- General Order 04-24

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

GENERAL ORDER AMENDING LOCAL RULES

It is hereby ORDERED that the following amendments to the local rules, having been approved by the judges of this court, are adopted for immediate implementation.[1] These amendments shall be posted forthwith on the court's Internet website, found at *www.txed.uscourts.gov.*

1. **LOCAL RULE CV-4 Complaint, Summons and Return**

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(b) On the complaint, all litigants shall type or print all party names contained in the case caption with the accurate capitalization and spacing for each party (e.g.Martha vanDerkloot, James De Borne'). This procedure seeks to ensure that accurate computer party name searches can later be performed. ~~In multi-party cases, all parties in the case caption shall be numbered (e.g. plaintiffs - 1. Martha vanDerkloot 2. James De Borne; defendants - 1. John Smith 2. Jane Doe).~~

Comment: Several years of experience has resulted in the conclusion that the benefit of this numbering requirement is outweighed by the burden of complying with it.

2. **LOCAL RULE CV-5 Service and Filing of Pleadings and Other Papers**

(a) **Electronic Filing Required**. Except as expressly provided or in exceptional circumstances preventing a Filing User from filing electronically, all documents filed with the court shall be electronically filed in compliance with the following procedures.

(1) **Exemptions from Electronic Filing Requirement**. The following are exempted from the requirement of electronic filing:

(A) In a civil case, the initial papers, including the complaint, the civil cover sheet, the issuance and service of the summons and the notice of removal;

(B) In a criminal case, the charging documents, including the complaint, information, indictment, and any superseding indictment; petitions for revocation of probation or supervised release; affidavits in support of search and arrest warrants, pen registers, trap and trace requests, wiretaps and other documentation related to these types of applications; and other matters filed

[1]New language appears in <u>underlined</u> text; deleted language appears in ~~strikeout~~ text.

ex parte in connection with ongoing criminal investigations;

(C) filing from pro se litigants (prisoner and non-prisoner);

(D) filings to be kept under seal;

(E) consents to proceed before a magistrate judge;

(F) proof of service of the initial papers in a civil case;

(G) Fed.R.Crim.P. 20 and Fed.R.Crim.P. 40 papers received from another court; ~~and~~

(H) official administrative records or transcripts of prior court or administrative proceedings required to be filed by law, rule or local rule.

(I) notice of appeal;

(J) motion to appear pro hac vice; and

(K) any document pertaining to presentence investigation reports in criminal cases.

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(4) **File Size Limitations.** No single electronic file, whether containing a document or an attachment, may exceed ~~forty (40) pages in length~~ 5 megabytes in size. Documents and/or attachments in excess of ~~forty pages~~ 5 megabytes must be divided into multiple files and accurately described to the court.

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(6) **Attachments and Exhibits.** Filing Users must submit separately in electronic form ~~all~~ each ~~documents referenced as~~ exhibits or attachments, unless the court permits conventional filing. *See* Section (4), "File Size Limitations," above; Local Rule CV-7(b), 56(d) (requirements for documents attached to motions).

* * * * *

(9) **Paper Copies of Lengthy Documents.** If a document to be filed electronically exceeds five pages in length, including attachments, a paper copy of the filed document must be ~~provided~~ sent contemporaneously to the presiding judge's chambers. A copy of the "Notice of Electronic Filing" must be attached to the front of the paper copy of the document that was electronically filed. The paper copy should be sent directly to the judge's chambers and not to the clerk's office. *See*

Local Rule CV-10(b) regarding tabs and dividers for voluminous documents. Judges may opt out of this rule by entering an order. Such orders can be found on the court's website, located at *www.txed.uscourts.gov.*

(10) **Technical Failures.**

A Filing User whose filing is made untimely as the result of technical failure, may seek appropriate relief from the court. Notice of technical failures at the court will be posted on the court's website. A technical failure does not relieve a party of exercising due diligence to timely file and serve document(s).

(b) **Filing by Paper.** Where filing by paper is permitted, the original and one copy of pleadings, motions and other papers shall be filed with the clerk *(but see* Local Rule CV-4(b) (two copies of summons and complaint required when serving Texas Secretary of State); Fed.R.Civ.P. 4(i) (extra copies required when serving the United States as a party); and Fed. R. Civ. P. 5(d) (discovery or disclosure materials under Fed.R.Civ.P. 26(a)(1) and (a)(2), including notices of depositions, are not filed unless by order of the court)).

