

## District of Delaware Amends Local Rules of Civil Practice and Procedure

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For the first time in more than a decade, the District of Delaware has amended its Local Rules of Civil Practice and Procedure (“Rules”) effective June 30, 2007. As stated in the Preface to the 2007 Amendments, “[s]ince the last amendments were made effective [on January 1, 1995], the Court has seen many changes, most notably the adoption in March 2005 of its Administrative Procedures Governing Filing and Service by Electronic Means. The amendments made herein are made to reflect the practices of the Court and of the Bar as they have evolved over the past decade, particularly with respect to the advent of electronic filing.”

This article provides an overview of the Rules and highlights substantive changes most likely of interest to litigants. As questions are likely to arise, please do not hesitate to contact us regarding the Rules or a particular Judge’s standing orders, which, although not part of the Rules, operate in conjunction with them and govern proceedings over which the Judge presides.

### Scope of the Rules

- **Citation and Availability.** The Rules are cited according to the formula: “D. Del. LR \_\_.” D. Del. LR 1.1(a). The 2007 Amendments are effective June 30, 2007, supercede prior local rules, and govern civil practice in the District of Delaware, unless otherwise ordered, or as modified by the Court in any proceeding in the interest of justice. *Id.* at 1.1(b), (d). To the extent consistent with the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”), the Rules are construed consistent with 1 U.S.C. §§1-5. *Id.* at 1.1(c). An electronic copy of the Rules may be found on the Court’s website at [www.ded.uscourts.gov](http://www.ded.uscourts.gov). *Id.* at 1.2(a). Paper copies are available from the Clerk for a fee. *Id.*
- **Sanctions.** The Court may at its discretion impose sanctions, including both monetary and substantive sanctions. *Id.* at 1.3(a), (b). Emphasis is placed in the 2007 Amendments on substantive sanctions for failure to follow the Rules, including, possibly, judgment against the offending party. *Id.* at 1.3(b).

### Commencement of Action; Process; Service and Filing of Pleadings and Other Papers

- **Initiating Suit.** Every party initiating a civil action in the District of Delaware, except prisoners not represented by counsel, shall complete and file with the Clerk a civil cover sheet. *Id.* at 3.1(a). Counsel for the defendant(s) shall bring missing or inaccurate information on the civil cover sheet to the attention of the Clerk, all parties, and the Court.

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*Id.* This is a new obligation imposed on a defendant under the 2007 Amendments. Previously, the Clerk provided notice of an omission to the party filing the civil cover sheet. In patent cases, as before, copies of the patents at issue shall be attached and filed with the complaint. *Id.* at 3.2.

- **Related Actions.** The cover sheet of a civil action shall indicate whether the action “is related to any other civil action previously decided or pending in this or any other federal district court.” *Id.* at 3.1(b). The addition of “federal district court” in this Rule marks a change from prior practice which required indication of a related action filed in this District or in any other court. A civil action is related if it (1) arises from the same or substantially identical transactions, happenings, or events; (2) involves the same or substantially the same parties or property; (3) involves the same patent or the same trademark; or (4) would otherwise entail substantial duplication if heard by different judges. *Id.* at 3.1(b)(1)-(4).

- **Summons and Service.** Upon or after filing a complaint, except in cases brought under 28 U.S.C. § 1915(d), plaintiff or its counsel must present a completed form of summons for each defendant to the Clerk for the Clerk’s signature and seal. *Id.* at 4.1(a). The 2007 Amendments account for the common practice of serving a complaint some time after filing with use of the language “[u]pon or after filing[.]” *Id.* Previously, the Rules called for delivery of a completed form of summons to the Clerk contemporaneously with filing.

As before, the Rules provide that, if service is made pursuant to 10 Del. C. § 3104, § 3112, or § 3113, plaintiff or plaintiff’s counsel shall, within 10 days of receiving the return receipt, file an affidavit of mailing stating that a nonresident defendant has been served by mail and has either accepted or refused the notice. *Id.* at 4.1(b).

