

**United States District Court**  
**District of South Dakota**  
**Andrew W. Bogue United States Courthouse**

Office of the Clerk  
515 Ninth Street, Room 302  
Rapid City, SD 57701  
Telephone 605-399-6000

MEMORANDUM

TO: Matt Thelen

FROM: Operations Committee (Ronald, Tammy, Kathy & Summer)

DATE: September 29, 2021 (revised)

RE: Proposed Changes to Local Rules

**Introduction and Overview**

Pursuant to your request, we have completed our review of the local rules in light of the 2018 amendments to the federal rules. We recommend a number of changes. In addition to those changes prompted by the federal rules, we have incorporated, where possible, standing orders. Other proposals seek to provide consistency between our civil and criminal local rules. In some cases, they are based on issues that have been brought to our attention by court users and others. Finally, some recommendations are based on changes in practice since COVID.

A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

Fed. R. Civ. P. 83.

**1. Civil Local Rules**

A. Civ. LR 5.1 (Crim. LR. 49.1) (Serving and Filing Pleadings and Other Papers)

The 2018 amendments to the federal rules revised the provisions for electronic service. The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A party who registers is subject to service through CM/ECF unless the court provides otherwise.

We approached Rule 5.1 by first eliminating anything that is now covered by Rule 5 of the Federal Rules of Civil Procedure. Thus, we struck those sections of the local rule dealing with consent to electronic service and defining what constitutes service, as well as sections dealing with methods of service and certificates of service. We renamed and revised what was left. We retained the requirement that a “/s/” be typed in the space where a signature otherwise would appear, although this is not required by Rule 5.<sup>1</sup>

We also added a new section consistent with Standing Order 21-04 that addresses the procedure for filing highly sensitive documents outside of CM/ECF.

(1) Non-attorney signatures

We reminded counsel of the signature requirements for documents filed with the Court in our August Newsletter:

Affidavits and declarations signed by anyone other than the attorney or pro se filer who files them in CM/ECF must contain the actual ink signature of the affiant or declarant. Notarized documents must also contain the actual ink signature of the notary public.

Since COVID, we have been getting push back from attorneys who point out that their clients can sign estate documents and purchase homes using an e-signature. In addition, e-notary businesses are now buying advertisement on NPR. If the Court is inclined to loosen the signature requirements in light of these changes, now might be the time to do so.

(2) The Nebraska Approach

In the District of Nebraska, if an original document requires a non-attorney’s signature, the filer may scan and upload the signed document or electronically file the document with the non-attorney signature represented by an “s/” and the name typed in the space where the signature would otherwise appear. The filer is responsible for maintaining the original signed document in paper form. If there is a dispute as to the authenticity of an electronically filed document with a non-attorney signature, an objection must be filed within 7 days. See Rule 11.1 (a) (2) of the Nebraska Civil Rules and Rule 49.2 (c) (1) (B) of the Nebraska Criminal Rules.

B. Civ. LR 7.1 (Crim. LR 47.1) (Motions)

We propose changes to Section B 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. In paragraph one, we struck the word count limit leaving the page limitation in light of Civ. LR 83.4,<sup>2</sup> which imposes font and spacing requirements. Finally, we removed the reference to attachments making it clear that the brief itself cannot exceed 25 pages.<sup>3</sup> We note that the briefing period in Civ. LR 7.1 (21

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<sup>1</sup> “A filing made through a person’s electronic-filing account and authorized by that person, together with that person’s name on a signature block, constitutes the person’s signature.” Fed. R. Civ. P. 5(d)(3)(C).

<sup>2</sup> We are recommending a new criminal local rule to mirror Civ. LR 83.4. See draft Crim. LR 57.9.

<sup>3</sup> Jackie Hammond brought the attachment issue to our attention.

days for a responsive brief, 14 days for a reply) differs from Crim. LR 47.1 (7 days for a responsive brief, 4 days for a reply).

C. Civ. LR 43.1 (Crim. LR 57.3) (Exhibits)

This rule has been substantially revised consistent with Standing Order 20-01. Standing Order 20-01 directs the clerk to: (1) electronically file all documentary exhibits offered or received in CM/ECF; (2) restrict electronically filed exhibits to court users and 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. If no redactions are required, it directs the clerk to remove the restriction and enter a Notice of Unrestricting Trial/Hearing Exhibits. Finally, it allows physical exhibits to be returned to the offering party at the conclusion of a trial or other proceeding.

Although Standing Order 20-01 requires a court order before physical exhibits can be returned, we recommend eliminating this requirement in light of our experience. Since the standing order went into effect, we have found that our judges have universally ordered that physical exhibits be returned to the offering party.

When physical exhibits are returned, Section C imposes a duty to retain and preserve the exhibits. Section D addresses exhibits necessary for appeal.