(1) **Filing by After-Hours Depository.** The court maintains after-hours document depositories at the courthouses in Beaumont, Lufkin, Tyler, Marshall, Sherman and Texarkana. Where filing by paper is permitted, any pleadings or other documents that are marked received using the electronic time stamp contained in the depository and then placed in the box will be ~~entered on the docket~~ filed as of the time and date marked as received to the depository.

* * * * *

~~(c) **Filing by Facsimile.** Filing by facsimile will only be allowed in situations determined by the court to be of an emergency nature or other compelling circumstance. The clerk shall not accept documents transmitted by facsimile equipment unless prior authorization has been obtained from the judge or magistrate judge to whom the case has been assigned, or at that judge's personal direction, with the exception of emergency pleadings in capital offense cases.~~

~~(1) Authorized facsimile transmissions must be faxed directly to the clerk's office. Additionally,~~

~~(A) the party filing the document must mail or otherwise submit the original signed document to the clerk on the same day it is sent via facsimile, along with any reasonable fee established by the clerk, and~~

~~(B) absent express judicial permission, documents filed by facsimile transmission shall not exceed 15 pages in length.~~

~~Failure to comply with these requirements may result in the pleading being stricken~~

~~from the record.~~

~~(2) A facsimile pleading is deemed to be filed as of the date it is received by the court. The filed facsimile shall have the same force and effect as the original. The clerk shall assign the original signed pleading the same document number as the facsimile pleading.~~

~~(3) The clerk shall not accept for facsimile filing an original complaint, a removal from state court, or any other document constituting a new action.~~

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(f) **Service by Facsimile Or Electronic Means Authorized.** Parties may serve copies of pleadings and other case related documents to other parties by facsimile or electronic means in compliance with Local Rule CV-5(a) in lieu of service and notice by mail. Such service is deemed complete ~~as of the telephonic transfer to the recipient's facsimile machine or telecopier~~ upon sending. Service ~~by facsimile~~ after 5:00 p.m. local time of the recipient shall be deemed served on the following day.

Comments: Notices of appeal and pro hac vice motions were added to the list of exceptions to the electronic filing rule because the court's electronic filing ("CM/ECF") database is not equipped to accept electronic fee payments over the Internet. Therefore, documents that are typically accompanied by a fee, e.g., civil complaints and notices of appeal, must be filed in paper format until such time as the court has the ability to accept fee payments via the Internet.

Documents pertaining to presentence investigation reports in criminal cases were also added to the list of exceptions because the presentence report and documents pertaining to it are deemed confidential and should be sealed.

The language in subsection (a)(4) was amended because the court was recently advised that the CM/ECF electronic filing system has the ability to accept files of up to 5 megabytes in size, which is substantially larger than the current "40 page rule." The 5 megabyte threshold will allow attorneys to electronically file most documents without having to separate them into multiple files. Instructions on how to determine electronic file size have been posted on the court's Internet site.

The language in subsection (a)(6) was amended to require each electronically-filed exhibit and/or attachment to be submitted separately. This gives each exhibit and attachment a separate tab in the court's CM/ECF case file.

A helpful reference has been added to subsection (a)(9).

Notice of technical failures at the court will be posted on the court's website per the language in subsection (a)(10). This will provide counsel with documentation of a technical failure at the court, in the event it causes a filing to be untimely. The second new sentence makes it clear that counsel must still exercise due diligence to timely file and serve documents, even if a technical failure is encountered.

The language of section (b) has been changed to require counsel to send courtesy copies of electronically filed documents to the presiding judge at the time of filing. Subsection (b)(1) has been corrected to state that documents placed in an after-hours depository box will be filed, but not necessarily entered on the docket, as of the date and time received in the depository.

Sections (c) regarding facsimile filing has been deleted, since section (a) of the rule makes electronic filing mandatory.

Section (f) was amended to clarify that parties may serve documents to other parties by electronic mail as well as by facsimile. Automatic e-mail service of electronic documents occurs when documents are filed electronically using the court's CM/ECF database. The facsimile service provision was retained for situations where opposing counsel has obtained court permission not to receive e-mail notice and service of documents, and filing counsel would rather serve documents on them via facsimile rather than by conventional mail.

3. **LOCAL RULE CV-7 Motions Practice**

(a) **Generally**. All motions, unless made during a hearing or trial, shall be in writing and conform to the requirements of Local Rules CV-5 and CV-10. With each motion there shall also be filed and served a proposed order for the judge's signature. The order shall be a separate ~~paper~~ document endorsed with the style and number of the cause, and shall not include a date or signature block.