- **CM/ECF Procedures.** Documents submitted for filing with the Court shall be filed in accordance with the Court’s Administrative Procedures Governing Filing and Service by Electronic Means (the “CM/ECF Procedures”) unless specifically exempted by Court order or rule. *Id.* at 5.1. This is a new rule added by the 2007 Amendments, and has been the practice almost exclusively since March 2005 when the Court implemented the CM/ECF Procedures.

To the extent applicable and consistent with the CM/ECF Procedures, all pleadings, motions, and other papers presented for filing shall be on 8½ by 11 inch white paper and shall be typed or printed and double-spaced, except quoted material and footnotes. *Id.* at 5.1.1. All margins shall not be less than 1 inch, and all printed matter must appear in 12 point type. *Id.* at 5.1.1(a). These requirements do not apply to exhibits, letters to the Court, and documents filed in removed actions prior to removal from state court. *Id.* at 5.1.1(b)(1)-(3). The Court at its discretion may provide notice and not act on matters raised in a nonconforming paper; or may take other action it deems appropriate. *Id.* at 5.1.2(a), (b).

- **Sealed Documents and “Originals.”** A document placed under seal must be filed in accordance with the CM/ECF Procedures, unless otherwise ordered by the Court. *Id.* at 5.1.3. This amendment conforms the Rules to local practice. To implement the Rule, the cover page of the filing and a single sheet marked “SEALED DOCUMENT” or its

In documents submitted for filing with the Court, margins should not be less than 1 inch, and all printed matter must appear in 12 point type.

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equivalent are filed electronically using the CM/ECF Procedures. A hard copy of the actual document is then placed in a sealed envelope, served on counsel, and filed with the Court (usually the next business day as a result of the midnight electronic filing deadline) to preserve confidentiality.

The Rules now deem electronically filed documents the “original” and require a party to file with the Clerk one paper copy of pleadings, stipulations, motions, responses to motions, briefs, memoranda of points and authorities, appendices, and proposed pretrial orders in conformance with D. Del. LR 16.4(c). *Id.* at 5.3. The hard copy filing of a sealed document likely constitutes the “original” (*see id.* at 5.2(b)) because, as described above, the electronic version is little more than a placeholder.

- **Electronic Service.** The Rules now provide for two separate service requirements. *Id.* at 5.2. When all parties are participants of CM/ECF, the Court’s Notice of Electronic Filing (“NEF”), which is automatically generated for each document filed, shall serve as the certificate of service; no separate certificate shall be filed. *Id.* at 5.2(a). The practice before had been to file a certificate of service with the electronic filing. CM/ECF participation is likely met if local counsel for a party is a CM/ECF participant. When all parties are not CM/ECF participants or if the document filed is one under seal, “the original of any pleading filed with the Court and required to be served” shall have a certificate of service. *Id.* at 5.2(b). Parties should carefully note early in litigation whether the CM/ECF participation requirement has been met to avoid issues with service under the Rules.
- **Discovery Material.** Practice with regard to discovery material is little changed under the Rules. Discovery material under Fed. R. Civ. P. 26, 30, 31, and 33 through 36, except in cases involving *pro se* parties, is served on all parties represented by counsel, but is not filed with the Court. *Id.* at 5.4(a), (b). In lieu thereof, the requesting party and the party serving responses shall file with the Court a “Notice of Service.” *Id.* at 5.4(b). Filing the notice of taking an oral deposition under Fed. R. Civ. P. 30(b)(1) and filing the proof of service under Fed. R. Civ. P. 45(b)(3) satisfies this requirement. *Id.* at 5.4(b)(1). The party requesting (or taking, as to a deposition) or responding to discovery shall retain the original, including, when applicable, a deposition transcript, and is considered the custodian. *Id.* at 5.4(b)(2). Discovery material shall be filed with the Court when used at trial or when necessary to a pretrial or posttrial motion. *Id.* at 5.4(b)(3).

