section A about plea supplements consistent with Amended Standing Order 16-04.

On page 5 of Tab C, Crim. LR 16.1 adds a new paragraph requiring a stipulation for entry of a standing discovery order consistent with Standing Order 19-03.

On page 5 of Tab C, Crim. LR 17.1 clarifies that defendants unable to pay for service of a subpoena must file an ex parte motion and attach a prepared AO89 or AO 89 that includes a physical address for service. It also clarifies that ex parte documents are not part of the public record and clarifies that the rule does not apply to defendants represented by the Federal Public Defender except for out-of-district subpoenas. Section C on writs is revised to trigger the rule when an application is filed rather than when a writ is delivered to be served by the United States Marshal Service.

On page 6 of Tab C, Crim. LR 24.2, which places restrictions on interviewing jurors, has been revised to add restrictions on photographing jurors in accordance with paragraph 6 of Standing Order 18-03.

On page 7 of Tab C, Crim. LR 28.1 adds a sentence to the end of the rule that addresses the circumstances under which the court will provide sign language interpreters.

On page 8 of Tab C, Crim. LR 32.1 on sentencings is revised consistent with three standing orders. It clarifies that pretrial services reports and related documents are confidential and may not be distributed beyond the Court and counsel. It also clarifies that counsel may review confidential sentencing documents with their clients but may not provide copies to them. In the past, we had someone post on social media portions of presentencing investigation reports concerning information from and the names of cooperating witnesses. Section C is new. It sets sentencing deadlines consistent with Rule 32 of the Federal Rules of Criminal Procedure and clarifies the procedure for filing sentencing documents.

On page 10 of Tab C, Crim. LR 44.1 on attorneys was amended consistent with the changes to Civ. LR 83.2.

On page 18 of Tab C, Crim. LR 47.1 has been revised to clarify that a written brief is required for every motion raising a question of law except oral motions made during a hearing or trial. It also limits briefs to 25 pages exclusive of attachments unless the court allows additional pages.

On page 18 of Tab C, Crim. LR 49.1 mirrors the changes to Civ. LR 5.1 regarding serving and filing documents.

³ The page references are to the redlined copy at Tab C.

On page 24 of Tab C, Crim. LR 49.1.1 clarifies in Section B that after filing a redacted document, a party may “submit for filing under seal” an unredacted copy of a document. It also strikes language in Section D.3 about unsealing charging documents after the initial appearance of all defendants. This language was stricken because it is inconsistent with practice. Our practice is to have a copy of the indictment redacted of the name of the grand juror signing the indictment and publicly filed.

On page 25 of Tab C, Crim. LR 57.1 was revised to clarify that ex parte documents are included in information relating to a pending criminal case that is not part of the public record.

On page 26 of Tab C, Crim. LR 57.3 was substantially revised consistent with Standing Order 20-01 and mirrors Civ. LR 43.1.

On page 29 of Tab C, Crim. LR 57.4 clarifies that the rule regarding withdrawal and substitution of counsel does not apply to situations where withdrawal results in continued representation by the same firm or organization.

On page 29 of Tab C, Crim. LR 57.5 has been revised consistent with paragraph 4 of Standing Order 18-03.

On page 31 of Tab C, Crim. LR 57.6 is a new rule that mirrors Civ. LR 10.1 regarding captions and signature blocks.

On page 31 of Tab C, Crim. LR 57.7 is another new rule. It incorporates Standing Order 7/1/14 on defendant’s appearance during trial.

On page 31 of Tab C, Crim. LR 57.8 allows payments prior to entry of judgment consistent with Standing Order 3/11/11.

On page 31 of Tab C, Crim. LR 57.9 is a new rule that mirrors Civ. LR 83.4, which imposes font and spacing requirements. It allows the Court to rely on page limits rather than a word count.

On page 31 of Tab C, Crim. LR 57.10 is also a new rule. It incorporates Amended Standing Order 16-04 and clarifies that only sealed and/or restricted documents must be sent to the warden, while publicly filed documents may be sent directly to the inmate. It imposes a new obligation on prosecutors to identify cooperating witnesses prior to eliciting their testimony and requires that two transcript be prepared: a restricted transcript and a public transcript that excludes the identity of cooperating witnesses. It also adds a section on serving sealed and/or restricted documents.

On page 33 of Tab C, Crim. LR 57.11 is a new rule on magistrate judge duties. It mirrors Civ. LR 72.1.

On page 34 of Tab C, Crim. LR 57.12 is a new rule that sets forth court security officer duties consistent with Standing Order 22-02.