* * * * *

Comment: In section (a), "paper" was replaced by "document" to better describe a document filed in electronic format. The new language prohibiting date or signature block in the proposed order is necessary because the court uses an electronic stamp that automatically inserts the date and signature when a proposed order is approved.

4. **LOCAL RULE CV-10 Form of Pleadings**

(a) **Generally.** When offered for filing, all ~~papers~~ documents shall:

(1) be endorsed with the style and number of the action;

(2) contain a caption containing the name and party designation of the party filing the ~~paper~~ document and a statement of the character of the ~~paper~~ document clearly identifying each included pleading, motion or other ~~paper~~ document (e.g., Defendant John Doe's Answer and Motion to Dismiss under Rule 12(b)(6)) [note: see Local Rule CV-38(a) for cases involving jury demands][counsel are encouraged to file pleadings, motions and other documents separately whenever possible];

~~(3) include in the caption the last name of the assigned district judge or the appropriate magistrate judge (in the event that a case has been referred to a magistrate judge for~~

~~disposition), except where a judge has not yet been assigned to a case;~~

(4) be signed by the attorney in charge, or with his or her permission;

(5) when filed by paper, be plainly written, typed, or printed~~,~~ double-spaced, on 8 1/2 inch by 11 inch white paper, fastened at the top only, and punched at the top center with two holes 2 7/8 inches apart; and

(6) be in a font no smaller than twelve (12) point type.

(b) **Tabs and Dividers.** When filed by paper, original ~~papers~~ documents offered for filing shall not include tabs or dividers. The copy of the original that is required to be filed for the Court's use (see FRCP 5(a)), if voluminous, should have dividers or tabs, as should all copies sent to opposing counsel.

(c) **Covers.** "Blue backs" and other covers are not to be submitted with ~~papers~~ paper filings.

(d) **Deficient pleadings/documents.** The clerk shall monitor ~~papers~~ documents for compliance with the federal and local rules as to format and form. If the ~~paper~~ document sought to be filed is deficient as to form, the clerk shall immediately notify counsel, who should be given a reasonable opportunity, preferably within one business day, to cure the perceived defect. If the perceived defect is not cured in a timely fashion, the clerk shall refer the matter to the appropriate district or magistrate judge for a ruling as to whether the ~~papers~~ documents should be made part of the record.

(e) **Redaction of Personal Identifiers.** The parties shall refrain from including, or shall redact where inclusion is necessary, the following personal identifiers from all documents filed with the court:

(1) **Social Security numbers.** If an individual's Social Security number must be included in a document, only the last four digits of that number should be used.

(2) **Names of ~~minor children~~ minors.** ~~If the involvement of a minor must be mentioned~~, A minor should only be identified by initials, unless the minor's parent, guardian or next friend consents to the use of the minor's full name, or uses it in a document filed with the court. Where initials are used for identification, they are sufficient for all purposes for identification.

(3) **Dates of birth.** If an individual's date of birth must be included in a document, only the year should be used.

(4) **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

The purpose of this rule is to avoid publication of sensitive personal information in

court documents that are available on the Internet. The responsibility for redacting personal identifiers rests solely with counsel and the parties. The clerk will not review each pleading for compliance with this rule.

Comment: References to "paper" in sections (a) through (d) have been replaced with "document" to better describe electronically-filed documents.

A note was added to subsection (a)(2) to indicate the court's preference for filing separate motions for each request, rather than combining multiple requests in one motion.

Subsection (a)(3) has been deleted as no longer necessary, as the "Notice of Electronic Filing" generated when a document is electronically filed contains the name of the presiding judge.

The language change in section (d) indicates the court's preference that technical deficiencies in electronically filed documents be cured within one business day, if possible. This should speed the process of repairing filing errors.

The language of subsection (e)(2) was amended to allow counsel, in certain circumstances, to be able to refer to a minor by his or her full name with the consent of the minor's parent, guardian or next friend, or when the minor's full name is used by the parent, guardian or next friend in a document filed with the court.

5. LOCAL RULE CV-11 Signing of Pleadings, Motions and Other ~~Papers~~ Documents

Comment: The reason for this language change was explained previously.

