MEMORANDUM EXPLAINING DSD'S PROPOSED LOCAL RULE CHANGES

TO: Eighth Circuit Judicial Council Rules Committee

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

DATED: November 10, 2015

I. Overview and Introduction

Chief Judge Viken assigned me responsibility for leading a review of the Local Rules of the District of South Dakota. We have fairly extensive proposed revisions to our Local Rules ready to be adopted. This memorandum is to explain how we came to this point.

When we last submitted revisions to the Eighth Circuit Judicial Council's Rules Committee, Judge Steven Colloton in his response advised us that use of the word "shall" is now disfavored and has been eliminated from the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. Our Local Rules at that time repeatedly used the word "shall." Judge Colloton provided material concerning when words such as "must," "must not," "may," "will," and "should" ought to be substituted for the word "shall."

Our Federal Practice Committee requested certain changes to our Civil Local Rules. After Chief Judge Viken referred those requested changes to me, Clerk of Court employees and I met for several days to work on Local Rule changes. We conducted a thorough review of both our Civil Local Rules and our Criminal Local Rules, as well as reviewing the numerous standing orders on our District's website at the time. Rather extensive proposed changes to this District's Local Rules resulted.

The following precepts drove the changes:

1. With the word "shall" having been eliminated from the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, we should attempt to do the same to improve our Local Rules.

2. We should retain separate Civil Local Rules and Criminal Local Rules, because many attorneys practice in just one of these two areas. It would be more complicated and confusing to have three sets of rules: standard rules of practice; civil rules; and criminal rules. Therefore, a certain amount of duplication between the Civil Local Rules and Criminal Local Rules is acceptable.

3. Our Local Rules should be consistent with our standing orders.

4. Lawyers more commonly consult Local Rules than wade through our various standing orders posted on our website. Accordingly, where appropriate, we should include language from the standing orders in the Local Rules and eliminate standing orders that duplicate what is in the Local Rules.

5. Consolidation, elimination, and updating of standing orders both limit the number on our website and make it more likely that lawyers (and we judges) follow the standing orders.

6. Our Local Rules and the functioning of the Clerk of Court's office should be in harmony with one another. Where a Local Rule specifies some practice that the Clerk of Court's office no longer does, either the Local Rule is outdated and should be revised, or the Clerk of Court's practices should change.

7. Although our primary aim was to make the Local Rules clearer and more user-friendly, this review provides an opportunity to propose substantive changes to the Local Rules that are appropriate and beneficial.

All judges (both senior status and active) of the District of South Dakota received a binder containing and explaining the proposed rule changes. All judges then discussed the proposed Local Rule changes by telephone and in person at our annual intra-district judges meeting. Some tweaks to proposed revisions resulted.

The proposed revisions then went to the District of South Dakota's Federal Practice Committee for review and comment. The Federal Practice Committee liked the changes, made

some minor language changes, and requested a substantive revision of one Civil Local Rule. We judges met again by telephone to discuss what the District's Federal Practice Committee had suggested and reached agreement on the final version of proposed Local Rule changes.

The Clerk of Court posted the proposed changes to both the Civil Local Rules and Criminal Local Rules on the District's website for the period of September 18, 2015 to November 5, 2015. We received no negative feedback.

We have attached the Civil Local Rules in redlined form as Tab A and in clean form as Tab B. The Criminal Local Rules are attached in redlined form as Tab C and in clean form as Tab D. Many of these changes are self-explanatory. However, where appropriate, I have included some explanations to correspond with proposed language changes.

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

On page 1 of Tab A,[1] under Individual Calendars, there are two changes. First, we propose to eliminate references to cases being randomly assigned because that limits our flexibility and is inconsistent with how we sometimes have assigned cases. For instance, in the Western Division during Judge Battey's final years on the bench, we did not assign cases randomly to him, but did so based on the type of case. We also have two senior status judges who winter in Florida, so assignment of cases to them can be somewhat seasonal. We also commonly assign cases from frequently filing inmates to the district judge who has the most familiarity or the most cases filed by that particular inmate. For cases where a temporary restraining order is sought, we sometimes assign or reassign the case to the judge most readily

[1]The page references are to the redlined copies at Tab A. The overall effect of the proposed changes actually results in the length of the rules remaining about the same, notwithstanding the addition of new rules regarding court reporter independence, stipulated extensions to answer, no headers and footers with law firm names, and no links to websites with pornographic material.

available to handle the matter. We however are not ending the random draw in divisions where more than one judge is willing to take cases.