### Pleadings and Motions

- **Averment and Requests by Motion.** Parties, other than *pro se*, filing a non-dispositive motion with the Court must file an averment of counsel for the moving party that a reasonable effort has been made to reach agreement with the opposing party as to the matters set forth therein. *Id.* at 7.1.1. A failure to include the averment may result in dismissal of the motion. *Id.* Unless the Court otherwise orders, all requests for relief must be by motion. *Id.* at 7.1.2(a). The body of the motion or a supporting brief or memorandum of points and authorities must articulate the relief requested and the grounds in support. *Id.* The 2007 Amendments require

that a responsive paper adopt the form of filing used by the movant in the opening, *e.g.*, speaking motion, brief, or memorandum of points and authorities. *Id.*

■ **Computation of Time and Briefing Schedule and Requirements.**

A response to a motion is due 10 days after the motion is deemed served and a reply may be filed within 5 days after the response is deemed served. *Id.* at 7.1.2(b). These periods are calculated in accordance with Fed. R. Civ. P. 6(a) and (e) and the CM/ECF Procedures. *Id.* Thus, business days are used to calculate the 10 and 5 day periods and, it appears, electronic service, as discussed above, tacks 3 days onto response periods, as provided in Fed. R. Civ. P. 6(e). The page limit for briefs is 40 pages for the opening and answering briefs and 20 pages for replies. *Id.* at 7.1.3(a)(4). Opening and answering briefs shall contain a distinctive title and include, in the following order: (1) a table of contents, (2) a table of citations, (3) a statement of the nature and stage of the proceedings, (4) a summary of argument, (5) a concise statement of facts, (6) an argument, and (7) a short conclusion. *Id.* at 7.1.3(c)(1)(A)-(G). A reply brief shall not contain material that should have been included in a full and fair opening brief. *Id.* at 7.1.3(c)(2).

■ **Citations and Unreported Opinions.** Citations in papers filed with the Court shall be made in accordance with “A Uniform System of Citation,” published by the Harvard Law Review Association. *Id.* at 7.1.3(a)(5).

The 2007 Amendments require the filing of unreported opinions (usually as exhibits) only if they are not reported in the National Reporter System nor available to the Court on either WESTLAW or LEXIS. *Id.* at 7.1.3(a)(7). Previously, each Judge had his or her own preference regarding the filing of unreported decisions. Papers already filed with the Court should be cited by docket item number maintained by the Clerk according to the format: “D.I. \_\_\_.” *Id.* at 7.1.3(a)(6).

■ **Appendix.** An appendix may be filed with any brief. *Id.* at 7.1.2(a).

It shall have a paginated table of contents and portions of the record included shall be in chronological order. *Id.* at 7.1.3(d). Material in the appendix shall include the original and appendix pagination. *Id.* at 7.1.3(a)(3). Material in a foreign language shall be accompanied by an English translation along with a certification that the translation is true and correct. *Id.* at 7.1.3(d). Parties may agree to a joint appendix, which shall be bound separately. *Id.* at 7.1.3(e). Duplication of material shall be avoided. *Id.* at 7.1.3(d).

■ **Oral Argument and Reargument.** A party may request oral argument in writing on any motion no later than 3 days after service of the reply brief. *Id.* at 7.1.4. The Court has discretion to grant or deny the request and may order oral argument *sua sponte*. *Id.* A motion for reargument, which the Rules state will be granted sparingly, must be filed within 10 days after the Court issues its opinion or decision. *Id.* at 7.1.5. Within 10 days thereafter, the opposing party may file a brief answer. *Id.* The Court will determine from the motion and answer whether to grant reargument. *Id.*

The 2007 Amendments require the filing of unreported opinions (usually as exhibits) only if they are not reported in the National Reporter System nor available to the Court on either WESTLAW or LEXIS.