6. LOCAL RULE CV-77 District Courts and Clerks

Notice of Orders and Judgments. The clerk may serve and give notice of judicial orders and judgments by ~~facsimile or~~ electronic mail in lieu of service and notice by conventional mail, to any person who has ~~provided a facsimile machine phone number or~~ signed a filed pleading or document and provided an e-mail address with his/her pleadings as specified in Local Rule CV-11(c)(1)(F). Any other attorney who wishes to receive notice of judicial orders and judgments must file a notice of appearance of counsel with the court.

By providing the court with ~~a facsimile number or~~ an e-mail address, the party submitting the pleadings is deemed to have consented to receive service and notice of judicial orders and judgments from the clerk by ~~facsimile and/or~~ e-mail. Persons who wish to be excluded from receiving judicial notices by ~~facsimile and/or~~ e-mail may do so by ~~sending a written notice to the clerk~~ filing a motion with the court.

(A) Notice of judicial orders and judgments is complete when the clerk obtains electronic confirmation of the receipt of the transmission. Notice by ~~facsimile or~~ e-mail by the clerk that occurs after 5:00 p.m. on any business day is deemed effective as of the following business day.

Comment: References to facsimile noticing have been deleted, since the court now provides notice by e-mail rather than by facsimile. *See* Local Rule CV-5(1)(a).

Language has been added to the first paragraph of the rule to clarify what attorneys must do to receive electronic notice of the filing of court documents. The second paragraph of the rule was changed to reflect that persons who wish to be excluded from receiving electronic notices cannot automatically opt out and must file a motion.

7. LOCAL RULE CV-83 Rules by District Courts; Judge's Directives

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(c) **Standing orders.** Any standing order adopted by a judge pursuant to Fed. R. Civ. P. 83(b) must conform to any uniform numbering system prescribed by the Judicial Conference of the United States, and be filed with the clerk of court. The court will periodically review all standing orders for compliance with Rule 83(b) and for possible inclusion in the local rules. This subsection does not apply to provisions in scheduling or other case-specific orders.

(d) **Courtroom Attire and Conduct.** All persons present in a courtroom where a trial, hearing or other proceeding is in progress must dress and conduct themselves in a manner demonstrating respect for the court. The presiding judge shall have the discretion to establish appropriate standards of dress and conduct.

Comment: New section (c) is relatively self-explanatory and is contained in the attached "Report to the Court on the Use of Judicial Standing Orders." New section (d) gives the presiding judge the discretion to establish appropriate standards for courtroom dress and conduct.

Signed this 28 day of October, 2004.

FOR THE COURT:

THAD HEARTFIELD, CHIEF JUDGE

U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS
LOCAL RULES ADVISORY COMMITTEE

REPORT TO THE COURT ON THE USE OF JUDICIAL STANDING ORDERS

I. Summary of Report

The Court recently charged the local rules committee with reviewing and commenting on existing standing orders regarding the degree of conflict, variation and duplication of other rules, and whether these orders are a cause of concern for the bar. Specifically, the Court expressed concern with respect to differing pre-trial criminal procedures, divergent courtesy copy requirements, modification of local rule summary judgment procedures and discordant joint final pre-trial order formats. The Court also expressed interest in whether the time has come to adopt patent rules uniformly applicable throughout the district.

The committee has done so, and submits this report for the Court's consideration. The report contains a short review of the law applicable to standing orders, and a set of recommendations, which can be briefly summarized as follows:

1) Existing standing orders should be reviewed to: (a) eliminate provisions that conflict with or duplicate the federal or local rules in order to comply with Fed. R. Civ. P. 83(b); (b) ensure that the benefit they provide the Court justifies the burdens placed on practitioners; and (c) add numbering to correspond with the numbering scheme for the federal and local rules.
2) The local rules should provide for the routine review of any standing orders to ensure compliance with Rule 83(b).
3) The Court should consider including standing order-type provisions in scheduling or other case-specific orders, rather than as stand-alone orders.
4) The current practice of permitting individualized docket control orders and decisions as to the procedures to be used in patent cases should remain.

The committee's recommendations also take the form of proposed Local Rule CV-83(c), which is contained in section IV of this report, as well as in the committee's proposals regarding rule changes.

II. Standing Orders

As the Court is aware, local court rules and standing orders are promulgated pursuant to Fed. R. Civ. P. 83. Rule 83(b) affords judges discretion to regulate their practice in the absence of controlling law to the extent such procedures are consistent with Acts of Congress, the Federal Rules, and the local court rules. Fed. R. Civ. P. 83(b); *see also* Advisory Committee Notes (1995); *see also First Nat'l Bank, Henrietta v. Small Bus. Admin.*, 429 F.2d 280, 284 (5th Cir. 1970).