We also propose a revision broadening to whom attorneys may inquire regarding "motions or other matters" to "court personnel" rather than just to the Clerk of Court. We do not have schedulers within the Clerk of Court's office and typically have our judicial assistants handle scheduling. Lawyers seeking to set a change of plea hearing or other such hearing appropriately contact our judicial assistants rather than the Clerk of Court.

On page 2, Civ. LR 1.1.B drops the effective date of January 1, 2013, and adds that the Local Rules become effective, after the comment period, upon placement on the court's website. Under Fed. R. Civ. P. 83(a)(1)—the provision allowing for Local Rules—"[a] local rule takes effect on the date specified by the district court and remains in effect unless amended by the court." We thought more generic language was appropriate, rather than guessing as to the time it would take to seek approval by the Eighth Circuit Judicial Council Rules Committee.

On page 3, Civ. LR 5.1.B.2(c) is revised at the request of the Clerk of Court's office to incorporate by reference language in the CM/ECF user manual. The CM/ECF user manual contains information specific to confidential, ex parte, and other such filings. The NextGen version of CM/ECF will allow counsel to file the summons, complaint, and other such documents electronically, so the old version of Civ. LR 5.1.B.2(c) will be outdated.

On page 4, Civ. LR 5.1.B.6 contains new language on restricted hyperlinks. This Local Rule is to prevent hyperlinks in a pleading to any website containing pornographic content or personal identifiers. This is somewhat of a rare problem in a civil case, but has occurred in criminal case filings.

On page 5, Civ. LR 7.1.B contains language changes not intended to be substantive. This is an illustration of a rule where we believe the language "with the Clerk of Court" should be eliminated. There are occasions where filing presently must be with the Clerk of Court—such as an original complaint. However, the "with the Clerk of Court" language is inconsistent with the practice of requiring electronic filing of most documents directly through the CM/ECF system and is eliminated elsewhere in these Rules as well.

On page 6, Civ. LR 10.1.B prohibits headers or footers containing the law firm name and address from appearing on pages of the pleadings, which is a change previously approved by this District's judges. Some firms were listing their full name and address on each page of every pleading, which is a practice that we understand exists in some places like California state court, but one that our district judges do not want to have.

On page 6, Civ. LR 12.1 contains language requested by our Federal Practice Committee for a stipulated extension of up to 21 days to answer a complaint. The Federal Practice Committee wanted 30 days as the time for such a stipulated extension. We judges preferred a shorter period divisible by seven, thereby requiring counsel to file a joint motion explaining any cause for an extension to answer beyond the 21 days.

On page 7, we added language to allow the court to exempt any case from the Rule 16 pretrial conference procedure, as we were not sure we had an exhaustive list of those types of cases that would be so exempted. We thought it best to have flexibility for the court to choose to require or exempt any case from the Rule 16 pretrial conference procedure.

On page 8, old Civ. LR 26.2 is proposed to be eliminated. Old Civ. LR 26.2 appeared to contemplate filing of all original deposition transcripts and then destruction of deposition

transcripts not read or offered into evidence. The practice of filing all original deposition transcripts ended many years ago, so old Civ. LR 26.2 is unnecessary.

Pages 8−9 contain the proposed language involving independence of court reporters requested by our Federal Practice Committee. This new Civil Local Rule tracks language in the State of South Dakota's version of Fed. R. Civ. P. 28(c), found at SDCL § 15-6-28(c). We did not include all of the new SDCL § 15-6-28(c) because part of the language struck us as confusing and unnecessary. Court reporters have complained of large litigation management businesses requiring them to provide their transcripts not to the lawyers but to those litigation management businesses; those businesses in turn reformat the transcripts and have the ability to otherwise modify the transcripts. This presents concerns for accuracy and reliability of the transcripts and independence of the reporter. A copy of SDCL § 15-6-28(c) in its entirety is attached at Tab E for reference.