- **Motion to Amend.** A party that moves to amend a pleading shall attach to the motion a signed proposed amended pleading and a form of the amended pleading showing material added in underline and deleted in brackets or by striking through the material. *Id.* at 15.1(a), (b). If the motion is granted, the proposed amended pleading as so executed will be docketed. *Id.* at 15.1.
- **Rule 16(b) Scheduling Conference.** Formerly addressed in Rule 16.2, Fed. R. Civ. P. 16(b) practice in the District of Delaware is now governed by Rule 16.1. Under the 2007 Amendments, there is no longer a specific date by which the Court will schedule an initial conference (it had been within 45 days after service of process on all defendants), although litigants can expect to receive a timely order for a scheduling conference from the Court. The remaining changes to Fed. R. Civ. P. 16(b) procedures are minimal. Notably, however, the parties now are explicitly directed to “confer” on all pretrial management issues, not just settlement, prior to the scheduling conference – a codification of established local practice. *Id.* at 16.1(a). As before, counsel for the parties and any unrepresented parties shall participate in a Fed. R. Civ. P. 16(b) scheduling conference. *Id.* The conference should address: (1) the scheduling, including trial dates, applicable to the case; (2) the number of interrogatories and requests for admission and the number and location of depositions; (3) the manner in which discovery disputes are to be resolved; (4) the briefing practices to be employed; and (5) the possibility of settlement. *Id.* at 16.1(b)(1)-(5). The form for the proposed Fed. R. Civ. P. 16(b) Scheduling Order should conform to that used by the Judge presiding over the matter. Certain categories of actions are exempt from these requirements. *Id.* at 16.2.
- **Pretrial Conference and Procedure.** A pretrial conference shall be held in all civil actions for which a trial is scheduled. *Id.* at 16.3(a). If no trial date is set, any party may request the conference following the completion of discovery and any scheduled motion practice. *Id.* Unless otherwise ordered, counsel conducting the trial shall participate in the conference. *Id.* at 16.3(b). Before the conference, counsel for all parties shall meet and confer to premark and exchange all trial exhibits and discuss the contents of the pretrial order. *Id.* at 16.3(c). The contents of the proposed pretrial order are provided for in the Rules. *Id.* at 16.3(c)(1)-(13).

The 2007 Amendments provide a specific schedule for the exchange of materials required for the pretrial order.

Unless otherwise ordered or agreed to by the parties and approved by the Court, the 2007 Amendments require plaintiff to provide a draft pretrial order to all other parties at least 30 days before the pretrial order is due. *Id.* at 16.3(d)(1). The draft shall include the plaintiff’s proposals for the sections of the pretrial order. *Id.* If the parties have not already exchanged trial exhibits, the plaintiff shall at this time also provide exhibits or provide reasonable access to them. *Id.* At least 15 days before the pretrial order is due, all other parties must make a similar exchange. *Id.* at 16.3(d)(2). Thereafter, the parties shall meet and confer in good faith such that plaintiff may file a conforming pretrial order at least 5 days prior to the pretrial conference. *Id.* at 16.3(d)(3), (4).

- **Requests for Extensions of Deadlines.** Unless otherwise ordered, a party may request an extension of a discovery deadline or postponement of trial by making a motion or stipulation before expiration of the deadline. *Id.* at 16.4. The motion or stipulation shall include the reasons for the request and either an affidavit or certification by counsel that a copy of the request was sent to the client. *Id.* at 16.4(a), (b).

## Parties

- **Class Action.** A party seeking to maintain a civil action as a class action shall include the legend “Class Action” in the complaint or other pleading asserting a class action. *Id.* at 23.1.