Although the 1985 Advisory Committee Note to Rule 83 expressly encourages districts to "adopt procedures, perhaps by local rule, for promulgating and reviewing single-judge standing orders," the Eastern District of Texas does not have such a mechanism. As the Court observed in its charge to the committee, such a procedure is important because – unlike the national and local rules – standing orders are not subject to public notice and comment.

As the Court also observed, it cannot be denied that detailed standing orders run counter to the goals of consistency and simplicity embodied in the national rules, which were drafted with an eye toward creating uniform practice in federal courts throughout the country. Although the authors of Rule 83 contemplated the promulgation of local rules "on rare occasions when the Civil Rules deliberately had left gaps to be filled in light of recognized local needs," prominent commentators believe that they did not envision the degree to which local rule-making would abound. *See* Wright & Miller, *Federal Practice & Procedure* § 3152. By 1988, the Judicial Conference committee seeking to address the proliferation of rules noted the existence of over 5000 local rules–not counting subparts–so diverse in form and substance as to require reform. *Id.* The degree to which the local rules duplicated and conflicted with the national rules led to the 1995 amendments to Rule 83. *Id.* Those amendments sent a clear message to district courts: review, reorganize and prune local rules and standing orders. *Id.* It is worth noting that following the 1995 amendments, the Eastern District renumbered its local rules and folded the former CJRA Plan into them so that practitioners would have one set of rules – organized to correspond to the federal rules – to refer to.

The committee wholeheartedly agrees with the Advisory Committee's observation in 1985 that "the sheer volume of directives" can lead to problems for practitioners, and description of the issue of standing orders as "controversial, particular among members of the practicing bar."

But standing orders do serve a salutary purpose – they assist individual judges in operating at peak efficiency, and they serve as a testing ground for new practices and procedures – a place where innovations in docket management can be tried out. They also provide counsel with guidance as to how a particular judges prefers to have things done. But the benefit of these new procedures is limited if the procedures are not reviewed and considered for inclusion in the local rules as a whole so that the local rules reflect the Court's best practices, and if there is not some forum for comment regarding the rules. An example of the latter is this committee's existence as an opportunity for the Court to obtain input from the bar as to proposed local rules.

With this overview of the background and permissible scope of standing orders, the committee turns to the questions raised by the Court.

III. Discussion

The committee examined several different areas where there are existing standing orders that regulate practice in some courts. The orders reviewed are available on the Eastern District's website at http://www.txed.uscourts.gov/. Some of the orders reviewed are docket control orders (which are not truly "standing orders" as will be discussed below, some are protective orders, some are procedures manuals, and some are rules for use in patent cases.

The issues identified by the committee with respect to standing orders generally fall into three categories. First, there are rules that conflict with or duplicate either the federal rules, or existing local rules. Second, there are provisions whose level of detail may not provide a benefit to the court that is in proportion to the burden that they impose on practitioners. And finally, there is the issue of ensuring that practitioners have notice of any standing rules, so that any such rules are effectively incorporated into practice.

A. CONFLICT AND DUPLICATION

As noted above, Fed. R. Civ. P. 83(a) mandates that local rules be consistent with, but not duplicative of, the federal rules. Section (b) imposes the same limitation on individual judges' practice with respect to the Court's local rules. However, a number of the standing orders that the Court directed the committee to review contain provisions that raise exactly this issue.

For example, in several instances, the standing rules restate or incorporate existing local rules, most often those dealing with Local Rules CV-5, 7 and 11 regarding signatures, filing and motion practice. While the inclusion is no doubt intended as a helpful reference to the reader, Rule 83 does not permit such duplication, and for a good reason – the reader cannot know whether all of the relevant provisions are included or current. And in the event that the duplicated rule is changed, the attorney is presented with a difficult choice – comply with the now-conflicting rule, notify the Court that its rules are "wrong", or simply fail to comply, and assume that the Court will not enforce its rule in contravention of the applicable federal or local rule. It bears mentioning that these rules are revised, at least in minor ways, with some frequency, so their inclusion in a standing order raises a significant risk that a standing order might conflict with the local rules, if not now, then in the future. At the very least, ensuring that this does not occur imposes unnecessary burdens on court staff to constantly review its standing orders.