D. Civ. LR 43.2 (Taking Testimony)

We recommend striking this rule and removing the Protocol for the Use of Interactive Video Conferencing (Civil) from the court's website on the grounds that the procedures contained therein are rarely, if ever, followed. Without referencing the protocol, the rule merely duplicates Fed. R. Civ. P. 42.

E. Civ. LR 47.1 (Examination of Potential Jurors)

Strike as unnecessary.

F. Civ. LR 47.2 (Crim. LR 24.2) (Restriction on Interviewing Jurors)

We have incorporated paragraph 6 of Standing Order 18-03 into this rule and changed the heading to Restrictions on Photographing or Interviewing Jurors.

G. Civ LR 54.1 (Taxation of Costs)

We have revised Paragraph C after an attorney raised this issue with the Local Practice Committee, which in turn, forwarded it to us. The existing rule makes no mention of a reply brief. The proposed change expressly allows for a reply brief.

H. (new) Civ. LR 72.1 (Magistrate Judge Duties)

Now that all of our magistrate judges are full-time, it seems appropriate to adopt a rule setting out their duties in lieu of individual standing orders, which must be renewed periodically. The new rule is based on Standing Order 21-08 and Minnesota LR 72.1.

I. Civ. LR 77.1 (Office of the Clerk)

Strike as redundant. This information is included following the list of magistrate judges.

J. Civ. LR 83.1 (Crim. LR 57.5) (Recording and Cellular Devices)

We have made changes consistent with paragraph 4 of Standing Order 18-03.

K. Civ. LR 83.2 (Crim. LR 44.1) (Attorneys)

We are proposing changes to three sections of the attorney rule: 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).

We have removed the reference to our website in Section C.1 and are moving away from the concept of a “written” application. Although we did not implement the Attorney Module in NextGen, this paves the way if we decide to do so in the future. In paragraph 7, we clarified that the court would contact approved applicants to schedule an admission ceremony. In paragraph 8, we removed the requirement that an applicant appear in person for an admission ceremony to reflect our experience during COVID and added a six-month requirement for swear-in after approval. In the past, we have had some attorneys wait a considerable period before scheduling a swear-in ceremony. We are concerned that information may grow stale in the interim. Other changes in this section are minor.

We have revised Section E to require the disclosure of sanctions in addition to disciplinary actions based on a recent issue with an applicant.

Our goal in Section F was to create two sections: resident attorneys and nonresident attorneys, and to distinguish between regular admission and provisional admission for resident attorneys.<sup>4</sup> We have also clarified that the procedure for provisional admission follows the procedure outlined in Section C except resident attorneys would not pay until they are admitted to the State Bar, at which time the clerk would issue a certificate of admission. Finally, we have clarified that no application for admission is required for non-resident attorneys seeking admission.

L. Civ. LR 83.3 (Assignment of Official Reporters)

Strike as unnecessary.

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<sup>4</sup> South Dakota is in the small minority of districts that require government attorneys to be members of the local bar.

M. Civ. 83.3 (Jury Deliberations)

This is a new rule that mirrors Crim. LR 30.1 with minor changes.

N. Civ. LR 83.7 (Crim. LR 57.4) (Withdrawal of Counsel)

We have added a sentence at the end of the first paragraph to clarify that the rule does not apply to situations where withdrawal results in continued representation. This change was prompted by a government request to create a new CM/ECF event Notice of Withdrawal. The issue also comes up occasionally in civil cases when an attorney leaves a firm.

O. (new) Civ. LR 83.9 (Procedures in Social Security Cases)

This rule is based on Minnesota LR 7.2 and Standing Order 21-10, which goes into effect November 1, 2021. Under the rule, every case opened under 42 U.S.C. § 405(g) would initially be assigned to a magistrate judge. After opening, each party would have 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 will randomly be assigned to a district judge. The proposed rule also sets forth the deadline for electronically filing an answer and certified copy of the administrative record.

## 2. Criminal Local Rules

A. Crim. LR 11.1 (Pleas)

04. Adds language regarding plea supplements consistent with Amended Standing Order 16-

B. Crim. LR 16.1 (Discovery)

Adds a new paragraph consistent with Standing Order 19-03 regarding stipulations for entry of a discovery order.

C. Crim. LR 17.1 (Subpoenas and Writs)

Clarifies that Section A applies to defendants unable to pay, who must file an ex parte motion.<sup>5</sup> It also adds a sentence indicating that all motions should be filed with an attached, prepared AO 89 or AO 89B and must include a physical address for service as well as the date and time it is reasonably anticipated the witness will be called to testify. Finally, it clarifies that ex parte documents are not part of the public records of the court (see Crim. LR 57.1) and that the rule does not apply to defendants represented by the Federal Public Defender except for out-of-district subpoenas. See Standing Order filed on 1/6/09.

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<sup>5</sup> We may need to create new event: ex parte motion for subpoenas.