## Depositions and Discovery

- **Interrogatories, Requests for Production, and Confidentiality.** Interrogatories and requests for production are to be sequentially numbered, and each subpart of an interrogatory or request shall be counted towards the propounding party’s allotted number of interrogatories or requests, which, as of the effective date of the amendments, is no longer specifically limited by the Rules. *Id.* at 26.1(a). Previously, the Rules capped interrogatories at 50. Through silence, the 2007 Amendments implicitly impose the 25-interrogatory limit adopted by Fed. R. Civ. P. 33(a), but allow additional interrogatories with leave of the Court or upon written stipulation, as provided in Fed. R. Civ. P. 33(a). Rule 26.2 remains unchanged and provides attorneys’ eyes only protection to documents produced prior to the entry of a protective order/confidentiality agreement.
- **Notice.** The reasonable notice period for taking depositions pursuant to Fed. R. Civ. P. 30(b)(1) and 30(b)(6) has been lengthened from 5 business days to 7 business days. *Id.* at 30.1. Deposition procedures remain largely unchanged, save (1) the addition of new language (“... or such other form of application for relief as the Court may prescribe”) in Rule 30.2 (Deposition Motions) to account for the spectrum of discovery dispute procedures utilized by the Judges in the District of Delaware; (2) new Rule 30.6 (Depositions Upon Oral Examination), codifies the well-established Delaware prohibition against attorneys conferring or consulting with deponents during depositions, including any recesses or continuances; and (3) amendments to the Rules to account for changes in technology.
- **Attendance at Deposition.** Unless the Court otherwise orders or the parties agree, a deposition may be attended only by (1) the deponent, (2) counsel for any party (and employees of their firms), (3) a party who is a natural person, (4) an individual designated by counsel to represent a party that is not a natural person, (5) counsel for the deponent, and (6) any consultant or expert designated by counsel for any party. *Id.* at 30.3(a)-(e). If a confidentiality order has been entered, any person not authorized under the order may be excluded while a deponent is being examined about a confidential document or information. *Id.* at 30.3.

The number of interrogatories is now governed by the Federal Rule 33 limit of 25, unless otherwise agreed to and/or ordered by the Court.

New Rule 30.6 codifies the well-established Delaware prohibition against attorneys conferring or consulting with deponents during depositions, including any recesses or continuances.

- **Motions.** With regard to discovery motions filed pursuant to Fed. R. Civ. P. 26 through 37, movants must include within their moving papers a verbatim recitation of the discovery at issue or attach to their motion papers a copy of the discovery in dispute. *Id.* at 37.1.

## Trials

- **Jury Demand, Witness Consultation, and Failure to Prosecute.** The Rules have been amended to conform them to the local practice of placing “Demand for Jury Trial” or the equivalent “in the caption” of a pleading when a jury trial is sought. *Id.* at 38.1 (emphasis added). In a move similar to that described above concerning Rule 30.6, the 2007 Amendments add Rule 43.1, which precludes counsel who is offering a witness for direct examination from consulting or conferring with the witness once the direct examination is concluded and until cross examination of the witness is concluded, except for the purpose of determining whether to assert a privilege or how to comply with a court order.

In the event of a failure to prosecute a civil action, the 2007 Amendments now require an “opportunity to be heard” as part of the procedure pursuant to Fed. R. Civ. P. 23 and Rule 23.1. *Id.* at 41.1.

- **Voir Dire.** Voir dire is conducted by the Court. *Id.* at 47.1(a). Parties have the opportunity to suggest special voir dire questions, if filed at least 3 business days before the pretrial conference. *Id.* at 47.1(a)(2). Regarding peremptory challenges of potential jurors, each party has 3 challenges, which are employed in alternating fashion with the plaintiff having the first, third, and fifth opportunity to challenge. *Id.* at 47.1(b). Rule 47.1 no longer precludes a party from exercising its remaining peremptory challenges if it passes on making a peremptory challenge during its first two peremptory challenge rounds.
- **Communications with Jurors and Jury Instructions.** Communications with prospective jurors or with a juror after discharge of the jury are prohibited under Rule 47.2, thus conforming the Rules to local practice. Unless otherwise ordered by the Court, Rule 51.1 sets forth the requirements for submitting joint and disputed jury instructions and special verdict/interrogatories, both of which are required to be filed at least 3 business days prior to the pretrial conference.

## Judgments

- **Costs.** A prevailing party may seek costs by filing a bill of costs within 20 days after the time for appeal has expired or, if an appeal is filed, within 10 days after the issuance of the mandate of the appellate court. *Id.* at 54.1(a), (c). Once filed, any other party may file specific detailed objections to any item sought in the bill of costs. *Id.* at 54.1(a)(3). The list of taxable costs will vary by case and will be subject to numerous exceptions and/or prerequisites. Items generally taxable are provided for in the Rules. *See id.* at 54.1(b)(1)-(11).

Rule 54.2 has been changed to include the permissive word “may” rather than “shall,” but still provides a mechanism for the Court to assess juror costs, as defined in the Rules, against the parties and/or their counsel in any action settled or otherwise resolved less than 3 full business days before jury selection is to occur.

