

**EASTERN DISTRICT OF TEXAS
LOCAL RULE UPDATE**

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On February 18, 2010 Chief Judge Folsom adopted amendments to the Local Rules of the Eastern District of Texas. The amendments include changes to

- filing procedures,
- response deadlines, and
- page limits.

Understanding these amendments is essential to any Federal litigation practice in East Texas. Since this publication is directed toward IP litigation, I have left discussing the significant local admiralty rule changes for another time and place. What follows outlines the significant amendments to the general and patent rules and their practical impact on litigation practice in East Texas.

Local Rule CV-4 Complaint, Summons, and Return

New Rule: Complaints must now be filed within 24 hours of opening a civil case in CM/ECF.

- Former Rule: No limitation on the amount of time a civil case could be open before a complaint was filed.
- Practical Effect/Commentary: This rule is intended to end the occasional practice of opening a new civil case on CM/ECF and never filing a complaint or waiting an unreasonable amount of time before filing. Practically, this means practitioners should not open a new civil case before their complaint is ready for filing.

Local Rule CV-5 Service and Filing of Pleading and Other Papers

New Rule: Magistrate Judge Consent Forms must be e-filed.

- Former Rule: Consent Forms were exempt from e-filing.
- Practical Effect/Commentary: ECF now supports an “event code” for filing a magistrate judge consent form. To stay in compliance with Fed. R. Civ. P. 73, both parties are required to file a consent form in CM/ECF and the judges will only be informed of the decision if both parties have consented to trial before a magistrate judge. Depending on the judge, this provision may have no practical effect on the procedure currently in place. Some judges hold a status conference where the parties are asked in open court whether they consent to trial before a magistrate. (Note: Whether the open-court consent

procedure is within Rule 73 is another question entirely. I can, however, guarantee that I do not want to be the first person to object on that ground.)

New Rule: Sealed civil complaints are exempt from the e-filing requirement. They must now be filed on CD-ROM with the clerk's office along with a motion to file under seal.

- **Former Rule:** Sealed complaints were not exempt from e-filing, but CM/ECF is not equipped for filing a complaint under seal. This led to a variety of ad hoc procedures for filing a sealed Complaint.
- **Practical Effect/Commentary:** This rule creates an explicit procedure for filing complaints under seal, eliminating any uncertainty concerning the protection confidential information.

New Rule: For calculating any deadlines based on the "service" of a document by a *pro se* litigant, the document is deemed served when it is electronically docketed in the Court's CM/ECF system.

- **Former Rule:** The date of service was determined based on the method of service pursuant to the Federal Rules.
- **Practical Effect/Commentary:** This rule provides more certainty in calculating deadlines for attorneys opposing *pro se* litigants.

Local Rule CV-5.2 Privacy Protections for Filings Made with the Court

New Rule: During the 90-day inspection period for transcripts filed with Court, the transcripts may not be printed from public computer terminals located in the clerk's office.

- **Former Rule:** There was no restriction on the public availability of transcripts during the 90-day inspection period.
- **Practical Effect/Commentary:** This rule closes a major loophole allowing anyone to access and print a transcript from public computer terminals located in the clerk's office without paying the court reporter's fee. Court reporters need to get paid too.

Local Rule CV-6 Computation of Time

New Rule: Calculation of time for documents corrected or re-filed following a deficiency rejection by the clerk's office will run from the date of filing of the corrected document.

- **Former Rule:** No rule governed the effect of a deficiency rejection on applicable timelines.

- **Practical Effect/Commentary:** This rule settles long-standing uncertainty regarding the effect of a deficiency rejection by the clerk's office. Practically, this means that attorneys receiving a deficiency notice should work quickly to cure the deficiency in order to avoid giving the opposing party too much extra time to file its response.

Local Rule CV-7 Motions Practice

New Rule: Case dispositive motions and responses are limited to 30 pages. Replies and surreplies are limited to 10 pages. Non-dispositive motions and responses are limited to 15 pages. Replies and surreplies are limited to 5 pages. Non-dispositive motions include motions to transfer venue, partial summary judgment, and motions for new trial.

- **Former Rule:** Partial summary judgment motions and motions for new trial were considered dispositive motions subject to a 30 page limit.
- **Practical Effect/Commentary:** This amendment effectively shortens the page limit for most summary judgment motions to 15 pages. Keep in mind, there is still a 60 page cumulative limit on all "summary judgment" motions (both total and partial). This could lead to some interesting results depending on the basis of the summary judgment motions.

New Rule: Responses to motions are due 14 days after service. Replies and surreplies are due 7 days after service.

- **Former Rule:** Responses to motions were due 12 days after service. Replies and surreplies were due 5 days after service.
- **Practical Effect/Commentary:** These amendments purportedly lengthen the deadlines for responsive briefs and bring the local rules in accordance with the "multiple of seven" deadlines reflected in the December 2009 amendments to the Federal Rules. However, the deadlines have not been lengthened enough to compensate for the "days are days" counting policy in the amended Federal Rule 6(a)(1) that includes intermediate Saturdays, Sundays, and legal holidays for all deadline calculation. Thus, while two days were added to all response deadlines, depending on the date of service, 2-4 days have been effectively subtracted. Never fear, the 3 day extension in Local Rule CV-6 still applies to all deadlines regardless of the method of service.

New Rule: Certificates of conference are now required for all motions in limine, but not to motions to issue letters rogatory.

- **Former Rule:** In limine motions could be filed without conference and letters rogatory required an unnecessary conference.
- **Practical Effect/Commentary:** This amendment has little effect on current practice. Most judges required parties to significantly shorten their limine motion list prior to the pretrial

hearing. This new requirement just extends that expectation prior to filing the motions. If you have studied Federal Rule 4 enough to know what a letter rogatory is, then this amendment is no surprise.

Local Rule CV-11 Signing of Pleadings, Motions, and Other Documents

New Rule: Only attorneys of record may sign pleadings with permission of the lead attorney.

- Former Rule: Attorneys foreign to a case could sign pleading “with permission.”

NEW Local Rule CV-50 Judgment as a Matter of Law in a Jury Trial

New Rule: JMOL motions have a cumulative page limit of 60 pages. Responses to JMOLs have a cumulative 60 page limit. Replies and surreplies are cumulatively limited to 20 pages respectively.

- Former Rule: JMOL motions had no cumulative page limit.
- Practical Effect/Commentary: This change has been expected for some time. This brings post-trial JMOL practice in accordance with summary judgment practice. Keep in mind that the page limits for case-dispositive and non-dispositive motions also apply to JMOL motions. For better or worse, the days of 200 pages of JMOL motions are officially over.

PATENT RULE AMENDMENTS

Patent Rule 2-1. Governing Procedure **Patent Rule 4-5. Claim Construction Briefs**

New Rule: Any patents attached to any e-filing must be in searchable PDF format and any other exhibits must be in searchable PDF format “whenever possible.” A copy of all of the asserted patents must be attached in searchable PDF format to all opening claim construction briefs.

- Former Rule: Patents did not need to be attached to opening claim construction briefs and did not have to be “searchable.”
- Practical Effect/Commentary: Since patents in “searchable PDF” format are not freely available on the internet, an OCR (optical character recognition) program will have to be used to convert a copy of a patent into a searchable format.