Section C is revised to trigger the rule when an application for writ is *filed* rather than when a writ is *delivered* to be served by the United States Marshals Service. This puts counsel on notice that they are responsible for timely filing and assumes a quick turn around on applications.

D. Crim. LR 24.2 (Civ. LR 47.2) (Restriction on Interviewing Jurors)

Incorporates paragraph 6 of Standing Order 18-03 into this rule and changes the heading to Restrictions on Photographing or Interviewing Jurors. Restrictions apply to petit and grand jurors.

E. Crim. LR 28.1 (Interpreters)

Substitutes “most” for “all” in the third sentence of Section A and adds a new sentence to the end of the section pursuant to Chapter 2 § 255 of the Guide to Judiciary Policy that addresses the circumstances under which the court will provide sign language interpreters.

F. Crim. LR 32.1 (Sentencings)

Section B is revised consistent with Amended Standing Order 16-04, Standing Order (10/1/14) and Standing Order (10-16-15). It also clarifies that pretrial services reports and related documents are confidential and may not be distributed beyond the court and counsel. Finally, it clarifies that counsel may review confidential sentencing documents with their clients but may not provide copies to clients in custody.

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.

G. Crim. LR 41.1 (Search Warrants)

Caption change consistent with Fed. R. Crim. R. 44.

H. Crim. LR 44.1 (Civ. LR 83.2) (Attorneys)

Changes mirror proposed changes to the companion civil rule. They include minor changes to the admission procedure in Section C and a new requirement that attorneys be sworn-in within six months of approval for admission. Changes in Section E require attorneys applying for pro hac vice admission to disclose sanctions as well as disciplinary actions. Section F creates two sections: resident attorneys and nonresident attorneys and distinguishes between regular admission and provisional admission for resident attorneys.

I. Crim. LR 47.1 (Civ. LR 7.1) (Motions)

Changes to Section C clarify that a written brief is required for every motion raising a question of law *except* oral motions made during a hearing or trial. Paragraph one eliminates the word count limit leaving the page limitation in light of Civ. LR 83.4 and proposed Crim. LR 57.9,

which impose font and spacing requirements. Finally, we removed the reference to attachments making it clear that the brief itself cannot exceed 25 pages.

J. Crim. LR 49.1 (Civ. LR 5.1) (Serving and Filing Documents)

The changes to Criminal Local Rule 49.1 are discussed in detail on page one and two under the section addressing Civil Local Rule 5.1. Federal Criminal Rule 49 previously required service and filing in a “manner provided” in “a civil action.” The amendments move the instructions for filing and service from the Civil Rules into Criminal Rule 49. Finally, we added a new section that addresses the procedure for filing highly sensitive documents outside of CM/ECF.

K. Crim. LR 49.1.1 (Personal Data Identifiers in All Pleadings and Documents)

This proposal 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 after the initial appearance of all defendants charged. This language was stricken because the language in the order to seal controls, and it is inconsistent with practice.

L. Crim. LR 57.1 (Release of Information by Courthouse Personnel in Criminal Cases)

The proposed change clarifies that information relating to a pending criminal case that is not part of the public records of the court include ex parte documents.

M. Crim. LR 57.3 (Civ. LR 43.1) (Exhibits)

This rule has been substantially revised consistent with Standing Order 20-01. It mirrors Civil Local Rule 43.1, discussed on page 3.

N. Crim. LR 57.4 (Civ. LR 83.7) (Withdrawal and Substitution of Counsel)

Clarifies that the rule does not apply to situations where withdrawal results in continued representation.

O. Crim. LR 57.5 (Civ. LR 83.1) (Recording and Cellular Devices)

Proposed changes are consistent with paragraph 4 of Standing Order 18-03.

P. (new) Crim. LR 57.6 (Identification)

This rule mirrors Civil Local Rules 10.1 regarding captions and signature blocks.

Q. (new) Crim. LR 57.7 (Trial Appearance)

This rule incorporates Standing Order 7/1/14.

R. (new) Crim. LR 57.8 (Payments Prior to Entry of Judgment)

This rule incorporates Standing Order 3/11/11.

S. (new) Crim. LR 57.9 (Form of Papers)

This rule mirrors Civil Local Rule 83.4, which imposes font and spacing requirements. It allows the court to rely on page limits rather than word count.

T. (new) Crim. LR 57.10 (Access to Criminal Documents)

This rule incorporates Amended Standing Order 16-04. It clarifies that only sealed and/or restricted documents must be sent to the warden and adds a section on serving sealed and/or restricted documents. Recently we have seen a few orders discussing a potential grey area involving transcripts that the Court may wish to revisit.<sup>6</sup>

U. (new) Crim LR 57.11 (Magistrate Judge Duties)

This rule mirrors proposed Civ. LR 72.1.

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<sup>6</sup> USA v. Janis, 17-50076 [258] and USA v. Olson, 17-50132 [137].