With respect to the more troublesome issue of conflict, again, a number of the orders appear to presently conflict with existing local rules. As to this issue, there are several substantive areas where this seems to recur, but one area where, notably, it does not.

1. Courtesy copies

The Eastern District has, as is its tradition, been in the forefront of embracing new practices and procedures, and electronic filing is no exception. With the advent of

mandatory, district-wide filing (and automatic service) effective September 1, 2004, practitioners in the Eastern District are realizing substantial benefits in terms of ease, efficiency, and substantially reduced copying and clerical expenses. The changeover to all-electronic filing will also hopefully represent substantial savings in personnel time for the clerk's office.

A drawback however, is that in chambers that, like many law offices, still rely on paper copies of documents, the Court will be receiving documents in electronic format, but may wish to convert those to paper. Many members of the Court have expressed concern about the logistics of getting paper copies of lengthy filings, and expressed an interest in a requirement that "courtesy copies" be provided.

The committee recognizes this concern, and does not believe that providing paper copies of motions over a certain page limit imposes a substantial burden on counsel. (Truth be told, many members of the bar insist upon this practice in their offices as well). What would have caused a significant burden is if the "courtesy copy" requirements were different from chambers to chambers, and for this reason, the committee expresses their appreciation to the Court for acting proactively to generate a new rule (Local Rule CV-5(a)(9) via General Order 04-16) that establishes a district-wide courtesy copy policy, while allowing individual judges to opt out where paper courtesy copies are not needed.

Obviously this represents a compromise position, as the goal of the CM/ECF system is to move toward a paperless system, but it is a step that the committee believes balances the competing interests, and above all, provides clear guidance to the bar. It is an example of a local rule that harmonizes practice between judges of the Court in a way that substantially assist the bar, and hopefully at a minimal burden to the Court.

2. Summary judgment procedures

As the Court is aware, Local Rule CV-56 contains detailed procedures for summary judgment practice. As a result, any standing orders must not either conflict with, or duplicate, these procedures. At present, some standing orders add additional requirements, and dispense with the local rules' requirements. The committee recognizes that different judicial officers have different preferences for how these motions should be prepared, but notes that requirements that conflict with, as opposed to fleshing out, the local rules, create a great deal of confusion as to precisely how attorneys are required to present these motions. This is, perhaps, exactly why Rule 83 requires consistency between these different sets of rules.

3. Docket control orders

At present, the Eastern District does not have a standardized docket control order or scheduling order, and therefore there is no true conflict with the individualized orders used by judges. While the Court adopted a form scheduling order as Appendix L to the local rules two years ago, that order is merely a guide, and its use is not mandatory. Instead, it serves primarily as a useful source for potential "best practices." The

committee recognized that while the adoption of a standardized docket control order, like the Court's standardized pretrial order, might be desirable from a uniformity point of view (and such has been requested by a number of members of the bar in recent years), individual judges needed more flexibility to manage their cases.

In addition, as even a brief review of these orders indicates, the orders reflect a variety of innovative docket control techniques based on individual judges' experiences and attitudes, as well as judge and division-specific concerns, such as the number of criminal cases that may be pending before a particular judge. The orders are also often heavily influenced by case-specific factors that reflect the needs of a particular case, which is wholly desirable.

Accordingly, the committee does not recommend that the current system of individualized docket control orders be modified, and in fact recommends that their use be expanded as needed to replace existing standing orders, as described below.

4. Joint Final Pretrial Order

One of the features of the former CJRA Plan that has remained in the local rules and is particularly liked by the bar, is a standardized pretrial order. The committee does not recommend modifying the pretrial order requirement, but does note that standing orders that impose differing and inconsistent requirements on attorneys with respect to the pretrial order, witness and exhibit lists[1], and various other pretrial requirements conflict with the local rules in contravention of Rule 83. There are also substantial concerns with the level of detail required in this and other pretrial filings, which will be addressed in section II. B, below,

5. Patent rules

As of this writing, the Eastern District of Texas is believed to have the third-largest docket of patent cases in the nation. Several judges of the Eastern District of Texas have adopted special rules in patent cases modeled after those of the Northern District of California.