- **Attorneys’ Fees.** Rule 54.3 remains unchanged and sets forth the requirements and timing for applications for attorneys’ fees. More specifically, “[w]here a judgment is not a final judgment on all claims, failure to apply for attorneys’ fees shall not prevent a party from applying for fees after entry of final judgment.” *Id.* at 54.3(a). Also, with regard to settled matters, parties must move for fees no later than 21 days from the Court’s approval of the settlement (if court approval is sought) or 21 days after the settlement is executed (if court approval is not sought). *Id.* at 54.3(b).

### Provisional and Final Remedies

- **Entry of Judgment.** Rules 58.1.1 – 71A.1 represent the universe of Rules applicable to provisional and final remedies. The lengthiest of these rules, Rules 58.1.1 and 58.1.2, deal with entry of judgment by confession and execution thereon, including entry of judgment by confession in open court. With just a few notable exceptions, the procedures for judgment by confession remain largely unchanged. In Rule 58.1.1(h)(1)(A), as part of the procedures that must be complied with prior to the issuance of the first writ of execution, the judgment creditor must now file with the Clerk a “praecipe,” not a “notice,” directed to the Clerk “requesting the particular execution writ together with a form of that writ obtained from the Superior Court of the State of Delaware.”
- **Court Deposited Funds.** Monies deposited with the Court will be kept in a registry account (*id.* at 67.2(a)) and “[a]ll orders to deposit money must be personally served on either the Clerk, Chief Deputy Clerk or Financial Administrator.” *Id.* at 67.2(b). Withdrawal of funds is accomplished by filing a motion to withdraw funds and requires a contemporaneously filed, separate, under seal notice setting forth the social security number or tax identification number of the ultimate recipient. *Id.* at 67.3.
- **Offer of Judgment.** Offers of judgment made pursuant to Fed. R. Civ. P. 68 shall not be filed with the Court unless they are accepted and the filing comports with the provisions of Fed. R. Civ. P. 68. *Id.* at 68.1. Rules 69.1 and 71A.1 govern proceedings on execution pursuant to Fed. R. Civ. P. 69 and the procedures in condemnation cases wherein the United States files separate land condemnation actions with only a single supporting declaration relating to the separate actions, respectively.

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## United States Magistrate Judges

- **Consent to Jurisdiction.** Upon consent of the parties, a Magistrate Judge may conduct a jury or nonjury trial in any civil action and hear and determine any and all pretrial and posttrial motions, including dispositive motions. *Id.* at 73.1.

## District Courts and Clerks

- **Return of Exhibits.** Unless otherwise ordered by the Court, any party upon conclusion of an action shall be entitled to have exhibits returned to the party or person to whom they belong without the necessity of filing copies thereof. *Id.* at 79.1(b).

## Miscellaneous Provisions

- **Transferred and Removed Cases.** In cases transferred or removed to the Court, the parties shall submit, within 20 days of the filing of the case with the Clerk, a statement identifying all pending matters requiring judicial action. *Id.* at 81.2. In a removed case, the caption on any pleading, including the petition, shall be identical, insofar as the parties are concerned, as in the state court. *Id.* at 81.1.

## Attorneys

- **Professional Conduct.** The Model Rules of Professional Conduct of the American Bar Association remain the standard for professional conduct for all attorneys admitted to practice before the Court, including those admitted on motion or otherwise. *Id.* at 83.6(d).
- **Local Counsel.** Unless otherwise ordered, attorneys who are not admitted to practice by the Supreme Court of the State of Delaware may not be admitted *pro hac vice* unless associated with local counsel who is a member of the Bar. *Id.* at 83.5(d). Local counsel shall be the registered user of CM/ECF and shall be required to file all papers with the Court. *Id.* Local counsel shall attend proceedings before the Court, unless otherwise so ordered. *Id.*

## Form for Motion for Admission *Pro Hac Vice*

- **Annual Fee.** Local counsel should provide and file the motion and order for admission *pro hac vice*. Attorneys admitted *pro hac vice* must pay an annual fee of \$25.00.