On pages 9–10, Civ. LR 40.1.A has some significant proposed revisions to it. The intention of these revisions is to encourage a joint motion for a continuance when counsel can agree on enlarged deadlines. The Clerk of Court's office and we judges prefer the filing of a joint motion rather than a stipulation, because only motions are flagged in CM/ECF as requiring court action. Stipulations, unlike motions, sometimes are overlooked and not flagged as seeking a court order. Moreover, Rule 7(b)(1) of the Federal Rules of Civil Procedure states: "A request for a court order must be made by motion." Most of the remaining changes are simply to express the rule more clearly. A substantive change, however, is at the end of Civ. LR 40.1.A, which specifies a shortened time period for a party opposing a continuance to respond and for the moving party to reply. We thought that the standard briefing schedule of 21 days to respond and 14 days to reply was too long on a motion for a continuance and could produce even greater

delay and with it uncertainty over whether a continuance will be granted. For instance, sometimes a 30-day enlargement of deadlines is sought, and our briefing schedule contemplates as much as 35 days (21 + 14) for completion of briefing on such a motion.

On the same page, Civ. LR 40.1.B struck us as capable of being expressed more briefly. Moreover, Fed. R. Civ. P. 32(a)(4) governs use of deposition testimony at trial for unavailable witnesses, and Fed. R. Evid. 801(d)(1) and (2) governs admissibility of certain affidavit statements as being non-hearsay.

On page 11, the time frame for preserving exhibits in Civ. LR 43.1.C was enlarged because a party has 90 days within which to file a writ of certiorari to the Supreme Court of the United States following a decision by a federal appellate court. Civ. LR 43.1.F is changed to require a court order prior to destruction of any exhibit received in evidence. The district court has authority to direct whether the exhibit be filed electronically in CM/ECF or otherwise preserved if the case has historical significance or, such as with a 28 U.S.C. § 2254 or § 2255 case, may result in further legal proceedings. Civ. LR 43.1.G is revised to reflect what our Clerk of Court now files in the CM/ECF system upon destruction of an exhibit.

On page 12, we judges discussed at length a change to Civ. LR 47.2. The old version of the rule restricted contact with jurors after trial, and we want to make clear that contact with jurors before and during trial (other than in open court) likewise is prohibited. There exists some possible uncertainty in this District as to when a "term of service as jurors" now ends. We have adopted a new practice where, if a juror is selected and listens to evidence in a case, that juror is discharged from further service during the term of service. We judges had much discussion over whether to permit contact with jurors a certain number of days after they are discharged. We try a wide variety of cases, including ones where tax protestors represent themselves pro se and drug

conspiracies where a party's post-trial contact with a juror could spook some jurors. We ultimately agreed, after research into other courts' local rules and court opinions on the matter, that requiring "permission" of the district court before allowing such contact was the best way to address the array of cases and instances where a party or attorney might desire to interview jurors.

On page 12, we propose to eliminate Civ. LR 51.1.C by moving into Civ. LR 51.1.A the requirement of proposed instructions being filed and served.

On page 14, Civ. LR 68.1 has a revision allowing the court to impose sanctions on "any or all of" the parties or their attorneys. Without the additional language, our rule could be understood to require the court to impose any sanction equally. In practice, imposition of such a sanction is extremely rare, but our local rules should clearly preserve court discretion to impose sanctions on "any or all of" the parties or attorneys. For instance, if one party caves from an unreasonable settlement position after jury selection and accepts an offer that has long been extended, costs (if any) more properly are imposed on the party whose unreasonable pretrial settlement position necessitated the selection of a civil jury, rather than evenly on the parties.

On pages 14–15, old Civ. LR 83.1 is replaced with language from a standing order, thereby updating the rule and making it consistent with our standing order.

On page 16, Civ. LR 83.2.C.5 and .8 are changed to reflect Clerk of Court practice. Civ. LR 83.2.C.4 uses the word "active" judges in describing that two such judges must approve each attorney application for admission. Our practice is to submit applications for attorney admissions to our three district judges not on senior status. Fortunately, we have two senior status judges who are quite active. In conflict with old Civ. LR 83.2.C.5, the Clerk of Court has been reporting the acceptance of an application of admission for a lawyer from our Northern

Division to Judge Kornmann, a senior status judge who is the only judge residing in Aberdeen where Northern Division cases are to be heard. The rule change is designed to allow the Clerk of Court to report an admission of new attorneys to a senior judge. As concerns the change to Civ. LR 83.2.C.8, there is no "roll of attorneys in the clerk of court's office" per se being kept, although there is a card that attorneys complete called the Attorney Registration Form, which is used to input new attorneys accepted to practice in the District of South Dakota in the CM/ECF system. The CM/ECF system then contains the list of those admitted.

We are proposing to change the oath of admission contained in LR 83.2.D. Our oath for attorneys had cumbersome language, such as a commitment to "faithfully demean yourself." We prefer an oath where the attorney repeats the words after the judge. There is no standard or prescribed oath for attorney admission in any federal statute. Our old oath appears to have been lifted in part from the South Dakota State Bar's oath.