The committee believes that the patent rules that are in use by several of the judges of the District represent an innovative approach to the management of their docket, and they have undoubtedly been used successfully in a number of cases. But, these rules represent only one approach to the management of a patent case, and courts and commentators are by no means in agreement that the rules represent the best method. *See* William F. Lee &

[1] The risk of conflict is not a theoretical one. One committee member recently faced a motion to strike exhibit and witness lists on the eve of trial for failure to comply with the pretrial order's requirements for such lists, even though the list form used was taken from a standing order on the Eastern District's web site. Only after the motion was filed was it learned that the list form, despite being posted on the District's website, did not comply with the local rules for such lists.

Anita K. Krug, *Still Adjusting to Markman: A Prescription for the Timing of Claim Construction Hearings*, 13 Harv. J.L. & Tech. 55, 79 (1999). Even judges and frequent patent practitioners in the Eastern District disagree as to whether the "Patent Local Rules" as they are called, represent the best practice. *See Datamize, Inc. v. Fidelity Brokerage Services, LLC*, 2004 WL 1683171 at *11 (E.D.Tex. 2004) (noting that although that court does not use the Northern District of California rules, it is familiar with patent cases, and "at least" similar efficiencies will be realized).

Accordingly, the committee does not recommend at this time that the Eastern District adopt these or any other particular rules for use in all patent cases. However the committee does recommend that the judges that do utilize the "local patent rules" attempt where possible to agree on a common set of patent rules, so that practitioners can know that a particular rule means the same thing in any court that chooses to use the rules. This also serves the useful purpose of allowing the judges and attorneys to consider as persuasive authority decisions from other judges of this Court as well as the Northern District of California, which uses the same rules. *See STMicroelectronics, Inc. v. Motorola, Inc.*, 308 F.Supp.2d 754, 756, n.1 (E.D.Tex. 2004) (court considered as persuasive decisions interpreting corresponding N.D. Cal. patent rule).

6. Pretrial Criminal Procedures

With respect to pretrial criminal procedures, as the Court is aware, different judges have, and appropriately so, differing policies and procedures regarding the taking of pleas. While the committee believes that some degree of uniformity in the preparation of this issue for the Court's consideration would result in some efficiencies within the agencies and offices involved in this issue, this issue is more appropriately the subject of a local rule, and the committee is not yet prepared to recommend the appropriate language for such a rule.

B. LEVEL OF DETAIL

The second category is perhaps the most problematic for practitioners, and that is detailed rules of form – the judicial equivalent of agency-level regulations. These rules are the most difficult for practitioners to comply with for several reasons. First, they are by their nature, different from judge to judge, and require time and attention taken from the case to ensure that the details of how an issue is presented to a particular judicial officer are correct. This imposes additional what are sometimes referred to as "transactional costs" to the case that may well be out of proportion to the benefit that they provide the Court.

The committee assumes that the Court is interested in input from the committee as to the burden that these requirements of form impose on practitioners, and the response is that they are substantial. They require attorneys to essentially stop preparing their cases and devote substantial time to studying detailed rules of form to ensure that the Court's orders are obeyed, while at least from the bar's perspective, providing little assistance to the Court.

With respect to summary judgment practice, additional and detailed requirements can impose substantial burdens on attorneys preparing and responding to such motions that may not be in proportion to the assistance they give the Court. Such requirements require attorneys to spend substantial time not only ascertaining which among multiple sets of rules apply, but recasting their motion, proof, and arguments to fit the court's template. While obviously some structure is helpful to the Court (as set forth in Local Rule CV-56), advocates already have a substantial interest in presenting their side of the issue in the most helpful form to the Court, and detailed rules do not, the committee believes, provide the Court assistance that justifies the significant burdens that they impose on practitioners.

This is especially true in smaller cases, where the issues at stake cannot justify the detailed rules that would be appropriate in an appellate brief. The committee believes that generally attorneys can and do devote more attention to detail as the significance of the issues at stake increase, and the Court's need for assistance increases, and that flexible rules that do not demand such detail in all cases would be a substantial help to attorneys in smaller cases.

With respect to pretrial orders and other pretrial requirements, they impose substantial additional burdens on attorneys at precisely the time, during pretrial preparations, when attorneys are working diligently to prepare the substance of their cases for trial. While detailed requirements (assuming of course that they do not conflict with or duplicate the existing local rules which, as noted above, is currently a concern) may not be a problem in larger cases, where both sides have adequate staff to study the competing requirements and determine how to best comply with them, in smaller cases attorneys have particular difficulty complying with the Court's requirements at this stage.

Once again, if a particular requirement provides substantial help to the Court, then of course it should be included. But unless the rule provides enough assistance to the Court to justify the substantial costs of compliance in terms of attorney and staff time, the committee asks that the Court seriously consider eliminating as many of these requirements as possible. The overriding purpose of the Federal Rules is to secure the "just, speedy, and inexpensive determination of every action" and particularly at the latter stages of cases, candidly, the committee believes that detailed rules threaten all three goals, with little corresponding benefit.

C. NOTICE

Finally, one recurring danger with all standing orders is that attorneys will not be aware of them, as they are not reported or published for notice and comment. The danger increases when judges use multiple standing orders without any overall framework, which may or may not even be available on the court's website.[2]

[2] Even if the rules are available on the Court's website, they are still not necessarily simple to find. Different judges' standing-type orders are contained on at least three

The best solution, in the committee's opinion, would be the elimination of the use of "standing" rules in favor of including truly needed court procedures into docket control orders, which the committee refers to as "scheduling and other case specific orders" in the proposed rule. Scheduling and other case-specific orders have an important advantage over judge-specific "standing orders" in that they are typically entered only after notice to the attorneys in a particular case, so that all parties are on notice not only of what deadlines the Court envisions for the case, but what procedures the Court intends to use, and can comment or ask questions prior to the entry of the order, presumably at the scheduling conference. The applicable provisions are also easy to locate, and there is no dispute what provisions are in effect in a particular case. The Court also has the option of including more detailed provisions in more complex cases, while leaving smaller, less complex cases to operate under the default local rules.

In this way the docket control orders are similar to the "local patent rules" discussed above – their provisions are discretionary with a particular judge, and appropriately so, since they reflect the individualized needs of the judge, the litigants, and the type of case. Another benefit of such an approach would be that the parties would unquestionably be on notice of all of the procedures that the Court was applying in a particular case, a requirement of Rule 83(b) before sanctions may be imposed for noncompliance. *See STMicroelectronics, Inc. v. Motorola, Inc.*, 307 F.Supp.2d 845, 848-849 (E.D.Tex. 2004) (local patent rules distributed in order to provide notice of the court's procedures).

If, however, individual judges wish to retain some judge-specific "standing rules" the committee recommends that such rules be subject to the same "uniform numbering system" as the federal and local rules and that any such rules be filed with the clerk's office, as is currently the informal practice. Such a requirement would greatly assist practitioners in checking to ensure that they have complied with the Court's requirements, and would likely assist the Court as well in drafting such standing orders, since the Court could easily determine what additional requirements it believes are appropriate, and can expressly direct how parties are to comply, without unnecessarily restating existing rules. It will also, incidentally, help in considering various standing orders for future inclusion in the local rules.

The committee recognizes that this proposal (as with the proposal regarding eliminating duplicative, conflicting, or unnecessarily detailed provisions in standing orders) will involve some revising by court staff, and is willing to provide any assistance needed. The committee notes that it provided similar guidance in 1997, when, in response to the requirement that the local rules be renumbered, the committee provided the Court with a proposed set of renumbered set of local rules, including the provision of the CJRA Plan. The committee did not believe that it would be helpful or appropriate at

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separate pages within the Eastern District's website (the initial page, Judges Orders, and Patent Rules) none of which are separately identifiable by a different web-site address. And this is assuming a well-maintained, well-organized website, as is currently the case.

this stage to undertake such revisions of specific existing standing rules without further direction from the Court.

IV. Proposed Local Rule CV-83(c)

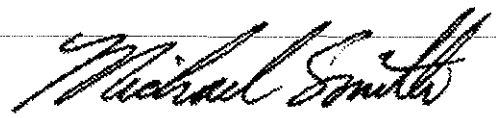
As set forth above, the committee proposes for the Court's consideration the following addition to the local rules, to be codified as new section (c) to Local Rule CV-83

> **(c) Standing orders**
> Any standing order adopted by a judge pursuant to Fed. R. Civ. P. 83(b) must conform to any uniform numbering system prescribed by the Judicial Conference of the United States, and be filed with the clerk of court. The court will periodically review all standing orders for compliance with Rule 83(b) and for possible inclusion in the local rules. This provision does not apply to provisions in scheduling or other case-specific orders.

V. Conclusion

Once again, the committee wishes to express its thanks to the Court for the opportunity to comment on the subject of standing rules. If the Court has any questions, please do not hesitate to call on us.

For the committee,



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