The changes proposed on pages 18–19 concerning attorney discipline were made with input from the Clerk of Court's office. Our policy long has been that attorneys not members of the South Dakota bar must be admitted pro hac vice and have local counsel to appear in civil cases, and that being a member of the South Dakota bar is required to be admitted to practice in our court. The main thought behind the change to Civ. LR 83.2.G is that if an attorney loses his or her license to practice in South Dakota, the attorney automatically should lose the right to practice in our court. Our current Local Rule allows an attorney disbarred in the State of South Dakota to file an application within 21 days of disbarment and show good cause why he or she should not automatically be disbarred from our court, thereby collaterally attacking the disbarment. We have conducted such hearings on rare occasions, but they have been quite senseless. Next, Civ. LR 83.2.H provides a procedure for an attorney who has been disbarred or

suspended to petition for reinstatement to the bar of our court. That procedure, however, contemplated an investigation and hearing; some reinstatements, we thought, could be by unanimous vote of the active judges. Our practice generally has been to reinstate without a hearing those attorneys who are temporarily suspended from the state bar following expiration of their suspension. The rule change proposed is consistent with that practice. Civ. LR 83.2.G.3 adds language concerning the disciplinary record consistent with what the Clerk of Court does.

On pages 21–22, we propose removal of Civ. LR 83.6, which contemplates paper files. We now have electronic files, what remains of paper files are in archives, and the Clerk of Court sees no reason for Civ. LR 83.6 to remain.

On page 22, Civ. LR 83.5.D (citation for non-payment) is proposed to be eliminated. The Clerk of Court's office could not recall any occasion where a citation for non-payment issued. Instead, we address non-payment of a fee through a court order.

The net effect of these rule changes is that the length of the Civil Local Rules of Practice will remain about the same, notwithstanding that we are adding several provisions. We believe the proposed changes make the Rules clearer and more consistent with how the Clerk of Court and electronic filing function.

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

The Criminal Local Rules of Practice have fewer instances of use of the word "shall" or inconsistency with current practice. Many of the proposed changes to the Criminal Local Rules duplicate changes discussed above to the Civil Local Rules.

On page 4, Crim. LR 11.1 lacked what we believed to be the requirement in this District that the defendant, defense attorney, and government attorney sign the plea agreement, factual basis statement, and supplement, or alternatively that the defendant and defense attorney sign the

petition to plead guilty. Rule 11 of the Federal Rules of Criminal Procedure has no such requirement. Even in cases where a plea deal was reached in the midst of trial, the Assistant U.S. Attorney and Assistant Federal Public Defender involved have wanted to ensure a written plea agreement and documents signed by the defendant. We propose that Crim. LR 11.1.A and .B include a requirement of defendant's signature on plea agreement documents or alternatively the petition to plead.

On page 5, the changes to Crim. LR 17.1.A are designed to make the rule consistent with a standing order on the subject and in turn to eliminate the need for the standing order.

On page 6, we propose language change to Crim. LR 28.1.A concerning interpreters to reflect the present expectations and practices.

On pages 7 and 8, Crim. LR 32.1.A contains two changes. First, the Clerk of Court and we prefer that a motion for departure or variance be filed before the sentencing hearing in the CM/ECF system and contain the reason urged for departing or varying. We do not care if a separate sentencing memorandum is filed or if it is part of the motion itself. We may still permit an oral motion to depart or vary at the sentencing hearing to avoid prejudice to the parties from counsel not filing such a motion, or to avoid granting a continuance of the sentencing hearing to allow for filing a written motion.

On pages 7 and 8, the change to Crim. LR 32.1.B is to make it clearer and to include Fed. R. Crim. P. 35 and U.S.S.G. Section 5K1.1 motions and materials as being confidential and protected.

Many of the other revisions mirror changes proposed in the Civil Local Rules.

On page 18, the change to Crim. LR 49.1.B.2(c) has the effect of allowing defense counsel to file in CM/ECF documents signed by the defendant. In the past, we have required

filing with the Clerk of Court of such original documents, which then are scanned to be filed in CM/ECF with the Clerk of Court then throwing away the original after quality control is done.

On pages 21−22, the changes to Crim. LR 57.3 are designed to prevent destruction of records until all proceedings are completed, including the possible petition for certiorari and Section 2255 motions.

Thank you for your consideration of these requested Local Rule changes.